20090031

Case No. 20090031
STATE OF NORTH DAKOTA
IN SUPREME COURT

Shirley Mertz,

Plaintiff/Appellant,

v.

999 Quebec, Inc., et al.,

Defendants/Appellees.

FILED
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June 3, 2009
STATE OF NORTH DAKOTA

Appeal From Final Order and Judgment
In the District Court, South Central Judicial District
Morton County

BRIEF OF DEFENDANTS/APPELLEES A.H. BENNETT COMPANY, FOSTER WHEELER LLC, GREENE, TWEED AND COMPANY, RILEY STOKER CORPORATION, RITE-HITE CORPORATION, SAINT-GOBAIN ABRASIVES, INC. (F/K/A NORTON COMPANY), SINGER SAFETY COMPANY, WEIL-McLAIN, UNITED CONVEYOR CORPORATION AND S.O.S PRODUCTS COMPANY, INC.

Kyle B. Mansfield, ND No. 04723
Robert E. Diehl, MN No. 175134
Heather H. Neubauer, MN No. 321606
Elizabeth Sorenson Brotten, ND No. 06521
Foley & Mansfield, P.L.L.P.
250 Marquette Avenue, Suite 1200
Minneapolis, MN 55401
Telephone: (612) 338-8788

Attorneys for A.H. Bennett Company, Foster Wheeler LLC, Greene, Tweed and Company, Riley Stoker Corporation, Rite-Hite Corporation, Saint-Gobain Abrasives, Inc. (f/k/a Norton Company), Singer Safety Company, and Weil-McLain

William M. Hart, MN No. 150526
David T. Schach, ND No. 06491
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

Attorneys for United Conveyor Corporation and S.O.S. Products Company, Inc.

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STATEMENT OF THE ISSUES

I. [¶ 1] Did the district court correctly determine that plaintiff's survival action on behalf of the estate of her deceased husband Allen Mertz was barred by the six-year statute of limitations because the only conclusion reasonable minds could draw from the undisputed evidence is that Allen Mertz discovered facts putting him on notice that he had a potential asbestos-related claim more than six years before plaintiff commenced this survival action?

II. [¶ 2] Does a survival action accrue no later than the injured person's death?

STATEMENT OF THE CASE

[¶ 3] In 2005, Plaintiff/Appellant Shirley Mertz ("plaintiff") commenced a survival action on behalf of the estate of her deceased husband, Allen Mertz, to recover damages for Allen Mertz's alleged asbestos-related injuries. At the close of discovery, the undersigned defendants/appellees A.H. Bennett Company, Foster Wheeler LLC, Greene, Tweed and Company, Riley Stoker Corporation, Rite-Hite Corporation, Saint-Gobain Abrasives, Inc. (f/k/a Norton Company), Singer Safety Company, Weil-McLain, S.O.S. Products Company, Inc., and United Conveyor Corporation ("defendants") moved for summary judgment on the basis that plaintiff failed to commence this survival action within the applicable statute of limitations. Based on the undisputed facts, the defendants contended that Allen Mertz discovered information sufficient to trigger the limitations period for a personal injury lawsuit arising out of the development of his lung cancer more than six years before the commencement of this survival action. Alternatively, the defendants contended that a survival action for Allen Mertz's injuries could accrue no later than his death in April of 1996, and that plaintiff's 2005 survival action was accordingly time barred.

[¶ 4] On November 18, 2008, the district court, Judge Robert O. Wefald, granted the defendants' motion, holding that the only reasonable conclusion that could be

drawn from the undisputed facts is that Allen Mertz knew of his asbestos-related cancer as early as 1995 and that plaintiff's 2005 survival action was accordingly time-barred as a matter of law. The district court did not reach the issue of whether a survival action may accrue subsequent to the death of the injured party. Plaintiff commenced this appeal by filing a notice of appeal on January 16, 2009.

STATEMENT OF THE FACTS

[¶ 5] Decedent Allen Mertz worked as a plumber/pipefitter for approximately 30 years at various locations in North Dakota. (App.[1] 44, 188.) He allegedly was exposed to asbestos-containing products manufactured, sold, or distributed by the various defendants. (App. 44.)

[¶ 6] In October 1995, Mr. Mertz sought medical attention after he began experiencing coughing, choking sensations, weight loss, and chest pain. (App. 188-189.) A chest x-ray identified the presence of a large mediastinal mass in his lung. (App. 188.) A subsequent CT scan confirmed the presence of a very large anterior mediastinal mass and showed nodular densities in the base of Mr. Mertz's right lung along with several bilateral pleural effusions. (App. 268.) Finally, on October 23, 1995, a needle biopsy of the lung mass was performed, and the treating pathologist indicated a diagnosis consistent with "oat" cell carcinoma, or lung cancer. (App. 269-270.)

[¶ 7] Mr. Mertz was referred to Dr. Abbas Khalil for further evaluation of the mediastinal mass. (App. 188-191.) Dr. Khalil's report noted that Mr. Mertz "has a strong exposure to asbestos." (App. 189.) At the end of his evaluation, Dr. Khalil noted a "differential diagnosis" of "small lung CA" and stated: "This gentleman is not a

[1] Citations to "App. __" refer to the Appendix of Plaintiff/Appellant.

smoker, however, he has a 30-year history of exposure to asbestos, which could be the underlying etiological factor of his condition." (App. 190.) Dr. Khalil's notes specifically reflect that he explained various treatment options to Mr. Mertz and his family. (App. 190.) The date of this consultation with Dr. Khalil, October 25, 1995, was the first date Allen Mertz discovered that his condition could be related to his exposure to asbestos.

[¶ 8] A second discussion of Mr. Mertz's asbestos exposure occurred on November 14, 1995, during a radiology oncology consultation with Dr. Kiernan J. Minehan. (App. 193-195.) Dr. Minehan's consultation report noted that Mertz had "asbestos exposure in his job as a heating mechanic." (App. 193.) Dr. Minehan's report also indicated that he "had a long, thoughtful, thorough discussion" with Allen Mertz about treatment options. (App. 195.)

[¶ 9] A third mention of the relationship between Mr. Mertz's exposure to asbestos and his lung cancer took place the following year, and was initiated by one of Mertz's immediate family members. On March 5, 1996, Mertz's daughter, Reneta, called the Medical Arts Clinic to request a statement signed by Dr. Khalil for her father's insurance. (App. 197.) She specifically requested that the statement indicate that her father "has exposure to asbestos," and that he had been diagnosed with lung cancer. (App. 197.) According to the chart note, a letter to this effect was drafted and was to be picked up by Reneta. (App. 197.)

[¶ 10] Allen Mertz died on April 20, 1996, at the age of 63. (App. 267.) The cause of death, as listed on his death certificate, was lung cancer. (App. 267.)

[¶ 11] Seven years later, on April 25, 2003, Dr. Brian P. Dolan issued a written report, evaluating Allen Mertz's medical condition. (App. 280-283.) Dr. Dolan based his report on his review of "[a] number of" Mr. Mertz's medical records, provided by plaintiff's counsel. (App. 280.) In his report, Dr. Dolan opines, to a reasonable degree of medical certainty, that Allen Mertz's "occupational exposure to asbestos over many years was a significant causative factor in his lung cancer." (App. 283.)

[¶ 12] In 2005, nine years after her husband's death, plaintiff commenced a survival action on behalf of her husband's estate by serving defendants (and numerous other entities) with summonses and complaints. (App. 39-51.) In her complaint, plaintiff alleges that the defendants were responsible for her deceased husband's exposure to asbestos, which she contends resulted in his death. (App. 39-51.) Defendants interposed answers, denying plaintiff's allegations and setting forth the affirmative defense that plaintiff's cause of action is barred by the applicable statute of limitations. (App. 52-130, 141-157.)

[¶ 13] At the close of discovery, defendants moved the district court for summary judgment, contending that, as a matter of law, plaintiff's survival action is barred under the six-year statute of limitation of N.D.C.C. § 28-01-16(5).[2] (M.D.[3] 117, App. 6, M.D. 141, App. 6.) Following a hearing, the district court issued a memorandum decision dated November 18, 2008, concluding that Allen Mertz "knew of his asbestos related

[2] In their summary judgment motions, defendants also argued that any wrongful death claim was time-barred under the two-year statute of limitations contained in N.D.C.C. § 28-01-18(4). Plaintiff concedes that she did not bring an action for wrongful death. (App. 199.) As such, the applicability of North Dakota's statute of limitations for wrongful death actions is not an issue on appeal.

[3] Citations to "M.D. _" refer to the district court's docket number on the Register of Actions in the Mertz case.

cancer as early as 1995." (App. 312-318.) The district court acknowledged that this Court had previously reversed a district court's grant of summary judgment on a similar issue in Biesterfeld v. Asbestos Corp. of America, 467 N.W.2d 730, 735-39 (N.D. 1991), on the basis that a factual issue was raised. (App. 318.) But the district court distinguished Biesterfeld from the facts of this case, because here, "[Mr.] Mertz and his family were 'aware of facts' as to his asbestos-related disease that placed [Mr.] Mertz and his family as reasonable persons 'on notice a potential claim exists, without regarding to the [their] subjective beliefs.'" (App. 318.) The district court then not only granted the moving defendants' motions for summary judgment, but also sua sponte granted summary judgment dismissing plaintiff's complaint against all nonmoving defendants. (App. 318.) On January 16, 2009, plaintiff filed her notice of appeal with the district court. (App. 330.) The district court thereafter entered judgment in favor of defendants. (Updated M.D.[4] 209, Appendix of Defendants/Appellees 16-18.)

STATEMENT OF THE STANDARD OF REVIEW

[¶ 14] This Court's standard of review for summary judgment is well-established:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, [the district court] view[s] the evidence in the light most favorable to the party opposing the motion, and that party [is] given the benefit of all favorable inferences which can reasonably be

[4] Citations to "Updated M.D. _" refer to the district court's docket number on the Updated Register of Actions in the Mertz case, which, unlike the register submitted in appellee's appendix, reflects the entry of judgment in this case.

> drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which [this Court] review[s] de novo on the entire record.

Farmers Union Oil Co. v. Smetana, 2009 ND 74, ¶ 8, 764 N.W.2d 665 (citing Hasper v. Center Mut. Ins. Co., 2006 ND 220, ¶ 5, 723 N.W.2d 409). See also Peoples State Bank of Truman, Inc. v. Molstad Excavating, Inc., 2006 ND 183, ¶ 17, 721 N.W.2d 43 (applying same standard of review).

LAW AND ARGUMENT

I. [¶ 15] **The district court properly ruled below that there are no genuine issues of material fact as to when Allen Mertz learned of facts sufficient to trigger the running of the statute of limitations and that defendants are entitled to judgment as a matter of law because plaintiff's survival claim is barred by the six-year statute of limitations.**

[¶ 16] Plaintiffs in product liability tort actions must commence survival actions "within six years after the claim for relief has accrued." N.D.C.C. § 28-01-16(5).[5] This Court has indicated that it would adopt a "discovery rule" in latent injury cases under which the limitations period would begin to run when the plaintiff discovers or reasonably should have discovered the injury and its causal connection. Erickson v. Scotsman, Inc., 456 N.W. 2d 535, 538 (N.D. 1990) (citing 4 American Law of Products Liability 3d, Statutes of Limitation § 47:21 (1987); 2A Frumer & Friedman, Products Liability §§ 12.02[3], 12.04[4] (1988)). Courts apply an objective standard to the

[5] Plaintiffs and defendants in North Dakota asbestos litigation dispute the current law regarding whether a three-year or six-year statute of limitations period applies to asbestos-related personal injury claims. As discussed herein, a determination of whether the three-year statute of limitations in N.D.C.C. § 28-01.3-08(4) or the more liberal six-year statute in N.D.C.C. § 28-01-16(5) applies need not be addressed for purposes of this appeal. The defendants will assume for the sake of argument that the six-year limitations period applies.

knowledge requirement of the discovery rule. Wall v. Lewis, 393 N.W.2d 758, 761 (N.D. 1986). This Court has explained the objective standard as follows:

> [T]he focus is upon whether the plaintiff has been apprised of facts which would place a reasonable person on notice that a potential claim exists. It is not necessary that the plaintiff be subjectively convinced that he has been injured and that the injury was caused by the defendant's negligence.

Id. The plaintiff's knowledge is ordinarily a question of fact, precluding the application of summary judgment. Biesterfeld v. Asbestos Corp. of Am., 467 N.W.2d 730, 736 (N.D. 1991). However "the issue becomes one of law if the evidence is such that reasonable minds could draw but one conclusion." Id. (citing Belgarde v. Rosenau, 388 N.W.2d 129, 130 (N.D. 1986)).

[¶ 17] Survival statutes are remedial in nature, and intended to permit recovery by the estate of the deceased for damages the deceased could have recovered had he or she lived. See Sheets v. Graco, Inc., 292 N.W.2d 63, 66-67 (N.D. 1980). Survival actions merely continue in existence the injured person's claim after death as an asset of his or her estate. In order words, "[t]he representatives of the deceased merely step into his shoes and continue the cause of action on behalf of the deceased's estate." Id. (citing Marsden v. O'Callaghan, 77 N.W.2d 531 (N.D. 1956)).

[¶ 18] On appeal, plaintiff contends that a factual dispute exists regarding when her husband discovered or should have discovered that his lung cancer was related to asbestos, which should have precluded summary judgment. But the evidence in this case leads to only one reasonable conclusion: that as early as 1995, and no later than 1996, Allen Mertz was "apprised of facts which would place a reasonable person on notice that a potential claim exist[ed]," triggering the accrual of a cause of action. Wall, 393

N.W.2d at 761. The notice required to trigger the discovery rule does not require a definitive diagnosis by a physician. Rather, the notice required is information that would put a reasonable person on notice that he or she has a potential claim. Schanilec v. Grand Forks Clinic, Ltd., 1999 ND 165, ¶ 13, 599 N.W.2d 253, 256. Here, Allen Mertz's medical records demonstrate that the link between his disease and asbestos was repeatedly discussed with him and his family and was sufficient to have placed him, as a reasonable person, on notice that a potential asbestos-related claim existed. As such, the statutory limitations period was triggered as early as 1995 and no later than 1996.

[¶ 19] Following his October 25, 1995 evaluation, Allen Mertz's treating physician, Dr. Khalil, noted a differential diagnosis of "small lung CA" and stated that although Mr. Mertz was not a smoker, "he has a 30-year history of exposure to asbestos, which could be the underlying etiological factor of his condition." (App. 190.) In connection with his further treatment for lung cancer, yet another doctor noted Mertz's history of occupational exposure to asbestos. (App. 193.) Both physicians indicated in their notes that they discussed their findings and opinions with Allen Mertz and his family. (App. 190, 195.) It is undisputed that the following year, Mertz's daughter called Dr. Khalil's office seeking a written statement from Dr. Khalil for insurance purposes. (App. 197.) She requested that the statement specifically indicate that her father had been diagnosed with lung cancer and that he had a history of exposure to asbestos. (App. 197.) The fact that his daughter intentionally sought out this letter demonstrates that by 1996, Allen Mertz and his family, under any objective standard, possessed sufficient information potentially linking Mertz's lung cancer with his asbestos exposure, and

eliminates any genuine issue of material fact as to when Allen Mertz discovered facts sufficient to trigger the running of the statute of limitations.

[¶ 20] Plaintiff contends that her case is factually akin to Biesterfeld and several cases from courts across the country. In Biesterfeld, this Court held that questions of fact as to when the plaintiff in an asbestos-related lawsuit discovered his injury precluded summary judgment on statute of limitations grounds. Biesterfeld, 467 N.W.2d at 738-739. This case, however, is distinguishable from both Biesterfeld and the other non-binding authority on which plaintiff relies, on numerous grounds. In Biesterfeld, the plaintiff's medical records indicated that he had been exposed to asbestos, but did not demonstrate the presence of any disease that could be attributable to asbestos. Id. at 737. Furthermore, the plaintiff filed a workers' compensation claim alleging that he had contracted asbestosis as a result of his occupational exposure to asbestos. Id. at 737. The Workers' Compensation Bureau denied the claim "on grounds which may have caused [the plaintiff] to doubt that he had asbestosis so as to discourage him from suing the defendants." Id. at 738. In addition, the plaintiff had been told that his history of working around asbestos was "strictly and [sic] exposure without any clinical significance." Id. at 733. Thus, in Biesterfeld, the plaintiff's medical providers had specifically discounted asbestos as the cause of his medical condition. This Court recognized the potential for the plaintiff's confusion regarding whether he had asbestosis, based on conflicting medical opinions and the denial of his workers' compensation claim. Id. at 738. Therefore, the Court determined that reasonable minds could draw more than a single conclusion from the facts, and determined that summary judgment was not proper. Id.

[¶ 21] Here, unlike the situation in Biesterfeld, there is no evidence that any physician ever discounted asbestos as the cause of Allen Mertz's cancer. In fact, Mr. Mertz's treating physicians specifically mentioned asbestos as a potential cause of his lung cancer. (App. 190.) Thus, the district court correctly determined that plaintiff's claims were appropriate for dismissal via summary judgment.

[¶ 22] Plaintiff claims that her deposition testimony addressing her knowledge regarding the relationship between her husband's exposure to asbestos and his lung cancer creates a fact question. Plaintiff testified that none of her husband's treating physicians told her that his lung cancer was caused by his exposure to asbestos and that her husband never told her that he thought his cancer was caused by exposure to asbestos. (App. 286.) Plaintiff also argues that she did not become aware that her husband had an asbestos-related disease until Dr. Dolan issued his report concluding as much on April 25, 2003. But both arguments relate to plaintiff's own knowledge or own discovery of her husband's asbestos-related condition, which is irrelevant. See Sheets, 292 N.W.2d at 67 (explaining that in a survival action, the estate's representative merely steps into the shoes of the decedent). Instead, the relevant inquiry is whether, during his lifetime, Allen Mertz had knowledge of his injury and its relationship to asbestos or had discovered facts which would reasonably lead to that discovery. Biesterfeld, 467 N.W.2d at 738.

[¶ 23] Furthermore, Dr. Dolan reached his conclusion that Allen Mertz's lung cancer was related to his exposure to asbestos by reviewing Allen Mertz's medical records. (App. 280.) Dr. Dolan's report references Dr. Khalil's findings in 1995, which merely records the same information that was made known to Allen Mertz eight years earlier. These are the very medical records which reflect that Allen Mertz's treating

physicians obtained a social history from Allen Mertz, who informed them, in 1995 and 1996, of his field of employment and past exposure to asbestos.

[¶ 24] Contrary to plaintiff's assertions, no genuine issue of material fact remains to be tried in this case regarding the discovery of Allen Mertz's condition, and defendants were entitled to judgment as a matter of law. Reasonable minds could only reach the conclusion: that Allen Mertz knew, or should have known, no later than March 5, 1996, that a potential claim existed for his asbestos-related lung cancer. Plaintiff brought her claim in 2005, ten years after the initial lung cancer diagnosis, nine years after her husband's death, and three years after the expiration of the statute of limitations for a survival action. Therefore, the Court should affirm the district court's grant of summary judgment in favor of defendants.

II. [¶ 25] Alternatively, the Court should rule that a survival action can accrue no later than the injured person's death.

[¶ 26] This is a survival action under Section 28-01-26.1, N.D.C.C., which provides that "[n]o action or claim for relief . . . abates by the death of a party or of a person who might have been a party had such death not occurred." In contrast to an action for wrongful death – which is "an entirely new cause of action for the benefit of persons close in relationship to the deceased" – a survival action "'merely continues in existence an injured person's claim after death as an asset of the estate.'" Ness v. St. Aloisius Hosp., 301 N.W.2d 647, 652 (N.D. 1981); Weigel v. Lee, 2008 ND 147, ¶ 12, 752 N.W.2d 618 (quoting Sheets v. Graco, 292 N.W.2d 63, 66-67 (N.D. 1980)). Therefore, in a survival action, the "representatives of the deceased merely step into his shoes and continue the cause of action on behalf of the deceased's estate." Sheets, 292

N.W.2d at 67. Survival actions "are intended to permit recovery by the representatives of the deceased for damages the deceased could have recovered had he lived." Id. at 66-67.

[¶ 27] In accord with these principles, the plaintiff commenced this suit in a representative capacity: "Shirley Mertz, on behalf of the Estate of Allen Mertz, deceased, Plaintiff." (App. 39-51.) For accrual, however, the plaintiff's argument disregards the representative capacity in which she maintains this action, arguing that accrual is measured by her personal, individual discovery of a causal connection between asbestos and the lung cancer that led to her husband's death seven years earlier, in 1996. (Appellant's brief, ¶¶ 14-15) (arguing that medical connection first made on April 25, 2003 and that "[t]he Summons and Complaint commencing this survival action was served – less than three years later – in March of 2005") (emphasis omitted). The Court should reject this argument and hold that a survival action can accrue no later than the injured person's death. Because plaintiff commenced this survival action some nine years after Mr. Mertz's death – well beyond expiration of the longest period of limitations for which the plaintiff argues – it is time-barred as a matter of law, thus requiring affirmance.

[¶ 28] The Appellees raised this issue as grounds for summary judgment below, but the district court did not rule. Nevertheless, "[a]n appellee is entitled on appeal to attempt to save the judgment by urging any ground asserted in the trial court." Livingood v. Meece, 477 N.W.2d 183, 188 (N.D. 1991). See also, Hummel v. Mid Dakota Clinic, 526 N.W.2d 704, 709 (N.D. 1995) (stating that "we will not set aside a correct result merely because the trial court assigned an incorrect reason if the result is the same under the correct law and reasoning").

A. [¶ 29] **The legislature intended for accrual of a survival action to occur within the injured person's lifetime, and this Court's decisions support that rule.**

[¶ 30] Statutory interpretation is a question of law subject to full review on appeal. Throndtveit v. M.W., 2009 ND 55, ¶ 6, 764 N.W.2d 185. The primary objective of statutory construction is to ascertain the intent of the legislature. Jones v. Pringle & Herigstad, P.C., 546 N.W.2d 837, 840 (N.D. 1996). In examining legislative intent, the Court looks first to the ordinary, plain-language meaning of the words in the statute itself. Throndtveit, 2009 ND at ¶ 6, 764 N.W.2d at 187. Legislative intent is derived from the statute as a whole. Id. The Court construes statutes in a practical manner and considers both a statute's context and the purpose for its enactment. Id. The Court will not, however, interpret a statute so as to produce an absurd or ludicrous result. Id.

[¶ 31] The statutes governing survival actions recognize the right to maintain such an action and provide for an expiration of its limitation period in a manner that necessarily bridges the injured person's death. As such, in addition to providing that "[n]o action or claim for relief . . . abates by the death of a party or of a person who might have been a party had such death not occurred" (N.D.C.C. § 28-01-26.1), the legislature provided for expiration of the limitation period with reference to the injured person:

> If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof and the claim for relief survives, an action may be commenced by his representatives after the expiration of that time and within one year from his death.

Section 28-01-26, N.D.C.C. (emphasis added). An examination of these provisions – and of this Court's decisions – shows that the legislature intended that a survival action would accrue within the injured person's lifetime and that the claim would be carried forward to

his representatives, not that it could accrue to those representatives after his death as a new cause of action.

[¶ 32] A survival action can potentially raise three distinctly legal statute-of-limitations issues: (1) What period of limitations applies (i.e., what is the proper length of time)? (2) what event signals accrual (i.e., injury, discovery, etc.)? (3) from whose perspective is accrual measured (i.e., from the perspective of the injured/deceased person or from the perspective of the personal representative)? As seen below, this case raises only the third issue.

[¶ 33] As to the proper length of the statutory period, the parties dispute whether a three-year or a six-year period of limitations applies, but the dispute is not dispositive on these facts. Nevertheless, some background may be useful for context. The defendants contend that the statutory three-year period specifically prescribed for asbestos-related injury survived this Court's holding in 2000 that the separate repose provision in the same statute violated equal protection. Dickie v. Farmers Union Oil Co., 2000 ND 11, 611 N.W.2d 168. Plaintiff disputes that argument and contends that the six-year period of limitations for personal-injury actions governs in the wake of Dickie. Plaintiff contends that the Dickie decision voided the entire statute, including the asbestos-specific limitations and discovery provisions. This Court has yet to address the issue. Plaintiffs' opening brief, however, argues that this Court's decisions "eliminate[] any doubt that . . . the six-year limitations of North Dakota's personal injury limitations statute . . . does indeed apply to **survival actions** . . . ." (Appellants' brief, ¶43) (emphasis in original; other original emphasis omitted) (citing Hulne v. Int'l Harvester Co., 322 N.W.2d 474 (N.D. 1982)) (see also, Appellant's brief, ¶¶ 41-42). But this

contention merely begs the question of the correct limitation period, because "[t]he statute of limitations that applies to an action which a person is entitled to bring also applies to that action when it is brought as a survival action by his representative upon his death." See, e.g., Hulne, 322 N.W.2d at 475 (so holding in answer to certified question). Whether a given case is an injury action or a survival action, the same limitations period applies. Therefore, the fact that this is a survival action has nothing to do with the proper period of limitations. But because Mr. Mertz died so long before commencement of suit – about 9 years – ultimately the parties agree that their dispute over the length of the limitation period will not affect the outcome on appeal. (E.g., Appellant's brief, ¶6, n.3).

[¶ 34] As for the event that signals accrual, this Court has not expressly held that a common-law discovery rule governs accrual of a cause of action for asbestos-related personal injury. The Court did suggest that it would follow such a rule in Erickson v. Scotsman, Inc., 456 N.W.2d 535 (N.D. 1990) (citing asbestos as a product that causes latent injury and stating that other courts had adopted a discovery rule in response). And the Court in fact applied a discovery rule to asbestos-related property damage in Hebron Public School Dist. No. 13 v. U.S. Gypsum Co., 475 N.W.2d 120, 124 (N.D. 1991). But the only application of a discovery rule to asbestos-related personal injury in this Court's decisions has been pursuant to statute. See Biesterfeld, 467 N.W.2d at 736 (stating that "N.D.C.C. Section 28-01.1-02(4) thus provides for the application of the 'discovery' rule in cases concerning injuries stemming from asbestos exposure"). Thus, if plaintiff's argument about the effect of Dickie were adopted – i.e., if the entire statute became void post-Dickie – then the only source of a discovery accrual would be the common law. See Tarpo v. Bowman Pub. Sch. Dist. No. 1, 232 N.W.2d 67, 70 (N.D. 1975) (stating that

where there is no express statutory or constitutional declaration, the common law applies).

[¶ 35] Because application of a discovery rule is not per se in dispute on appeal, this point is important only because it exposes critical inconsistencies in the plaintiff's reasoning. In discussing the timing of accrual – in support of the contention that a question of fact exists as to discovery of a causal link between asbestos exposure and Mr. Mertz's lung cancer – the plaintiff relies emphatically on the discovery standard discussed in Biesterfeld. (Appellant's brief, ¶¶ 50-52). But that standard comes from the predecessor statute to the one struck down in Dickie. Moreover, the asbestos-specific provisions in both the Dickie statute and its predecessor are indistinguishable – i.e., word-for-word identical or very nearly so. This raises two inconsistencies. First, this Court struck down the Dickie predecessor statute in 1986 on identical constitutional grounds. Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986). Biesterfeld, however, was decided in 1991, and it applied the asbestos-specific provisions of the stricken predecessor statute. Therefore, one must conclude that if the plaintiff is correct that the Dickie decision invalidated the entire statute – including the asbestos-specific statute of limitations and its related discovery provisions – then the Hanson decision could not be interpreted any differently, making application of the identical predecessor statute in Biesterfield unconstitutional. This makes no sense.[6]

[6] It also makes no sense that plaintiff argues for a discovery standard that is taken verbatim from a statute that plaintiff contends is entirely invalid. (Appellant's brief, ¶ 51) (arguing for a standard that requires "competent medical authority" as the source of discovery, a direct quote from the statutory standard). As already discussed, if plaintiff's argument about the breadth of the Dickie decision were correct, then a common law discovery standard would be the only available alternative for a discovery accrual. And the common law standard is not nearly as detailed as the asbestos-specific statutory

[¶ 36] Second, and more important to the issue on appeal, the injured asbestos worker (Baron) commenced the suit in Biesterfeld during his lifetime, and this Court approved its conversion to a survival action after he died two years later. 467 N.W.2d at 732. The then-applicable statutory discovery standard in Biesterfeld asked whether, within three years, "'the **injured person** ha[d] been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, ...'" Biesterfeld, 467 N.W.2d at 736 (quoting N.D.C.C. § 28-01.1-02(4)) (emphasis added).[7] An injured person cannot be informed of his asbestos-related injury after he has passed away. In other words, the plaintiff's argument is premised upon a discovery standard that, on its face, mandates examination of discovery from the injured person's perspective, thus requiring affirmance on the alternative ground that accrual for a survival action can occur no later than the injured person's death.[8]

[¶ 37] In fact, the language from Biesterfeld upon which plaintiff most relies only reinforces this conclusion: "The crucial question in the instant case, however, is whether or not Baron, 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,' . . . ." Biesterfeld, 467 N.W.2d at 738 (quoting N.D.C.C. § 28-01.1-02(4))

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provision. See, e.g., Wall, 393 N.W.2d at 761 (describing discovery standard as focusing on "whether the plaintiff has been apprised of facts which would place a reasonable person on notice that a potential claim exists").

[7] The Dickie statute, adopted in 1995 and stricken as to the statute of repose in 2000, has an identical provision.

[8] This is necessarily so because, as we have seen, "[t]he statute of limitations that applies to an action which a person is entitled to bring also applies to that action when it is brought as a survival action by his representative upon his death." Hulne, 322 N.W.2d at 475.

(emphasis added). Notably, the plaintiff's brief emphatically quotes the above language, but the quotation there replaces "Baron" – the injured person – with the generic term "the plaintiff." (Appellant's brief, ¶ 51) (alteration in parentheses). This alteration changes the fundamental meaning of the statute and the nature of the Court's inquiry and holding in Biesterfeld. Under Biesterfeld, accrual can occur no later than the injured person's death.

[¶ 38] The survival statute itself also makes this conclusion inescapable. As a starting point, the purpose for adopting a survival statute was to "continue in existence an injured person's claim after death as an asset of the estate . . . ." Sheets, 292 N.W.2d at 67 (emphasis added). By definition, a cause of action is not "in existence" until it has accrued. See, e.g., Black's Law Dictionary at 22 (8th ed. 2004) (defining "accrue" as "[t]o come into existence as an enforceable claim or right"). A cause of action cannot continue in existence if it has not first come into existence, that is, until it has accrued. Tarnavsky v. McKenzie County Grazing Ass'n, 2003 ND 117, ¶ 9, 665 N.W.2d 18 (stating that "[a] cause of action accrues when the right to commence the action comes into existence and can be brought in a court of law without being dismissed for failure to state a claim") (emphasis added). Thus, the purpose of a survival statute is to continue in existence – after death – a cause of action that has already accrued to the injured person during his lifetime. See also, Anthony v. Koppers Co., Inc., 496 Pa. 119, 125, 436 A.2d 181, 185 (1981) (rejecting post-death discovery rule for survival actions and stating that "[a]s distinguished from the wrongful death statutes, the survival statutes do no create a new cause of action; they simply permit a personal representative to enforce a cause of

action which had already accrued to the deceased before his death"). To survive, therefore, a cause of action can accrue no later than the injured person's death.

[¶ 39] The converse of "in existence" is the plain meaning of the legislature's chosen term – "abate." N.D.C.C. § 28-01-26.1 (providing that "[n]o action or claim for relief . . . abates by the death . . ."') (emphasis added). To abate is to terminate, to end. See, e.g., Merriam-Webster's Collegiate Dictionary at 2 (11th ed. 2005) (defining "abate" as "to put an end to"); Merriam-Webster's Collegiate Thesaurus at 2 (1988) (providing synonyms for "abate" as "abolish," "invalidate," "negate," "nullify"); Black's Law Dictionary at 3 (8th ed. 2004) (defining "abatement" as "[t]he act of eliminating or nullifying"). A cause of action cannot be saved from elimination, invalidation, or nullification if it has yet to come into existence, that is, if it has not already accrued. If a cause of action survives the injured person's death – i.e., is saved from abatement – it necessarily exists at the time of death or not at all. See Koppers, 496 Pa. at 125, 436 A.2d at 185 (rejecting post-death discovery rule for survival actions and stating that "by arguing that their decedents were not 'injured' until some time after their deaths, [plaintiffs] concede that no valid cause of action existed at the time of death which could be preserved under the survival statutes"). Again, to survive, a cause of action can accrue no later than the injured person's death.

[¶ 40] And the very need for a survival statute reflects the same legislative purpose of preserving an already-existing cause of action. At common law, a person's death signaled the end of all potential injury-related litigation. First, the common law recognized no right of action for wrongful death. Sheets, 292 N.W.2d at 68 (stating that North Dakota first adopted a wrongful death act in 1895 because "there was no such right

of recovery under the common law"). Second, the common law for centuries had held that a cause of action for personal injury abated upon the death of the person injured. See 3 Wm. Blackstone, Commentaries on the Laws of England 302-03 (1768) (stating rule and rationale that personal-injury action abates at injured person's death and that it "never shall be revived either by or against the executors or other representatives"). In short, the purpose of a wrongful-death statute is to create an entirely new cause of action previously unrecognized. Sheets, 292 N.W.2d at 67 (stating that "a wrongful death action is an entirely new cause of action for the benefit of those persons who bear a close relationship to the deceased"). But the purpose of a survival statute is not to create a statutory cause of action. Instead, its purpose is to overrule the common law of abatement and thereby allow causes of action already recognized and in existence to continue in existence rather than abate. N.D.C.C. § 28-01-26.1 (providing that "[n]o action or claim for relief . . . abates by the death . . ."") (emphasis added); see also, McDaniel v. Johns-Manville Sales Corp., 511 F.Supp. 1241, 1243 (N.D. Ill. 1981) (applying Illinois law and stating that "[t]he Survival Act does not create a statutory cause of action. It merely allows a representative of the decedent to maintain those statutory or common law actions which had already accrued to the decedent before he died") (quoting Nat'l Bank of Bloomington v. Norfolk & Western Ry. Co., 73 Ill.2d 160, 172, 383 N.E.2d 919 (1978)). Allowing accrual beyond the injured person's death would expand the survival statute beyond its legislative purpose, an impermissible result.

[¶ 41] The statutory limitation provision for survival actions further reinforces the conclusion that the legislature intended for accrual to occur no later than the injured person's death: "If a person entitled to bring an action dies before the time limited for the

commencement thereof and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year from death." N.D.C.C. § 28-01-26. This provision evinces a legislative intent that expiration be measured from the perspective of the person entitled to bring the action, i.e., the injured person. The "time limited for the commencement thereof" refers directly to its antecedent – an action that a deceased person was entitled to bring. A person is not entitled to bring an action if one has not accrued. Tarnavsky, 2003 ND at ¶ 9, 665 N.W.2d at 22 (stating that "[a] cause of action accrues when the right to commence the action comes into existence and can be brought in a court of law without being dismissed for failure to state a claim") (emphasis added). Further, if the first clause did not refer to an already-accrued cause of action, the second clause would be nonsensical, thus requiring an impermissible construction. This is so for two reasons. First, this Court has construed this provision as potentially extending the time within which a survival action may be commenced, not when it might accrue. Hulne, 322 N.W.2d at 476. The time for commencing an action cannot be extended if the time is not already running. Nothing about the extension statute suggests that the legislature intended for accrual to languish indefinitely after death. Second, the provision applies to actions commenced after expiration of the period of limitations. A cause of action cannot reach expiration without first accruing. In short, Section 28-01-26, when read in conjunction with the survival statute itself, shows that the legislature intended for a survival action to accrue no later than the injured person's death.

[¶ 42] Finally, in light of the rationale for this Court's holding that a wrongful death cause of action accrues at the time of death, the plaintiff can offer no reasoned basis

for allowing a survival action to accrue after death. Sheets, 292 N.W.2d at 67 (stating that wrongful-death cause of action accrues at time of death); Ness v. St. Aloisius Hosp., 301 N.W.2d 647, 652 (N.D. 1981) (same). Succinctly stated, the rationale for the rule for wrongful-death actions is this: "The discovery rule applicable in malpractice actions does not apply to wrongful death actions because it is the fact of death itself which should indicate a starting point for inquiry regarding a cause of action for wrongful death." Krueger v. St. Joseph's Hosp., 305 N.W.2d 18, 23 (N.D. 1981); see also, Pastierik v. Duquesne Light Co., 526 A.2d 323, 327 (Pa. 1987) (stating that "death is a definitely ascertainable event, and survivors are put on notice that, if an action is to be brought, the cause of action must be determined through the extensive means available at the time of death"). In other words, the discovery rule is intended to benefit the injured person during his lifetime, and the rationale for the rule ceases when the person dies. The fact of death should as much lead to inquiry regarding the cause of death, regardless whether the inquiry is meant to learn the cause of death as a basis to maintain a wrongful-death action or as a basis to maintain a survival action. Granted, wrongful-death actions are different because they always accrue at the time of death, while a survival action can accrue before death. But consistent and sustained reasoning requires the conclusion that a survival cause of action can accrue no later than the time of death, thus giving the injured person the benefit of a discovery rule during his lifetime, while upholding the Court's longstanding rationale that the fact of death should prompt an inquiry into the cause of death. See also, Greene v. CSX Transp., Inc., 843 So.2d 157, 163 (Ala. 2002) (rejecting post-death discovery rule for survival actions and stating that "[u]nder such a rule, liability for the wrongful death of an employee would be extinguished three years after

the death of the employee, while liability for the personal injury of that same employee could be held in abeyance indefinitely") (all emphasis in original).

[¶ 43] In sum, the legislative purpose for North Dakota's survival statute was to overrule the common law of abatement and thereby allow causes of action already recognized and in existence at the time of death to continue in existence rather than abate. The legislature's use of the term "abate" and this Court's construction of the statute as "continu[ing] in existence an injured person's claim after death as an asset of the estate . . ." permit only the conclusion that a survival action can accrue no later than the injured person's death. Because plaintiff commenced this survival action some nine years after Allen Mertz's death – well beyond expiration of the longest period of limitations for which the plaintiff argues – it is time-barred as a matter of law, thus also requiring affirmance on this alternative ground.

B. [¶ 44] **Public policy supports the rule that a survival action can accrue no later than the injured person's death.**

[¶ 45] Not only would delayed accrual contradict legislative intent and this Court's rulings, it would defeat the public policy underlying statutes of limitations. See Narum v. Faxx Foods, Inc., 1999 ND 45, ¶ 21, 590 N.W.2d 454 (stating that "[t]he public policy behind statutes of limitations is to prevent the litigation of stale claims when, through the lapse of time, evidence regarding the claim has become difficult to procure or even lost entirely"). Indeed, so long as a beneficiary of the deceased's estate remained alive, and the personal representative had yet to discover a causal connection between the death and exposure to asbestos, accrual of a survival action could remain in abeyance. See Greene, 843 So.2d at 163 (discussing a scenario, which it called "absurd," that would allow the period of limitations for survival actions to be tolled for six decades); Pastierik,

526 A.2d at 325 (rejecting post-death discovery rule for survival actions in part because doing so "would greatly expand, theoretically to infinity, the time period during which . . . [survival] . . . actions could be brought"). No basis exists in the statute, in the common law, or in the public policy of North Dakota for adopting such a rule. The rule that is consistent with each of those things is the rule that a survival action can accrue no later than the injured person's death. This Court should so hold and thereby affirm the district court's order dismissing this case as barred by the statute of limitations.

CONCLUSION

[¶ 46] Reasonable minds can draw but one conclusion from Allen Mertz's medical records: Allen Mertz knew, or as a reasonable person should have known, as early as 1995, that his lung cancer was related to his exposure to asbestos. But even if this Court determines that this inquiry involves factual determinations inappropriate for summary judgment determination, this Court should affirm the district court's grant of summary judgment because plaintiff's survival action could accrue no later than Allen Mertz's death. As such, plaintiff failed to commence her survival action in a timely manner and this Court should affirm the district court's November 18, 2008 order and corresponding judgment dismissing plaintiff's complaint against all moving and nonmoving defendants on statute of limitations grounds.

Respectfully submitted,

Dated: June 3, 2009

By /s/ William M. Hart

William M. Hart
David T. Schach, ND No. 06491
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

Attorneys for United Conveyor Corporation and S.O.S. Products Company, Inc.

Dated: June, 3, 2009

By /s/ Robert E. Diehl

Kyle B. Mansfield, ND No. 04723
Robert E. Diehl, MN No. 175134
Heather H. Neubauer, MN No. 321606
Elizabeth M. Sorenson Brotten, ND No. 06521
Foley & Mansfield, P.L.L.P.
250 Marquette Avenue, Suite 1200
Minneapolis, MN 55401
Telephone: (612) 338-8788

Attorneys for A.H. Bennett Company, Foster Wheeler L.L.C., Greene, Tweed and Company, Riley Stoker Corporation, Rite-Hite Corporation, Saint-Gobain Abrasives, Inc. (f/k/a Norton Company), Singer Safety Company, and Weil-McLain

[¶ 47] CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure because it contains 7,485 words, excluding words in the table of contents and table of citations. This brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type style requirements of Rule 32(a)(6) of the North Dakota Rules of Appellate Procedure because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 12-point Times New Roman font.

Dated: June 3, 2009

By /s/ William M. Hart
William M. Hart
David T. Schach, ND No. 06491
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

Attorneys for United Conveyor Corporation and S.O.S. Products Company, Inc.

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By /s/ Robert E. Diehl
Kyle B. Mansfield, ND No. 04723
Robert E. Diehl, MN No. 175134
Heather H. Neubauer, MN No. 321606
Elizabeth M. Sorenson Brotten, ND No. 06521
Foley & Mansfield, P.L.L.P.
250 Marquette Avenue, Suite 1200
Minneapolis, MN 55401
Telephone: (612) 338-8788

Attorneys for A.H. Bennett Company, Foster Wheeler L.L.C., Greene, Tweed and Company, Riley Stoker Corporation, Rite-Hite Corporation, Saint-Gobain Abrasives, Inc. (f/k/a Norton Company), Singer Safety Company, and Weil-McLain

[¶ 48] **CERTIFICATE OF SERVICE VIA EMAIL**

A copy of this document was e-filed with the North Dakota Supreme Court and served upon all counsel of record shown below, pursuant to Administrative Order 14 on the 3rd day of June, 2009. Specifically, the preceding Brief of Defendants/Appellees was electronically filed and served as follows:

The North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

Jeanette Boechler
lboec@aol.com

David T. Thompson
dct@rrv.net

Ronald H. McLean
rmclean@serklandlaw.com

Scott Jensen
sjensen@camrudlaw.com

Steven A. Storslee
sstorslee@storsleelaw.com

/s/ Elizabeth M. Sorenson Brotten
Elizabeth M. Sorenson Brotten