

20090031

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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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

REPLY BRIEF OF PLAINTIFF/APPELLANT

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REPLY ARGUMENT

A. The defendants' argument that a survival action may not *accrue* after a person's death is without merit because: (1) it ignores the touchstone North Dakota Supreme Court precedent of *Hulne v. International Harvester*, construing the survival action provided by N.D.C.C. § 28-01-26.1 while distinguishing survival actions from wrongful death actions in this jurisdiction; and (2) it ignores compelling authority from other jurisdictions holding that survival actions *may accrue* following the point of a decedent's death.

i. North Dakota's six-year limitations period of N.D.C.C. § 28-01-16(1) applies to personal injury-based survival actions.

¶ 1. Survival actions are substantively established by N.D.C.C. § 28-01-26.1,

which provides as follows:

28-01-26.1 Survival of claims for relief.

No action or claim for relief, except for breach of promise, alienation of affections, libel, and slander, *abates by the death of a party or of a person who might have been a party had such death not occurred.* (*emphasis added*).

¶ 2. It is well-established here in North Dakota that survival action claims for personal injuries are governed by our general six-year statute of limitations of N.D.C.C. § 28-01-16(1). *Hulne v. International Harvester Company*, 322 N.W.2d 474, 475-477 (N.D. 1982) [*"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 Section 28-01-16, N.D.C.C. . . . 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)*].

¶ 3. 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*, 467 N.W.2d 730, 736 (N.D. 1991).

¶ 4. As the Supreme Court noted in *Goodleft v. Gullickson*, 556 N.W.2d 303, 310 (N.D. 1996), the Court’s foundational decisions in *Hulne v. International Harvester*, *supra*, 322 N.W.2d at 475-477, and *Sheets v. Grayco, Inc.*, 292 N.W.2d 63, 66-67 (N.D. 1980), are those authorities which delineate the critical differences between wrongful death claims and survival action claims in North Dakota.¹

¹Indeed, as the Supreme Court explained in *Sheets v. Grayco, Inc.*, *supra*:

Conceptually, survival actions are quite different from wrongful death actions. Each provides a separate and distinct remedy for a different kind of loss. Wrongful death actions are intended to compensate the survivors of the deceased for the losses they have sustained as the result of a wrongful killing. . . . **Survival statutes, on the other hand, are remedial in nature, and are intended to permit recovery by the representatives of the deceased for damages the deceased could have recovered had he lived.**” Section 28-01-26, N.D.C.C. (footnote omitted). See, Section 28-01-26.1, N.D.C.C. (emphasis added).

¶ 5. However, the defendants’ argument displays a misunderstanding of the vital distinctions – *as between survival action claims and wrongful death action claims* – which the North Dakota Supreme Court took great care to explain at length in *Hulne* and *Sheets* – particularly with respect to the different statutes of limitations which this Court has held are applicable to survival action claims – versus wrongful death action claims. *See, Hulne v. International Harvester Company, Inc., supra*, 322 N.W.2d at 477 (the six-year period of N.D.C.C. § 28-01-16(1) for survival action claims), and *Sheets v. Grayco, Inc., supra*, 292 N.W.2d at 66-67 (the two-year limitations period of N.D.C.C. § 28-01-18(4), running strictly from the date of death).²

292 N.W.2d at 66-67.

²Ignoring the substance of the Supreme Court’s decision in *Hulne v. International Harvester and Sheets v. Grayco, Inc.*, particularly the Court’s careful explanation of the fundamental differences between wrongful death claims and survival claims in this jurisdiction, the defendants mistakenly argue in ¶ 42 of their brief that “the rationale for this Court’s holding that a wrongful death cause of action accrues at the time of death” should necessarily mean that survival action claims accrue at the time of a person’s death. It is respectfully submitted that this argument disregards the intrinsically distinct nature of a personal injury *survival action* claim, as opposed to that of a *wrongful death* claim.

In fact, the defendants incorrectly rely upon this Court’s decision in *Krueger v. St. Joseph’s Hospital*, 305 N.W.2d 18 (N.D. 1981), **a case which involved wrongful death claims only, and did not even address survival claims at all.** The defendants similarly incorrectly rely upon this Court’s decision in *Ness v. St. Aloisius Hospital*, 301 N.W.2d 647 (N.D. 1981), **a case in which this Court specifically determined that survival action claims had not been plead, with the Court therein implying that it would have reached a different result if survival action claims had been included in that case.** *See, Ness v. St. Aloisius Hospital, supra*, 301 N.W.2d at 652.

In contrast – as all parties agree – the instant case involves survival action claims only, and no wrongful death claims.

ii. **Personal injury survival claims may *accrue after* a person’s death.**

¶ 6. In their briefing, the defendants decline to advise this Court of the compelling authority of the unanimous Washington Supreme Court asbestos litigation decision in *White v. Johns Manville Corp.*, 693 P.2d 687, 695-697 (Wash. 1985)³, wherein that Court held as follows:

Survival Actions

A

Defendants argue the discovery rule is inapplicable to survival action on the grounds that a survival action “accrues” at the time of the decedent’s death, the time at which the personal representative has a duty to inquire into the causes of the decedent’s death. ***The plaintiff, on the other hand, argues the claimant in a survivorship action merely steps into the shoes of the decedent and should, therefore, have the benefit of the discovery rule. We agree with the plaintiff.***

B

The survivorship statutes applicable to the present case are RCW 4.20.046, .050, and .060. RCW 4.20.046(1), the general survival statute provides:

³In *White*, the Washington Supreme Court addressed Washington’s ***survival action statute*** [RCW § 4.20.046(1)] which is analogous in language to North Dakota survival statute of N.D.C.C. § 28-01-26.1. *White v. Johns Manville, supra*, 693 P.2d at 695-697. Significantly, in a separate part of its opinion, the Court in *White* also addressed Washington’s *wrongful death* statute, which – unlike North Dakota’s *wrongful death* statute – did not provide that *wrongful death* claims “accrue” at the time of the decedent’s death. The Washington Supreme Court in *White* in its separate *wrongful death* claim discussion referred to the ***wrongful death claim-only*** decision of the North Dakota Supreme Court in *Krueger v. St. Joseph’s Hospital, supra*, recognizing that this Court in *Krueger* observed that “the North Dakota (*wrongful death*) statute” mandated that the limitations period for *wrongful death* claims must run from the date of death. *White v. Johns Manville Corp., supra*, 693 P.2d at 691-692.

All causes of action by a person against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter . . .

The Washington survival statute contains no express statute of limitation nor does it indicate the time at which a cause of action “accrues”. Cf. Colo. Rev. Stat. § 13-21-204 (Supp. 1984) (survival action must be brought “within two years after the commission of the alleged negligence . . . or within one year after the death for which suit is brought, whichever is later”); R.I. Gen. Laws § 10-7-7 (Supp. 1984) (actions shall be commenced within 3 years after death).

We decline defendants’ invitation to rule either that, as a matter of law, a survivorship action “accrues” at the time of death, or is barred if it was not actually or constructively discovered by the decedent during his lifetime. Wooldridge v. Woolett, 96 Wn. 2d 659, 662-63, 638 P.2d 566 (1981). Defendants confuse the existence of a cause of action and the accrual of a cause of action; while the plaintiff in the present case may have been injured by defendants during his life, his cause of action did not accrue unless he discovered, or should have discovered, the cause of his injuries. See Sahlie v. Johns-Manville Sales Corp, 99 Wn. 2d 550, 554-55, 663 P.2d 473 (1983). Since the decedent would have benefitted from the discovery rule had he not died, his representatives should likewise benefit from it: what survives to the personal representatives are not only the decedents’ ripe causes of action but include their potential causes of action which may not have accrued at the time of death.

Our decision to apply the discovery rule to survivorship actions finds support in *Eisenmann v. Cantor Bros.*, 567 F.Supp. 1347 (N.D. Ill. 1983).

The *Eisenmann* court rejected the holding of *McDaniel v. Johns-Manville Sales Corp.*, *supra*, in which the court refused to apply the discovery rule to survivorship actions. The *Eisenmann* court noted:

While it is true that the [wrongful death and survivorship] Acts provide for different types of damages, the two causes of action are similar in their fundamental respects. The elements of both causes of action are essentially the same, as are the defenses

generally available. Additionally, experience teaches us that both causes of action are predicated on the same set of operative facts. If, as is manifest, Mr. Eisenmann would have had the benefit of the discovery rule if he brought a tort action in his own name, neither policy nor logic will support a contrary result due to his death.

Eisenmann at 1353.

We concur with the views expressed in *Eisenmann*. **The date of death in a case involving an invidious occupational disease does not necessarily mark the time at which the claimants knew or should have known the cause of the deceased's death, this always may be proved at trial.**

A survivor takes the rights of the decedent – no more and no less. Therefore, if the decedent would have had a cause of action during his lifetime, but for the invidious nature of his disease and his inability to link the injury to the wrongdoer, then that cause of action, when discovered, should survive his death.

Eisenmann at 1354.

We answer the second part of the federal court's certified question in the affirmative and **hold the discovery rule applies to survival actions. The statute of limitation pertinent to a survival action commences at the earliest time at which the decedent or his personal representatives knew, or should have know, the causal relationship between the decedent's exposure to asbestos and his ensuing disease.** (emphasis added).

693 P.2d at 695-697.

¶7. The decisional law of the North Dakota Supreme Court makes clear that this unanimous holding of the Washington Supreme Court in *White v. Johns Manville Corp.*, *supra*, is the authority which should be considered most persuasive and compelling in the instant case.

¶ 8. For example, in *BASF Corporation v. Symington*, 512 N.W.2d 692, 695 (N.D. 1994), the Supreme Court explained as follows:

Ordinarily, the statute of limitations commences to run from the commission of a wrongful act giving rise to the cause of action. See, *Fox v. Higgins*, 149 N.W.2d 369 (N.D.), *cert. denied*, 389 U.S. 873, 88 S.Ct. 160, 19 L. Ed. 2d 153 (1967). In a products liability case, the general rule is that the cause of action accrues “at the time of injury.” *Erickson v. Scotsman, Inc.*, 456 N.W.2d 535 (N.D. 1990). **However, when a case involves a latent injury, which only manifests itself through the passage of time, we apply the “discovery rule” for determining when the cause of action accrues.** *Id.*; see also *Froysland v. Altenburg*, 439 N.W.2d 797 (N.D. 1989). **Under the discovery rule, the action does not accrue and the limitations period does not begin to run until the claimant knows, or with reasonable diligence should know, that a potential claim exists.** *Osland v. Osland*. 442 N.W.2d 907 (N.D. 1989). (*emphasis added*).

512 N.W.2d at 695.

¶ 9. Similarly, in *Hebron Public School v. U.S. Gypsum*, 475 N.W.2d 120, 126 (N.D. 1991) – an asbestos property damage litigation case – the Court stated:

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

¶ 10. Under these circumstances, and particularly within the specific context of the North Dakota Supreme Court’s discussion of the applicability of North Dakota’s six-year limitations period of N.D.C.C. § 28-01-16 in *Hulne v. International Harvester Company*, *supra*, 322 N.W.2d at 475-477, it is respectfully submitted that the rule and holding of the Washington Supreme Court in *White v. Johns Manville*

Corp., supra, relative to the subject of “accrual” of a survival action after a person’s death, is the rule which should be applied here in the instant case.

B. The six-year limitations period of N.D.C.C. § 28-01-16(1) – *not* the “dead letter” three-year statute of N.D.C.C. § 28-01.3-08(4) – applies in the instant case asbestos-related product liability survival action.

¶ 11. In their motion for summary judgment in the proceedings below, the defendants stated that, “(f)or the purposes of this motion, we will assume that a six-year statute of limitations will apply.” (*emphasis added*). **Appendix** at page 178.

¶ 12. 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.*

¶ 13. Given this posture, briefing on this issue before the District Court was limited.

¶ 14. However, because the defendants appear to now be asserting their entitlement to the three-year limitations period of the “arm-without-a-body” judicially-superseded statute of N.D.C.C. § 28-1.3-08(4), the plaintiff hereby references Paragraphs 72-74 of her main brief, and the following stated authorities. *Dickie v. Farmers Union Oil Company*, 2000 ND 111 ¶¶ 4-9, 611 N.W.2d 168, 170-172 (N.D. 2000); *Hanson v. Williams County*, 389 N.W.2d 319, 328 (N.D. 1986); *BASF Corp. v. Symington, supra*, 512 N.W.2d at 695; and *Erickson v. Scotsman, Inc.*,

supra, 456 N.W.2d at 537-538.

¶ 15. Finally, it is submitted that this result is compelled by the legislative history attendant to N.D.C.C. § 28-01.3-08(3), and its identical statutory ancestor, former N.D.C.C. § 28-01.1-02(4). *See, the legislative history of these statutes, included at Appellants' Supplemental Appendix at pages 331-435.*

Dated this 29th day of July, 2009.

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