20100029

FILED
IN THE OFFICE OF THE
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JUNE 22, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Joseph M. Vicknair, et. al.	)	
	)	
Plaintiffs/Appellants,	)	
	)	Supreme Court No.: 20100029
vs.	)	
	)	
Phelps Dodge, et. al.	)	
	)	
Defendants/Appellees.	)	

Appeal From Amended Judgment Entered December 18, 2009

In the District Court, South Central Judicial District

Morton County

BRIEF OF APPELLANTS

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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 21, 2010, by thirteen (13) asbestos-related product liability action plaintiffs – all of whose cases were dismissed by the District Court – exclusively upon statute-of-limitations grounds.

¶ 2. Parenthetically, it should be noted that the current appeal represents the *second occasion* in which these cases reached the North Dakota Supreme Court – *within the temporal space of a matter of months* – following summary dismissals ordered by the Honorable Robert O. Wefald in these Morton County actions, in which discovery proceedings have never been permitted to commence – where the progression of these cases has been preempted by successful dispositive motions filed by asbestos company defendants.

¶ 3. On June 29, 2009, the Supreme Court decided *Vicknair v. Phelps Dodge Industries, Inc.*, 2009 ND 113, 767 N.W.2d 171 (N.D. 2009) [*referenced herein variously as "**Vicknair I**"*], in which the Supreme Court *reversed* an Order of the District Court which had uniformly – *albeit erroneously* – dismissed each of these plaintiffs' claims upon supposed *forum non conveniens* grounds.[1]

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[1]It should be noted that two (2) of the plaintiffs who were included in the prior North Dakota Supreme Court proceedings of *Vicknair v. Phelps Dodge Industries, Inc.*, 2009 ND 113, 767 N.W.2d 171 (N.D. 2009) – John Sehr and Patrick Blando – were ***not*** included in the underlying motion for summary judgment which preceded the District Court's December 9, 2009, (filed December 11, 2009), "Order Granting Motion for Summary Judgment" which comprises the subject matter of the current appeal. *See, also, the Order to Amend Judgment dated December 17, 2009, and the Amended Judgment of Dismissal dated and filed December 18, 2009, said documents*

¶ 4. By way of background, each of the plaintiffs/appellants commenced their asbestos-related product liability actions within the context of two (2) multiple-plaintiff complaints which were filed in Morton County and served upon the named defendants back in December of the year 2002. See, the Complaints and Affidavits of Service in, respectively, *Charles Allen, et. al. v. 999 Quebec, Inc., et. al.*, Morton County Civil No.: 02-C-1680 [**Appendix** at pages 10-19] and *Marliss Anderson, et. al. v. 999 Quebec, Inc., et. al.*, Morton County Civil No.: 02-C-1681 [**Appendix** at pages 31-52].

¶ 5. All of the plaintiffs/appellants in the instant appeal are residents of states other than North Dakota, who commenced their civil actions in North Dakota as transitory actions – naming as defendants therein defendant asbestos product manufacturers which were corporate residents of various states, including North

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being included at **Appendix** *pages 73-74*. By the same District Court Order in which summary judgment on statute of limitations grounds was filed on December 11, 2009, (**Doc. No. 105**), the John Sehr and Patrick (*for decedent Wendell*) Blando cases were ***severed*** from the multiple-plaintiff District Court file in *Joseph M. Vicknair, et. al. v. Phelps Dodge Industries, Inc., et. al.,* Civil No.: 30-08-C-350. *See, the District Court's Severance Order (**Doc. No.: 101**), at Slip Opinion pages 2-3,* **Appendix** at *Pages 65-66*, wherein the District Court stated as follows:

ORDER SEVERING DEFENDANTS
NOT SUBJECT TO MOTION

> On the motion of counsel for Phelps Dodge Industries, Inc., the cases of the plaintiffs John Sehr and Patrick Blando, Personal Representative of the Estate of William (*sic, apparently meaning Wendell*) Blando are hereby SEVERED. The Clerk of Court will set up a new file for the cases of these two plaintiffs. (*bold and capitalization emphasis in original*).

Dakota.

¶ 6. The procedural progression of these 2002-filed cases was stalemated by three successive decisions by the Honorable Robert O. Wefald between July 7, 2005, and June 25, 2007, in which the District Court summarily dismissed the claims of the current plaintiffs/appellants upon purported *forum non conveniens* grounds.

¶ 7. The *forum non conveniens*-based dismissals of these plaintiffs'/appellants' cases were effectuated by the following orders: (1) the first order (*addressing the claims of eleven (11) plaintiffs*) entered by the District Court on July 7, 2005 (*sic* dated "June 7, 2005")[2]; (2) the second order (*addressing the claims of plaintiffs Robert W. Ulshafer and Rona Pourier - for decedent Hobert Ecoffey*) entered by the District Court on August 4, 2006[3]; and (3) the third order (*addressing the claims of plaintiffs John Sehr and Wendell Blando*) entered on June 25, 2007.[4]

¶ 8. Eventually, these *forum non conveniens*-based dismissal orders of the District Court were appealed to the North Dakota Supreme Court, which on June 29, 2009 in "***Vicknair I***", reversed all three of these Orders in *Vicknair v. Phelps Dodge*

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[2]See, "Order on Motions", entered by the District Court on July 7, 2005 (*sic* dated "June 5, 2005"), a copy of which Order being attached hereto along with the "Second Amended Judgment", entered and filed on September 23, 2005, *said documents being included at* **Appendix** *pages 105-120*.

[3]See, "Order on Motion for Dismissal on *Forum Non Conveniens*", entered by the District Court on August 4, 2006.

[4]See, "Order Partially Granting and Partially Denying Motions for Summary Judgment", entered by the District Court on June 25, 2007.

Industries, Inc., 2009 ND 113, 767 N.W.2d 171 (N.D. 2009), and remanded these cases back to the District Court "for further proceedings." *Id.*, 2009 ND 113 at ¶ 14, 767 N.W.2d at 180.

¶ 9. Following denial by the Supreme Court of a Petition for Rehearing in *Vicknair v. Phelps Dodge Industries, Inc., supra,* on July 31, 2009, the Mandate was issued in that prior appeal on August 13, 2009, and the receipt for the case file upon remand was signed by the Clerk of the District Court in Morton County on August 18, 2009.

¶ 10. Before any Rule 16 Case Management/Scheduling Conference could be convened by the District Court following this remand, the unsuccessful appellee in *Vicknair v. Phelps Dodge Industries, Inc., supra,* filed a motion for summary judgment upon alleged statute of limitations grounds in all of these cases on September 15, 2009, less than a month after the District Court Clerk had received the file back from the Supreme Court. (**Doc. Nos. 54-58**).

¶ 11. Nowhere within the Phelps Dodge motion papers – including the 303-page spiral-bound "Appendix" which it filed in connection with that motion – did defendant Phelps Dodge acknowledge to the Court that back in 2005, it previously had prosecuted an ***unsuccessful*** motion for summary judgment on statute of limitations grounds ***in these very cases*** – ***while relying upon the Uniform Conflict of Law-Limitations Act grounds*** – and that the District Court, in an opinion authored by the Honorable Robert O. Wefald, had ***denied*** this motion in an Order entered on

July 7, 2005. *See, "Order On Motions", slip opinion at pages 2 and 5-7, entered July 7, 2005, referenced at "Second Amended Judgment", and "Order for Second Amended Judgment", said documents being included as* **Appendix** *pages 105-120*. See, also, the docket of *Joseph Vicknair v. Phelps Dodge Industries, Inc., et. al.*, Morton County Civil No.: 02-C-1680 at **Docket Entries Nos.: 237** ("Order on Motions", July 7, 2005); and **151-152** "Phelps Dodge Industries, Inc.'s Motion for Summary Judgment on the Basis of Statute of Limitations", March 28, 2005.[5]

¶ 12. As stated hereafter, the plaintiffs/appellants submit that the statute-of-limitations arguments of defendant Phelps Dodge Industries, Inc., are as devoid of merit as this Court found them to be when it rejected these same arguments back on July 7, 2005 – when the District Court ***denied*** an identical motion made by Phelps Dodge for summary judgment upon supposed statute of limitations grounds under the Uniform Conflict of Laws – Limitations Act.[6]

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[5]See, also, the companion case in which defendant Phelps Dodge Industries, Inc. also filed its prior ***unsuccessful*** motion for summary judgment upon statute of limitations grounds in *Ray Brunet, et.al. v. Phelps Dodge Industries*, Morton County Civil No.: 02-C-1681. *See, "Order On Motions", slip opinion at pages 2 and 5-7, entered July 7, 2005, referenced at "Second Amended Judgment", and "Order for Second Amended Judgment", said documents being included at* **Appendix** pages ***. See, also, the docket of *Ray Brunet, et. al. v. Phelps Dodge Industries, Inc., et. al.*, Morton County Civil No.: 02-C-1680 at **Docket Entry No.: 139** ("Order on Motions", July 7, 2005). **Appendix** *at pages ****.

[6]It is a matter of record in these very cases that these same plaintiffs served (*on June 10, 2005*) and filed (*on June 13, 2005*) briefing which contained substantial argument and legal authority in opposition to this identical previous motion by defendant Phelps Dodge Industries, Inc. for summary judgment dismissal of the plaintiffs' claims – supposedly upon Uniform Conflict of Laws - Limitations Act grounds. See, the "Memorandum of Plaintiffs in Response to 'Supplemental Brief'

¶ 13. Referring to the fact that the current Phelps Dodge motion for summary judgment upon supposed statute-of-limitations grounds was filed by this defendant less than a month after the mandate of the Supreme Court in ***"Vicknair I"*** had become final – counsel for the Vicknair plaintiffs stated to the District Court that any motion for dismissal on Uniform Conflict of Laws-Limitations Act [N.D.C.C. Chapter 28-01.2-02] grounds would necessarily be ***fact-driven***. *See, "Memorandum of Plaintiffs in Response to Motion by Defendant Phelps Dodge, Inc. for Summary Judgment Upon Supposed Statute of Limitations Grounds Under the Uniform Conflict of Laws – Limitations Act", included at* **Appendix** *page 79.*

¶ 14. In their briefing in opposition to this new Uniform Conflict of Laws – Limitations Act motion for summary judgment by Phelps Dodge, the *Vicknair* plaintiffs stated as follows:

> Specifically, as is evident from the succeeding substance of this memorandum, any motion for dismissal on Uniform Conflict of Laws-Limitations Act [N.D.C.C. Chapter 28-01.2-02] grounds would necessarily be ***fact-driven***.
>
> In this context, it should first be noted that – no appreciable discovery has taken place in the majority of the above-captioned plaintiffs' cases: **(1)** because these actions were dismissed by the Court on *forum non conveniens grounds;* and **(2)** these cases were only recently remanded to the District Court by the North Dakota Supreme Court after the appellate decision addressing these *forum non conveniens* issues in *Joseph M. Vicknair, et. al. v. Phelps Dodge Industries, Inc., et. al.*, 2009 ND 113, 767 N.W.2d 171 (N.D. June 29, 2009).

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of Defendant Phelps Dodge, Inc. Relative to the Phelps Dodge Motion for Summary Judgment on Supposed Statute of Limitations Grounds", *Vicknair, et. al. v. Phelps Dodge Industries, Inc., et. al.*, Morton County Civil No.: 02-C-1680 **Docket Entry Nos. 227-228**, a copy of which memorandum being included at **Appendix** *pages 253*.

> ***Not only should the above-captioned cases be given a case management/scheduling conference pursuant to Rule 16, N.D.R.Civ.P., but such a scheduling and planning conference is hereby requested by the undersigned counsel for the plaintiffs pursuant to Rule 16(b)(4), N.D.R.Civ.P., and the conduct of such a conference is thus mandatory***.
>
> Because any honest consideration of N.D.C.C. § 28-01.2-04 [of the Uniform Conflict of Laws-Limitations Act] necessarily implicates case-specific and plaintiff-specific factual inquiries – it is respectfully submitted that the plaintiffs must be granted a reasonable opportunity to conduct discovery in opposition to a summary judgment motion upon statute-of-limitations grounds before they may be subjected to another attempted summary execution of their claims against defendant Phelps Dodge Industries, Inc. and other "joining" asbestos companies. See, Rule 56(f), N.D.R.Civ.P., and *Aho v. Maragos*, 1998 ND 107, ¶¶ 4-20, 579 N.W.2d 165, 167-169 (N.D. 1998).
>
> Therefore, any consideration of the Phelps Dodge motion for summary judgment upon statute of limitations grounds by the Court of a motion on those grounds should necessarily await the completion of discovery in the instant case, particularly depositions and discovery of the defendants – and even discovery of the plaintiffs and/or decedents' survivors, where appropriate.
>
> Correspondingly, it is respectfully submitted that the Phelps Dodge motion for dismissal of this case on supposed statute of limitations grounds is, at best, premature – and that this motion should either be ***denied***, *on these grounds alone,* ***or*** *that this motion should be* ***deferred*** for consideration by the court at the time that all other dispositive motions shall be addressed by the court in this case, ***following the completion of discovery***. (*bold italicized emphasis in original document as filed with the District Court.*)

See, "Memorandum of Plaintiffs in Response to Motion by Defendant Phelps Dodge, Inc. for Summary Judgment Upon Supposed Statute of Limitations Grounds Under the Uniform Conflict of Laws – Limitations Act", included at **Appendix** *page 79.*

¶ 15. This argument by the Vicknair plaintiffs was not credited by the District Court, as it entered its "Order Granting Motion for Summary Judgment" dated December 9, 2009, and filed on December 11, 2009. *See, "Order Granting Motion for Summary Judgment",* (**Doc. No.: 101**), *included at* **Appendix** *pages 64.*

¶ 16. A Judgment of Dismissal thereafter was entered on December 11, 2009 (**Doc. No.: 102**), [**Appendix** *at page 72*], which was in turn followed by an "Order to Amend Judgment" (**Doc. No.: 107**), [**Appendix** *at page 73*], dated December 17, 2009, (*filed December 18, 2009*), in which the Court directed "that the Judgment be amended to exclude Marliss Anderson from the caption and to specify that it does not include John Sehr's and Patrick Blando's claims." An Amended Judgment of Dismissal [**Appendix** *at page 74*] was then entered on December 18, 2009.

¶ 17. A timely Notice of Appeal from this Final Amended Judgment of Dismissal was filed on January 21, 2010, (**Doc. No.: 113**), and the instant appellate case ensued.

STATEMENT OF FACTS

¶ 18. The instant cases involve the circumstances of the following individuals:

i. Eugene P. Brunet, deceased

> Decedent Eugene P. Brunet worked as a laborer, machinist, and asbestos ceiling tile installer in civilian and United States Navy Ships at the Avondale Shipyards in New Orleans, Louisiana, during the years of 1953 through 1987 and suffered from asbestosis and asbestos-caused pleural disease. *See, the answers of plaintiff Raymond Brunet to the defendants' Set I interrogatories, copies of which were attached as Appendix "A" to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at page 83.*
>
> ***All asbestos related personal injury/survival action and wrongful death claims of decedent Eugene P. Brunet, and/or his***

survivors, were barred by the statute of limitations in Louisiana and any and all other jurisdictions, other than North Dakota. *See, the affidavit of David C. Thompson, attached hereto as* Appendix "B", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at page 83.*

ii. Richard A. Christofretti, deceased

Decedent Richard A. Christofretti was "exposed to asbestos from February 21, 1962, to February 10, 1965, as an electrician when he was in the U.S. Navy onboard USS Blandy", and also "from March 1, 1965 to January 1, 1977, as an equipment installer at Western Electric in Allentown, Pennsylvania. *See, the report of Yasunosuke Suzuki, M.D., and the work history of decedent Richard A. Christofretti, as both documents are attached to the Plaintiffs' Set I Interrogatory Answers of plaintiff Lisa Sangerman, the decedent's surviving daughter, included within* Appendix "A" *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at pages 83-84.*

Richard A. Christofretti died of the invariably fatal "signature" asbestos-caused cancer of mesothelioma. *Id.*

All asbestos related personal injury/survival action and wrongful death claims of decedent Richard A. Christofretti, and/or his survivors, are barred by the statute of limitations in Pennsylvania and any and all other jurisdictions, other than North Dakota. *See, the affidavit of Pennsylvania attorney Robert E. Paul, attached as* Appendix "C", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at pages 83-84* .

iii. William H. Cooper, deceased

Decedent William H. Cooper's father served as a physician in the United States Army, and as a high school graduation gift in the year 1954, the decedent's father arranged for him to have a trip to Europe,

being transported on U.S. Navy ships, where the decedent was exposed to "asbestos dust in the air from the boiler, other machinery, insulation, piping, etc." *See, the work history of decedent William H. Cooper, as attached to the answers of plaintiff (and surviving spouse) Violet Cooper to the defendants' Set I interrogatories, copies of which are attached hereto within* Appendix "A", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at pages 84-85.*

Later, decedent William Cooper served as a radio operator in the United States Air Force, and thereafter worked for Mellon Bank, N.A., in Pittsburgh, Pennsylvania. *Id.*

The decedent died of the asbestos-caused, invariably fatal cancer of mesothelioma, and all asbestos related personal injury/survival action and wrongful death claims of decedent William Cooper, and/or his survivors, are barred by the statute of limitations in Pennsylvania and any and all other jurisdictions, other than North Dakota. *See, the affidavit of attorney David C. Thompson, attached hereto as* Appendix "B", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**].* **Appendix** *at pages 84-85.*

iv. John G. Pastva, deceased

Decedent John G. Pastva died as a result of the asbestos-caused cancer of mesothelioma, after having been exposed to asbestos during the years 1948 through 1983 at an asbestos insulation and refractory product manufacturing plant in Valley Forge, Pennsylvania. *See, the death certificate, pathology report, and work history for decedent John G. Pastva, as such documentary materials are attached to the Plaintiff's Set I Interrogatory Answers, as appended hereto as part of* Appendix "A", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at page 85.*

All asbestos related personal injury/survival action and wrongful death claims of decedent Richard A. Christofretti, and/or

his survivors, are barred by the statute of limitations in Pennsylvania and any and all other jurisdictions, other than North Dakota. *See, the affidavit of Pennsylvania attorney Robert E. Paul, attached hereto as* Appendix "C", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [Morton County Civil No.: 02-C-1680] on March 18, 2005, [**Docket Entries Nos.: 148-149**].* **Appendix** *at page 85.*

v. Eddie Pernell, Sr., deceased

Decedent Eddie Pernell died of asbestos-caused lung (squamous cell) cancer, after having been exposed to asbestos during the years 1956 through 1998 as a longshoreman, engaged in the work of loading and unloading asbestos-containing insulation and roofing materials, and in repairing ships, in the Port of New Orleans, Louisiana. *See, the death certificate, pathology report, and work history for decedent Eddie Pernell, Sr., as such documentary materials are attached to the Plaintiff's Set I Interrogatory Answers, as appended hereto as part of* Appendix "A", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at pages 85-86.*

All asbestos related personal injury/survival action and wrongful death claims of decedent Eddie Pernell, Sr., and/or his survivors, are barred by the statute of limitations in Louisiana and any and all other jurisdictions, other than North Dakota. *See, the affidavit of David C. Thompson, attached hereto as* Appendix "B"**,** *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**].* **Appendix** *at pages 85-86.*

vi. Cromwell W. Swygert, Jr., deceased

Decedent Cromwell W. Swygert, Jr., who died as a result of asbestos-caused mesothelioma, was first exposed to asbestos during the years 1943 through 1945, while serving in the United States Navy, and working as a welder repairing ships at the Pearl Harbor Shipyard in Honolulu, Hawaii. *See, the death certificate, pathology reports, and work history for decedent Cromwell W. Swygert, Jr., as such documentary materials are attached to the Plaintiff's Set I Interrogatory Answers, as appended hereto as part of* Appendix "A", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**].* **Appendix** *at pages 86-87.*

Later, the decedent sustained other additional asbestos exposures as a welder and as an automotive mechanic. *Id.*

All asbestos related personal injury/survival action and wrongful death claims of decedent Cromwell W. Swygert, Jr., and/or his survivors, are barred by the statute of limitations in South Carolina and any and all other jurisdictions, other than North Dakota. *See, the affidavit of David C. Thompson, attached hereto as* Appendix "B", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],***Appendix** *at pages 86-87.*

vii. David D. Todd, deceased

Decedent David D. Todd was exposed to asbestos on Coast Guard ships while serving in the United States Coast Guard during the years 1955 through 1959, and later as a welder, before contracting, and dying as a result of, the fatal asbestos-caused cancer of mesothelioma. *See, the death certificate, pathology reports, and work history for decedent David D. Todd, as such documentary materials are attached to the Plaintiff's Set I Interrogatory Answers, as appended hereto as part of* Appendix "A",*to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**].* **Appendix** *at page 87.*

<u>All asbestos related personal injury/survival action and wrongful death claims of decedent David D. Todd, and/or his survivors, are barred by the statute of limitations in Kansas and any and all other jurisdictions, other than North Dakota</u>. *See, the affidavit of David C. Thompson, attached hereto as* Appendix "B", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at page 87.*

viii. Liborio Zefiretto, deceased

Decedent Liborio Zefiretto was exposed to asbestos, in conjunction with his work as a safety coordinator employed by the New York City Transit Authority during the years 1955 through 1985 with this exposure including contact with asbestos covered electrical cables and asbestos insulating cements. *See, the death certificate, medical reports, and work history for decedent Liborio Zefiretto, as such documentary materials are attached to the Plaintiff's Set I Interrogatory Answers, as appended hereto as part of* Appendix "A", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**].* **Appendix** *at pages 87-88.*

<u>All asbestos related personal injury/survival action and wrongful death claims of decedent Liborio Zefiretto, and/or his survivors, are barred by the statute of limitations in New York, Florida, and any and all other jurisdictions, other than North Dakota</u>. *See, the affidavit of David C. Thompson, attached hereto as* Appendix "B", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [Morton County Civil No.: 02-C-1680] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at pages 87-88.*

ix. Plaintiff Anthony O'Neal Whitaker

Plaintiff Anthony O'Neal Whitaker was exposed to asbestos as a maintenance mechanic working in manufacturing plants in Mississippi, Indiana, and New Jersey, during the years 1960 through 1994, later with Mr. Whitaker contracting the disease of asbestosis, the occupational lung disease from which the plaintiff suffers today. *See,*

the medical reports and work history for Anthony O'Neal Whitaker, as such documentary materials are attached to the Plaintiff's Set I Interrogatory Answers, as appended hereto as part of Appendix "A", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**].* **Appendix** *at page 88.*

<u>All asbestos related personal injury claims of Anthony O'Neal Whitaker, are barred by the statute of limitations in Mississippi, Indiana, and New Jersey, and any and all other jurisdictions, other than North Dakota</u>. *See, the affidavit of David C. Thompson, attached hereto as* Appendix "B", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at page 88.*

x. Plaintiff Joseph M. Vicknair

Joseph M. Vicknair was exposed to asbestos during the years 1950 through 1961 at the Celotex Asbestos Plant in New Orleans, Louisiana, and later contracted the diseases of asbestosis and asbestos pleural disease, from which Mr. Vicknair suffers today. *See, the medical reports and work history for Joseph Vicknair, as such documentary materials are attached to the Plaintiff's Set I Interrogatory Answers, as appended hereto as part of* Appendix "A", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**].* **Appendix** *at pages 88-89.*

<u>All asbestos related personal injury claims of Joseph Vicknair, are barred by the statute of limitations in Louisiana and any and all other jurisdictions, other than North Dakota</u>. *See, the affidavit of David C. Thompson, attached as* Appendix "B", *to the plaintiffs' forum non conveniens brief, dated March 17, 2005, filed with the Court in Vicknair v. Phelps Dodge Industries, Inc., et. al., [**Morton County Civil No.: 02-C-1680**] on March 18, 2005, [**Docket Entries Nos.: 148-149**],* **Appendix** *at pages 88-89.*

<u>ARGUMENT</u>

A. The District Court committed reversible error by granting summary judgment dismissal of the plaintiffs' asbestos-related product liability claims, failing to correctly apply the provisions of N.D.C.C. Chapter 28-01.2-04 as it disregarded defendant Phelps Dodge's burden of proof concerning all of the elements of its purported statute of limitations *affirmative defense*.

¶ 19. As the Supreme Court noted in *Vicknair I*:

> ***The fifteen plaintiffs in this case*** were originally part of a group of individuals who in December 2002 ***commenced two lawsuits in Morton County against manufacturers, sellers, and distributors of asbestos-containing products, claiming they became ill or disabled after being exposed to those products***. ***The defendants are residents of or do business within North Dakota. The fifteen plaintiffs involved in this appeal are residents of states other than North Dakota and do not claim their asbestos exposure occurred in North Dakota***. The defendants moved to dismiss the plaintiffs' claims, arguing North Dakota is an inconvenient forum to conduct the litigation. During the proceedings, counsel for the plaintiffs conceded that 13 of the 15 plaintiffs had missed the statute-of-limitations periods in all jurisdictions except North Dakota when the actions began in December 2002. Counsel for the plaintiffs concede the statute of limitations had expired in the jurisdiction where the claims arose with regard to the remaining two plaintiffs sometime before the defendants moved to dismiss on the basis of *forum non conveniens*. (*emphasis added*).
>
> *Vicknair v. Phelps Dodge Industries, Inc., et. al.*, 2009 ND 113, ¶2, 767 N.W.2d 171 (N.D. 2009) ["*Vicknair I*"].

¶ 20. As stated above, *less than a month* after the mandate in *Vicknair I* had become final, defendant Phelps Dodge Industries, Inc., the unsuccessful appellee in *Vicknair I*, filed a motion for summary judgment upon supposed statute-of-limitations grounds, asserting that in each of these cases – the limitations periods of jurisdictions ***other than North Dakota*** were to be applied by the District Court – to thereby cause dismissal of all of the plaintiffs' claims.

¶ 21. In the proceedings below, the District Court expressed its opinion that the Supreme Court essentially had invited defendant Phelps Dodge Industries' statute-of-limitations-based summary judgment motion by a single sentence near the end of the Court's unanimous opinion in *Vicknair I*[7], wherein the Supreme Court stated:

> Because there are no adequate alternative forums, we conclude the district court abused its discretion in granting the (*forum non conveniens*) motion. Our conclusion that the district court erred in granting the motion to dismiss based on *forum non conveniens* does not necessarily mean North Dakota's applicable statute of limitations will govern in this case. *See* Uniform Conflict of Laws – Limitations Act, *N.D.C.C. ch. 28-01.2.*
>
> *Vicknair v. Phelps Dodge Industries, Inc., et. al.*, 2009 ND 113, ¶13, 767 N.W.2d 171 (N.D. 2009) ["*Vicknair I*"].

¶ 22. In the District Court proceedings below, without focusing in its initial summary judgment motion briefing below upon the section of N.D.C.C. Chapter 28-01.2 which is determinative in these cases – ***N.D.C.C. § 28-01.2-04*** – defendant

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[7]See Paragraph 12, *supra*. *See the Transcript of the proceedings of November 30, 2009, at pages 20-21* (**Appendix** *at pages 232-233*), where the following exchange occurred between the District Court and counsel for the *Vicknair* plaintiffs:

THE COURT:	All right. ***So, Mr. Thompson, didn't the Supreme Court in that last paragraph sort of hint that they really wanted this case back***?
MR. THOMPSON:	***Not at all, Your Honor***.
THE COURT:	Not at all? You don't think they want it back?
MR. THOMPSON:	Not only do I think the Supreme Court doesn't want it back, ***I think that beyond anything else the Supreme Court doesn't want these cases back before there's been a period of discovery***, and I'll discuss that. Bottom line here is that there are a number of issues that impinge upon statute of limitations and reasonable opportunities –
THE COURT:	Let me stop you. . . . (*emphasis added*).

Phelps Dodge argued that a *generalized* North Dakota "Choice of Law" analysis should be employed by the District Court to cause the limitations periods of states ***other than North Dakota*** to be applied – to thereby extinguish the asbestos disease claims of the *Vicknair* plaintiffs as time-barred.

¶ 23. In considering the argument of defendant Phelps Dodge, it is important to consider the structure of the operative sections within North Dakota Century Code Chapter§ 28-01.2 – N.D.C.C. §§ 28-01.2-02, and, the other section directly referenced therein – N.D.C.C. § 28-01.2-04.

¶ 24. N.D.C.C. § 28-01.2-02 provides as follows:

28-01.2-02. Conflict of Laws – Limitation period.

1. ***Except as provided by section 28-01.2-04***, if a claim is substantively based upon:

   a. The law of one other state, the limitation period of that state applies;
   b. The law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this state, applies.

2. The limitation period of this state applies to all other claims.

HISTORY: S.L. 1985, ch. 345, § 2. (*emphasis added)*.

¶ 25. Therefore, from the very beginning of the statutory language of N.D.C.C. § 28-01.2-02 is the important threshold excepting phrase, "***(e)xcept as provided by section 28-01.2-04***".

¶ 26. In their initial summary judgment briefing before the District Court, defendant Phelps Dodge functionally ignored the following vital provisions of

N.D.C.C. §28-01.2-04, which reads as follows:

> ***If the*** **court determines that the** ***limitation period of another state applicable under section 28-01.2-02 and 28-01.2-03 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon,*** or imposes an unfair burden in defending against, ***the claim, the limitations period of this state applies.*** *(emphasis added).*

¶ 27. This section, according to the official comments which accompany the Uniform Act, is expressly designed to apply in those cases in which the limitations period of the state whose substantive law is governing is: (1) "substantially different" from the forum jurisdiction's own limitations period[8]; ***and*** (2) where the other state's shorter limitations period fails to afford a plaintiff, a "fair opportunity" to "sue upon" their claims. *See, Comment, Uniform Laws Annotated, Uniform Conflict of Laws—Limitations Act, § 4.*

¶ 28. While essentially discounting the operation of N.D.C.C. § 28-01.2-04 in their initial summary judgment briefing below, defendant Phelps Dodge argued that application of the "other states'" statutes of limitations was appropriate in the instant

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[8]For example, the Pennsylvania statute of limitations, 42 Pa. C.S. § 5524(8) (2003) provides that a personal injury action related to asbestos exposure "shall be commenced within two years from the date on which the person is informed by a licensed physician that the person has been injured by such exposure . . .".

Clearly, as described at length herein with respect to the Uniform Conflict of Laws-Limitations Act, N.D.C.C. Chapter 28-01.2, particularly N.D.C.C. § 28-01.2-04, Pennsylvania's two (2) year limitations period is "substantially different from the limitation period" here in North Dakota – which is, for personal injury and survival actions, the period of six (6) years, pursuant to N.D.C.C. § 28-01-16(5). See, e.g., N.D.C.C. § 28-01-26.1; *Hulne v. International Harvester Co.*, 322 N.W.2d 474, 477 (N.D. 1982); and *Mertz v. 999 Quebec, Inc.*, 2010 ND 51, ¶¶ 29-45, 780 N.W.2d 446, 458-464 (N.D. 2010) (*Maring, J.*).

asbestos-related product liability litigation.

¶ 29. The applicable North Dakota statute of limitations, found in N.D.C.C. § 28-01-16(5), provides for a six year limitations period, which six-year period has been found by the North Dakota Supreme Court to comprehend and include a common law "discovery rule."[9] See, e.g., *Hebron Pub. Sch. Dist. No. 13 v. United States Gypsum Co.,* 475 N.W.2d 120 (N.D. 1991) (**for purposes of applying a six-year limitations period of N.D.C.C. § 28-01-16(5), a cause of action 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**.)

/i. Legal standards applicable to motions for summary judgment – ***where the summary judgment movant bears the burden of proof at trial relative to the affirmative defense of statute-of-limitations*** **– an**

[9]In the District Court proceedings below, the matter of whether North Dakota's general personal injury six-year limitations period of N.D.C.C. § 28-01-16(5) was to be applied in these cases – rather than the 1985-enacted N.D.C.C. § 28-01.3-08(4) exception to the *now-adjudicated-as-unconstitutional* product liability statute of repose of N.D.C.C. § 28-01.3-08, in light of the Supreme Court's decision in *Dickey v. Farmers Union Oil Company*, 2000 ND 611 N.W.2d 168 (N.D. 2000) – was not a determinative issue, simply because defendant Phelps Dodge flatly argued that based upon North Dakota's conflict-of-laws analysis, foreign states' statutes of limitations were to be applied as to the plaintiffs' claims in these cases.

It should be noted, however, that ever since the Supreme Court's decision in *Dickey v. Farmers Union Oil Company, supra*, every North Dakota District Court to have addressed the subject – including the District Court below in the current proceedings – has held that the effect of *Dickey v. Farmers Union Oil Company* has been to render constitutionally void the "ten-year/eleven-year" product liability statute of repose of N.D.C.C. § 28-01.3-08 – making the asbestos personal injury claim "exception" of N.D.C.C. § 28-01.3-08(4) to be a "dead letter" – or merely a statutory "appendage without a body." Indeed, it has been assumed *arguendo,* by plaintiff and defendant parties alike, that the general six-year personal injury/survival action limitations period of N.D.C.C. § 28-01-16(5) was to be applied to asbestos injury claims – just as it is applicable to all other types of personal injury claims here in North Dakota. *Mertz v. 999 Quebec, Inc.*, 2010 ND 51, ¶ 8, n.1, 780 N.W.2d 446, 452, n. 1 (N.D. 2010) (*Crothers, J.*)

affirmative defense which comprises the very subject matter of the summary judgment motion itself.

¶ 30. In considering the decision of the District Court to grant summary judgment dismissal of the claims of all the plaintiffs in the instant cases, it is essential to first consider the relative positions of the parties plaintiff and defendant, with respect to the matter of which parties bear the burden of proof as to the essential statute-of-limitations issue implicated in these civil actions by the Phelps Dodge motion for summary judgment.

¶ 31. It is well established that "the statute of limitations is an affirmative defense." *Gustafson v. Poitra*, 2008 ND 159, ¶ 7, 755 N.W.2d 479, 482 (N.D. 2008). See, also, Rule 8(c) of the North Dakota Rules of Civil Procedure.

¶ 32. It is equally well established that where a defendant pleads and presents an *affirmative defense* in a civil action, "the burden of proof is on the party raising that defense" at trial. *Peterson v. Ramsey County*, 1997 ND 92, ¶ 10, 563 N.W.2d 103, 106 (N.D. 1997); *Mougey v. Salzwedel*, 401 N.W.2d 509, 513 (N.D. 1987); and *Shirazi v. United Overseas, Inc.*, 354 N.W.2d 651, 654 (N.D. 1984).

¶ 33. The Supreme Court has repeatedly set forth its "well-established" standard for review of summary judgment decisions made by District Courts, stating as follows in this regard:

> ***Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial***. (*emphasis added*).
>
> *Hopfauf v. Hieb,* 2006 ND 72 ¶ 6, 712 N.W.2d 333 (N.D. 2006)

> (quoting *Heart River Partners v. Goetzfried*, 2005 ND 149 ¶ 8, 703 N.W.2d 330) (N.D. 2005).

¶ 34. Of course, in the instant cases, the exclusive purported basis for the summary judgment motion by defendant Phelps Dodge Industries, Inc. is this defendant's contention that the plaintiffs' claims should be dismissed upon Phelps Dodge's ***affirmative defense*** of statute of limitations – an ***affirmative defense*** for which Phelps Dodge unquestionably bears the burden of proof at trial.

¶ 35. Therefore, where the exclusive basis for the Phelps Dodge summary judgment motion is this defendant's assertion of its ***affirmative defense*** of statute of limitations – ***Phelps Dodge not only bears the "initial burden of establishing the absence of any genuine issues of material fact"[10], but in this situation also has the burden of proof as to all elements of the statute of limitations defense as well***.

¶ 36. The Sixth Circuit explained in a factual context similar to that in the current appellate record of *Vicknair II* – in *Fonseca v. Consolidate Rail Corporation*, 246 F.3d 585, 590-591 (6th Cir. 2001) as follows:

> Both parties argue in their briefs about whose burden it was to proffer relevant medical evidence supporting or disputing the separateness of Fonseca's daily discomforts and later continuous pain. Although such evidence would have been helpful, it was not required as a matter of law. ***A party who moves for summary judgment "bears the initial***

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[10]See, *Sime v. Tvenge Associates Architects & Planners, P.C.*, 488 N.W.2d 606, 608 (N.D. 1992) ["(T)he initial burden of establishing the absence of any genuine issues of material fact lies with the summary judgment movant."]; *Jose v. Norwest Bank North Dakota, N.A.*, 1999 ND 175, ¶ 7, 599 N.W.2d 293, 296 (N.D. 1999) [same]; and *Arnegard v. Cayko*, 2010 ND 83, ¶ 5, __ N.W.2d __ (N.D. May 11, 2010) ["the party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact . . ."].

> ***burden of showing the absence of a genuine issue of material fact***." *Johnson v. United States Postal Serv.*, 64 F.3d 233, 236 (6h Cir. 1995). ***Furthermore, Conrail has the burden of proof on all affirmative defenses, such as the statute of limitations***. See, *Campbell v. Grand Trunk W. R.R. Co*., 238 F.3d 772, 775 (6th Cir. 2001); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) ("The inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.") ***Thus, if Conrail failed to meet its burden of proof, Fonesca had no obligation to proffer any additional evidence in order to rebut the statute of limitations defense***. (*emphasis added*).
>
> 246 F.3d at 590-591

¶ 37. Where, in such as in the instant cases, defendant Phelps Dodge Industries "has the burden of proof on all affirmative defenses", such a "party moving for summary judgment on the basis of an affirmative defense may not meet that burden merely by pointing to the absence of evidence supporting the non-moving parties claim. Rather, such a defendant must demonstrate that there are no genuine issues of material fact concerning the elements of the affirmative defense." *Taylor Building Corporation of America v. Benfield*, 507 F. Supp. 2d 832, 837 (S. D. Ohio 2007). See, also, *Ebbert v. Daimler Chrysler Corporation*, 319 F.3d 103, 108 (3rd Cir. 2003); *Christiansen v. Union Pacific Railroad Company,* 136 P.3d 1266, 1271 (Utah App. 2006); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d. 842, *** (Tex. App. 2005); and *David L. Smith & Associates v. Keane Landscaping, Inc.,* 2006 Tex. App. LEXIS 9870, **3-4 (Tex. App. November 15, 2006).

/ii. The District Court erroneously failed to hold defendant Phelps Dodge to its burden of proof – *within the context of N.D.C.C. §§ 28-01.2-02 and 28-01.2-04* – to establish all of the elements of its statute of limitations affirmative defense.

¶ 38. Pursuant to N.D.C.C. § 28-01.2-02 – as that statute references N.D.C.C. § 28-01.2-04 – even if the substantive law of another jurisdiction would otherwise apply to a civil action brought here in North Dakota under this jurisdiction's traditional conflict-of-laws analysis, where: **(1)** the foreign states' limitations period is "substantially different" from the North Dakota limitation period; and **(2)** the limitation period of the foreign state "has not afforded (the plaintiff)" a fair opportunity to sue upon . . . the claim, the limitation period of (North Dakota) applies." N.D.C.C. § 28-01.2-04.

¶ 39. Under this statutory scheme, plaintiff-specific facts necessarily are implicated when the Uniform Conflict of Laws – Limitations Act package of N.D.C.C. Chapter 28-01.2 comes into play – as it necessarily does in the instant cases where defendant Phelps Dodge has moved for summary judgment upon statute of limitations grounds in a conflict-of-laws setting.

¶ 40. As counsel for the plaintiffs argued – *albeit unsuccessfully* – to the District Court at a hearing conducted in connection with the Phelps Dodge summary judgment motion, the matter of whether the "substantially different" foreign state limitations period "has not afforded a fair opportunity to sue upon . . . the claim" is, at the very minimum, a question of fact, which is ill-suited for resolution within the context of a motion for summary judgment. *See, the transcript of proceedings of November 30, 2009, at pages 20-31 and 33-38,* **Appendix** *at pages 232-243, and 245-250.*

¶ 41. Importantly, in the District Court proceedings below, defendant Phelps Dodge Industries, Inc., made no factual or evidentiary showing of any kind of any case-specific, plaintiff-specific facts in its motion papers to the effect that any of the individual plaintiffs in these cases had been "afforded a fair opportunity to sue upon" the asbestos-related claims which they prosecute in the above-captioned court.

¶ 42. Where the particular type of summary judgment motion at issue in the instant appeal is a summary judgment motion by defendant Phelps Dodge which was exclusively based upon this defendant's ***affirmative defense*** of statute of limitations – an ***affirmative defense*** for which Phelps Dodge bears the substantive burden of proof at trial – the failure by this defendant to make any factual showing at all not only caused Phelps Dodge to fail to "meet its initial burden of showing the absence of a genuine issue of material fact" – but it caused the Phelps Dodge summary judgment motion to be thoroughly deficient because Phelps Dodge failed to even address the fact that it possessed the substantive burden of proof at trial as to its statute-of-limitations affirmative defense. *Fonseca v. Consolidated Rail Corporation, supra*, 246 F.3d at 590-591; *Steward v. International Longshoreman's Association*, 2009 U.S. App. LEXIS 116, **6-7 (11th Cir. January 8, 2009) ["**A defendant's argument that a claim is barred by the statute of limitations raises an affirmative defense, and '(i)t is beyond dispute that the defendants have the burden of proof in establishing the elements of the affirmative defense of the statute of limitations.**' *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1292 (11th Cir.

2005)"]; and *August v. U.S. Bancorp.*, 190 P.3d 86 (Wash. App. 2008), *review denied*, 203 P.3d 380 (Wash. 2009).

¶ 43. Unfortunately, these well-established principles of law were not appreciated or addressed by the District Court in its decision granting the defendant Phelps Dodge Industries, Inc. summary judgment dismissal as to the claims of each and every plaintiff in these cases. It is respectfully submitted that the District Court's committed reversible error by failing to appreciate ***either***: (1) the fact that Phelps Dodge was required to "meet its initial burden of showing the absence of a genuine issue of material fact"; and (2) that even assuming that Phelps Dodge shouldered this "initial burden", that this defendant failed entirely to satisfy its substantive burden of proof as to its statute-of-limitations affirmative defense. *Fonseca v. Consolidated Rail Corporation, supra*, 246 F.3d at 590-591.

¶ 44. In its "Order Granting Motion for Summary Judgment" dismissal of the plaintiffs' claims in these cases, District Court stated, in pertinent part, as follows:

> NDCC 28-01.2-04 Escape Clause
>
> Despite the plaintiffs' failure to show that choice of law analysis favors North Dakota law, North Dakota's statute of limitations may still apply through the "escape clause." North Dakota has adopted the Uniform Conflict of Laws – Limitations Act, NDCC Chapter 28-01.2. Under the Uniform Conflict of Laws – Limitations Act, the six-year limitation period of North Dakota will apply "[i]f the court determines that the limitation period of another state . . . is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or impose an unfair burden in defending against, the claim[.]" NDCC 28-01.2-04.
>
> In *Am. Gen. Fire & Cas. v. Wal-Mart Stores, Inc.*, 791 F. Supp. 763, 764 (D. Minn. 1992), the plaintiffs argued that the Arkansas escape clause applied so that Arkansas' three-year statute of limitations

would apply in lieu of Louisiana's one-year limitation period. *Id.* First, the court stated that "the drafters of the Uniform Conflict of Laws Limitations Act chose language which would give courts a measure of flexibility in choosing the appropriate limitations period." *Id*. at 764-65. Next, the court determined that Arkansas' three-year limitation period was "substantially different" than Louisiana's one-year period. *Id.* at 765. Finally, Louisiana's one-year period did not afford the plaintiff a fair opportunity to sue. *Id.* As to this last point, the court reasoned that although it would have been *possible* for the plaintiff to sue within Louisiana's one-year limitation period, "the test is not whether the plaintiff could possible have filed a complaint within a year. Rather, it is whether plaintiff had a 'fair opportunity' to sue within one year." *Id.*

Again, in *Burks v. Abbott Labs., et. al.*, 639 F. Supp. 2d 1006, 1019 (D. Minn. 2009), the district court found that the Louisiana one-year statute of limitation was substantially different from Minnesota's six-year limitation period. The court further determined that the disparity between the two limitation periods could "not form the sole grounds on which to argue substantial differences and fair opportunities to litigation." *Id.* However, additional discovery was granted to determine whether the plaintiffs had a fair opportunity to litigate their claims. *Id.* Here, the other states' limitation periods range from one to four years, with most limitation periods in the one-to three-year range. Our North Dakota Supreme Court has not yet analyzed the Uniform Conflict of Laws – Limitations Act escape clause to determine whether another state's limitation period is substantially different from North Dakota's six-year limitation period. However, it is likely that our Supreme Court would analyze the escape clause in much the same way as the Minnesota court, and determine that one-to four-year statutes of limitation differ substantially from a six-year limitation.

The Court's analysis of the escape clause must then turn to whether the plaintiffs have been afforded a fair opportunity to litigate. NDCC 28-01.2-04; *Burks*, 639 F. Supp 2d at 1019. . . . .

However, as noted above, in determining this case is ready for summary judgment, the Court found that the plaintiffs have not "raise[d] a genuine issue of material fact precluding summary judgment by setting forth specific facts showing that there is a genuine issue for trial."

The reality is that asbestos cases basically never go to trial, despite the fact the Court has repeatedly urged counsel to try an asbestos case. This issue will no doubt be appealed, as it should be. ***It is simply unfair to all asbestos parties to be asked to wait until this case is tried to be able to have this question resolved as all litigants***

> ***may be placed in a position where the economies of scale in asbestos litigation compel settlement without being able to have this fundamental issue resolved, the resolution of which could reduce litigation and the workload on all courts. The Court fines that summary judgment is appropriate as a matter of law***.
>
> Phelps Dodge Industries, Inc.'s Motion for Summary Judgment Under the Uniform Conflict of Law – Limitations Act is GRANTED. It is also GRANTED as to those defendants who joined the motion. As to all the remaining defendants who did not join in the motion, the Court *sua sponte* as to them DISMISSES the Complaints of the plaintiffs on the same basis.
>
> All parties shall be responsible for their own costs and attorney fees.
>
> IT IS SO ORDERED. (*emphasis added*).
>
> "Order Granting Motion for Summary Judgment", dated December 9, 2009, (*filed December 11, 2009*) at **Doc. No.: 101**, at slip opinion pages 6-8, **Appendix** *pages 69-71*.

¶ 45. To be clear, defendant Phelps Dodge Industries made no factual showing whatsoever in the District Court proceedings below in any attempt to show that foreign states limitations periods had "not afforded (*the plaintiffs*)" a fair opportunity to sue upon . . . the(ir) claim(s)" – plaintiff-specific, case specific facts which certainly are incorporated within ***both*** defendant Phelps Dodge's "initial burden of showing the absence of a genuine issue of material fact"; and (2) defendant Phelps Dodge's ultimate substantive ultimate burden of proof on its statute of limitations affirmative defense.

¶ 46. For these reasons, the District Court committed reversible error by granting summary judgment dismissal to defendant Phelps Dodge Industries, Inc. upon supposed statute-of-limitations grounds.

B. The District Court committed reversible error by disregarding the

plaintiffs' request made under Rule 56(f), N.D.R.Civ.P. to either *deny* the Phelps Dodge summary judgment motion without prejudice or to *defer* consideration of the motion until an adequate opportunity for discovery had occurred.

¶ 47. During the hearing which occurred on November 30, 2009, and in briefing filed with the District Court prior to that hearing, counsel for the plaintiffs invoked the provisions of Rule 56(f), N.D.R.Civ.P., as construed by the Supreme Court decision in *Aho v. Maragos*, 1998 ND 107, ¶¶ 4-20, 579 N.W.2d 165, 167-169 (N.D. 1998), and requested that the Court *either* deny the Phelps Dodge summary judgment motion without prejudice, or that the Court defer ruling upon the motion until after the plaintiffs had an adequate opportunity to conduct discovery. *See*, **Appendix** *pages 81-82 (Memorandum briefing), and pages 33-35 (Transcript of Summary Judgment Motion Hearing of November 30, 2009).*

¶ 48. Indeed, this argument by counsel for the plaintiffs was recognized by the District Court in its decision in this case, wherein the Court stated as follows:

> Plaintiffs have asserted that "no appreciable discovery has taken place in the majority of the above-captioned plaintiffs' cases: (1) because these actions were dismissed by the Court on *forum non conveniens* grounds; and (2) these cases were only recently remanded to the District Court by the North Dakota Supreme Court after the appellate decision addressing these *forum non conveniens* issues[.]" Plaintiffs assert that only upon being given a reasonable opportunity for discovery can they be afforded a reasonable opportunity to litigate the fact specific issues at hand.
>
> "Order Granting Motion for Summary Judgment", dated December 9, 2009, (*filed December 11, 2009*) at **Doc. No.: 101**, at slip opinion 7-8, **Appendix** *pages 70-71*.

¶ 49. Strangely, in the *Burks* decision which was recited to the District Court

by counsel for the plaintiffs at oral argument, which was referenced by the District Court in its decision, *Burks v. Abbott Laboratories, et. al.*, 639 F. Supp. 2d 1006, 1018-1020 (D. Minn. 2009), the Minnesota District Court considered § 4 of the Minnesota Uniform Conflict of Laws - Limitations Act [Minn. Stat. § 541.33] – a statute effectively identical to N.D.C.C. § 28-01.2-04 – and ***denied*** a product liability defendant's summary judgment motion on statute of limitations grounds stating as follows:

> ***However, the Court cannot conclude at this stage of the litigation that the escape clause should not apply. In particular, the Court expects that discovery will provide a reasonable factual basis on which the Court may conclude whether the parent-plaintiffs "encountered any kind of substantial barriers to instituting the suit*** within one year." *Hall v. Summit Contractors, Inc.*, 356 Ark. 609, 158 S.W.3d 185, 189 (Ark. 2004) (addressing the Arkansas Uniform Act's similar statute-of-limitations "escape clause"). ***Although the mere difference in prescriptive periods may not form the sole grounds on which to argue substantial differences and fair opportunities to litigate, that disparity may play a role alongside other factual considerations. Accordingly, the Court finds that additional discovery is needed to determine whether the Burks had a fair opportunity to litigate their claims under the Louisiana prescriptive period***. (*emphasis added*).
>
> 639 F. Supp. 2d at 1019-1020

¶ 50. It bears noting again that defendant Phelps Dodge filed its summary judgment motion on supposed statute of limitations grounds less than one month after the Supreme Court mandate became final in *Vicknair I.* No Rule 16 scheduling/case management conference was convened by the Court, even though counsel for the plaintiffs had requested such a conference **in writing** pursuant to Rule 16(b)(4), N.D.R.Civ.P. No plaintiff was deposed by the defendants, and defendant Phelps

Dodge was not deposed.

¶ 51. It is respectfully submitted that the District Court at least should have followed the procedure employed by the Minnesota federal district court in *Burks*. Had the District Court done so, it is respectfully submitted that the very kinds of plaintiff-specific and case-specific facts which the Minnesota federal court recognized could be implicated by the "escape clause" provision of the Uniform Conflict of Laws - Limitation Act – would have been part of the record in the instant cases, making it possible to litigate them upon the substantive merits comprehended by N.D.C.C. § 28-01.2-04. Unfortunately, this did not occur, and it is respectfully submitted that the District Court committed reversible error by failing to proceed reasonably, as the Minnesota federal district court did in *Burks,* and as counsel for the plaintiffs specifically requested pursuant to Rule 56(f), N.D.R.Civ.P., and *Aho v. Maragos, supra*.

C. The attempted "defense" by Phelps Dodge in this defendant's resort to purported choice-of-law/preemption of North Dakota substantive law grounds, is itself an affirmative defense, which this defendant was required to plead in its answers pursuant to Rule 8(c), N.D.R.Civ.P., and having failed to do so, this defendant has waived this defense.

¶ 52. It is undisputed that defendant Phelps Dodge Industries, Inc. did not preserve the affirmative defenses of "choice of law" or the "application of foreign state law" in its respective ***answers***, as filed and served in the instant case. *See, e.g., the Answers of defendant Phelps Dodge Industries, Inc. , as filed and served in the instant litigation, with said answers being included at* **Appendix** *pages 53-58, and*

59-63.

¶ 53. Rule 8(c) of the North Dakota Rules of Civil Procedure, and reported decisional law construing identical federal and state rules in other jurisdictions, stands for the proposition that ***choice-of-law arguments, wherein the state law of the forum jurisdiction is proposed for preemption by the substantive law of another jurisdiction, are nothing less than affirmative defenses, which either must be preserved in the answer, or raised by a Rule 12 motion made prior to the time that an answer is served and filed***. See, e.g., *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293, 298 (Tex. App. 2001) ("**choice-of-law is an affirmative defense that may be waived**."); *Piekarski v. Home Owners Savings Bank*, 956 F.2d 1484, 1489 (8th Cir. 1992) (**"*Where preemption involves a choice of law* . . . *it is an affirmative defense*.** E.g., *Dueringer v. General Am. Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988); *Gilchrist v. Jim Slemons Imports, Inc.* 803 F.2d 1488, 1496-97 (9th Cir. 1986)**.** *Brannan v. United Student Aid Funds*, Inc. 94 F.3d 1260, 1266 (9th Cir. 1996, *certiorari denied*, 1997 U.S. LEXIS 3993 (1997) (**choice-of-law defense is an affirmative defense which must be raised as such, or it is waived**); *Joann Curry v. Cincinnati Equitable Insurance Company*, 834 S.W.2d 701, 704 (Ky. App. 1992) (**choice-of-laws is an affirmative defense which must be raised as such**); *Maher and Associates, Inc. v. Quality Cabinets*, 640 N.E.2d 1000, 1003 (Ill. App. 2nd Dist. 1994) ("**the choice-of-law issue" is appropriately raised in an answer "as an affirmative defense**"); *Gonzales v. Surgidev Corporation*, 899 P.2d 576, 583 (N.M.

1995) ["**clearly involves a choice-of-law question and therefore must be asserted as an affirmative defense", citing *Dueringer v. Great Am. Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988),** and numerous other authorities for the same proposition]; and *Collins v. CSX Transportation, Inc.,* 441 S.E.2d 150, 153-154 (N.C.App. 1994) ("**choice-of-law must be asserted as an affirmative defense . . . and an affirmative defense which is not specifically pled is waived**.")

¶ 54. Although "choice-of-law" is not one of the enumerated affirmative defenses within the express text of Rule 8(c) of the North Dakota Rules of Civil Procedure, it is well established that "choice-of-law", wherein preemption of the forum's substantive law is sought, is an ***affirmative defense***, nonetheless, which must be affirmatively and expressly pled in an answer.

¶ 55. It is respectfully submitted that defendant Phelps Dodge Industries, Inc. has ***not*** preserved a "choice-of-law" defense as an affirmative defense herein.

¶ 56. Indeed, the District Court acknowledged in its decision below that "(c)hoice of law is an affirmative defense", citing *Piekarski v. Home Owners Savings Bank*, 956 F.2d 1484, 1489 (8th Cir. 1992), and that "(a)n affirmative defense is waived 'if it is neither made by motion . . . nor included in a responsive pleading . . . N.D.R.Civ.P. 12(h)." **Appendix** *at pages 67-68.*

¶ 57. However, the District Court stated that "Phelps Dodge initially in fact pleaded that other states limitation periods barred plaintiff's claims . . . (t)hus, Phelps Dodge put plaintiffs on sufficient notice that a choice of law defense would be raised

and preserved that defense. **Appendix** *at page 68.*

¶ 58. ***To be clear – the actual answers filed by defendant Phelps Dodge Industries, Inc. contain no such language at all***. *See, the Separate Answers of Phelps Dodge Industries, Inc., dated December 26, 2002, included at* **Appendix** *pages 53-58, and 59-63*.

Dated this 22nd day of June, 2010.

BOECHLER, P.C

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