

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 25, 2016, 4:21 pm
BY RONALD R. CARPENTER
CLERK

E

bjh

Supreme Court No. 91969-1
Court of Appeals Cause No. 71297-7-I

RECEIVED BY E-MAIL

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.

RESPONDENTS ASBESTOS CORPORATION LIMITED,
INGERSOLL RAND COMPANY'S ANSWER TO BRIEF OF AMICUS
CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION AND BRIEF OF AMICUS CURIAE BERGMAN
DRAPER LADENBURG PLLC

Mark B. Tuvim, WSBA #31909
Kevin J. Craig, WSBA #29932
Counsel for Respondents
Asbestos Corporation Limited
and Ingersoll Rand Company

GORDON & REES LLP
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
(206) 695-5100

 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT..... 1

 A. Contrary to the Arguments Raised by Amicus WSAJF, The Court Should Follow *Stare Decisis* Because the Legislature Has Declined To Change This Court’s Interpretation of the Wrongful Death Statute Despite Numerous Opportunities To Do So.1

 1. The Principle of Legislative Acquiescence Should Control as the Legislature Has Subsequently Amended the Wrongful Death Statute on Multiple Occasions Since *Calhoun* Yet Has Left That Decision Undisturbed.3

 2. This Court Correctly Decided *Calhoun* and the Other Cases Holding That a Decedent’s Pre-Death Conduct May Bar or Limit a Wrongful Death Action.11

 3. *Calhoun* and This Court’s Other Precedent Are Not “Harmful.”13

 B. Affirmance Would Not Deprive Family Members of a Remedy Even When There Is No Inequitable or Dilatory Conduct.....14

 C. The Same Damages Are Available in Both the Personal Injury Action and the Wrongful Death Action.17

 D. The Risk of Double Recovery Presents a Real Problem.....18

III. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

<i>Brodie v. Wash. Water Power Co.</i> , 92 Wn. 574, 159 P. 791 (1916).....	6, 9, 10, 12
<i>Calhoun v. Washington Veneer Co.</i> , 170 Wn. 152, 15 P.2d 943 (1932).....	passim
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	2, 3
<i>Deggs v. Asbestos Corp. Ltd.</i> , 188 Wn. App. 495, 354 P.3d 1 (2015).....	17
<i>Ferrin v. Donnellfeld</i> , 74 Wn.2d 283, 444 P.2d 701 (1968).....	16
<i>Friends of Snoqualmie Valley v. King Cnty. Boundary Review Ed.</i> 118 Wn.2d 488, 825 P.2d 300 (1992).....	passim
<i>Glass v. Stahl Specialty Co.</i> , 97 Wn.2d 880, 52 P.2d 948 (1982)	5
<i>Grant v. Fisher Flouring Mills Co.</i> , 181 Wn. 576, 44 P.2d 193 (1935).....	passim
<i>Hale v. Wellpinit School Dist. No. 49</i> , 165 Wn.2d 494, 198 P.3d 1021 (2009).....	4
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	3
<i>Hart v. Geysel</i> , 159 Wn. 632, 294 P. 570 (1930).....	10
<i>In re Stranger Creek & Tributaries in Stevens Cnty</i> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	2
<i>Johnson v. Ottomeier</i> , 45 Wn.2d 419, 275 P.2d 723 (1954).....	1, 12, 13
<i>Nisqually Delta Ass'n v. DuPont</i> , 95 Wn.2d 563, 627 P.2d 956 (1981).....	4, 5

<i>Northern Pac. Ry. Co. v. Adams</i> , 192 U.S. 440, 24 S.Ct. 408, 48 L. Ed. 513 (1904).....	6, 9
<i>Ostheller v. Spokane & Inland Empire R.R. Co.</i> , 107 Wn. 678, 182 P. 630 (1919).....	6, 9, 10, 12
<i>Payne v. Tennessee</i> , 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).....	2
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004)	2, 3
<i>Ryan v. Poole</i> , 182 Wn. 532, 47 P.2d 981 (1935).....	10, 11, 12
<i>Soproni v. Polygon Apt. Partners</i> , 137 Wn.2d 319, 971 P.2d 500 (1999).....	2, 3
<i>State v. Burri</i> , 87 Wn.2d 175, 550 P.2d 507 (1976)	16
<i>State v. Kephart</i> , 56 Wn. 561, 106 P. 165 (1910).....	8
<i>State v. Kier</i> , 164 Wn.2d 798, 94 P.3d 212 (2008).....	3
<i>State v. Thornton</i> , 119 Wn.2d 578, 835 P.2d 216 (1992)	8, 9
<i>Ueland v. Reynolds Metals Co.</i> , 103 Wn.2d 131, 691 P.2d 190 (1984).....	14, 16, 17
<i>Welch v. Creek</i> , 88 Wn. 429, 153 P. 355 (1915).....	6, 9, 12
Statutes	
RCW 36.93.100	5
RCW 36.93.160(5).....	4, 5
RCW 4.04.010	8
Other Authorities	
1973 Sess. Laws, ch. 1543, § 2.....	7
1985 Sess. Laws, ch. 130, § 1	7
2007 Sess. Laws, ch. 156, § 1	7
2011 Sess. Laws, ch. 336, § 90.....	7

FATAL ACCIDENTS ACT, 1846, 9 & 10 VICT. C. 93 (Eng.)..... 11

Page Keeton, PROSSER & KEETON ON TORTS § 127 (5th ed.
1984) 11, 12

I. INTRODUCTION

Respondents Asbestos Corporation Limited (ACL) and Ingersoll Rand Company (Ingersoll Rand) (collectively “Respondents”) jointly submit this brief in response to the Brief of Amicus Curiae Washington State Association for Justice Foundation (WSAJF) and the Brief of Amicus Curiae Bergman Draper Ladenburg PLLC (BDL). This Court’s interpretation of the wrongful death statute as recognized in *Calhoun v. Washington Veneer Co.*, 170 Wn. 152, 159-60, 15 P.2d 943 (1932) and other applicable cases has remained undisturbed by the Legislature for nearly a century. The Court should follow *stare decisis* and affirm the Court of Appeals.

II. ARGUMENT

A. Contrary to the Arguments Raised by Amicus WSAJF, The Court Should Follow *Stare Decisis* Because the Legislature Has Declined To Change This Court’s Interpretation of the Wrongful Death Statute Despite Numerous Opportunities To Do So.

Amicus WSAJF does not attempt the distinguish this case from this Court’s precedent in *Calhoun v. Washington Veneer Co.*, 170 Wn. 152, 159-60, 15 P.2d 943 (1932); *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 580-81, 44 P.2d 193 (1935); and *Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954). Rather, it asks the Court to disregard the rule of *stare decisis* and abrogate the Court’s long-standing

precedent. The doctrine of *stare decisis* “requires a **clear showing** that an established rule is incorrect and harmful before it is abandoned.” *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-47, 217 P.3d 1172 (2009) (citations omitted) (emphasis added). Further, this Court has recognized the principle of “legislative acquiescence” by presuming “that the legislature is aware of judicial interpretations of its enactments” and thus showing particular deference to precedent interpreting statutes (as opposed to precedent interpreting a rule under the common law). *Koenig*, 167 Wn.2d at 348; *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *Friends of Snoqualmie Valley v. King Cnty. Boundary Review Ed.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992)); *Soproni v. Polygon Apt. Partners*, 137 Wn.2d 319, 327 & n.3, 971 P.2d 500 (1999). This respect for precedent “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Koenig*, 167 Wn.2d at 346-47 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). “Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office.” *In re Stranger Creek & Tributaries in Stevens Cnty*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). As a result, Washington appellate courts “do not lightly

set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful.” *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). The Court should affirm because neither Petitioner nor Amicus WSAJF has met their burden because they have failed to make a “clear showing” that this Court’s precedent is both incorrect and harmful.

1. The Principle of Legislative Acquiescence Should Control as the Legislature Has Subsequently Amended the Wrongful Death Statute on Multiple Occasions Since *Calhoun* Yet Has Left That Decision Undisturbed.

As a threshold matter, Amicus WSAJF almost entirely ignores the principle of legislative acquiescence despite its clear implication here. This Court has recently and repeatedly recognized that “[it] presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.” *Koenig*, 167 Wn.2d at 348; *Riehl*, 152 Wn.2d at 147; *Soproni*, 137 Wn.2d at 327 & n.3; *Friends of Snoqualmie Valley*, 118 Wn.2d at 496; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986). Thus, recognizing the separation of powers between the legislative and judicial branches, this Court has given particular deference to its precedent interpreting statutes when the

Legislature has declined to change the statute in the wake of the Court's decision. *See, generally, Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 509, 198 P.3d 1021 (2009) (upholding retroactive application of Legislature's amendment abrogating prior interpretation of statute by Washington Supreme Court).

In particular, this Court has declined to overrule precedent interpreting a statute when the Legislature has subsequently amended that statute on other grounds yet left the statute unchanged with respect to the Court's holding. *Friends of Snoqualmie Valley*, 118 Wn.2d at 496-97. For example, this case closely follows *Friends of Snoqualmie Valley* in which the Court refused to overturn prior precedent interpreting a statute because the Legislature had declined to abrogate the prior ruling when it subsequently amended the statute for other reasons. *Id.* Specifically, the Court in that case was asked to overturn its decision in *Nisqually Delta Ass'n v. DuPont*, 95 Wn.2d 563, 570, 627 P.2d 956 (1981), which had interpreted RCW 36.93.160(5) to mean that parties could appeal a decision of the Boundary Review Board only if they currently lived or owned property within the boundary of a proposed annexation. *Friends of Snoqualmie Valley*, 118 Wn.2d at 493. Citing the Legislature's failure to address the *Nisqually Delta* holding when it subsequently amendment of

the statute, the Court deferred to the Legislature and refused to overrule its precedent:

We must refuse the appellants' invitation to modify or overrule our decision in *Nisqually Delta*. While the Legislature changed RCW 36.93.100 in 1987 to expand the class of persons who could seek Boundary Review Board review, it did not take the opportunity to expand the class of those parties who under RCW 36.93.160(5) may obtain judicial review. Thus, for a petitioner to obtain the extraordinary relief of an automatic stay of action under RCW 36.93.160(5), it must be clear and unequivocal that the Legislature intended this policy. That could have been accomplished by the Legislature amending the specific section in question or making clear that parties such as appellants were included within the parties permitted to a stay of action upon appeal under RCW 36.93.160(5). Without clear legislative intent excepting this category of petitioners from our previously announced rule, we cannot on this record overrule *Nisqually Delta*. The Legislature in 1987 left RCW 36.93.160(5) undisturbed in the face of this court's decision in *Nisqually Delta*. The Legislature is presumed to be aware of judicial interpretation of its enactments. *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887, 52 P.2d 948 (1982). We therefore conclude that if the Legislature wished to grant standing and an automatic stay under RCW 36.93.160(5) to persons outside of areas to be annexed, it would have expressly amended the language of the relevant section rather than leave it unchanged. Because the statutory language of RCW 36.93.160(5) has remained unchanged since the time of this court's decision in *Nisqually Delta*, we are not persuaded that we should overrule clear precedent of this court interpreting the same statutory language.

Friends of Snoqualmie Valley, 118 Wn.2d at 496-97.

This appeal presents an even stronger case of legislative acquiescence than *Friends of Snoqualmie Valley* given that even longer

time has passed since *Calhoun* (84 years instead of 11 years) and the Legislature has amended the wrongful death statute more than once since then without disturbing *Calhoun* or the other applicable cases. As examined in greater detail in the Brief of Amicus Curiae WDTL at pages 3-11, the first court to interpret the language of the Washington wrongful death statute to mean that the heirs of the decedent “can recover only” when the decedent “could have recovered damages had he not been killed” was the United States Supreme Court in 1904. *Northern Pac. Ry. Co. v. Adams*, 192 U.S. 440, 449-50, 24 S.Ct. 408, 48 L. Ed. 513 (1904) (relying on the “wrongful act” language in wrongful death statute). Thereafter, the Washington Supreme Court reached the same interpretation of the wrongful death statute in *Welch v. Creek*, 88 Wn. 429, 435, 153 P. 355 (1915) (“[I]t seems clear from the wording of the statute that. . . the heirs or personal representatives may maintain the action where the deceased might have maintained it had he lived.”); *Brodie v. Wash. Water Power Co.*, 92 Wn. 574, 577, 159 P. 791 (1916) (interpreting the wrongful death statute to hold that decedent’s release of his personal injury claim barred his estate’s wrongful death action); and *Ostheller v. Spokane & Inland Empire R.R. Co.*, 107 Wn. 678, 681-82, 182 P. 630 (1919) (interpreting the “wrongful act” language in the wrongful death statute to “mean wrong or neglect as against the deceased; that is, in the sense that the deceased

could have recovered damages for the injury resulting in his death”). The Court then applied this same interpretation of the wrongful death statute to hold in *Calhoun*, 170 Wn. at 159-60, and *Grant*, 181 Wn. at 580-81, that the expiration of the statute of limitations on the decedent’s claims during his or her lifetime would similarly bar a wrongful death action based on the same injury. Thus, the Legislature has known about this Court’s interpretation of the wrongful death statute since the 1910s and its application to the statute of limitations context in particular since the 1930s.

Despite the Legislature’s knowledge of this Court’s statutory interpretation since the early part of last century, the Legislature has declined to abrogate this Court’s interpretation of the wrongful death statute despite making several amendments since then. The Legislature has amended the wrongful death statute on a total of four occasions since 1932 – including as recently as 2011 – but only to add a gender-neutral term and new classes of beneficiaries (non-minor brothers, stepchildren, and domestic partners). 2011 Sess. Laws, ch. 336, § 90 (gender-neutral term); 2007 Sess. Laws, ch. 156, § 1 (domestic partners); 1985 Sess. Laws, ch. 130, § 1 (stepchildren); 1973 Sess. Laws, ch. 1543, § 2 (non-minor brothers). Like the Boundary Review Board statute in *Friends of Snoqualmie Valley*, 118 Wn.2d at 496-97, the wrongful death statute has

been subsequently amended by the Legislature – and in this case, multiple times – yet the Legislature has declined to change the law to address *Calhoun* and other precedent. Given the Legislature’s inaction regarding *Calhoun* despite its multiple amendments to the wrongful death statute since, a stronger case of legislative acquiescence is difficult to imagine.

While Amicus WSAJF’s brief essentially dodges the issue of legislative acquiescence (absent a single footnote), the lone case that it does cite – *State v. Thornton*, 119 Wn.2d 578, 582-83, 835 P.2d 216 (1992) – does not support its position. Contrary to Amicus WSAJF’s suggestion, this Court in *Thornton* overruled prior precedent applying a rule of “common law,” not precedent interpreting a statute, as is the case here. In fact, *Thornton* specifically explained that the prior decision – *State v. Kephart*, 56 Wn. 561, 106 P. 165 (1910) – was expressly premised solely on the common law, not an interpretation of a statute:

Since the personal violence rule is court imposed, it retains its common law character. *Cf. Kephart*, 56 Wn. at 563, 106 P. 165; *see also* RCW 4.04.010. Indeed, **this court expressly rejected the notion that it was construing the statutory privilege in *Kephart*, and instead relied solely on its interpretation of the common law in requiring that a crime of personal violence be involved.** Thus, as a judge-made rule, the personal violence exception is subject to modification by this court.

Thornton, 119 Wn.2d at 582 (footnote and additional citations omitted) (emphasis added). *Calhoun* and the other applicable precedent concerned the interpretation of a statute, not the common law.

Similarly, Amicus WSAJF's argument that *Calhoun* (and any other applicable precedent) was not "a judicial decision interpreting a statute" is erroneous. While Amicus and Appellant may disagree with the Court's prior interpretation of the wrongful death statute, they cannot seriously contend that *Calhoun* and the other cited cases did not interpret and apply the statute. Again, as cited above, the initial applicable decisions expressly relied upon the "wrongful act" language in the wrongful death statute to "mean wrong or neglect as against the deceased; that is, in the sense that the deceased could have recovered damages for the injury resulting in his death." *Ostheller*, 107 Wn. at 681-82; accord *Northern Pac. Ry. Co.*, 192 U.S. at 449-50 (same); *Brodie*, 92 Wn. at 577 (despite recognizing the different wording between the survival statute and the wrongful death statute, interpreting the wrongful death statute to mean that "[i]f the deceased, in his lifetime, has done anything that would operate as a bar to recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death"); *Welch*, 88 Wn. at 435 ("[I]t seems clear from the wording of the statute that. . . the heirs or personal representatives may maintain the

action where the deceased might have maintained it had he lived.”).

Moreover, this Court explicitly cited the wrongful death statute when reaching its decisions in *Calhoun*, 170 Wn. at 159-60, and *Grant*, 181 Wn. at 580-81.¹ None of these cases cite the common law as a basis for their holding.

In short, this Court has long interpreted the wrongful death statute to mean that that the heirs cannot recover unless the decedent could have recovered against the defendants at the time of death. The Legislature has

¹ Amicus WSAJF further fails to acknowledge that this Court has recognized other instances in which the decedent’s conduct during his or her lifetime precluded or limited the personal representative’s right to bring a wrongful death action **even though the wrongful death statute was silent on such issues**. See, e.g., *Ryan v. Poole*, 182 Wn. 532, 536, 47 P.2d 981 (1935) (holding that the decedent’s engagement in unlawful and criminal acts when injured precluded the accrual of a wrongful death action even though the decedent’s injuries later resulted in death and the statute contained no explicit exception for criminal acts); *Hart v. Geysel*, 159 Wn. 632, 294 P. 570 (1930) (same as to decedent who consented to prize fight); *Brodie*, 92 Wn. at 577 (holding that decedent’s release of his personal injury claim barred his estate’s wrongful death action even though wrongful death statute did not explicitly include such language). In fact, the Court even addressed this very issue in *Ryan* when it rejected essentially the same argument raised by Amicus WSAJF here. In *Ryan*, the Court considered whether the fact that the decedent would have been barred from bringing a personal injury action because he was killed in the course of committing a criminal act would similarly bar the personal representative’s wrongful death action even though the wrongful death statute itself was silent on the issue. *Ryan*, 182 Wn. at 536. After acknowledging that the Washington wrongful death statute did not include the same language from Lord Campbell’s Act (the original wrongful death statute from England) or the Washington survival statute expressly limiting wrongful death actions to circumstances where the decedent could have maintained an action if he or she had survived, the Court concluded that it had “definitely settled” on an interpretation of the wrongful death statute that a defense that would bar an action brought by a decedent who had survived the injury would also bar a wrongful death action brought by the personal representative. *Id.* at 537-38. As the Court explained, the words “‘wrongful act or neglect,’ used in statutes of this nature in defining the quality of the act causing the injury and death, it seems to be universally agreed by the courts, mean wrong or neglect as against the deceased; that is, in the sense that the deceased could have recovered damages for the injury resulting in his death.” *Id.* (quoting *Ostheller*, 107 Wn. at 681-82). Thus, these decisions rest upon interpretations of the wrongful death statute.

declined to disturb this interpretation despite making several other amendments to the wrongful death statute over the last eighty years. The Court should defer to the Legislature and affirm the Court of Appeals.

2. This Court Correctly Decided *Calhoun* and the Other Cases Holding That a Decedent's Pre-Death Conduct May Bar or Limit a Wrongful Death Action.

Neither Petitioner nor Amicus WSAJF can meet their burden and make a “clear showing” that this Court’s interpretation of the wrongful death statute is incorrect. Historically, the common law did not recognize a beneficiary’s cause of action for wrongful death. *Ryan*, 182 Wn. at 535. After the passage of Lord Campbell’s Act in 1846,² several states, including Washington, enacted their own wrongful death statutes. *See Ryan*, 182 Wn. at 535; Page Keeton, PROSSER & KEETON ON TORTS § 127, p. 945 (5th ed. 1984). Lord Campbell’s Act contained an express provision limiting the wrongful death action to cases where the decedent might have recovered damages if he lived, which was either expressly incorporated into American statutes or “has been read into them by implication where it does not expressly appear.” PROSSER § 127, p. 954. Consistent with Lord Campbell’s Act and the majority of American jurisdictions, this Court interpreted Washington’s wrongful death statute to prohibit an action that the decedent (if he had survived) could not have

² FATAL ACCIDENTS ACT, 1846, 9 & 10 VICT. C. 93 (Eng.).

asserted against the defendant. *Johnson*, 45 Wn.2d at 423 (“the action for wrongful death is derivative only in the sense that it derives from the wrongful act causing the death, rather than from the person of the deceased”); *see also* PROSSER § 127, p. 955 (“The wrongful death action for the benefit of survivors is, like other actions based on injuries to others, derivative in nature[.]”) (footnote omitted).

Thus, it is Petitioner and Amicus WSAJF (**not** this Court) that has incorrectly concluded a wrongful death action is not derivative of the decedent’s own personal injury claims. Rather, *Calhoun* and the other applicable cases are mere applications of this Court’s “definitely settled” interpretation of the wrongful death statute that heirs only have a right to recover damages when the decedent would have had a right to recover damages against the defendants if he or she had survived. *Ryan*, 182 Wn. at 536-37; *accord Ostheller*, 107 Wn. at 681 (holding that, under “well-settled law,” the wrongful death statute provides “a right of action to the heirs of the deceased which is dependent . . . upon the right of the injured person to maintain an action for the damage resulting from this injury, had he survived.”); *Brodie*, 92 Wn. at 577 (same); *Welch*, 88 Wn. at 435 (same). The historical rule that a wrongful death action is derivative of the decedent’s personal injury action explains why a decedent’s engaging in conduct which compromises his action by allowing the statute of

limitations to run can, as in the case, result in barring a wrongful death claim by his estate. *Johnson*, 45 Wn.2d at 422-23; *Grant*, 181 Wn. at 580-81; *Calhoun*, 170 Wn. at 159-60.

3. *Calhoun* and This Court's Other Precedent Are Not "Harmful."

Petitioner and Amicus WSAJF also do not meet their burden of making a "clear showing" that this Court's interpretation of the wrongful death statute is harmful. To the contrary, the only potential harm would be to Respondents and similarly-situated defendants if this Court abandons its well-settled interpretation of the wrongful death statute and requires defendants to defend stale claims without the benefit of deposing the decedent or conducting other contemporaneous discovery.

This case demonstrates the soundness of this Court's prior rulings. Decedent, Petitioner, and the other statutory beneficiaries already received a full and fair opportunity to seek the same damages for the same injuries from the same defendants in the 1999 lawsuit. In the 1999 Lawsuit, Decedent, his spouse, and Petitioner had the opportunity to bring an action against Respondents for the same injuries and the same damages as alleged in the wrongful death action, including but not limited to future damages for *the family members' own loss* due to Decedent's alleged

terminal illnesses.³ Decedent and Petitioner then slept on their rights for over a decade, which substantially prejudiced Respondents by depriving them of their ability to depose Decedent or conduct other needed discovery. The Court of Appeals' decision applying this Court's prior interpretation of the wrongful death statute creates no injustice or unreasonable result.

The rule established by this Court's decisions promotes several important policy goals. By requiring the decedent to diligently pursue claims during his lifetime, the rule promotes finality, precludes stale claims, and guards against the threat of double recovery. Decedent and his family had their opportunity for their day in court over a decade ago. Barring the estate from bringing an identical lawsuit based on the same set of facts, allegations, and injuries against Respondents due to Decedent and Petitioner's own dilatory action creates no harm. Accordingly, the Court should follow *stare decisis* and affirm the Court of Appeals.

B. Affirmance Would Not Deprive Family Members of a Remedy Even When There Is No Inequitable or Dilatory Conduct.

Amicus BDL misses the point of this appeal by arguing that the parties "have failed to contemplate situations where a personal injury

³ See, e.g., *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 140-141, 691 P.2d 190 (1984) ("[W]e hold that a child has an independent cause of action for loss of the love, care, companionship and guidance of a parent tortiously injured by a third party. This separate consortium claim must be joined with the parent's underlying claim unless the child can show why joinder was not feasible.").

claim never accrued but a death claim did” and that it could potentially deprive family members of a remedy even when there is no dilatory conduct. Amicus BDL apparently conflates the term “subsisting cause of action” with the decedent actually filing a pending lawsuit – a proposition wholly unsupported by either legal authority or logic. If, like the BDL clients referenced in its brief, the injured parties’ personal injury claims never accrued during their lifetime because they never knew, nor reasonably should have known, of their asbestos-related illness, the statute of limitations on any potential personal injury claim never began to run. Thus, they would have died with an existing cause of action (even if they did not know it at the time), and the rule of *Calhoun* would not apply because the statute of limitations never ran on the decedent’s personal injury claim. *See Grant*, 181 Wn. at 580-82 (holding that because the statute of limitations had not run on the decedent’s right to recover for his personal injury claim before his death, the wrongful death action was not barred). Amicus BDL’s argument to the contrary is neither factually nor legally correct.

Moreover, Amicus BDL’s hypothetical is not the case before the Court because Decedent and his family were dilatory in bringing claims against Respondents. The discovery rule is not at issue because Petitioner waived any such argument by failing to raise it on summary judgment

before the trial court. *State v. Burri*, 87 Wn.2d 175, 178, 550 P.2d 507 (1976); *Ferrin v. Donnellefeld*, 74 Wn.2d 283, 285, 444 P.2d 701 (1968). Rather, it is undisputed that Decedent, his spouse (who was also a named plaintiff in the 1999 personal injury lawsuit and is a potential statutory beneficiary under the wrongful death statute), and Petitioner (who is his daughter, the personal representative of his estate, and also a potential statutory beneficiary under the wrongful death statute) knew or should have known they had claims for damages against Respondents⁴ in 1999 when Decedent and his spouse brought their personal injury action. It is also undisputed that Petitioner, as Decedent's daughter, could have brought a claim for her own current and *future* damages against Respondents in 1999 under *Ueland*, 103 Wn.2d at 140-141. Moreover, both the 1999 lawsuit and the 2012 lawsuit were based on the exact same asbestos-related diseases. CP at 144-163, 182-213, 216-243, 336-381. Respondents are not arguing – and the Court of Appeals did not hold – that a wrongful death claim would be barred if the statute of limitations on the underlying personal injury action never expired either because the injured parties dies before the three years had elapsed or because the statute of limitations never even began to run. Thus, the Court may readily dismiss this argument.

⁴ Respondent ACL was also a defendant in the 1999 Lawsuit.

C. The Same Damages Are Available in Both the Personal Injury Action and the Wrongful Death Action.

Amicus BDL also mistakenly argues that the damages in wrongful death action are not available in a personal injury, yet cites no supporting authority and fails to grasp the facts of this case given that the trial concerned future damages contemplating Mr. Sundberg's death.⁵ There is no dispute that damages for loss of consortium were available in the 1999 Lawsuit. In fact, the trial in the 1999 Lawsuit expressly included a request for future damages for loss of consortium and a jury instruction on life expectancy, CP 596-600, and the Sundbergs were awarded loss of consortium damages in addition to non-economic and economic damages. CP 635. Nor is there any dispute that Petitioner herself could have brought her own claim for future damages in the decedent's personal injury action or in her own action. *Ueland*, 103 Wn.2d at 140-41. And as the Court of Appeal recognized, Petitioner specifically could have sought future damages for the Decedent's shortened life. *Deggs v. Asbestos Corp. Ltd.*, 188 Wn. App. 495, 510-11, 354 P.3d 1 (2015); see WPI 30.01.01 (providing instruction on future damages); WPI 30.02.01 (same); WPI 34.04 (providing mortality table for determining future damages).

⁵ Amicus strains to make a distinction between "permanent" loss of consortium and "future" loss of consortium, but the concept of "permanent" damages does not exist under Washington law. Rather, Washington recognizes two characteristics of damages – past and future. See, e.g., WPI 30.01.01-30.09.02 (providing instructions for "past" and "future" damages, but none for "permanent" damages).

In other words, in personal injury actions, the plaintiffs and their families can certainly seek and argue for *future* loss of consortium from the shortening of the plaintiffs' life expectancy. Plaintiffs' families claim damages to compensate them for the future loss of consortium due to the alleged shortening of the plaintiff's life. This is the same claim made by families in wrongful death actions. The only difference is the factual evidence – in the personal injury action, the families present evidence that the plaintiff's life span will be shortened; in the wrongful death action, they are simply able to introduce a specific date. These are the exact same damages. Amicus's argument is without merit.

D. The Risk of Double Recovery Presents a Real Problem.

As the Court of Appeals recognized, the risk of double recovery presents a very real problem with no viable solution. As explained above, the wrongful death action involves the same damages included in the personal injury action. For example, in the 1999 Lawsuit, Mr. and Mrs. Sundberg were awarded future damages. If the wrongful death claims would proceed to trial, Appellant would request the same component of damages that were previously requested and awarded in the personal injury action. The trial court in the wrongful death action would face an insurmountable obstacle – either permit a double recovery in allowing the recovery of the same damages twice, or attempt to allocate the future

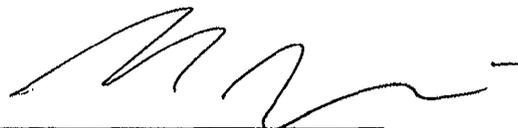
damages awarded for loss of consortium in the 1999 Lawsuit from the loss of consortium damages in the wrongful death action without any basis to do so. Neither Amici nor Petitioner has offered how a jury instruction could actually be crafted to prevent a double recovery. Their unsupported assertions that the courts could solve the problem at some indefinite point in the future with a hypothetical jury instruction is not a solution. Under Petitioner's and Amici's interpretation, there is nothing to stop the statutory beneficiaries from recovering the same damages in both the personal injury and wrongful death actions.

III. CONCLUSION

This Court should follow *stare decisis* because this Court's interpretation of the wrongful death statute as recognized in *Calhoun* and the other applicable cases has remained undisturbed for nearly a century. Although the Legislature has revisited the statute on multiple occasions since then, the Legislature has not seen fit to disturb this Court's long-standing interpretation of that statute. Neither Petitioner nor Amici WSAJF and BDL have met their burden of making a "clear showing" that the Court's statutory interpretation is both incorrect and harmful. Their remedy lies with the Legislature, not this Court. Accordingly, the Court should affirm the Court of Appeals.

DATED this 25th day of February, 2016.

GORDON & REES LLP

A handwritten signature in black ink, appearing to be 'Mark B. Tuvim', written over a horizontal line.

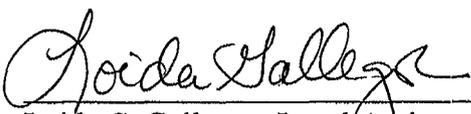
Mark B. Tuvim, WSBA No. 31909
Kevin J. Craig, WSBA No. 29932
Attorneys for Respondents Asbestos
Corporation Limited and Ingersoll
Rand Company

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on February 25, 2016, I caused a true and correct copy of the foregoing to be served via e-mail on all counsel of record, as follows:

Meredith Boyden Good Brayton Purcell, LLP 806 SW Broadway, Suite 1100 Portland, OR 97205 portland@braytonlaw.com <i>Appellant</i>	Philip A. Talmadge Talmadge/Fitzpatrick 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 phil@tal-fitzlaw.com <i>Appellant</i>
J. Scott Wood Foley & Mansfield, PLLP 999 Third Ave., Suite 3760 Seattle, WA 98104 asbestos-sea@foleymansfield.com <i>AstenJohnson, Inc.</i>	Richard G. Gawlowski Wilson, Smith, Cochran & Dickerson 901 Fifth Avenue, Suite 1700 Seattle, WA 98164-2050 MetLifeAsbestos@wsed.com <i>Metropolitan Life Insurance Company</i>
Stewart A. Estes Keating, Bucklin & McCormack, Inc., P.S. 800 Fifth Avenue, Suite 4141 Seattle, WA 98104-3175 sestes@kbmlawyers.com <i>Washington Defense Trial Lawyers</i>	Michael B. King Carney Badley Spellman, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98104-7010 king@carneylaw.com <i>Washington Defense Trial Lawyers</i>
George M. Ahrend Ahrend Law Firm PLLC 100 E. Broadway Ave. Moses Lake, WA 98837 gahrend@ahrendlaw.com <i>Washington State Association for Justice Foundation</i>	Brian P. Harnetiaux Attorney at Law 517 E. 17 th Ave. Spokane, WA 99203 <i>Washington State Association for Justice Foundation</i>

<p>Valerie D. McOmie Attorney at Law 4549 NW Aspen St. Camas, WA 98607-8302 valeriemcomie@gmail.com <i>Washington State Association for Justice Foundation</i></p>	<p>Matthew P. Bergman Colin B. Mieling Bergman Draper Ladenburg, PLLC 821 2nd Avenue, Suite 2100 Seattle, WA 98104 matt@bergmanlegal.com colin@bergmanlegal.com</p>
<p>Bonnie Lynn Black 1020 N K St., Apt. D Tacoma, WA 98403-1861 bonnielablack@gmail.com</p>	


 Loida C. Gallegos, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Loida Gallegos
Cc: mgood@braytonlaw.com; lleroy@braytonlaw.com; bleroy@braytonlaw.com; matt@bergmanlegal.com; brian@bergmanlegal.com; Colin Mieling; asbestos-sea@foleymansfield.com; Asbestos.Seattle@sedgwicklaw.com; chris.marks@sedgwicklaw.com; Eliot.Harris@sedgwicklaw.com; rachel.reynolds@sedgwicklaw.com; gawlowski@wscd.com; gahrend@ahrendlaw.com; bryanpharnetiauxwsba@gmail.com; valeriemcomie@gmail.com; sestest@kbmlawyers.com; King, Mike; bonnielablack@gmail.com; jbrucker@foleymansfield.com; Mark Tuvim; Kevin Craig; 'matt@tal-fitzlaw.com'
Subject: RE: Deggs v. Asbestos Corporation Limited, et al. - Cause No. 91969-1

Received on 02-25-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Loida Gallegos [mailto:lgallegos@gordonrees.com]
Sent: Thursday, February 25, 2016 4:18 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: mgood@braytonlaw.com; lleroy@braytonlaw.com; bleroy@braytonlaw.com; matt@bergmanlegal.com; brian@bergmanlegal.com; Colin Mieling <Colin@bergmanlegal.com>; asbestos-sea@foleymansfield.com; Asbestos.Seattle@sedgwicklaw.com; chris.marks@sedgwicklaw.com; Eliot.Harris@sedgwicklaw.com; rachel.reynolds@sedgwicklaw.com; gawlowski@wscd.com; gahrend@ahrendlaw.com; bryanpharnetiauxwsba@gmail.com; valeriemcomie@gmail.com; sestest@kbmlawyers.com; King, Mike <king@carneylaw.com>; bonnielablack@gmail.com; jbrucker@foleymansfield.com; Mark Tuvim <mtuvim@gordonrees.com>; Kevin Craig <kcraig@gordonrees.com>; 'matt@tal-fitzlaw.com' <matt@tal-fitzlaw.com>
Subject: Deggs v. Asbestos Corporation Limited, et al. - Cause No. 91969-1

Attached please find the following document for filing with the Court:

Respondents Asbestos Corporation Limited and Ingersoll Rand Company's Answer to Amici Briefs

Please let me know if you have any problems with opening the attached.

Thank you.

LOIDA C. GALLEGOS | Legal Secretary

GORDON & REES
SCULLY MANSUKHANI

701 Fifth Avenue, Suite 2100
Seattle, WA 98104
D: 206-695-5140 | P: 206-695-5100 | F: 206-689-2822
lgallegos@gordonrees.com

Alabama • Arizona • California • Colorado • Connecticut • Florida • Georgia
Illinois • Maryland • Massachusetts • Missouri • Nevada • New Jersey • New York
North Carolina • Ohio • Oregon • Pennsylvania • South Carolina • South Dakota
Texas • Virginia • Washington • Washington, D.C. • West Virginia
www.gordonrees.com

 Please consider the environment before printing this email.

Alabama * Arizona * California * Colorado * Connecticut * Florida * Georgia * Illinois * Maryland * Massachusetts * Missouri * Nevada * New Jersey * New York *
North Carolina * Ohio * Oregon * Pennsylvania * South Carolina * South Dakota * Texas * Virginia * Washington * Washington, DC * West Virginia

This email communication may contain CONFIDENTIAL INFORMATION WHICH ALSO MAY BE LEGALLY PRIVILEGED and is intended only for the use of the intended recipients identified above. If you are not the intended recipient of this communication, you are hereby notified that any unauthorized review, use, dissemination, distribution, downloading, or copying of this communication is strictly prohibited. If you are not the intended recipient and have received this communication in error, please immediately notify us by reply email, delete the communication and destroy all copies.

GORDON & REES LLP
<http://www.gordonrees.com>