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

*Petitioner,*

vs.

ASBESTOS CORPORATION LIMITED; ASTENJOHNSON, INC.; CBS  
CORPORATION (FKA VIACOM INC., FKA WESTINGHOUSE  
ELECTRIC CORPORATION); INGERSOLL-RAND COMPANY,

*Respondents.*

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

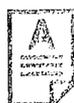
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George M. Ahrend  
WSBA No. 25160  
100 E. Broadway Ave.  
Moses Lake, WA 98837  
(509) 764-9000

Valerie D. McOmie  
WSBA No. 33240  
4549 NW Aspen St.  
Camas, WA 98607-8302  
(509) 833-2211

Bryan P. Harnetiaux  
WSBA No. 5169  
517 E. 17th Ave.  
Spokane, WA 99203  
(509) 624-3890

On Behalf of  
Washington State Association for  
Justice Foundation



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## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                           | <u>Page</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| I. IDENTITY AND INTEREST OF AMICUS CURIAE                                                                                                                                                                                                                                                 | 1           |
| II. INTRODUCTION AND STATEMENT OF THE CASE                                                                                                                                                                                                                                                | 1           |
| III. ISSUE PRESENTED                                                                                                                                                                                                                                                                      | 4           |
| IV. SUMMARY OF ARGUMENT                                                                                                                                                                                                                                                                   | 4           |
| V. ARGUMENT                                                                                                                                                                                                                                                                               | 6           |
| A. Overview Of <i>Calhoun</i> Et Al. And The Limitation Of Wrongful Death Claims To Cases Where There Is A Subsisting Cause Of Action In The Deceased.                                                                                                                                    | 7           |
| B. <i>Calhoun</i> Et Al. Are “Incorrect” Because They Are Not Grounded In The Text Of The Wrongful Death Statute, Seem To Conflate Wrongful Death And Survival Claims, And Infringe On The Proper Role Of The Legislature In Creating And Defining The Contours Of Wrongful Death Claims. | 11          |
| C. <i>Calhoun</i> Et Al. Are “Harmful” Because They Undermine Normal Principles Of Accrual, Effectively Creating A De Facto Repose Period For Wrongful Death Claims, And Otherwise Interject Equitable Considerations Into The Statutory Analysis.                                        | 15          |
| D. Concerns About Double Recovery, Finality Of Judgments, Stale Claims And The Like Can Be Raised As Affirmative Defenses And Addressed On A Case-By-Case Basis.                                                                                                                          | 18          |
| VI. CONCLUSION                                                                                                                                                                                                                                                                            | 21          |
| Appendix                                                                                                                                                                                                                                                                                  |             |

## TABLE OF AUTHORITIES

|                                                                                                                           | <u>Page</u> |
|---------------------------------------------------------------------------------------------------------------------------|-------------|
| <b>Cases</b>                                                                                                              |             |
| <u>1000 Virginia Ltd. Partnership v. Vertices Corp.</u> ,<br>158 Wn. 2d 566, 146 P.3d 423 (2006)                          | 17          |
| <u>Atchison v. Great W. Malting Co.</u> ,<br>161 Wn. 2d 372, 166 P.3d 662 (2007)                                          | 15, 18      |
| <u>Calhoun v. Wash. Veneer Co.</u> ,<br>170 Wash. 152, 15 P.2d 943 (1932)                                                 | passim      |
| <u>Cavazos v. Franklin</u> ,<br>73 Wn. App. 116, 867 P.2d 674 (1994)                                                      | 7           |
| <u>City of Federal Way v. Koenig</u> ,<br>167 Wn. 2d 341, 217 P.3d 1172 (2009)                                            | 15          |
| <u>Deggs v. Asbestos Corp., Ltd.</u> ,<br>188 Wn. App. 495, 354 P.3d 1, <i>review granted</i> ,<br>184 Wn. 2d 1081 (2015) | passim      |
| <u>Dodson v. Continental Can Co.</u> ,<br>159 Wash. 589, 294 Pac. 265 (1930)                                              | 9, 15-16    |
| <u>Flynn v. New York, New Haven &amp; Hartford R. Co.</u> ,<br>283 U.S. 53 (1931)                                         | 8-10, 14    |
| <u>Grant v. Fisher Flouring Mills Co.</u> ,<br>181 Wash. 576, 44 P.2d 193 (1935)                                          | passim      |
| <u>In re Dependency of H.S.</u> ,<br>188 Wn. App. 654, 356 P.3d 202 (2015)                                                | 19          |
| <u>Johnson v. Ottomeier</u> ,<br>45 Wn. 2d 419, 275 P.2d 723 (1954)                                                       | passim      |

|                                                                                                                                  |        |
|----------------------------------------------------------------------------------------------------------------------------------|--------|
| <u>Klossner v. San Juan County,</u><br>93 Wn. 2d 42, 605 P.2d 330 (1980)                                                         | 18     |
| <u>Otani ex rel. Shigaki v. Broudy,</u><br>151 Wn. 2d 750, 92 P.3d 192 (2004)                                                    | 14, 19 |
| <u>State v. Bolar,</u><br>129 Wn. 2d 361, 917 P.2d 125 (1996)                                                                    | 14     |
| <u>State v. Devin,</u><br>158 Wn. 2d 157, 142 P.3d 599 (2006)                                                                    | 6      |
| <u>State v. Thornton,</u><br>119 Wn. 2d 578, 835 P.2d 216 (1992)                                                                 | 15     |
| <u>Townsend v. Quadrant Corp.,</u><br>173 Wn. 2d 451, 268 P.3d 917 (2012)                                                        | 20     |
| <u>Ueland v. Reynolds Metals Co.,</u><br>103 Wn. 2d 131, 691 P.2d 190 (1984)                                                     | 19     |
| <u>Vernon v. Aacres Allvest, LLC,</u><br>183 Wn. App. 422, 333 P.3d 534 (2014), <i>review denied</i> ,<br>182 Wn. 2d 1006 (2015) | 7      |
| <u>Walker v. City of Spokane,</u><br>62 Wash. 312, 113 Pac. 775 (1911)                                                           | 14     |
| <u>Warner v. McCaughan,</u><br>77 Wn. 2d 178, 460 P.2d 272 (1969)                                                                | 7      |
| <u>Woodall v. Avalon Care Center-Federal Way, LLC,</u><br>155 Wn. App. 919, 231 P.3d 1252 (2010)                                 | 20     |
| <b>Statutes and Rules</b>                                                                                                        |        |
| 45 U.S.C. § 51                                                                                                                   | 14     |
| 45 U.S.C §§ 51 & 56                                                                                                              | 14     |

|                                        |       |
|----------------------------------------|-------|
| 45 U.S.C. §§ 51-59                     | 14    |
| 45 U.S.C. § 56                         | 14    |
| 45 U.S.C. § 59                         | 14    |
| CR 8(c)                                | 19-20 |
| Laws of 1927, ch. 156                  | 7     |
| RCW 4.20.010                           | 12    |
| RCW 4.20.010-.020                      | 5, 13 |
| RCW 4.20.046 & .060                    | 13    |
| RCW 5.60.060(1)                        | 15    |
| Rem. Comp. Stat. § 183 (1927)          | 7, 12 |
| Rem. Comp. Stat. § 183-1               | 7     |
| Rem. Comp. Stat. §§ 183 & 183-1 (1927) | 13    |
| Rem. Comp. Stat. §§ 183-1 & 194        | 7, 13 |
| Rem. Comp. Stat. § 194 (1927)          | 7, 13 |
| <br><b>Other Authority</b>             |       |
| Merriam-Webster Online                 | 13    |

## I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the relationship between a decedent's inter vivos claim for personal injury and a related wrongful death claim brought for the benefit of the decedent's statutory beneficiaries.

## II. INTRODUCTION AND STATEMENT OF THE CASE

This review involves the relationship between inter vivos personal injury claims and related wrongful death claims. Judy Deggs (Deggs), as Personal Representative of the estate of her father, Ray Sundberg (Sundberg), brought claims against Asbestos Corporation Limited (ACL), AstenJohnson Inc. (AJ), and Ingersoll Rand Company (IRC) (collectively Respondents) for her father's death. The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties.<sup>1</sup>

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<sup>1</sup> See *Deggs v. Asbestos Corp., Ltd.*, 188 Wn. App. 495, 497-99, 354 P.3d 1, *review granted*, 184 Wn. 2d 1081 (2015); Deggs Br. at 3-10; Resp. Br. at 4-7; Deggs Pet. for Rev. at 1 (declining to take issue with the Court of Appeals' statement of facts); Resp. Ans. to Pet. for Rev. at 1 (incorporating Court of Appeals' statement of facts by reference); Deggs Supp. Br. at 2 (adopting Court of Appeals' statement of facts); Resp. Supp. Br. at 1-3.

For purposes of this amicus curiae brief the following facts are relevant: Sundberg was exposed to asbestos while working for various employers from 1942 to 1989. He was diagnosed with colon cancer and lymphoma on July 24, 1998, pleural disease on August 31, 1999, and asbestosis on February 21, 2000, all caused by his work-related asbestos exposure.

On September 20, 1999, Sundberg, later joined by his wife, filed a personal injury action against forty defendants—including ACL, but not AJ or IRC—for injuries resulting from his asbestos exposure. This lawsuit was tried to verdict in 2001, and the jury awarded Sundberg \$451,900 in economic damages and \$700,000 in noneconomic damages, and his wife \$360,000 for loss of consortium.

In December of 2010 Sundberg died, and thereafter Deggs was appointed personal representative of his estate. On July 3, 2012, she filed a lawsuit against ACL and several new defendants, including AJ and IRC, alleging wrongful death and survival claims based on what the Court of Appeals describes as “much of the same asbestos exposure as the 1999 lawsuit,” and seeking “the same relief as the 1999 lawsuit” plus funeral expenses. Deggs, 188 Wn. App. at 498.

AJ moved for summary judgment on grounds that expiration of the statute of limitations on Sundberg's inter vivos claims barred Deggs' subsequent wrongful death and survival claims. The trial court agreed and dismissed Deggs' complaint as to AJ, and later dismissed her complaint against ACL and IRC on the same grounds. See Deggs at 498-99.

Deggs appealed dismissal of the wrongful death claim, but not the survival claim. See Deggs Pet. for Rev. at 3 n.4. The Court of Appeals affirmed over dissent. The majority recognizes that a wrongful death claim is a separate and distinct statutory claim that does not accrue until the decedent's death (or later, if the discovery rule is applicable). See Deggs at 503 & 508. However, the majority considered itself bound by a trio of this Court's cases imposing a limitation on wrongful death claims, requiring a subsisting cause of action in the deceased at the time of death. See id. at 503, 510-11. Under this limitation, a wrongful death claim is deemed to be "preempted" by expiration of the limitations period applicable to the decedent's inter vivos claim. See id. at 500-06 (explicating Calhoun v. Wash. Veneer Co., 170 Wash. 152, 159-60, 15 P.2d 943 (1932); Grant v. Fisher Flouring Mills Co., 181 Wash. 576, 580-82, 44 P.2d 193 (1935); Johnson v. Ottomeier, 45 Wn. 2d 419, 422-23, 275 P.2d 723 (1954); collectively "Calhoun et al."). The majority concludes that these cases

require “a valid subsisting claim in the decedent at death in order for the statutory beneficiaries' wrongful death claims to accrue.” Deggs at 507. The majority justifies this limitation based on the risk of double recovery, finality of judgments and avoidance of stale claims. See id. at 510-11.

The dissent urges that the cases on which the majority relies have been “overtaken” by more recent precedent that reaffirms the separate and distinct nature of inter vivos and wrongful death claims. The dissent rejects the majority’s analysis as illogical because, under this approach, a wrongful death claim can be extinguished before it accrues. See Deggs at 511-17 (Dwyer, J., dissenting).

This Court granted Deggs’ petition for review.

### III. ISSUE PRESENTED

Does expiration of the statute of limitations or a judgment on a decedent’s inter vivos personal injury claim preclude the decedent’s personal representative from pursuing a related wrongful death claim for the benefit of the statutory beneficiaries?

### IV. SUMMARY OF ARGUMENT

To the extent Calhoun, Grant and Johnson, supra, have not been superseded by more recent precedent, they should be expressly overruled as “incorrect and harmful.” They are “incorrect” for several reasons: *First*, there is no basis in the plain text of the wrongful death statutes, RCW

4.20.010-.020, for limiting wrongful death claims to cases where there is a subsisting cause of action in the decedent. These statutes are silent on the relationship between a decedent's inter vivos personal injury claim and a related wrongful death claim. Because a wrongful death claim is statutory, any "preemption" of such a claim based on expiration of the limitations period applicable to a related inter vivos claim should only be imposed by the Legislature. *Second*, Calhoun et al. seem to conflate the analysis of wrongful death claims with survival claims. The requirement of a subsisting cause of action is expressly contained in the survival statutes, but not in the wrongful death statutes. *Third*, Calhoun et al.'s reliance on equitable principles as an aid to statutory interpretation is misguided, as such principles are not a proper basis for limiting the operation or effect of a statute as a matter of policy. Instead, the statutes should be interpreted and applied in accord with customary rules of construction. Equitable doctrines such as res judicata, collateral estoppel, and the rule against double recovery can be raised as affirmative defenses where applicable, and resolved on a case-by-case basis. (The same is true of affirmative defenses such as settlement and release or accord and satisfaction.)

Calhoun et al. are "harmful" because they undermine well-established principles of accrual for wrongful death actions, effectively

creating a non-statutory repose period within which such actions must accrue, and otherwise improperly allow equitable doctrines to limit the operation and effect of the wrongful death statutes.

#### V. ARGUMENT

The Court of Appeals majority and Respondents rely on Calhoun et al. to “preempt” the accrual of a wrongful death claim unless there is a subsisting cause of action in the decedent at the time of death. See Deggs at 500, 504 & 508; Resp. Ans. to Pet. for Rev. at 13; Resp. Supp. Br. at 13. The dissent and Deggs contend that Calhoun et al. have been superseded by more recent precedent. See Deggs at 511-12; Deggs Pet. for Rev. at 5-13; Deggs Supp. Br. at 4-13. However, Deggs also argues that, even if Calhoun et al. can be harmonized with other precedent, they should be overruled. See Deggs Pet. for Rev. at 13-17; Deggs Supp. Br. at 13-17. This brief assumes for the sake of argument that Calhoun et al. must be overruled in order for Deggs to prevail, and argues that these decisions are incorrect and harmful. See State v. Devin, 158 Wn. 2d 157, 142 P.3d 599 (2006) (applying incorrect and harmful test for overruling precedent).

**A. Overview Of *Calhoun Et Al.* And The Limitation Of Wrongful Death Claims To Cases Where There Is A Subsisting Cause Of Action In The Deceased.**

In Calhoun, *supra*, an injured worker brought a claim against his employer but died before the claim could be resolved. His widow was appointed administrator of his estate and substituted as plaintiff, and she filed an amended complaint that appears to have alleged both wrongful death and survival claims against the defendant-employer.<sup>2</sup> This Court affirmed dismissal of the amended complaint on grounds that the *inter vivos* action filed by the injured worker was barred by the applicable statute of limitations, stating:

As to the causes of action set up on behalf of appellant in the amended complaint for wrongful death and to recover funeral expenses which, of course, had not accrued at the time the original complaint was filed herein, while she is entitled to recover such damages under the provisions of Rem. Comp. Stat. §§ 183-1, 194, and Laws of 1927, chap. 156, p. 143, if her action was begun within the time limited by law, it is clear that these causes of action were first introduced into the action in her amended

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<sup>2</sup> The Court cited to both the wrongful death and survival statutes in its opinion. See Calhoun, 170 Wash. at 160 (citing Rem. Comp. Stat. §§ 183-1 & 194, and Laws of 1927, ch. 156). Rem. Comp. Stat. § 183-1 identified the statutory beneficiaries of a wrongful death claim under the former wrongful death statute, Rem. Comp. Stat. § 183, and Rem. Comp. Stat. § 194 is the former survival statute. In addition, the amended complaint sought damages for funeral expenses and post-death loss of support. See Calhoun, 170 Wash. at 154 & 160. Under the current survival statutes, RCW 4.20.046 and 060, funeral expenses are recoverable as economic damages in a survival action. See Warner v. McCaughan, 77 Wn. 2d 178, 181, 460 P.2d 272 (1969); Vernon v. Acres Allvest, LLC, 183 Wn. App. 422, 430, 333 P.3d 534 (2014), *review denied*, 182 Wn. 2d 1006 (2015); Cavazos v. Franklin, 73 Wn. App. 116, 121, 867 P.2d 674 (1994). The text of the survival statute in effect when Calhoun was decided is not materially different. See Rem. Comp. Stat. § 194 (1927).

complaint. Her amended complaint was served December 3, 1931, and filed December 21, 1931.

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. *Horner v. Pierce County*, 111 Wash, 386, 191 P. 396, 14 A. L. R. 707. See, also, 17 R. C. L. 764 and 765; *Shaw v. Rogers & Rogers*, 117 Wash. 161, 200 P. 1090; *Flynn v. New York, New Haven & Hartford R. Co.*, 283 U. S. 53, 51 S. Ct. 357, 75 L. Ed. 837, 72 A. L. R. 1311.

Calhoun, 170 Wash. at 160.<sup>3</sup>

Following Calhoun, in Grant, *supra*, another injured worker brought an action against his employer and died before it could be resolved. As in Calhoun, his widow was appointed administrator of the estate and filed an amended complaint alleging wrongful death and survival claims. The Court *reversed* dismissal of both claims because the original action filed by the injured worker was timely under the applicable statute of limitations. With respect to the wrongful death action, the Court described and distinguished Calhoun as follows:

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<sup>3</sup> There are significant non-substantive (but maddening) differences in the quotations from Calhoun, Grant and Johnson between the Westlaw versions and official Washington reports. This brief uses the Westlaw versions for quotations.

The action for wrongful death, under section 183, Rem. Rev. Stat., is a distinct and separate action from the survival action, under section 194, *Id.* Brodie v. Washington Water Power Co., 92 Wash. 574, 159 P. 791. *In accord with the great weight of authority, this court has held that the action accrues at the time of death, and that the statute of limitations then begins to run.* Dodson v. Continental Can Co., 159 Wash. 589, 294 P. 265; Reading Co. v. Koons, Administrator, 271 U. S. 58, 46 S. Ct. 405, 70 L. Ed. 835; Baltimore & Ohio S. W. R. Co. v. Carroll, Administratrix, 280 U. S. 491, 50 S. Ct. 182, 74 L. Ed. 566. *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 lifetime* (Littlewood v. Mayor, etc., of N. Y., 89 N. Y. 24, 42 Am. Rep. 271; Hecht v. Ohio & Mississippi Ry. 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, 75 L. Ed. 837, 72 A. L. R. 1311). *In this latter class falls the case of Calhoun v. Washington Veneer Co., supra.* Respondent contends that this case lays down the rule that the action for wrongful death accrues when the deceased person sustained injury through the negligence of the party charged. There is language in the opinion susceptible of that construction, but to so construe the decision brings it in direct conflict with the case of Dodson v. Continental Can Co., *supra*. In view of the facts in the Calhoun Case, we think that decision can, and should, be so interpreted as to avoid conflict with the decision in the Dodson Case.

In the Calhoun Case, the court held that his action for personal injuries accrued about the middle of May, 1928, the time when he ceased to be exposed to the poisonous gas. Of necessity, his injury culminated, and the defendant's negligence terminated, at that

time. Undoubtedly his cause of action was then accrued. He brought an action in September, 1931. He died pending the action. Obviously, at the time of his death there was no valid action subsisting in his favor, because the statute of limitations had run against it. The case falls squarely within the rule of *Flynn v. New York, N. H. & H. R. Co.*, *supra*. The only difference between the two cases is that *Flynn* died without bringing an action for personal injuries, after the statute of limitations had run.

The instant case presents an entirely different problem. Here, Grant brought his action for personal injuries within the time prescribed by the statute of limitations. While he died more than three years after his cause of action accrued, he left a valid subsisting cause of action. Under these circumstances, we think there is no question but what the action for wrongful death can be maintained. *Altzheimer v. Central R. Co.*, 75 N. J. Law, 424, 67 A. 1051. See, also, *Knabe v. Hudson Bus Transp. Co.*, 111 N. J. Law, 333, 168 A. 418.

Grant, 181 Wash. at 580-82 (emphasis added).

Lastly, in Johnson, *supra*, a husband murdered his wife and then committed suicide. The executor of the wife's estate brought a wrongful death claim against the husband's estate for the benefit of the children. The trial court dismissed the claim on grounds of inter-spousal immunity, but this Court reversed on grounds that such immunity is personal to the wife and does not extend to the wife's estate. In reaching this result, the Court distinguished Calhoun (as described in Grant) as involving

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 P. 791, where decedent gave an effective release and satisfaction; and *Calhoun v. Washington v. Venee 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.

The wrongful death statute itself and generally recognized equitable principles sanction the recognition of such defenses as have been dealt with in all of the cases cited above.

Johnson, 45 Wn. 2d at 422-23.

The issue to be addressed is whether the "limitation" on wrongful death claims emanating from Calhoun and described (but not applied) in Grant and Johnson, should be overruled.

**B. *Calhoun Et Al.* Are "Incorrect" Because They Are Not Grounded In The Text Of The Wrongful Death Statute, Seem To Conflate Wrongful Death And Survival Claims, And Infringe On The Proper Role Of The Legislature In Creating And Defining The Contours Of Wrongful Death Claims.**

There is no basis in the text of the past or present wrongful death statutes for requiring a subsisting cause of action at the time of the decedent's death, or otherwise linking the decedent's inter vivos claim to a wrongful death claim. The Court of Appeals majority and dissent, as well as Respondents, recognize that the text of the wrongful death statutes is silent on this issue. See Deggs, 188 Wn. App. at 500 (majority op.); id. at 514 (Dwyer, J., dissenting); Resp. Supp. Br. at 13-16.

The language of the wrongful death statute at issue in Calhoun and the current version of the statute merely provide, in pertinent part:

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[.]

RCW 4.20.010 (emphasis & brackets added); see also Rem. Comp. Stat. § 183 (1927). As correctly noted by the Court in Johnson, the highlighted language indicates that a wrongful death claim “is derivative in the sense that it derives from *the wrongful act* causing the death, rather than from the person of the deceased.” 45 Wn. 2d at 423 (emphasis added). This is the only predicate for a wrongful death claim required by the statute. The claim does not otherwise hinge upon the viability of the decedent’s inter vivos claim at the time of death.

Calhoun does not purport to ground its holding in the text of the wrongful death statutes. See 170 Wash. at 159-60. Grant seems to suggest that Calhoun represents a limitation superimposed on the statute, rather than an interpretation or construction of the statutory language. See Grant, 181 Wash. at 580-81. Johnson states that the limitation recognized in Calhoun and discussed in Grant is “sanction[ed]” by “[t]he wrongful death statute itself and generally recognized equitable principles.” Johnson, 45

Wn. 2d at 423 (brackets added). Johnson's conjunction of "the statute itself" and "generally recognized equitable principles" implies that the statutory language alone is insufficient to create the subsisting cause of action requirement. Johnson's use of the word "sanction" implies that the language of the wrongful death statute permits—in the sense that it does not specifically exclude—a subsisting cause of action requirement.<sup>4</sup>

In imposing a subsisting cause of action requirement onto the wrongful death statute, Calhoun seems to conflate the analysis of the wrongful death statute with the survival statute. See 170 Wash. at 160. Claims under both statutes were at issue in Calhoun, and the Court addressed them together, without making any distinction between them. See id. at 160 (citing Rem. Comp. Stat. §§ 183-1 & 194).<sup>5</sup> This combined treatment is unwarranted because the wrongful death statutes create a new cause of action for the benefit of identified statutory beneficiaries, whereas the survival statutes merely provide that no inter vivos cause of action

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<sup>4</sup> See Merriam-Webster Online, s.v. "sanction" (viewed Jan. 22, 2016; available at [www.m-w.com](http://www.m-w.com)).

<sup>5</sup> The wrongful death and survival statutes in effect when Calhoun was decided do not materially differ from those currently in effect. With respect to the wrongful death statutes, compare Rem. Comp. Stat. §§ 183 & 183-1 (1927) with RCW 4.20.010-.020. With respect to the survival statutes, compare Rem. Comp. Stat. § 194 (1927) with RCW 4.20.046 & .060. These statutes are reproduced in the Appendix.

shall abate or otherwise be determined by reason of the decedent's death.<sup>6</sup>

The requirement of a subsisting cause of action is expressly incorporated into the survival statutes, but not the wrongful death statutes. Calhoun is incorrectly decided because it appears to overlook this distinction.<sup>7</sup>

The free floating equitable considerations referenced in Johnson do not justify imposing a subsisting cause of action requirement onto the wrongful death statute. Equity is not a proper basis for interpreting an unambiguous statute.<sup>8</sup> While equity may, in appropriate circumstances, toll the running of the applicable limitations period, there is no principle of equity recognized by Washington law that could be used to shorten a statutory limitations period or time for accrual of a claim.

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<sup>6</sup> See Otani ex rel. Shigaki v. Broudy, 151 Wn. 2d 750, 755, 92 P.3d 192 (2004) (stating “[u]nlike Washington’s wrongful death statutes, the survival statutes do not create new causes of action for statutorily named beneficiaries but instead preserve causes of action for injuries suffered prior to death”; brackets added).

<sup>7</sup> Calhoun also relies on a federal case interpreting statutes that differ from Washington law. See 170 Wash. at 160 (citing Flynn v. New York, New Haven & Hartford R. Co., 283 U.S. 53 (1931), which involves the Federal Employers’ Liability Act (FELA), 45 U.S.C. §§ 51-59); see also Grant, 181 Wash. at 581 (noting Calhoun’s reliance on Flynn); Deggs, 188 Wn. App. at 503 n.3 (same). FELA creates a single hybrid cause of action that encompasses both inter vivos and wrongful death claims. See 45 U.S.C. § 51. Accrual of this singular cause of action does not appear to hinge upon whether the claim is inter vivos or for wrongful death. See 45 U.S.C. § 56. (While FELA also contains a separate survival statute, 45 U.S.C. § 59, Flynn only addressed 45 U.S.C §§ 51 & 56. See 283 U.S. at 56.)

<sup>8</sup> See State v. Bolar, 129 Wn. 2d 361, 366, 917 P.2d 125 (1996) (stating courts may not consider “nontextual considerations such as equity” in interpreting unambiguous statute); Walker v. City of Spokane, 62 Wash. 312, 318, 113 Pac. 775 (1911) (stating “it is the concensus [sic] of judicial opinion that, while equitable construction may be tolerated in remedial statutes, it should always be resorted to with great caution, and never extended to mere arbitrary regulations of matters of public policy”).

Because wrongful death claims are statutory, any linkage to the decedent's inter vivos claim, other than the express wrongful act requirement discussed above, should be made by the Legislature.<sup>9</sup> In the absence of statutory language linking a wrongful death claim to the decedent's inter vivos claim, the Court should not read such a link into the statute.<sup>10</sup>

**C. *Calhoun Et Al.* Are “Harmful” Because They Undermine Normal Principles Of Accrual, Effectively Creating A De Facto Repose Period For Wrongful Death Claims, And Otherwise Interject Equitable Considerations Into The Statutory Analysis.**

As the Court of Appeals majority and the parties recognize, a wrongful death claim does not normally accrue until death.<sup>11</sup> The subsisting cause of action requirement imposed as a “limitation” on the

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<sup>9</sup> See *Atchison v. Great W. Malting Co.*, 161 Wn. 2d 372, 381, 166 P.3d 662 (2007) (stating “[b]ecause wrongful death actions are strictly statutory, formulation of a new policy with regard to this statutory cause of action is the responsibility of the Legislature, not a task for this court”; brackets added & quotation omitted).

<sup>10</sup> Respondents contend that the Legislature's failure to amend the wrongful death statute following *Calhoun et al.* is indicative of legislative acquiescence to those decisions. See Resp. Ans. to Pet. for Rev. at 5; Resp. Supp. Br. at 9. However, legislative acquiescence should be limited to judicial interpretations of statutory language, not freestanding limitations on the operation or effect of a statute such as the limitation imposed by *Calhoun et al.* See *City of Federal Way v. Koenig*, 167 Wn. 2d 341, 348, 217 P.3d 1172 (2009) (indicating legislative acquiescence applies to “a judicial decision interpreting a statute”). At any rate, legislative acquiescence is not a bar to overruling prior precedent when necessary to interpret a statute in accordance with its plain language. See *State v. Thornton*, 119 Wn. 2d 578, 582-83, 835 P.2d 216 (1992) (overruling court imposed limitation on plain language of exception to spousal immunity statute, RCW 5.60.060(1), notwithstanding legislative acquiescence).

<sup>11</sup> See *Dodson v. Continental Can Co.*, 159 Wash. 589, 593, 294 Pac. 265 (1930); *Atchison*, 161 Wn. 2d at 379 (citing *Dodson* and describing the accrual of wrongful death claim as “well settled”).

wrongful death statute, “preempting” the normal rule of accrual, creates instability in the law.

In the course of its combined analysis of the wrongful death and survival statutes, Calhoun states that the statutory “claim for damages accrued, if at all, at the time of the injury” to the decedent, rather than the time of death. See 170 Wash. at 160. Grant recognized that this statement is inconsistent with the normal rule of accrual for wrongful death claims, and, as a result, interpreted Calhoun as creating a freestanding “limitation” on the application of the wrongful death statute.<sup>12</sup> Johnson subsequently re-framed Grant’s interpretation of Calhoun as involving unspecified “generally recognized equitable principles.” 45 Wn. 2d at 422-23.

The resulting confusion is evident in the divided opinion of the Court of Appeals below. The majority summarizes the effect of Calhoun et al. as follows: “Wrongful death claims derive from the wrongful act and do not *accrue* absent a valid subsisting cause of action in the decedent at the time of death.” Deggs, 188 Wn. App. at 497 (emphasis added). Elsewhere, the majority describes the effect of Calhoun as “preempt[ing] the *accrual*” of a wrongful death claim, using the concept of preemption

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<sup>12</sup> See Grant, 181 Wash. at 581 (stating “[t]here is language in the [Calhoun] opinion susceptible of that construction [i.e., that the action for wrongful death accrues when the deceased person sustained injury, rather than their death], but to so construe the decision brings it in direct conflict with the case of Dodson”; brackets added).

in an unprecedented and novel way. Id. at 500 (emphasis added). In a sense, the majority opinion is understandable because, whenever possible, the appellate court is bound to harmonize and uphold this Court's precedent. However, the majority's effort here only serves to illuminate the flawed reasoning of Calhoun et al.

The effect of the subsisting cause of action requirement is to create a de facto repose period within which wrongful death claims must accrue, as pointed out by the dissent below.<sup>13</sup> If death does not occur within the limitations period for the decedent's inter vivos claim, then the personal representative of his estate is barred from bringing a wrongful death claim on behalf of the decedent's statutory beneficiaries, even if the wrongful death claim would otherwise be timely.

The de facto repose period resulting from the subsisting cause of action requirement for wrongful death claims goes beyond the Court's interpretive function and encroaches upon the role of the Legislature with respect to wrongful death actions. Because wrongful death actions are strictly statutory, formulation of policy is the responsibility of the

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<sup>13</sup> See Deggs, 188 Wn. App. at 516 (Dwyer, J., dissenting); see also 1000 Virginia Ltd. Partnership v. Vertices Corp., 158 Wn. 2d 566, 574-75, 146 P.3d 423 (2006) (describing statutes of repose).

Legislature, not a task for this Court.<sup>14</sup> Calhoun et al. should be overruled and the otherwise well-settled law regarding accrual of wrongful death actions should be reaffirmed, which would render Deggs' wrongful death claim timely as to Respondents.<sup>15</sup>

**D. Concerns About Double Recovery, Finality Of Judgments, Stale Claims And The Like Can Be Raised As Affirmative Defenses And Addressed On A Case-By-Case Basis.**

The Court of Appeals majority attempts to justify the result in Calhoun et al. based on concerns about the risk of double recovery, the finality of judgments and avoidance of stale claims. Deggs at 510-11. These concerns cannot serve to independently justify the elimination of wrongful death claims that do not accrue during the limitations period applicable to the decedent's related inter vivos claim (or arise during the pendency of such a claim, as in Grant). Instead, they are more appropriately raised as separate and distinct affirmative defenses and resolved on a case-by-case basis.<sup>16</sup>

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<sup>14</sup> Cf. Atchison, 161 Wn. 2d at 381 (declining to allow tolling of wrongful death claim based on minority of statutory beneficiary); Klossner v. San Juan County, 93 Wn. 2d 42, 47-48, 605 P.2d 330 (1980) (declining to interpret former version of wrongful death statute to include stepchildren as beneficiaries).

<sup>15</sup> The consequences of the judgment in Sundberg's inter vivos action against ACL is addressed infra.

<sup>16</sup> Johnson itself seems to acknowledge the limitations imposed on the wrongful death statute in Calhoun are "defenses." 45 Wn. 2d at 423.

With respect to concerns about double recovery, the same potential for a double recovery exists, regardless of whether or not a wrongful death claim is brought within the limitations period applicable to the decedent's inter vivos claim.<sup>17</sup> In either instance, a defendant may raise this issue with the trial court. In jury trials, any potential for a double recovery can be eliminated by properly instructing the jury. See Deggs at 519 (Dwyer, J., dissenting); Ueland v. Reynolds Metals Co., 103 Wn. 2d 131, 139, 691 P. 2d 190 (1984) (noting proper instructions can prevent risk of double recovery).<sup>18</sup>

Concerns about finality can be adequately addressed by invoking doctrines like res judicata and collateral estoppel, which are frequently raised as affirmative defenses. See CR 8(c) (listing affirmative defenses including “estoppel” and “res judicata”); see also In re Dependency of H.S., 188 Wn. App. 654, 660, 356 P.3d 202 (2015) (noting “[o]ne purpose of collateral estoppel is to encourage respect for judicial decisions by ensuring finality”; brackets added & quotation omitted). Similar concerns,

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<sup>17</sup> The potential for double recovery would appear to be small in any event because a wrongful death claim is for the benefit of identified statutory beneficiaries rather than the decedent, and generally involves post-death damages. See Otani, 151 Wn. 2d at 755.

<sup>18</sup> Respondents seem to suggest that Deggs failure to join her father's inter vivos lawsuit to allege a claim for loss of parental consortium pursuant to Ueland should preclude all or part of her wrongful death claim, although the record seems to be under-developed on this point. See Resp. Ans. to Pet. for Rev. at 2, 11 n.7, 15 n.12; Resp. Supp. Br. at 2, 8 n.5, 16. The feasibility of joinder under Ueland should be raised as an affirmative defense.

such as settlement and release or accord and satisfaction, may also be addressed as affirmative defenses. See CR 8(c) (including “accord and satisfaction” and “release”).<sup>19</sup>

These various defenses, and other similar limitations on liability or damages, can be independently asserted by defendants and resolved on a case-by-case basis.<sup>20</sup> Calhoun et al. seem to have gone astray by not recognizing the freestanding nature of these defenses and limitations, instead allowing concerns about how they should be applied to affect what was otherwise a straightforward issue of statutory construction. This approach should be rejected as unsound. To the extent the Court’s interpretation of the wrongful death statutes raises concerns about perceived unfairness to defendants in wrongful death actions, this should be a matter for the Legislature to resolve.

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<sup>19</sup> Respondents contend that the decedent’s settlement and release of an inter vivos claim also releases a wrongful death claim brought by the personal representative for the benefit of statutory beneficiaries, citing Grant, supra. See Resp. Ans. to Pet. for Rev. at 2-3 n.3; Resp. Supp. Br. at 8 n.4. This is questionable in light of Townsend v. Quadrant Corp., 173 Wn. 2d 451, 464, 268 P.3d 917 (Stephens, J., concurring/dissenting, joined by four other Justices, holding that non-signatories not bound by arbitration agreement). See also Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 929-32, 231 P.3d 1252 (2010) (holding arbitration agreement signed by decedent and purporting to bind heirs required arbitration of survival claims, but not wrongful death claims). In any event, there is no settlement in this case.

<sup>20</sup> As to ACL, the basis for dismissal appears to be Sundberg’s judgment in the inter vivos action. See Deggs, 188 Wn. App. at 511. This arguably raises issues of res judicata, collateral estoppel and double recovery, which are separate and distinct from whether there is a viable wrongful death claim.

VI. CONCLUSION

The Court should overrule Calhoun et al. as incorrect and harmful, and apply the normal rules regarding accrual of wrongful death claims in resolving the issues on review.

Dated this 25th day of January, 2016.

*George M. Ahrend* *George M. Ahrend*  
GEORGE M. AHREND FOR BRYAN P. HARNETIAUX, WITH AUTHORITY

*George M. Ahrend*  
FOR VALERIE D. McOMIE, WITH AUTHORITY

On Behalf of WSAJ Foundation

# APPENDIX

West's Revised Code of Washington Annotated  
Title 4. Civil Procedure (Refs & Annos)  
Chapter 4.20. Survival of Actions (Refs & Annos)

West's RCWA 4.20.010

4.20.010. Wrongful death--Right of action

Effective: July 22, 2011

Currentness

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.

**Credits**

[2011 c 336 § 89, eff. July 22, 2011; 1917 c 123 § 1; RRS § 183. FORMER PARTS OF SECTION: 1917 c 123 § 3 now codified as RCW 4.20.005. Prior: 1909 c 129 § 1; Code 1881 § 8; 1875 p 4 § 4; 1854 p 220 § 496.]

Notes of Decisions (148)

West's RCWA 4.20.010, WA ST 4.20.010

Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

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Proposed Legislation

West's Revised Code of Washington Annotated  
Title 4. Civil Procedure (Refs & Annos)  
Chapter 4.20. Survival of Actions (Refs & Annos)

West's RCWA 4.20.020

4.20.020. Wrongful death--Beneficiaries of action

Effective: July 22, 2011

Currentness

Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife, husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his or her death.

In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

**Credits**

[2011 c 336 § 90, eff. July 22, 2011; 2007 c 156 § 29, eff. July 22, 2007; 1985 c 139 § 1; 1973 1st ex.s. c 154 § 2; 1917 c 123 § 2; RRS § 183-1.]

Notes of Decisions (147)

West's RCWA 4.20.020, WA ST 4.20.020

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| West's Revised Code of Washington Annotated<br>Title 4. Civil Procedure (Refs & Annos)<br>Chapter 4.20. Survival of Actions (Refs & Annos) |
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West's RCWA 4.20.046

4.20.046. Survival of actions

Effective: June 12, 2008

Currentness

(1) 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: PROVIDED, HOWEVER, That the 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 on behalf of those beneficiaries enumerated in RCW 4.20.020, and such damages are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action. The liability of property of spouses or domestic partners held by them as community property to execution in satisfaction of a claim enforceable against such property so held shall not be affected by the death of either or both spouses or either or both domestic partners; and a cause of action shall remain an asset as though both claiming spouses or both claiming domestic partners continued to live despite the death of either or both claiming spouses or both claiming domestic partners.

(2) Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occurs simultaneously with or after the death of a person who would have been liable therefor if his or her death had not occurred simultaneously with such death or injury or had not intervened between the wrongful act, neglect or default and the resulting death or injury, an action to recover damages for such death or injury may be maintained against the personal representative of such person.

**Credits**

[2008 c 6 § 409, eff. June 12, 2008; 1993 c 44 § 1; 1961 c 137 § 1.]

Notes of Decisions (98)

West's RCWA 4.20.046, WA ST 4.20.046

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West's Revised Code of Washington Annotated  
Title 4. Civil Procedure (Refs & Annos)  
Chapter 4.20. Survival of Actions (Refs & Annos)

West's RCWA 4.20.060

4.20.060. Action for personal injury survives to surviving spouse,  
state registered domestic partner, child, stepchildren, or heirs

Effective: July 22, 2007

Currentness

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, or leaving no surviving spouse, state registered domestic partner, or such children, if there is dependent upon the deceased for support and resident within the United States at the time of decedent's death, parents, sisters, or brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such surviving spouse or state registered domestic partner, or in favor of the surviving spouse or state registered domestic partner and such children, or if no surviving spouse or state registered domestic partner, in favor of such child or children, or if no surviving spouse, state registered domestic partner, or such child or children, then in favor of the decedent's parents, sisters, or brothers who may be dependent upon such person for support, and resident in the United States at the time of decedent's death.

**Credits**

[2007 c 156 § 30, eff. July 22, 2007; 1985 c 139 § 2; 1973 1st ex.s. c 154 § 3; 1927 c 156 § 1; 1909 c 144 § 1; Code 1881 § 18; 1854 p 220 § 495; RRS § 194.]

Notes of Decisions (75)

West's RCWA 4.20.060, WA ST 4.20.060

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Pac. 856; 6 F. (2d) 330; 282 U. S. 101, 75 L. ed. 239, 51 Sup. Ct. Rep. 68.

The wife may join in her husband's action to set aside a fraudulent conveyance to defeat a judgment recovered by the husband alone, in view of this section: *Casey v. Edwards*, 123 Wash. 661, 212 Pac. 1082.

For personal injuries: See *Remington's Digest*, Parties, § 39; *Phelps v. Steamship City of Panama*, 1 W. T. 518; *Apker v. Hoquiam*, 51 Wash. 567, 99 Pac. 746; *Magnuson v. O'Dea*, 75 Wash. 574, 135 Pac. 640, Ann. Cas. 1015B, 1230, 48 L.R.A.(N.S.) 327.

In replevin brought against a husband and wife, who defend jointly, claiming the property as community

personalty, under this section, she is entitled to defend in her own right upon the issues raised by her answer; and a judgment of dismissal on plaintiff's failure to prove title is proper: *Glass v. Buttner*, 39 Wash. 296, 81 Pac. 699.

Joint action by husband and wife for wrongs directly affecting both, arising from the same act. 25 A.L.R. 743.

Misjoinder of parties in action ex contractu by husband and wife as ground for plea in abatement. 1 A.L.R. 363.

Right of married woman to maintain civil action for assault upon her without joining her husband. 6 A.L.R. 1023.

§ 183. Right of action for wrongful death. When the death of a person is caused by the wrongful act, neglect or default of another, his 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. [L. '17, p. 495, § 1; L. '09, p. 425, § 1. Cf. L. '54, p. 220, § 496; L. '75, p. 4, § 4; Cd. '81, § 8; 2 H. C., § 138.]

See notes to §§ 194, 4077.

*Survival of action for personal injury:* See infra, § 194.

*Actions by and against executors, etc.:* See infra, § 967 et seq.

Former laws cited in 3 Wash. 104-106, 109, 28 Pac. 331; 3 Wash. 225-227, 28 Pac. 333, 29 Pac. 263; 4 Wash. 401-403, 30 Pac. 714; 4 Wash. 433, 30 Pac. 729; 5 Wash. 262, 31 Pac. 868; 8 Wash. 151, 152, 35 Pac. 620; 8 Wash. 364, 36 Pac. 272; 17 Wash. 593, 50 Pac. 518; 19 Wash. 134, 138, 52 Pac. 1013, 40 L.R.A. 822; 26 Wash. 480, 67 Pac. 274; 33 Wash. 410, 74 Pac. 582, 65 L.R.A. 333; 34 Wash. 47, 74 Pac. 817; 34 Wash. 407, 75 Pac. 904; 39 Wash. 212, 214, 81 Pac. 705; 46 Wash. 174, 176, 89 Pac. 468, 9 L.R.A.(N.S.) 1193; 58 Wash. 491, 108 Pac. 1072; 60 Wash. 93, 110 Pac. 795; 60 Wash. 294, 111 Pac. 102; 65 Wash. 615, 618, 622, 623, 121 Pac. 833; 67 Wash. 546, 547, 122 Pac. 23; 80 L.R.A.(N.S.) 1150; 69 Wash. 258, 124 Pac. 687; 70 Wash. 257, 126 Pac. 636; 71 Wash. 549, 129 Pac. 308; 71 Wash. 620, 129 Pac. 403; 72 Wash. 465, 130 Pac. 743; 75 Wash. 442, 134 Pac. 1092; 48 L.R.A.(N.S.) 917; 88 Wash. 434, 153 Pac. 355; 89 Wash. 642, 155 Pac. 153; 92 Wash. 575, 159

Pac. 791; 94 Wash. 647, 648, 654, 660, 661, 163 Pac. 193, L.R.A.1917D, 1084; 97 Wash. 324, 166 Pac. 1166; 107 Wash. 296, 181 Pac. 685; 115 Wash. 246, 197 Pac. 6; 118 Wash. 43-48, 203 Pac. 26, 26, 27; 120 Wash. 247, 206 Pac. 970; 120 Wash. 253, 258, 259, 260, 206 Pac. 970, 972; 121 Wash. 646, 210 Pac. 13; 122 Wash. 379, 210 Pac. 733; 123 Wash. 242, 212 Pac. 285; 132 Wash. 120, 231 Pac. 777, 37 A.L.R. 830; 132 Wash. 278, 282, 231 Pac. 930; 134 Wash. 605, 236 Pac. 103; 137 Wash. 136, 241 Pac. 964; 138 Wash. 254, 260, 244 Pac. 567; 144 Wash. 444, 671, 672, 674, 258 Pac. 824; 145 Wash. 36, 37, 38, 258 Pac. 842; 140 Wash. 28, 261 Pac. 643; 155 Wash. 591, 285 Pac. 425, 67 A.L.R. 1152; 162 Wash. 462, 298 Pac. 419; 168 Wash. 258, 1 P. (2d) 301.

ACTIONS FOR WRONGFUL DEATH: See *Remington's Digests*, Death, §§ 1-30 and cases cited.

§ 1. Presumption as to death from absence: *Scott v. McNeal*, 5 Wash.

tion for death of spouse. 18 A.L.R. 1409.

**Municipal corporations—**

—notice of claim as condition of municipal liability for injury resulting in death. 64 A.L.R. 1059.

—rule of municipal immunity from liability for acts in performance of governmental functions as applicable in case of death as result of nuisance. 75 A.L.R. 1196.

Penal law, death statute as, within the rule that courts of one state or country will not enforce penal laws of another. 62 A.L.R. 1330.

Personal representative as proper party to maintain statutory action for death. L.R.A.1916E, 160.

**Prisoners—**

—contributory negligence of prisoner killed by electric shock. 46 A.L.R. 116.

—liability for death of or injury to prisoner. 50 A.L.R. 268.

Release by, or judgment in favor of, person injured as barring action for his death. 39 A.L.R. 579.

Rescuer, liability for death of one rescuing, or attempting to rescue, person in peril. 19 A.L.R. 4.

Soldier in service of government, liability for death of, or injury to, by negligently constructed, maintained, or operated railroad. 13 A.L.R. 1028.

Street railway company's liability to passenger struck by vehicle not subject to its control. 44 A.L.R. 162.

Suicide, civil liability for death by. 23 A.L.R. 1271.

Time of bringing action, provision of death statute as to, as condition of right of action or mere statute of limitations. 67 A.L.R. 1070.

Wanton or wilful misconduct by person killed or injured as defense to an action based on wanton or wilful misconduct of defendant. 41 A.L.R. 1379.

§ 183-1. Beneficiaries of action for wrongful death. Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just. [L. '17, p. 495, § 2.]

"Such action." See § 183.

Cited in 132 Wash. 120, 231 Pac. 777, 37 A.L.R. 830; 134 Wash. 605, 236 Pac. 103; 138 Wash. 260, 244 Pac. 567; 144 Wash. 444, 258 Pac. 321; 144 Wash. 671, 672, 674, 258 Pac. 824; 145 Wash. 36, 37, 38, 258 Pac. 842; 146 Wash. 28, 261 Pac. 643; 146 Wash. 689, 264 Pac. 900; 162 Wash. 462, 298 Pac. 419; 163 Wash. 266, 1 P. (2d) 301.

Persons for whose benefit suit may be maintained: Copeland v. Seattle, 33 Wash. 415, 74 Pac. 582, 65 L.R.A. 333; Borrie v. Northern Pac. R. Co., 60 Wash. 552, 111 Pac. 788, Ann. Cas. 1912B, 731; Kanton v. Kelly, 65 Wash. 614, 118 Pac. 890, 121 Pac. 833; Jensen

v. Culbert, 134 Wash. 599, 236 Pac. 101; Machek v. Seattle, 118 Wash. 42, 203 Pac. 25; Castner v. Tacoma Gas & Fuel Co., 123 Wash. 236, 212 Pac. 283.

An action for wrongful death under this section and for the benefit of the relatives named who may be dependent upon the deceased for support, is properly dismissed for want of proof of dependency, where a mother, capable of supporting herself and two minor daughters, brought action for the death of a daughter fourteen years of age, who had contributed but five or six dollars to the support of the family and

§ 22. Nature and Extent of Rights of Assignee in General: *Madison Co. v. McMillan Pool Works*, 117 Wash. 233, 200 Pac. 303.

§ 23. Rights of Assignee as Against Assignor: *Austin v. Wallace*, 117 Wash. 61, 200 Pac. 566.

§ 24. Equities and Defenses Between Original Parties—In General: *Austin v. Wallace*, 117 Wash. 61, 200 Pac. 566.

§ 26. — Bona Fide Assignees: *Willet v. Central Yakima Ranches Co.*, 126 Wash. 537, 219 Pac. 20.

§ 28. By Assignee—In Name of Assignor: *McCallaway v. Columbia Salmon Co.*, 104 Wash. 923, 177 Pac. 660.

§ 34. Evidence: *Northern Pac. R. Co. v. Ridley & Gilbert Co.*, 132 Wash. 528, 232 Pac. 355; *Harland v. First State Bank*, 122 Wash. 289, 210 Pac. 681.

Share of corporate stock as within statute enabling assignee to maintain action in his own name. 23 A. L. R. 1322.

Right of assignee to enforce option to purchase contained in lease. 33 A. L. R. 1163.

**§ 192. Actions Against Persons Severally Liable.**

Cited in 129 Wash. 561, 564, 225 Pac. 428, 429.

In the case of a joint and several bond upon which the principal is liable, the sureties may be sued separately from the principal, under this section: *State ex rel. Reitsner v. Oakley*, 129 Wash. 553, 225 Pac. 425.

Joinder in one action at law of persons not jointly liable, one or

the other of whom is liable to the plaintiff. 41 A. L. R. 1223.

Joinder of several persons in action for slander. 34 A. L. R. 345.

Joinder of principal and agent or employer and employee as parties defendant in action for slander. 46 A. L. R. 1506.

**§ 193. Action not to Abate by Disability.**

Cited in 121 Wash. 19, 208 Pac. 84.

**Rights of Distributee—Substitution.**—Under this section, providing that no action shall abate "by . . . the transfer of any interest therein," upon the final discharge of an administrator, the distributee is entitled to be substituted as plaintiff in a pending action to recover property of the estate: *Moe v. Judd*, 121 Wash. 14, 208 Pac. 82.

**ABATEMENT AND SURVIVAL OF ACTION:** See *V. Remington's Sup. Digest*, Abate. & R., §§ 18—25.

§ 18. Death as Cause of Abatement: *Hawley v. Isaacson*, 117 Wash. 197, 21 A. L. R. 268, 200 Pac. 1109.

§ 19. Causes of Action Which Survive—In General: *State ex rel. Baeder v. Blake*, 107 Wash. 294, 181 Pac. 685; *Dyer v. Missouri State Life Ins. Co.*, 132 Wash. 373, 232 Pac. 346.

§ 20. — Actions on Contract: *Warner v. Benham*, 126 Wash. 393, 34 A. L. R. 1353, 218 Pac. 260.

§ 21. Actions and Proceedings Which Abate: *State ex rel. Baeder v. Blake*, 107 Wash. 294, 181 Pac. 685.

§ 22. Death After Final Judgment: *Hillman v. Gordon*, 126 Wash. 614, 219 Pac. 46; *Jacobs v. Teachout*, 126 Wash. 569, 219 Pac. 33.

§ 23. Death Pending Appeal or Other Review: *Gordon v. Hillman*, 109 Wash. 223, 186 Pac. 651.

§ 24. Necessity and Mode of Suggesting Death as Cause of Abatement: *Gordon v. Hillman*, 109 Wash. 223, 186 Pac. 651.

§ 25. Continuance or Revival of Action—Persons Entitled: *Moe v. Judd*, 121 Wash. 14, 208 Pac. 82.

Death of principal defendant as abating or dissolving garnishment or attachment. 21 A. L. R. 272.

Survival of action or cause of action for alienation of affections or criminal conversation. 24 A. L. R. 488.

Survival to grantor's heir of equitable suit to set aside conveyance for cause. 33 A. L. R. 51.

Survival of action or cause of action for breach of contract to marry. 34 A. L. R. 1363.

**§ 194. Action for Personal Injury Survives to Wife, Child or Heirs.**

No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such

death, if he have a wife or child living, or leaving a wife or child in the United States at the time of his death, or having a wife or child in the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death. [L. '27, p. 143, § 1.]

For repeal of this section, or of its amendment in 1909, without any saving clause, see L. '27, p. 144, § 2.

Section 1 of the Act of 1927 declares: "That section 18 of the Code of Washington Territory of 1881, (section 194 of Remington's Compiled Statutes; section 8275 of Pierce's 1919 Code) be amended to read as follows: . . ."

Section 2 provides: "That chapter 144 of the Laws of 1909, page 566, is hereby repealed."

The act of 1881 (amended above) affected only rights of action for wrongful death in favor of the wife or wife and children, and if no wife, the child or children of the deceased. All the further provisions as to dependent parents, sisters and minor brothers (except the provision that the action be by the executor or administrator of the deceased), were added in 1909 as an express amendment to Ballinger's Code, § 4838 [Code 1881, § 18]. The repeal of the act of 1909 [Rem. Comp. Stat., § 194] by section 2 of the act of 1927, without any saving clause, would seem to affect all causes arising prior to June 8, 1927.

In the opening clause of section 1, the Act of 1927 states, that Remington's Compiled Statutes, § 194, is amended "so as to read as follows: . . ." In section 2, the same act is repealed. Where an act both amends and repeals a certain section, the part repugnant to the clear legislative intent must give way and is held inoperative and void (*McKnight v. Seattle*, 55 Wash. 289, 104 Pac. 504). The wording, or parenthetical reference, as well as the context, seems to indicate a clear legislative intent to amend section 194 by attaching and continuing the provisions covering dependents, rather than to cut them off by a repeal.

There are many similar repeals in the Act of 1927, following attempts to amend laws long since superseded or repealed by constitutional amendment, "so as to read as follows: . . ." (*Adams County*

*v. Scott*, 117 Wash. 85, 200 Pac. 1112; *Spokane v. Eastern Trust Co.*, 127 Wash. 541, 221 Pac. 615).

With this full explanation, these similar instances of amendments of obsolete or repealed laws, and repeals of the acts in fact (or at least in effect) amended, will be briefly noted for whatever they may be worth.

Cited in 118 Wash. 43—48, 203 Pac. 25; 120 Wash. 253, 257, 258, 260, 206 Pac. 970, 971, 972, 973.

**Concurrent Actions—For Whose Benefit.**—An action by an administrator for the wrongful death of a minor may be prosecuted for the benefit of the parent or parents, under this section, independently of, and concurrently with, actions for support, under section 183, and for loss of services under section 184; *Machek v. Seattle*, 118 Wash. 42, 203 Pac. 25.

**Joinder—Parties Entitled to Sue.**—Damages for injuries and suffering sustained by the decedent and resulting in his death can only be recovered in an action prosecuted by the heirs and beneficiaries named in this section, and cannot be joined with an action for wrongful death to be prosecuted by the personal representative for the benefit of the widow and children under sections 183—183-3; *Howe v. Whitman County*, 120 Wash. 247, 206 Pac. 968, 212 Pac. 164.

**Survival of Right of Action of Person Injured:** See *V Remington's Sup. Digest, Death*, § 5; *Machek v. Seattle*, 118 Wash. 42, 203 Pac. 25.

Damages for injuries and suffering sustained by decedent and resulting in his death can only be recovered in an action prosecuted by the heirs and beneficiaries named in this section, and cannot be joined with an action for wrongful death to be prosecuted by the personal representative for the benefit of the widow and children under sections 183—183-3; *Howe v. Whitman County*, 120 Wash. 247, 206 Pac. 968, 212 Pac. 164.

(Or if short term to be filled)

(Or if short term to be filled)

No.....  
Short term.  
Vote for One.

No.....  
Short term.  
Vote for One.

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| ..... | <input type="checkbox"/> | ..... | <input type="checkbox"/> |
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Sec. 2. That chapter 68 of the Laws of the Extraordinary Session of 1925, pages 66-69, is hereby repealed.

Statute repealed.

Passed the Senate January 20, 1927.  
Passed the House February 2, 1927.  
Approved by the Governor February 16, 1927.

CHAPTER 156.

[S. B. 84.]

SURVIVAL OF ACTIONS FOR PERSONAL INJURIES.

An Act relating to the survival of actions and causes of actions for personal injury resulting in death, amending Section 18 of the Code of Washington Territory of 1881, and repealing Chapter 144 of the Laws of 1909.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That section 18 of the Code of Washington Territory of 1881, (section 194 of Remington's Compiled Statutes; section 8275 of Pierce's 1919 Code) be amended to read as follows:

§ 18, Code of 1881; § 194, Rem. Stats.; § 8275, Pierce's 1919 Code.

Section 18. No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he leave a wife or child living, or leaving no wife or issue, if he have dependent upon him non-support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or adminis-

Right of action survives to wife, children, and dependent heirs.

trator of the deceased, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death.

Statute repealed.

SEC. 2. That chapter 144 of the Laws of 1909, page 566, is hereby repealed.

Passed the Senate January 21, 1927.

Passed the House February 2, 1927.

Approved by the Governor February 16, 1927.

CHAPTER 157.

[H. B. 108.]

CONSOLIDATED SCHOOL DISTRICTS.

AN ACT relating to consolidated school districts, the election, powers and duties of directors thereof, and amending Section 4738 of Remington's Compiled Statutes as amended by Section 1 of Chapter 106, of the Laws of the Extraordinary Session of 1925 and declaring an emergency.

*Be it enacted by the Legislature of the State of Washington:*

§ 4738, Rem.  
Statutes, 1917,  
Ch. 106,  
§ 1, Extraordinary  
Session of 1925,  
Repealed  
Code.

SECTION 1. That section 4738 of Remington's Compiled Statutes as amended by section 1, of chapter 106, Laws of the Extraordinary Session of 1925 be amended to read as follows:

Consolidated  
districts  
as amended  
by new  
incorporation.

SECTION 4738. The county superintendent of any county in which new districts are formed or heretofore have been formed by the uniting of two or more districts, or by the incorporating of any city or town having, jointly or two or more school districts, shall upon being notified of such action by the board of directors of such new district, proceed to designate

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**To:** Shari Canet  
**Cc:** Philip A. Talmadge; Sidney Tribe; Meredith Good; Mark B. Tuvim; Kevin J. Craig; J. Scott Wood; Dan Ruttenberg; Jan E. Brucker; asbestos-sea@foleymansfield.com; Matthew P. Bergman; Colin B. Mieling; Stewart Estes; Bryan Harnetiaux; George Ahrend; Valerie McOmie  
**Subject:** RE: Deggs v. Asbestos Corporation Limited, et al. (S.C. #91969-1)

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**Subject:** Deggs v. Asbestos Corporation Limited, et al. (S.C. #91969-1)

Dear Mr. Carpenter:

On behalf of the WSAJ Foundation, an Amicus Curiae Brief (with annexed Appendix) and Motion to File 1-Page Over-Length Brief are attached to this email. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--

Please note new address below eff. Jan. 1, 2016.

Shari M. Canet, Paralegal  
Ahrend Law Firm PLLC  
100 E. Broadway Ave.  
Moses Lake, WA 98837  
(509) 764-9000 ext. 810  
Fax (509) 464-6290

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