ORIGINAL (e-filed)

**20090031**

IN THE SUPREME COURT
STATE OF NORTH DAKOTA



Shirley Mertz,

Plaintiff /Appellant,

v.

Supreme Court No.: 20090031

999 Quebec, Inc., et. al.,

Defendants/Appellees.

**Appeal From Final Order and Judgment**

**In the District Court, South Central Judicial District**

**Morton County**

# BRIEF OF PLAINTIFF/APPELLANT

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## STATEMENT OF THE CASE

¶ 1 The instant appellate proceedings derive from a Notice of Appeal which was filed in the District Court on January 16, 2009, by above-captioned plaintiff Shirley Mertz – the surviving spouse of decedent Allen Mertz – from a November 18, 2008, final order in which the District Court dismissed all of the plaintiff's claims against all defendants of record upon statute of limitations grounds.[1]

¶ 2 Specifically, this Order of the District Court came in response to motions for dismissal filed by several defendants, and the District Court in its final Order stated as follows:

> The Motions for Summary Judgment on Statute of Limitations grounds against Shirley Mertz, Civil No.: 30-05-C-0163 are GRANTED. The Court on its own motion GRANTS Summary Judgment DISMISSING the Mertz Complaint against all non-moving defendants.
>
> *Order Partially Granting and Partially Denying Motions for Summary Judgment, dated November 18, 2008, an Order which addressed motions which had been made in the Shirley Mertz case and several companion Morton County Asbestos Litigation cases as well, at slip opinion page 7,* **Appendix** page 318.

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[1]As the Supreme Court previously was advised, no separate Judgment was entered in the District Court proceedings below following the November 18, 2008, Order of the District Court dismissing all of the claims of plaintiff Shirley Mertz as against all defendants of record. By e-mail correspondence from Supreme Court Clerk Penny Miller dated April 10, 2009, the Court stated that it would "permit this appeal to proceed, with the understanding that whether an order or judgment is in fact appealable is always subject to review." The Court in this correspondence also directed appellee counsel from the Minneapolis law firm Foley & Mansfield "or another prevailing party (to) cause judgment to be entered under N.D.R.Civ.P. 58, and, if that is not accomplished within 30 days, (appellant counsel) are directed to do so." *Id.*

¶ 3 The several asbestos company defendants represented by the Minneapolis law firms of Foley & Mansfield and Meagher & Geer, moved for summary judgment, in the Shirley (Allen) Mertz case, seeking dismissal of the plaintiff's claims upon the supposed grounds that the plaintiff's asbestos disease claims were barred by the applicable statute of limitations.[2]

¶ 4 In the District Court proceedings below, plaintiff Shirley Mertz made *survival action claims only* – and no wrongful death action claims – against the asbestos company defendants in this litigation. *See, Consolidated Memorandum of Plaintiffs in Opposition to Motions by Various Defendants for Summary Judgment Upon Supposed Statute of Limitations Grounds, at page 2 thereof,* **Appendix** page 199.

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[2]Those asbestos company defendants which filed fully-briefed motions for summary judgment in the instant case upon supposed statute of limitations grounds were the following: A.H. Bennett Company, Foster Wheeler, LLC, Greene, Tweed & Co., Riley Stoker Corporation, Rite-Hite Corporation, S.O.S. Products Company, Inc., Saint-Gobain Abrasives, Inc., Singer Safety Company, Sprinkmann Sons Corporation of Illinois, United Conveyor Corporation, Weil-McLain, a Division of the Marley Company, Zurn Industries, American Standard, and The Trane Company.

In addition, other defendants filed one-page *"joinder" motions*, seeking the benefit of a ruling by the District Court upon the above-referenced defendants' statute of limitations-based summary judgment motions.

As narrated above, the District Court both granted the moving defendants motions for summary judgment on statute of limitations grounds, and "on its own motion", granted summary judgment dismissing the Mertz complaint as against all non-moving defendants. *Order Partially Granting and Partially Denying Motions for Summary Judgment, dated November 18, 2008, an Order which addressed motions which had been made in the Shirley Mertz case and several companion Morton County Asbestos Litigation cases as well, at slip opinion page 7,* Appendix page 318.

¶5 Notwithstanding this fact, some of the defendants which made summary judgment motions on supposed statute of limitations grounds in the instant litigation expended significant effort in their briefing presentations in arguing that Shirley Mertz's *wrongful death* claims were barred by the *two-year* limitations period prescribed within N.D.C.C. § 28-01-18(4).

¶6 To be clear – plaintiff Shirley Mertz did **not** bring any action for the *wrongful death* of her late husband Allen Mertz pursuant to N.D.C.C. § 28-01-18(4). Rather, Shirley Mertz solely pled and pursued ***survival action claims*** which are governed by the relevant personal injury six-year limitations period of N.D.C.C. § 28-01-016(1).[3]

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[3]See, e.g., *Hulne v. International Harvester Company*, 322 N.W.2d 474, 476 (N.D. 1982) ["**(W)e conclude that the two-year statute of limitations under subsection 28-01-18(4), N.D.C.C., does not apply to survival actions . . . the survival action in the instant case is based upon two theories in tort and is, therefore, subject to the six-year statute of limitations under subsection 28-01-16(1), N.D.C.C., . . . It is undisputed that the survival action was commenced within six years after the cause of action accrued, and accordingly, is not barred by the statute of limitations.**"]

Although it is anticipated that some of the appellee asbestos company defendants may argue that a now-superseded three-year asbestos injury limitations period *exception* to the *unconstitutional* statute of repose scheme of N.D.C.C. § 28-01.3-08. See, *Dickie v. Farmers Union Oil Company*, 2000 ND 111, 611 N.W.2d 168 (N.D. 2000), declaring the "ten-year/eleven-year" product liability statute of repose of N.D.C.C. § 28-01.3-08 to be violative of the Equal Protection Clause of the North Dakota Constitution, Article I, § 21. The 1983-enacted asbestos disease *exception* to this now-unconstitutional N.D.C.C. § 28-01.3-08 has been found to be the statutory equivalent of "an arm without a body" – no longer operative in post-*Dickie v. Farmers Union Oil Company* jurisprudence in this jurisdiction – by all North Dakota District Courts which have considered asbestos companies which have argued for application that the three-year intended "asbestos disease" *exception* to the "ten year/eleven year" statute of repose of N.D.C.C. § 28-01.3-08.

¶ 7 On November 18, 2008, in its "Order Partially Granting and Partially Denying Motions for Summary Judgment", the District Court held as follows with respect to the survival action claims prosecuted by plaintiff Shirley Mertz, derivative to the asbestos-caused lung cancer which claimed the life of her late husband Allen Mertz:

> In Shirley Mertz, Civil No.: 30-05-C-0163, several defendants have made Motions for Summary Judgment based on the statute of limitations to dismiss her claims of wrongful death and a survival action following the death of her husband, Allen Mertz, who died on April 20, 1996, as asbestos related lung cancer. Her Complaint is dated February 24, 2005. Defendants set forth facts taken from the 14 exhibits filed in support of their Joint Memorandum of Law. These exhibits clearly indicate that the cancer took the life of Allen Mertz was diagnosed in 1995. . . .
>
> As to Shirley Mertz, the Court finds that her, her husband and her

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For example, in ruling as have district judges Bruce E. Bohlman, Bruce B. Haskell, Thomas J. Schneider, Georgia P. Dawson, Norman J. Backes, John C. Irby, and Frank R. Racek, in post-*Dickie v. Farmers Union Oil* decisions in North Dakota asbestos litigation, the Honorable Robert O. Wefald held previously on June 7, 2005, that, "***(t)he applicable statute of limitations as found in N.D.C.C. 28-01-16 is six years*** . . . this Court is unwilling to find that a part of N.D.C.C. 28-01.3-08 escaped our Supreme Court's holding that N.D.C.C. 28-01.3-08 is unconstitutional . . . thus, ***this Court finds that the applicable statute of limitations is six years***." (*emphasis added*). *See, e.g., "Order on Motions" entered June 7, 2005, slip opinion at pages 5-7 in Charles Allen, et. al., Morton County Civil Nos. 02-C-1680 and 02-C-1681, said slip opinion being attached to the plaintiff's memorandum in the proceedings below,* **Appendix** pages 230-232 .

In any event, however, it is respectfully submitted that the matter of whether North Dakota's general six-year personal injury limitations period of N.D.C.C. § 28-01-16(1) must be applied to asbestos disease claims after *Dickie v. Farmers Union Oil Company* is not determinative in the instant case involving the survival action claims brought by plaintiff Shirley Mertz – because the District Court's summary judgment dismissal of those claims would have been erroneous under *either* a six-year *or* a three-year limitations period.

family knew of his asbestos related cancer as early as 1995. With the filing of her Complaint in March 2005, her claim is well beyond the six year statute of limitations. The "discovery rule" clearly applies to Mertz. . . .

*The clear evidence is that Mertz knew he suffered from an asbestos-related disease*. In *Biesterfeld v. Asbestos Corp. of America*, 467 N.W.2d 730, 735-739 (N.D.1991), a summary judgment was reversed on the basis that a question of fact was raised, but in this case the Court finds that Mertz and his family were "aware of facts" as to his asbestos-related diseased that placed Mertz and his family as reasonable persons "on notice a potential claim exists, without regard to the [their] subjective beliefs."

The Motions for Summary Judgment on Statute of Limitations grounds against Shirley Mertz, Civil No.: 30-05-C-0163, are GRANTED. The Court on its own motion GRANTS Summary Judgment DISMISSING the Mertz Complaint against all non-moving defendants.

*Order Partially Granting and Partially Denying Motions for Summary Judgment, dated November 18, 2008, an Order which addressed motions which had been made in the Shirley Mertz case and several companion Morton County Asbestos Litigation cases as well, at slip opinion pages 6-7,* **Appendix** page 317-318.

¶ 8 The instant appeal ensued thereafter, with the filing by the plaintiff/appellant of her Notice of Appeal with the District Court on January 16, 2009.

## STATEMENT OF FACTS

¶ 9 Plaintiff Shirley Mertz's deceased husband Allen Mertz worked as a pipefitter, and in maintenance and operations at the heating plant of the Minot Air Force Base in Minot, North Dakota, during the years 1956 through 1988. **Appendix** at page 202.

¶ 10 In November of 1995, Allen Mertz was diagnosed with lung cancer.

*See, generally, the Allen Mertz medical records included within the plaintiff's opposition to the asbestos company defendants' motion for summary judgment on statute of limitations grounds, at* **Appendix** pages 275-277 .

¶ 11 Allen Mertz died on April 20, 1996, as a result of this lung cancer. *See, the Allen Mertz death certificate, included within the plaintiff's opposition to the asbestos company defendants' motion for summary judgment on statute of limitations grounds, at* **Appendix** page 267.

¶ 12 Several years after her husband's death, Shirley Mertz had an unsolicited discussion about her late husband and his death – with a man who had been a co-worker of Allen Mertz. Deposition of Shirley Mertz at page 33, **Appendix** page 286.

¶ 13 During the course of this fortuitous discussion, this former co-worker of Allen Mertz informed Shirley that he and Allen had worked with asbestos products – and that she should check into the cause of her late husband's death. Deposition of Shirley Mertz at page 33, **Appendix** page 286.

¶ 14 On April 25, 2003, after an extensive review of decedent Allen Mertz's medical records, death certificate, and work history documentation – Brian P. Dolan, M.D., M.P.H. – a physician board-certified in the fields of Occupational Medicine, Preventative Medicine, and Internal Medicine, with a Master's Degree in Public Health, rendered a detailed and factually-substantiated medical report, in which Dr. Dolan expressed his opinion "rendered to a reasonable medical probability, that

(Allen Mertz's) exposure was a significant causative factor in his lung cancer." *See the Report of Brian P. Dolan, M.D., M.P.H., dated April 25, 2003, included at* **Appendix** pages 280-283, specifically page 283.

¶ 15 ***The Summons and Complaint commencing this survival action was served – less than three years later – in March of 2005***. *See, a copy of the Complaint in this civil action, filed with its Affidavit of Service on March 14, 2005, at District Court Docket Entries Nos. 2-3, a copy of which being attached hereto at* **Appendix** pages 003, and 39-51.

¶ 16 The deposition of plaintiff Shirley Mertz was taken by the asbestos company defendants on April 11, 2008, in this case.

¶ 17 At her deposition, Shirley Mertz was specifically questioned by several lawyers for defendant asbestos companies, with regard to her knowledge – and the timing thereof – relative to the causation of her husband's lung cancer and death. *See, excerpt of the transcript of the deposition of plaintiff Shirley Mertz, at pages 33-34, said excerpt being included as* **Appendix** page 286.

¶ 18 In her deposition testimony, Mrs. Mertz testified on April 11, 2008, that neither she nor her husband Allen had been told by any doctor that Allen Mertz's lung cancer had been caused by asbestos exposure. *Id.*

¶ 19 In fact, Shirley Mertz testified at her deposition that she and her husband were not even aware that Allen had worked with asbestos throughout his career. *Id.*, at pages 33-34, 38-39, and 60, included at **Appendix** pages 286-288.

¶ 20 Specifically, the following exchanges occurred at plaintiff Shirley Mertz's deposition as she was subjected to exacting questions on these subjects by lawyers for asbestos company defendants in this case:

Q. Did any of his treating doctors tell you that his – and this was lung cancer; right?
**A. Absolutely.**
Q. *Did any of his treating doctors tell you that his lung cancer was caused by exposure to asbestos*?
**A. *Not at that time*.**
Q. Okay. *When did you first learn that his lung cancer – when did someone first tell you that his lung cancer was caused by asbestos*?
**A. Well, we seen ads and things. *Someone had called me and told me that I should check into it.***
Q. Okay. *And when did that occur*?
**A. Oh, I can't tell you for sure. *I'd say after 2000 sometime*.**
Q. And when you say someone called you and suggested that you check into it, this was like a family friend or something?
**A. No. Someone evidently that had worked up there too.**
Q. Oh, a co-worker of your husband?
**A. That's what I would think it was.**
Q. Okay.
**A. I didn't know the person, so I can't be sure.**
Q. And then as I understand it a Dr. Dolan reviewed information and he's the one that concluded that the lung cancer was caused by exposure to asbestos?
**A. Yes.**
Q. Have you ever met Dr. Dolan?
**A. No.**
Q. After your husband was diagnosed with lung cancer did he ever tell you that he though perhaps his lung cancer was caused by asbestos exposure?
**A. Not in those words. I mean he'd talk about all the asbestos up there, but not that he –**
Q. *He talked about the asbestos, but he didn't relate it to his cancer diagnosis*?
**A. *Nobody talked about it at that time that it was from that. And you didn't realize it.*** (*bold emphasis in original, italicized underlining added*).

*Deposition of Shirley Ann Mertz, reported April 11, 2008, at pages 33-34 thereof, said excerpt having been made part of the District Court record below, being also included at* **Appendix** page 286.

¶ 21 Thereafter, a different lawyer for another asbestos company defendant closely questioned Shirley Mertz in the following exchange:

Q. Okay. Do you remember a physician by the name of Dr. Abbas Khalil, which is spelled K-h-a-l-i-l?
**A. Yes.**
Q. Was that your husband's primary care physician?
**A. Yes.**
Q. *Do you remember any discussions with Dr. Khalil about exposure to asbestos back in 1995, '96*?
**A. *No.***
Q. No. Do you know if your daughter Renetta – did I say that correctly?
**A. Renetta.**
Q. *Do you know if your daughter Renetta had any discussions with Dr. Khalil*?
**A. *No more than the rest of us, I guess*.**
Q. Okay.
**A. *We're a family. When something is done, we're altogether*.**
Q. Sure. Sure. I've had a chance to look at some of your husband's medical records. And there's a note in there from about March of 1996 that says that your daughter asked Dr. Khalil for a letter regarding his asbestos exposure for insurance purposes. Do you remember that, ma'am?
**A. No, I don't. I'm sorry.**
Q. Okay. Where is your daughter at?
**A. Renetta?**
Q. Yes.
**A. She's a civil engineer at the Base.**
Mr. Sharkey: Okay. Thank you, ma'am. (*bold emphasis in original, italicized underlining added*).

*Deposition of Shirley Ann Mertz, reported April 11, 2008, at pages 38-39 thereof, said excerpt having been made part of the District Court record below, being also included at* **Appendix** page 287.

¶ 22 The asbestos company defendants never attempted to take the

deposition of Allen Mertz's daughter Renetta prior to the expiration of the discovery period in the District Court proceedings below.

¶ 23 Rather, the asbestos company defendants asserted their entitlement to summary judgment in this case by relying exclusively upon three separate entries in the medical records of Allen Mertz in which the word "asbestos" was mentioned, despite the fact that these medical records contain: (1) no expression by any physician of a medical opinion – *rendered to a medical probability* – that Allen Mertz's *lung cancer* was caused by his occupational asbestos exposure; and/or (2) no recordation that Allen Mertz – or any member of his family – was informed of any physician's medical opinion – *expressed to a medical probability* – that Allen Mertz's *lung cancer* was caused by his occupational exposure.

¶ 24 Without being able to identify any such physician's medical opinion *rendered to a medical probability* in Allen Mertz's treatment medical records, the defendants asserted their entitlement to summary judgment in the District Court by relying ***exclusively*** upon three disparate entries in these medical records in which the word "asbestos" is mentioned.

¶ 25 In the first medical record document relied upon by the defendants – a typed entry (*dictated on October 25, 1995, and typed and signed the following day*) and signed by Abbas Khalil, M.D., of the Minot Medical Arts Clinic – the defendants in their briefing below declined to advise the District Court of the fact that Dr. Khalil on that day had identified Allen Mertz as having had a smoking history, and that

Dr. Khalil on that day was unsure of whether Allen Mertz's cancer was a primary *lung cancer* – or whether his cancer was some *other type of malignancy.*

¶ 26 In this typed chart narrative signed by Dr. Khalil on October 26, 1995, Dr. Khalil stated, in pertinent part, as follows:

> ALLAN (*sic*) MERTZ 51655 10/25/95
> MINOT MEDICAL ARTS CLINIC
>
> SUBJ: Allen is referred by Dr. Shipley to evaluate his mediastinal mass. . . .
>
> *He smoked*, but he stopped in the 50s, but he has been working for 30 years in plumbing, *and he has a strong exposure to asbestos. . . .*
>
> ASMT: 1. A 62-year-old gentleman with large mediastinal mass, with a small nodule at the base of the right lung. *The pathology is poorly undifferentiated carcinoma, with neuroendocrine features by being positive to Synaptophysin. The differential diagnosis of this will be a small lung CA. This gentleman is not a smoker, however, he has a 30-year history of exposure to asbestos, which could be the underlying etiological factor of his condition. **Other tumors of neuroendocrine origin could be the cause of this mediastinal mass**.* Tumors which are highly responsive to treatment should be ruled at, and this ***included prostatic CA and extra-gonadal germ cell tumors***.
>
> PLAN: 1. Our recommendation at this point is to stage this gentleman. We are going to get a CAT scan of the abdomen and a CAT scan of the brain, and bilateral bone marrow biopsy aspiration to rule out any metastases to these sites.
>
> 2. ***I am going to order alpha fetoprotein and BHCG to rule out any testicular or extra-gonadal germ cell tumors. I am going to order a PSA to rule out CA of the prostate***.

3. *I explained to the family the options and the way of the treatment, and they agreed about the treatment.* (*italicized, underlined and bold emphasis added).*

*Typed medical chart narrative of the Minot Medical Arts Clinic, dictated October 25, 1995, typed and signed the following day, October 26, 1995, included as Exhibit 10 to the Defendants' Joint Memorandum of Law in Support of Their Motion to Dismiss on Statute of Limitations Grounds*, **Appendix** pages 187-191.

¶27 In their briefing below, the defendants failed to advise the District Court either of the fact that Dr. Khalil had noted Allen Mertz to have had a smoking history back in the 1950's, or that as of October 25, 1995, Dr. Khalil had not even made a determination of the primary situs and type of Allen Mertz's cancer. *Id.* at **Appendix** pages 179-180.

¶28 And while this chart narrative does reflect that "treatment" options were discussed with the Allen Mertz family, and that the family members "agreed about the treatment", there is no recordation by Dr. Khalil that he discussed with the Allen Mertz family members anything other than diagnostic and treatment options – let alone the subject of any possible asbestos causation of Allen Mertz's cancer of as-yet undetermined origin as of October 25, 1995.

¶29 The defendants never attempted to take the deposition of Dr. Khalil – or to obtain any sworn statement from this physician – in the District Court proceedings below.

¶30 The second document from Allen Mertz's medical records which the defendants relied upon to assert their entitlement to summary judgment in the District

Court was a "Radiation Oncology Consultation" from oncologist K.J. Minehan, M.D., of UniMed Medical Center in Minot dated November 14, 1995. *See, Radiation Oncology Consultation, K.J. Minehan, M.D., included as Exhibit 11 to Defendants' Joint Memorandum of Law in Support of Their Motion to Dismiss on Statute of Limitations Grounds*, **Appendix** page 193-195 .

¶31 In this radiation oncology consultation report by Dr. Minehan, the following separate excerpts were relied upon by the defendants in their quest for summary judgment in the trial court below:

> PAST MEDICAL HISTORY . . .
>
> Habits: Nonsmoker. ***He does have an asbestos exposure in his job as a heating mechanic***. . . .
>
> SOCIAL HISTORY
>
> The patient has been married for 38 years, and is currently retired. However, he does work part-time for a heating ventilation company. ***He has a very supportive family who are in attendance at this consultation. He has an 8-year level of education***. (*bold underlined italic emphasis added*).

*Id.* **Appendix at** pages 193-194.

¶32 Nowhere within this radiation oncology consultation does Dr. Minehan narrate that he discussed the subject of asbestos with members of the Allen Mertz family, although Dr. Minehan did note that Allen Mertz had only "an 8-year level of education." *Id.*

¶33 Given the actual text and substance of Dr. Minehan's radiation oncology consultation report of November 14, 1995, it is respectfully submitted that the

defendants actually ***misrepresented*** this document in their briefing before the District Court below, where the defendants incorrectly stated to Judge Wefald, "***(a) second discussion of Allen's asbestos exposure occurred on November 14, 1995, during a radiation oncology consultation with Dr. Kiernan Minehan***." (*emphasis added*). *Id.*, **Appendix** at pages 193-195.

¶ 34 Put directly – there is nothing in Dr. Minehan's report of November 14, 1995, that records that there was any "discussion of Allen's asbestos exposure" with any member of the Allen Mertz family on that day. *Id.* To the contrary, there was merely a passing reference by Dr. Minehan in this report about Allen Mertz having had asbestos exposure in the "Past Medical History" section of Dr. Minehan's report, which was sent to referring physicians Abbas Khalil, M.D., and Bruce Swenson, M.D., with no reference to this document ever having been sent to the patient, Allen Mertz, or to any member of his family. *Id.*

¶ 35 The asbestos company defendants never attempted to take the depositions of Dr. Minehan, or Dr. Swenson, or Dr. Khalil, during the course of discovery in the District Court proceedings below.

¶ 36 The third and final document upon which the defendants relied as they asserted their entitlement to summary judgment in the trial court below was a hand-written note dated March 5, 1996, entered by Medical Arts Clinic registered nurse P. Mongeon, which provided, in its entirety, as follows:

> 3-5-96 – *Daughter, Reneta (sic), calls. Requests statement for pt. insurance stating pt. has exposure to asbestos, What pt. diagnosis is,*

> and Dr. signature. Dr. Khalil notified. Letter typed and daughter will pick up. See copy on Chart. #68/ P. Mongeon, RN.
>
> *See, note from Medical Arts Clinic Registered Nurse P. Mongeon, dated March 5, 1996, included as Exhibit 12 to Defendants' Joint Memorandum of Law in Support of Their Motion to Dismiss on Statute of Limitations Grounds*, **Appendix** page 197.

¶ 37 As plaintiff Shirley Mertz testified during the course of her deposition, her daughter Renetta did not have any more discussions with Dr. Khalil "than the rest of us", because "(w)c're a family... (w)hen something is done, we're altogether", and that the plaintiff had no memory of any requested letter from Dr. Khalil. *Deposition of plaintiff Shirley Ann Mertz, reported April 11, 2008, at pages 38-39,* **Appendix** at page 287.

¶ 38 Neither did the asbestos company defendants produce a copy of any such "letter" in this litigation, and at best – from the nurse's note above – there is no recordation that Dr. Khalil expressed any opinion to a medical probability that the lung cancer with which Allen Mertz had been diagnosed as of March 5, 1996, causally attributable to Allen Mertz's asbestos exposure.

¶ 39 In addition, Dr. Khalil – who served as Allen Mertz's primary treating physician – signed Mr. Mertz's death certificate, and Dr. Khalil on that death certificate listed **no contributing cause or conditions of the lung cancer** from which Allen Mertz suffered, and which caused his death. *See, the Death Certificate of Allen Mertz, made part of the District Court record and included at* **Appendix** page 267.

¶ 40 Finally – *and importantly* – in the box on Allen Mertz's death certificate

in which the question "(i)n your opinion, did tobacco use by the decedent contribute to death", Dr. Khalil first checked the box "probably", and then lined it out, and checked the box "***unknown***", expressly declining to check the boxes marked "no" or "yes". *Id.*

## ARGUMENT

### A. The *survival action* claims deriving from the asbestos-caused lung cancer personal injury of Allen Mertz are governed by North Dakota's *personal injury* statute of limitations.

¶41 The long-established decisional law of the North Dakota Supreme Court of *Hulne v. International Harverster Company*, 322 N.W.2d 474, 475-477 (N.D. 1982), and subsequent decisions of this Court make clear that *survival action* claims are governed by North Dakota's *personal injury* statute of limitations.

¶42 As the Supreme Court explained in *Hulne v. International Harverster Company*, *supra*:

> *The survival action in the instant case is based upon two theories in tort and is, therefore, subject to the six-year statute of limitations under subsection 28-01-16, N.D.C.C.* See, *Bender v. Time Ins. Co.*, 286 N.W.2d 489 (N.D. 1979). It is undisputed that the survival action was commenced within six years after the cause of action ***accrued***, and, accordingly, it is not barred by the statute of limitations. (*emphasis added*).

322 N.W.2d at 477

¶43 It is beyond clear that the North Dakota Supreme Court's use of the term "**accrued**" in *Hulne*, combined with the Court's later juxtaposition of citing *Hulne* within the context of a "discovery rule" discussion in subsequent decisions,

eliminates any doubt that: (1) the *six-year* limitations period of North Dakota's personal injury limitations statute, N.D.C.C. § 28-01-16(1) does indeed apply to ***survival actions***; and (2) that this *six-year* limitations period begins at the point in time at which the cause of action "**accrues**" – not merely the point in time when a physical disease has been diagnosed. See, e.g., *Erickson v. Scotsman, Inc.*, 456 N.W.2d 535, 537-538 (N.D. 1990), citing *Hulne v. International Harvester Company, supra*, with *Erickson* being later cited by the North Dakota Supreme Court in *Biesterfeld v. Asbestos Corporation of America, supra,* 467 N.W.2d 736.[4]

¶ 44 This latter fact is highly significant, for the purposes of considering the current motions by the asbestos company defendants for summary judgment on supposed statute of limitations grounds, as to the *survival action* claims relating to Allen Mertz's lung cancer.

**B. The District Court committed error by impermissibly *adjudicating* issues of disputed material fact – as it granted summary judgment upon purported statute of limitations grounds in favor of the asbestos company defendants – as to the plaintiff's *survival action* claims.**

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[4]In their motion for summary judgment in the proceedings below, the asbestos company defendants stated that, "(f)or the purposes of this motion, we will assume that a six-year statute of limitations will apply." *"Defendants' Joint Memorandum of Law in Support of Their Motion to Dismiss on Statute of Limitations Grounds", at page 3, and footnote 2, included at* **Appendix** page 178. *Id.*

These defendants added that they "contend a three-year, rather than a six-year statute of limitations applies to asbestos claims", pursuant to N.D.C.C. § 28-01.3-08(4), but these defendants acknowledged that all North Dakota District Courts to have addressed this issue had determined that North Dakota's general six-year personal injury statute of limitations applied to asbestos claims. *Id.*

¶ 45 In the instance of the Allen Mertz survival action case, despite these defendants' assertions of their entitlement to summary judgment on statute of limitations grounds – there is no evidence in the District Court record that Allen Mertz's lung cancer diagnosis was ever accompanied by a *treating physician's* medical opinion – ***expressed to a medical probability*** – to the effect that this lung cancer was causally attributable to Allen Mertz's asbestos exposure.

¶ 46 Neither is there any evidence in the record that any such treating physician's medical opinion – ***rendered to a medical probability*** – had ever been communicated to Allen Mertz or members of his immediate family, including plaintiff Shirley Mertz.

¶ 47 As the Pennsylvania appellate court explained in *Acie v. Hamilton, Inc.*, *617* A.2d 386 (Pa. App. 1992), *appeal denied*, 629 A.2d 1375 (Pa. 1993), slip opinion included at **Appendix** pages 291-301, specifically pages 297-298:

> ***A diagnosis of cancer is not a diagnosis which carries a connotation of an automatic causal connection such as might be found in a diagnosis of asbestosis or black lung or silicosis***. These diseases are generally associated with exposure to certain substances and that fact is commonly known in today's society. ***A diagnosis of cancer, however, does not carry the same sense of causal connection. The average individual does not necessarily relate cancer with a specific cause. Thus, we cannot conclude that merely because the decedent and his family learned of his cancerous condition on February 20, 1985, that they should have reasonably suspected that it was caused by exposure to substances at the work place***. Nor can we conclude that, as a matter of law, an individual placed in the position decedent or his family was would have made greater inquiries or investigation of the cause of the cancer than did appellant here or that a reasonably diligent individual would have discovered the causal connection sooner

than decedent's family did here. (*emphasis added*).

*Id.*, slip opinion at pages 6-7, included at **Appendix** pages 296-297.

¶ 48 Similarly stated, the simplistic recitation by the defendants of the fact that decedent Allen Mertz was diagnosed with lung cancer on a particular date – in and of itself – does not constitute any evidence which shows that any competent medical authority causally attributed that lung cancer to Mr. Mertz's asbestos exposure, prior to the report of Brian Dolan, M.D., M.P.H., on April 25, 2003.

¶ 49 Under these attendant circumstances, such genuine issues of material fact were not appropriately subject to adjudication by the District Court upon summary judgment, and is the face of these facts, the District Court erroneously held as follows:

> *As to Shirley Mertz, the Court finds that her, her husband and her family knew of his asbestos related cancer as early as 1995*. With the filing of her Complaint in March 2005, her claim is well beyond the six year statute of limitations. The "discovery rule" clearly applies to Mertz. . . .
>
> *The clear evidence is that Mertz knew he suffered from an asbestos-related disease*. In *Biesterfeld v. Asbestos Corp. of America*, 467 N.W.2d 730, 735-739 (N.D.1991), a summary judgment was reversed on the basis that a question of fact was raised, but *in this case the Court finds that Mertz and his family were "aware of facts" as to his asbestos-related diseased that placed Mertz and his family as reasonable persons "on notice a potential claim exists, without regard to the [their] subjective beliefs*."
>
> *Order Partially Granting and Partially Denying Motions for Summary Judgment, dated November 18, 2008, an Order which addressed motions which had been made in the Shirley Mertz case and several companion Morton County Asbestos Litigation cases as well, at slip opinion page 7,* **Appendix** page 318.

¶ 50 It is well-established here in North Dakota that asbestos litigation defendants seeking to avoid responsibility to a plaintiff within the context of a *personal injury* or *survival action* upon alleged statute of limitations grounds must address the standards which were set forth by the North Dakota Supreme Court in *Biesterfeld v. Asbestos Corporation of America*, 467 N.W.2d 730, 735-739 (N.D. 1991).

¶ 51 In *Biesterfeld v. Asbestos Corp. of America*, *supra*, the Supreme Court referenced former N.D.C.C. § 28-01.1-02(4) in framing the essential issue as follows:

> ***The crucial question*** **in the instant case, however,** ***is whether*** **or not** ***(the plaintiff)*****, prior to September of 1984,** ***was "informed of*** **discovery of** ***the injury by competent medical authority and that such injury was caused by exposure to asbestos,***" or discovered "facts which would reasonably lead to such discovery." § 28-01.1-02, N.D.C.C. (*emphasis added*).
>
> 467 N.W.2d at 738

¶ 52 In *Biesterfeld*, the court *reversed* a District Court decision in which summary judgment had been improperly granted on statute of limitations grounds, with the court explaining that, "we cannot say that the facts are 'such that reasonable minds could not draw but one conclusion' and, accordingly, summary judgment of dismissal was not proper." *Biesterfeld*, *supra*, 467 N.W.2d at 738.

¶ 53 For the purposes of the instant case involving the circumstances involving the Mertz *survival action* claims, however, it is significant that the North Dakota Supreme Court relied particularly in *Biesterfeld* upon the prior decision of the

Illinois Supreme Court in *Nolan v. Johns-Manville Asbestos*, 421 N.E.2d 864, 869 (Ill. 1981), quoting wholesale from that case.

¶ 54 As the North Dakota Supreme Court explained in *Biesterfeld*:

> We believe our opinion is also supported by a decision of the Illinois Supreme Court which stated the following under similar factual circumstances:
>
> > "In the instant case, Nolan knew he had lung problems in 1957, and he knew he had pulmonary fibrosis in 1965. **It was not until May 15, 1973, *that he was told by a doctor that he had asbestosis and that his condition was caused by exposure to asbestos materials at work. The evidence is conflicting as to whether or when Nolan would have had sufficient information to reach such a conclusion earlier. The resolution of this question is not the province of this court. It is a question of fact*, and in this case, a seriously disputed one. *Accordingly, summary judgment*, which requires that no genuine issues of material fact exist, *is not an appropriate remedy here*.** Therefore, for the reasons stated, the judgment of the appellate court is affirmed and this matter is remanded to the circuit court for proceedings consistent with this opinion. [Citation omitted.]"
> >
> > Nolan v. Johns-Manville Asbestos, 85 Ill.2d 161, 52 Ill. Dec. 1, 6, 421 N.E.2d 864, 869 (1981). (*emphasis added*).
>
> 467 N.W.2d at 738-739.

¶ 55 Also, in a case with analogous facts, the Honorable William F. Hodny held as follows in prior Burleigh County asbestos personal injury litigation:

> Plaintiff Gipp alleges exposure to asbestos-containing products commencing in the late 40's and continuing for many years thereafter. In 1988, plaintiff underwent a pulmonary function test and based on the result received a letter recommending he visit a physician. **On June**

**20, 1989, plaintiff saw Dr. Mendoza and, based on that and subsequent visits, *Dr. Mendoza's "impression" that plaintiff has asbestosis was noted in his records of July 21, 1989.***

Section 28-01.1-02(4) requires commencement of the action within three years after plaintiff was

> "... ***informed of discovery of the injury by competent medical authority*** **and that such injury was caused by exposure to asbestos** ...., or within three years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier.

This action was commenced in November of 1992. ***Although Dr. Mendoza noted that his July 21, 1989, impression was asbestosis we do not know what information Dr. Mendoza actually conveyed to plaintiff. In his deposition, plaintiff testified to the effect that Dr. Mendoza did not inform him he had asbestosis until 1990.*** However, defendants rely on the October 24, 1992, MedCenter One report indicating that plaintiff gave a history of a 1989 biopsy revealing asbestosis as showing plaintiff's knowledge of his diseased condition.

***Plaintiff's deposition testimony to the effect that prior to being informed by Dr. Mendoza of the asbestosis in 1990, he had not been informed by anyone that he was afflicted or suspected to be afflicted with asbestosis creates a genuine issue of fact as to whether plaintiff was informed prior to 1990.*** Dr. Mendoza's record of September 12, 1991, in which he states he explained to plaintiff that his lung disease is due to asbestosis could be construed as corroborating plaintiff's version. Although defendants rely on the October 24, 1992, MedCenter One record as showing that plaintiff gave a history of biopsy and asbestosis, that record does not definitely reveal plaintiff as the source of that detail in the record. That matter could have come from medical records.

**That leaves the issue of plaintiff's discovery of facts which would reasonably lead to discovery of his condition. The evidence on this issue is susceptible to differing inferences.**

**Motion ordered denied. (emphasis added).**

Memorandum Decision entered in *Albert Gipp v. Abex Corporation, et.*

*al.*, Burleigh County Civil No.: 92-C-2822, January 21, 1994, a copy of which slip opinion was made part of the District Court record below, included at **Appendix** pages 303-304.

¶ 56 In another case with facts analogous to those in the instant case, the New York appellate court explained in *Cochrane v. Owens-Corning Fiberglas Corporation*, 631 N.Y.S.2d 358, 359-360 (N.Y. App. Div. 1995), as follows, as it denied the defendants' summary judgment motion which had been brought on alleged statute of limitations grounds:

> On (occasions in 1985 and 1987) the plaintiff was examined by Martin Aronow, D.O. and diagnosed as suffering from paroxysmal atrial fibrillation. **Chest x-rays** taken at each visit revealed pleuroparenchymal scarring, ***and the radiology reports raise a question of exposure to asbestos. Based upon these reports, defendants maintain that plaintiff should have known that he had lung disease caused by*** *occupational exposure to* ***asbestos*** **by November of 1987.** ***Plaintiff, however, avers that he was not told that he might have been injured by asbestos exposure until January 1990, when he was diagnosed by Greg Hicklin, M.D., as suffering from "asbestos-related diffuse pleural thickening."*** . . . .
>
> Whether the physicians at Mercy Hospital **knew or should have known that plaintiff's condition might be related to exposure to a toxic substance is not the issue.** ***The operative question is when sufficient information was communicated to plaintiff so as to induce a reasonable person to associate his physical condition with exposure to a toxic substance.*** . . . .
>
> **Inquiry regarding the time a plaintiff discovered or could, in the exercise of reasonable diligence, have discovered a condition, presents a mixed question of law and fact and,** ***where the plaintiff's knowledge***

> ***cannot be conclusively demonstrated, a motion to dismiss the complaint must be denied and the question deferred until trial.*** (*citations omitted*): **"Factual disputes are not amenable to resolution on a motion for summary judgment dismissing the complaint.** (*citations omitted*). **The credibility of the parties is not an appropriate consideration for the court** (*citations omitted*), **and statements made in opposition to the motion must be accepted as true** (*citations omitted*)." **The Trial Court's conclusion that plaintiff's allegations are "not credible" therefore constitutes the impermissible determination of an issue that must await trial** (*citations omitted*). ***The function of a court entertaining a motion for summary judgment is one of issue finding, not issue determination (citations omitted), and any conflict between plaintiff's allegations and the documentary evidence merely presents an issue of credibility for resolution at trial.*** (*citations omitted*). (emphasis added).
>
> 631 N.Y.S.2d at 359-360.

¶ 57 Similar reasoning was employed by the Pennsylvania appellate court in *Acie v. Hamilton, Inc.*, 617 A.2d 386 (Pa. Super. 1992), *appeal denied*, 629 A.2d 1375 (Pa. 1993), an asbestos disease statute of limitations case wherein the defendants had argued, unsuccessfully, that summary judgment was appropriate, principally, because the treating physician was himself aware of the asbestos etiology of a worker's lung cancer, as reflected in the plaintiff's medical records. As the court explained in *Acie*:

> Despite the fact that Dr. Laman knew of the asbestos connection at the time of the diagnosis of cancer and indicated that he would have shared that information if he was asked, ***it is not established that he in fact informed the decedent or decedent's family of the asbestos connection.*** **Absent evidence that decedent or appellant actually knew of the causal connection, the case rests upon a determination of whether or not a reasonably diligent individual would have discovered the connection sooner than April 10, 1985.** ***Unless the***

> ***evidence overwhelmingly indicates that a reasonably diligent individual would have discovered this connection, the granting of summary judgment represents a usurpation of the jury's function.*** In the present case, such evidence was not overwhelming and we will not reach this conclusion. Consequently, the order granting summary judgment must be vacated and the case remanded for continuation. (emphasis added).
>
> *Acie v. Hamilton, Inc., supra*, slip opinion at pages 9-10, slip opinion included at **Appendix** pages 300-301.

¶ 58 Other similar authorities from other jurisdictions – including authorities which have cited the North Dakota Supreme Court decision in *Biesterfeld v. Asbestos Corporation of America, supra* – soundly repudiate the kind of argument which has been made by the defendants in the instant case involving the Allen Mertz *survival action* claims. See, e.g., *In re: Collins v. Pittsburgh Corning Corporation*, 673 A.2d 159, 163 (Del. 1996) (**citing *Biesterfeld***); and *Healy v. Owens Corning Fiberglas*, 543 N.E.2d 110, 112-115 (Ill. App. 1989), appeal denied, 548 N.E.2d 1069 (Ill. 1990).

¶ 59 These authorities include the following: *Joseph v. Hess Oil*, 867 F.2d 179, 184 (3rd Cir. 1989) (**"The district court based its decision on the medical report of Dr. Cebedo . . . (w)hether the medical report supports the conclusion that [the plaintiff] should have known he suffered from asbestosis in 1982 is a question of fact that is disputed by the parties. Accordingly, summary judgment should not have been granted on this issue."**); *Schultz v. Keene Corporation*, 729 F.Supp. 609, 612 (N.D. Ill. 1990) (**summary judgment motion by asbestos defendants was denied, even though one of plaintiff's treating physicians claimed that he had informed plaintiff that plaintiff was suffering from asbestosis in**

1983.); and *Martin v. A & M Insulation Company*, 566 N.E.2d 375, 379 (Ill. App. 1990) **(genuine issue of material fact existed as to whether plaintiff knew or should have known, from comments made to plaintiff by family physician in October 1978 and January 1980, that plaintiff had lung condition caused by his work exposure to asbestos, thereby precluding summary judgment in favor of asbestos product manufacturers and distributors on basis of expiration of two-year statute of limitations).**

¶ 60 In another appellate court decision with essentially identical facts, the Ohio Court of Appeals explained as follows, in *Stroney v. Eagle-Picher Industries, Inc.*, 1988 Ohio App. LEXIS 4125, **2-4 (Ohio App. 1988), in ***reversing*** a trial court which had erroneously entered summary judgment under circumstances functionally indistinguishable from those of the instant case:

> ***The defendants did not present any evidence to suggest***, and they do not argue on appeal, ***that plaintiff had been informed by competent medical authority that he had been injured by exposure to asbestos***. See R.C. 2305.10 Thus, defendants must show that, by the exercise of reasonable diligence, plaintiff knew or should have known prior to October 16, 1983, that he had been injured by the exposure to asbestos. R.C. 2305.10. **The evidentiary materials presented to the trial court in this case demonstrate that genuine issues of fact precluded summary judgment.**
>
> Defendants' evidence showed that in January of 1983, Dr. Bal, a pulmonary specialist, wrote to plaintiff's treating physician, Dr. Bernat, and indicated that the changes in plaintiff's chest X-ray "would be compatible with asbestosis." One month later, in February of 1983, a Youngstown radiology comparison report of plaintiff's chest X-rays by Dr. Barrett noted "pleural calcifications which help establish the diagnosis of asbestosis." ***Nothing in the record indicates that these preliminary diagnoses were ever communicated to plaintiff Stroney***.

> ***Plaintiff's sworn testimony indicated that*** **although he had experienced back pains as early as 1976 and some chest pains in 1983, *Dr. Bal did not inform him that he had asbestosis until September 1985, one month before this action was commenced.*** Stroney stated that in spite of the tests that had been performed, "they couldn't figure out what the hell I had." ***Nothing in this record suggests that Stroney did not exercise reasonable diligence.***
>
> ***Construing this evidence most strongly in favor of the plaintiff, we conclude that the defendants did not sustain their burden of showing that no genuine issue of material fact exists.*** See Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 66. Cf. Yung v. Raymark Industries, Inc. (C.A. 6, 1986), 789 F.2d 397 (jury question presented regarding timeliness of worker's discovery of asbestos-related injury). ***The credibility of plaintiff's testimony is a matter for the trier of fact and is not properly within the province of a hearing on defendants' motion for summary judgment.*** See Duke v. Sanymetal Products Co. (1972), 31 Ohio App. 2d 78, 83. ***Accordingly, summary judgment was improper.*** (*emphasis added*).

*Stroney v. Eagle-Picher Industries, Inc.*, 1988 Ohio App. LEXIS 4125, at **2-4 .

¶ 61 In yet another closely analogous appellate court decision, *Kraciun v. Owens-Corning Fiberglas Corporation,* 895 F.2d 444, 454-456 (8th Cir. 1990), the United States Court of Appeals for the Eighth Circuit ***reversed*** a trial court which had erroneously entered summary judgment on statute of limitations grounds in several consolidated asbestos disease actions.

In *Kraciun*, the Eighth Circuit held as follows:

> ***While it is true that after 1980 plaintiffs were aware they had been exposed to asbestos in their work at duPont, knowledge of exposure to asbestos alone is insufficient to establish plaintiffs knew they were injured.*** See, *Lowe v. Johns-Manville Corp.*, 604 F. Supp. 1123, 1127-1128 (E.D. Pa. 1985). **In *Lowe*, the court refused to grant summary judgment, rejecting defendants' contention that plaintiff *Lowe***

> **should have known of an asbestos-related disease when informed in 1979 that he had 'pleural thickening.'** ***In addition to finding a question of fact concerning whether the plant physician had followed his 'usual practice' and had informed plaintiff Lowe of his findings,*** **the court noted that there was no evidence Lowe's case of pleural thickening had curtailed his life activities such that he should have been put on guard of a respiratory ailment.** *Id.* at 1126, 1128. **'In short, a physician's guidance was necessary to inform Lowe that the effects of his exposure to asbestos had become manifest in a disease.'** *Id.* at 1128. . .
>
> **As in *Lowe*, plaintiff *Kraciun's* medical records show 'very minimal pleural thickening' in 1982, and pleural thickening again in 1984, but *Kraciun's testimony is that physicians never identified his condition as 'pleural thickening*,'** and when he asked about it specifically told him 'not to worry.'
>
> **Based on the record before us, we question whether plaintiffs Kraciun, Kennedy, and Snook even had knowledge of a problem 'sufficient to put them on inquiry' . . . *at a minimum, however, we find questions of fact concerning whether these plaintiffs should reasonably have discovered any asbestos-related injury prior to September, 1984*** . . .
>
> (W)e are unable to conclude as a matter of law that plaintiffs Kraciun, Kennedy, Snook, Lily, and Loehndorf should reasonably have discovered their alleged injuries sooner. . . **Accordingly, the judgment of the district court is reversed**. . . (*emphasis added*).
>
> 895 F.2d at 454-456

¶ 62 Indeed, there are a number of other reported appellate court decisions similar to these authorities recited above.

¶ 63 At the very minimum, it is manifest that genuine issues of material fact existed, in the District Court record below, and that the trial court committed error by granting the asbestos company defendants summary judgment upon supposed statute of limitations grounds.

¶ 64 On the basis of these compelling persuasive authorities, as applied to the facts of the instant case involving the circumstances of the Allen Mertz *survival action*, it is respectfully submitted that the defendants' summary judgment motion on purported statute of limitations grounds was clearly without merit, and thus should have been **denied**.

**C. The District Court committed error when it held that decedent Allen Mertz and his family were "aware of facts" which triggered a "duty to inquire" that caused the statute of limitations to run before this run before the instant *survival action* was commenced.**

¶ 65 In its decision below, the District Court stated that "(t)he clear evidence that (Allen) Mertz knew he suffered from an asbestos related disease." **Appendix at** page 318.

¶ 66 In actuality, however, there is no such evidence in the District Court record of this case, and it is respectfully submitted that the District Court committed error by making this finding.

¶ 67 The District Court further stated that "Mertz and his family 'were aware of facts' as to his asbestos-related disease that placed Mertz and his family as reasonable persons 'on notice a potential claim exists, without regard [to their] subjective beliefs. *Id.* **Appendix** at page 318.

¶ 68 However, although the asbestos company defendants argued that a duty to inquire arose on the parts of the Allen Mertz family back in 1995, these defendants made no argument – nor could they – that Allen Mertz or his family members would have received any medical opinion – expressed to a reasonable medical probability

– from Mr. Mertz's treating physicians.

¶ 69 As the Oregon Appellate Court explained in *Keller v. Armstrong World Industries, Inc.*, 107 P.3d 29, 31-33 (Or. App. 2005), *affirmed upon rehearing en banc* 115 P.3d 247, *affirmed by* 147 P.3d 1154 (Or. 2006):

> Finally, we note that ***defendants have not argued that plaintiff could have received . . . a different medical opinion that would have established more definitely that his symptoms were caused by asbestos***. Presumably, defendants did not raise that argument because there is no evidence in the summary judgment record to support it . . .
>
> Moreover, we observe that, ***to the extent that it could be argued that plaintiff had discovered facts that triggered 'duty to inquire' further about the cause of his symptoms, a 'duty to inquire' standing alone is not sufficient to cause the period of limitations to begin to run; a factual question will persist until the facts learned as a result of the injury would cause a reasonable person to discover that his or her symptoms are asbestos related*** . . . ***the existence of a duty to inquire and failure to do so are not, standing alone, sufficient to support a conclusion that the period of limitations began to run as a matter of law. There must also be evidence that, had plaintiff inquired, he or she would have learned facts sufficient to support the pertinent elements of his or her claim***. . . .
>
> ***(T)hat obligation must be accompanied by evidence of what the plaintiff would have learned had he or she undertaken the discovery efforts. Such evidence is necessary to establish what a plaintiff 'should have known'; we cannot create such evidence if it is not in the record. In this case, defendants put no evidence into the record about what plaintiff would have learned had he inquired further***. (*emphasis added*).
>
> 107 P.3d at 31-40

¶ 70 Furthermore, the Oregon Appellate Court emphasized in *Keller v. Armstrong World Industries, Inc., supra*, that in this summary judgment setting specifically, it is inappropriate to rely upon "inferences that favor defendants" – as the

District Court did as to the facts relating to decedent Allen Mertz and his family members in the instant case, as that Court thus erroneously granted the asbestos company defendants summary judgment dismissal.

¶71 Similar reasoning was employed by the Pennsylvania appellate court in *Acie v. Hamilton, Inc.*, 617 A.2d 386 (Pa. Super. 1992), *appeal denied*, 629 A.2d 1375 (Pa. 1993), included at **Appendix** pages 291-301, an asbestos disease statute of limitations case wherein the defendants had argued, unsuccessfully, that summary judgment was appropriate, principally, because the treating physician was himself aware of the asbestos etiology of a worker's lung cancer. As the court explained in *Acie*:

> ***Despite the fact that Dr. Laman knew of the asbestos connection at the time of the diagnosis of cancer and indicated that he would have shared that information if he was asked, it is not established that he in fact informed the decedent or decedent's family of the asbestos connection.*** **Absent evidence that decedent or appellant actually knew of the causal connection, the case rests upon a determination of whether or not a reasonably diligent individual would have discovered the connection sooner than April 10, 1985.** ***Unless the evidence overwhelmingly indicates that a reasonably diligent individual would have discovered this connection, the granting of summary judgment represents a usurpation of the jury's function.*** In the present case, such evidence was not overwhelming and we will not reach this conclusion. ***Consequently, the order granting summary judgment must be vacated and the case remanded for continuation.*** *(emphasis added).*
>
> *Acie v. Hamilton, Inc., supra*, slip opinion at pages 9-10, slip opinion attached at **Appendix** pages 300-301.

**D. While the defendants alleged that the above-captioned asbestos personal injury cases are governed by the *now-obsolescent* three (3) year limitations period appearing at N.D.C.C. § 28-01.3-08(4), all North Dakota district courts to have addressed the matter since the decision of the North Dakota Supreme Court in *Dickie v. Farmers Union Oil Company*, 2000 ND 111, 611 N.W.2d 168 (2000), have held that asbestos-related *personal injury and survival actions*, like literally all other kinds of personal injury actions in this jurisdiction, are to be governed by the standard six (6) year limitations period set forth in N.D.C.C. § 28-01-16.**

¶ 72 As this Court itself has recognized, on multiple occasions, and as North Dakota district courts in Cass County, Grand Forks County, and Morton County have universally held, on more than one occasion in each of these judicial districts, ever since the decision of the North Dakota Supreme Court in *Dickie v. Farmers Union Oil Company*, 2000 ND 111, 611 N.W.2d 168 (2000), the so-called "savings exception" of N.D.C.C. § 28-01.3-08(4) has been essentially a "dead letter" in our law. See, e.g., the decision by the Honorable Bruce E. Bohlman in Grand Forks County Asbestos Litigation Groups 10 and 12, *Gloria Smith, et. al.*, Grand Forks Civil Nos. 98-C-666, *et. seq.*, entered on November 20, 2004, at slip opinion page 3. In that decision, Judge Bohlman stated as follows: "On the strict liability claims, **the court has held in (Grand Forks County Asbestos Litigation) Groups 9 and 11 that the statute, N.D.C.C. § 28-01.3-08(4), is unconstitutional, under the authority of *Dickie v. Farmers Union Oil Co. of LaMourc*, 611 N.W.2d 168 (N.D. 2000). The motions are therefore denied.**" *(emphasis added).*

¶ 73 In one such example, the Honorable Bruce B. Haskell explained as follows, in an order entered by Judge Haskell in Burleigh County Asbestos Litigation:

> The defendants argue that the court should apply the three-year limitation period found as an exception to § 28-01.3-08, N.D.C.C. However, Section 28-01.3-08, N.D.C.C. was declared unconstitutional. ***Dickie v. Farmers Union Oil Company*, 2000 ND 111, 611 N.W.2d 168**. An unconstitutional statute is so from its inception. The exception to the statute cannot be severed as it is meaningless without the statute. Therefore, the six-year limitation period found at Section 28-01-16(1), N.D.C.C. applies. (*bold emphasis in original.*)
>
> "Order Regarding Motions for Summary Judgment on Statute of Limitations Grounds", entered on July 18, 2000, in *Arlene (Noey) Hebert, et. al.* Burleigh County Asbestos Litigation - Set 13, Burleigh County Civil Nos. 96-C-1922, *et. seq.* slip opinion at page 2 thereof, **Appendix** at pages 306-309.

¶ 74 Indeed, the Honorable Robert O. Wefald held previously as following, on June 7, 2005, in a prior group of Morton County asbestos litigation cases:

> (Defendant) PDI's Motion for Summary Judgment on the Basis of Statute of Limitations seeks dismissal of the Complaints against it because the plaintiffs also have missed North Dakota's statute of limitations. **The applicable statute of limitations as found in N.D.C.C. 28-01-16 is six years**. PDI asserts the applicable statute of limitations is set forth in N.D.C.C. 28-01.3-08(4) . . .
>
> Plaintiffs note that our Supreme Court in *Dickie v. Farmers Union Oil Co. of LaMoure*, 2000 ND 111, 611 N.W.2d 168, held NDCC 28-01.3-08 unconstitutional. PDI asserts that what was held unconstitutional was the statute of repose language, but this Court notes nothing in our Supreme Court's opinion states the intention of limiting the unconstitutionality of N.D.C.C. § 28-01.3-08 to its statute of repose provisions while preserving the three year statute of limitations for asbestos claims. ***This Court is unwilling to find that part of NDCC 28-01.3-08 escaped our Supreme Court's holding that NDCC 28-01.3-08 is unconstitutional. Thus, the Court finds the applicable statute of limitations is six years***.
>
> "Order on Motions" entered June 7, 2005, slip opinion at pages 5-7 in *Charles Allen, et. al.* Morton County Civil Nos. 02-C-1680 and 02-C-1681, said slip opinion included at **Appendix** pages 230-232.

¶ 75 In light of these prior decisions, therefore, it is respectfully submitted that there it is the *six-year* limitations period of N.D.C.C. § 28-01-16(1) which is the applicable statute of limitations governing the *survival action* claims of plaintiff Shirley Mertz in the instant litigation.

**E. Even if the asbestos company defendants' incorrect representations of the factual record of these cases were assumed, *arguendo,* to be accurate, entry of summary judgment on statute of limitations grounds was erroneous nevertheless.**

¶ 76 In an asbestos litigation statute of limitations case which addressed application of a "discovery rule", *Foster v. Johns-Manville Sales Corp.*, 787 F.2d 390, 393 (8th Cir. 1986), the Eighth Circuit explained as follows:

> ***Even assuming arguendo that Mr. Foster knew that he had asbestosis in 1972, defendants failed to show the absence of a genuine issue as to another material fact--Foster's knowledge regarding causation. We cannot say as a matter of law that Foster knew or should have known*** before March 12, 1980 (two years before suit was filed) ***that his asbestosis was caused by his exposure to asbestos products manufactured by defendants and that these products were defective and unreasonably dangerous or that defendants' wrongful acts caused his condition***. See *Franzen II,* 377 N.W.2d at 662 ("knowledge of all the elements of the action"); *(emphasis added).*

787 F. 2d at 393

¶ 77 The fact that the Supreme Court of North Dakota would adopt this reasoning of the Eighth Circuit, and the Iowa Supreme Court, is made clear by reference to the North Dakota court's holdings in similar "discovery rule" settings.

¶ 78 For instance, in *Hebron Public School v. U.S. Gypsum*, 475 N.W.2d

120, 126 (N.D. 1991), an asbestos property damage case, the North Dakota Supreme Court explained:

> California courts, construing a statute of limitations that, like § 28-01-16 N.D.C.C., and the New York statute, CPLR § 203, commences to run when a cause of action has "accrued," have recognized a number of exceptions to the general rule and have applied the discovery rule in a variety of cases. ... **"[A] plaintiff's cause of action for property damage caused by latent construction defects accrues 'from the point in time when plaintiffs became aware of defendant's negligence as a cause** [of damage to the property], or could have become so aware through the exercise of reasonable diligence.' (Citation omitted.)" *Allen v. Sundean,* 137 Cal.App.3d 216, 186 Cal.Rptr. 863, 866 (1982).
>
> Because of the range of our previous decisions applying a discovery rule in other actions in which such an argument would have been equally persuasive and in light of legislation incorporating discovery rules in either statutes of limitations, we decline to now hold that a discovery rule is not applicable to this action under § 28-01-16(1), N.D.C.C., to recover the costs of removing asbestos-containing acoustical ceiling plaster. To retreat to the constrictive logic Gypsum would have us now employ would be contrary to the current concept of the purpose of statutes of limitation apparent from decisions in other jurisdictions and as demonstrated by the previous decisions of this court and recent legislative enactments. . . .
>
> Since *Iverson* was decided, **the Legislature has incorporated a discovery rule** in § 28-01-18(3), (4), N.D.C.C., for medical malpractice; § 28-01-22.1, N.D.C.C., for actions against the state; and, **significantly, § 28-01.1-02(4)**, (5), N.D.C.C., **for personal injury** and property damage actions allegedly stemming from asbestos. . . .
>
> ***We conclude that*** for purposes off § 28-01-16(1), N.D.C.C., (Cum.Supp.1989), ***a cause of action, or claim for relief does not accrue until the aggrieved party discovers the facts which constitute the basis for its cause of action or claim for relief, and we answer the first certified question in the affirmative.*** *(emphasis added).*

475 N.W.2d at 122-126

¶ 79 Certainly the defendants in the instant cases made no threshold factual showing in the District Court below to the effect that decedent Allen Mertz or his family – in the language of *Foster v. Johns-Manville Sales Corp., supra* – "knew or should have known that (his asbestos disease) was caused by his exposure to asbestos products manufactured by defendants ***and*** that these products were defective and unreasonably dangerous or that defendants' wrongful acts caused (their) condition(s)." *(emphasis added). Foster v. Johns-Manville Sales Corp., supra*, 787 F.2d at 393.

¶ 80 Put simply, the defendants in the instant cases failed to even address in their motions for summary judgment – let alone establish – the **absence** of a genuine issue of material fact as to the additional factual issues of asbestos product identification and defect which were highlighted in *Foster v. Johns-Manville Sales Corp., supra.* This is true even if one were to accept, as accurate, the defendants' unsupportable view of the factual record of this case, and it is respectfully submitted that the defendants' motion for summary judgment upon alleged statute of limitations grounds should have been denied on these independent grounds as well.

## III. CONCLUSION

¶ 81 On the basis of the recitation of facts, and the decisional authorities and argument which have been set forth above herein, it is respectfully submitted that the District Court committed foundational error when it adjudicated disputed issues of

material fact – instead of simply identifying their existence – as the District Court granted summary judgment dismissal of the plaintiff's survival action claims upon statute of limitations grounds. In consequence, it is respectfully submitted that this decision should, in all things, be reversed and it is correspondingly requested that this case be remanded to the District Court for continuation and trial upon its substantive merits.

Dated this 15th day of April, 2009.

**BOECHLER, P.C**

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Shirley Mertz,

Plaintiff/Appellant,

v.

Supreme Court No.: 20090031

999 Quebec, Inc., et. al.,

Defendants/Appellees.

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## AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

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STATE OF NORTH DAKOTA )
)ss
COUNTY OF GRAND FORKS )

On April 15, 2009, the undersigned, being first duly sworn, deposes and says that, pursuant to North Dakota Supreme Court Administrative Order 16, she served the following documents:

**BRIEF OF PLAINTIFF/APPELLANT; and**
**APPENDIX OF PLAINTIFF/APPELLANT**

by transmitting the following to:

| | | |
|---|---|---|
| **Jeanette T. Boechler, Esq.** | **Ronald H. McLean, Esq.** | **Robert E. Diehl, Esq.** |
| **Boechler, P.C.** | **Serkland Law Firm** | **Foley & Mansfield** |
| lboec@aol.com | rmclean@serklandlaw.com | rdiehl@foleymansfield.com |
| **Jane L. Dynes, Esq.** | **David T. Schach, Esq.** | |
| **Serkland Law Firm** | **Meagher & Geer** | |
| jdynes@serklandlaw.com | dschach@meaghergeer.com | |

Dated this 20th day of April, 2009.

Toni Nicolson

Subscribed and sworn to before me this 20th day of April, 2009.

(SEAL) DAVID C THOMPSON
Notary Public
State of North Dakota
My Commission Expires Sep. 12, 2009

Notary Public
My Commission Expires:

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Shirley Mertz,

Plaintiff/Appellant,

v. Supreme Court No.: 20090031

999 Quebec, Inc., et. al.,

Defendants/Appellees.

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**AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

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STATE OF NORTH DAKOTA )
)ss
COUNTY OF GRAND FORKS )

The undersigned, being first duly sworn, deposes and says that, pursuant to North Dakota Supreme Court Administrative Order 16, she served the following documents:

***CORRECTED* BRIEF OF PLAINTIFF/APPELLANT**

by transmitting the following to:

| | | |
|---|---|---|
| **Jeanette T. Boechler, Esq.** | **Ronald H. McLean, Esq.** | **Robert E. Diehl, Esq.** |
| **Boechler, P.C.** | **Serkland Law Firm** | **Foley & Mansfield** |
| lboec@aol.com | rmclean@serklandlaw.com | rdiehl@foleymansfield.com |
| **Jane L. Dynes, Esq.** | **David T. Schach, Esq.** | |
| **Serkland Law Firm** | **Meagher & Geer** | |
| jdynes@serklandlaw.com | dschach@meaghergeer.com | |

Dated this 20th day of April, 2009.

Toni Nicolson

Subscribed and sworn to before me this 20th day of April, 2009.
(SEAL)

DAVID C. THOMPSON
Notary Public
State of North Dakota
My Comm. Expires Sep. 12, 2009

Notary Public
My Commission Expires: