20100029

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SEPTEMBER 8, 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

REPLY BRIEF OF APPELLANTS

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A. The brief of the *amici curiae* should be either stricken – or disregarded – because: (1) this brief impermissibly interjects a multitude of purported "facts" which were never made part of the trial court proceedings below; and (2) this brief improperly raises new, over-arching tort reform advocacy issues which were addressed by neither the appellants or appellees – with this brief thus being a serious departure from the proper role of *amici curiae*. 1

B. Although defendant/appellee Phelps Dodge Industries, Inc. argues in this appeal that the instant asbestos personal injury/survival action cases are governed by the *now-obsolescent* three (3) year limitations period appearing at N.D.C.C. § 28-01.3-08(4), literally all North Dakota district courts to have addressed this subject since the decision of the North Dakota Supreme Court in *Dickie v. Farmers Union Oil Company*, 2000 ND 111, 611 N.W.2d 168 (2000), have held that asbestos-related *personal injury and survival actions* – like literally all other kinds of personal injury actions in this jurisdiction – are to be governed by the standard six (6) year limitations period set forth in N.D.C.C. § 28-01-16. 8

C. Even if defendant/appellee Phelps Dodge Industries' incorrect representation of the factual record of these cases were assumed, *arguendo,* to be accurate, entry of summary judgment on statute of limitations grounds would be erroneous nevertheless. 13

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REPLY ARGUMENT

A. The brief of the *amici curiae* should be either stricken – or disregarded – because: (1) this brief impermissibly interjects a multitude of purported "facts" which were never made part of the trial court proceedings below; and (2) this brief improperly raises new, over-arching tort reform advocacy issues which were addressed by neither the appellants or appellees – with this brief thus being a serious departure from the proper role of *amici curiae*.

¶ 1. Several organizations representing insurance company, tort reform advocacy, and asbestos product manufacturer interests have appeared as *amici curiae* in the instant appeal, with these *amici curiae* arguing in their brief that their "members would be adversely affected" by reversal of the District Court's decision herein.[1]

¶ 2. In their motion for leave to file an *amici curiae* brief in this case, these insurance company and manufacturer organizations essentially admit that they are attempting to present **new information** – ***including facts and argument which were not made part of the District Court record below*** – and that their brief raises issues which have not been raised by the appellant and appellee parties in this case.[2]

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[1]The *amici curiae* include the Coalition for Litigation Justice, Inc., ("a nonprofit association formed by insurers to address the asbestos and toxic tort litigation environment"), and other insurance, asbestos product manufacturer and tort reform organizations.

[2]In their motion for leave to file an *amici curiae* brief, these insurance industry and manufacturer organizations state as follows:

> "(T)he proposed brief does not seek to simply repeat Defendants-Appellees' argument. Rather, ***we will utilize our broad perspective to inform this Court about the serious public policy problems raised by Plaintiffs-Appellants' argument and will discuss the subject appeal in the context of the overall asbestos litigation environment***."

¶ 3. Indeed, the content of the brief of the *amici curiae* is far more characteristic of a lobbyist's position paper – or of written testimony appropriately presented to a legislative committee – than of proper briefing before the Supreme Court – something which is not particularly surprising, given the *amici curiae* brief's principal author and proponent, Washington D.C. lawyer Mark A. Behrens, who is no stranger to the halls of the North Dakota State Capitol while the Legislative Assembly is in session.[3]

¶ 4. In this case, the brief of the *amici curiae* fails to comply with Rule 29(a), N.D.R.App.P., which requires that "(a)n amicus brief must be limited to issues raised on appeal by the parties.

¶ 5. *See, e.g., Apache Corporation v. MDU Resources Group, Inc.*, 1999 ND 247, ¶ 7 n.1, 603 N.W.2d 891, 893, n.1 (N.D. 1999); *B.R.T. v. Executive Director of the Social Service Board of North Dakota*, 391 N.W.2d 594, 601 n.11 (N.D. 1986); and *Soo Line Railroad Company v. State of North Dakota*, 286 N.W.2d 459, 466 (N.D. 1979) [same].

(*emphasis added*).

Motion for Leave to File an *Amicus Curiae* Brief, at page 2 thereof, filed with the Court on July 22, 2010, and granted by the Court that same day.

[3] *See, e.g, the article published on the website NorthDecoder.com, at the following link*: http://www.northdecoder.com/index.php/Living-Next-Door-To-ALEC.html

¶ 6. While *amici curiae* certainly are not required to be unbiased, it should be noted that the principal author of the *amici curiae* brief herein – Washington, D.C. lawyer/lobbyist Mark A. Behrens – has a long track record of activist advocacy on behalf of asbestos companies, the tobacco industry, Toyota Motor Corporation, the American Legislative Exchange Council, the insurance industry, various manufacturer interests, and a collection of rabid tort reform proponent groups. See, e.g., *McCathern v. Toyota Motor Corporation*, 23 P.3d 320, 322 (Or. 2001); *Satterfield v. Breeding Insulation Company*, 266 S.W.3d 347, 350 (Tenn. 2008); and *Chemtall, Incorporated, et. al. v. the Honorable John T. Madden, Judge of the Circuit Court*, 655 S.E.2d 161, 163 (W.Va. 2007). See, also, the references to Mark A. Behrens, Esq., and to his long-time senior partner and self-acknowledged mentor, Victor E. Schwartz, Esq., in the Tobacco Documents Online archive, http://tobaccodocuments.org.[4]

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[4] Indeed, *amici curiae* author Mark A. Behrens' regular client , the American Legislative Exchange Council (ALEC), is described in Tobacco Documents Online database as being an "(e)ntity through which PM (tobacco giant Philip Morris) launders favors and donations", being also "a conservative pro business entity that endorses modelstate bills that are sponsored by corporations and industries." http://tobaccodocuments.org/profiles/american_leg_exch_council . See, also, the comprehensive investigative report on ALEC entitled "Governing the Nation from the State Houses: The Right Wing Agenda in the States and How Progressives Can Fight Back", published by the Progressive States Network, New York, New York, published in February of 2006, at the following web link: http://www.progressivestates.org/resources/eyeOnTheRight/AlecReport_PsnVersion.pdf See, as well, the report, "Corporate America's Trojan Horse in the States: The Untold Story Behind the American Legislative Exchange Council", published by the National Resources Defense Council (NRDC), at the following weblink: http://alecwatch.org/11223344.pdf

¶ 7. In this context, it is submitted that where the *amici curiae* recite supposed "facts" in their brief – such as their recitation of alleged "facts" concerning the supposed state of asbestos litigation nationally as these *amici curiae* "utilize (their) broad perspective to inform this Court about the serious public policy problems raised by the Plaintiffs'/Appellants' argument" – these portions of the *amici curiae* brief should either be stricken or disregarded by the Court. See, *Apache Corporation v. MDU Resources Group, Inc., supra,* 1999 ND 247, at ¶ 7, n.1, 603 N.W.2d at 893, n.1.

B. Although defendant/appellee Phelps Dodge Industries, Inc. argues in this appeal that the instant asbestos personal injury/survival action cases are governed by the *now-obsolescent* three (3) year limitations period appearing at N.D.C.C. § 28-01.3-08(4), literally all North Dakota district courts to have addressed this subject since the decision of the North Dakota Supreme Court in *Dickie v. Farmers Union Oil Company*, 2000 ND 111, 611 N.W.2d 168 (2000), have held that asbestos-related *personal injury and survival actions* – like literally all other kinds of personal injury actions in this jurisdiction – are to be governed by the standard six (6) year limitations period set forth in N.D.C.C. § 28-01-16.

¶ 8. As this Court itself noted in *Mertz v. 999 Quebec, Inc.*, 2010 ND 51, ¶¶ 8 n.1, and 28, 780 N.W.2d 446, 452 n.1, 458-459 (N.D. 2010) and as North Dakota district courts in Burleigh County, Cass County, Grand Forks County, and Morton County have universally held – ever since the decision of the North Dakota Supreme Court in *Dickie v. Farmers Union Oil Company*, 2000 ND 111, 611 N.W.2d 168

____

(2000), the so-called "savings exception" of N.D.C.C. § 28-01.3-08(4) essentially has been considered to be a "dead letter" in our law. See, e.g., the decision by the Honorable Bruce E. Bohlman in Grand Forks County Asbestos Litigation Groups 10 and 12, *Gloria Smith, et. al.*, Grand Forks Civil Nos. 98-C-666, *et. seq.*, entered on November 20, 2004, at slip opinion page 3, **Supplemental Appendix of Plaintiffs/Appellants at page 438**. In that decision, Judge Bohlman stated as follows: "On the strict liability claims, **the court has held in (Grand Forks County Asbestos Litigation) Groups 9 and 11 that the statute, N.D.C.C. § 28-01.3-08(4), is unconstitutional, under the authority of *Dickie v. Farmers Union Oil Co. of LaMoure,* 611 N.W.2d 168 (N.D. 2000). The motions are therefore denied.**" (*emphasis added*). *Id.*

¶ 9. In another similar holding, the Honorable Bruce B. Haskell explained as follows, in an order entered in Burleigh County Asbestos Litigation:

> The defendants argue that the court should apply the three-year limitation period found as an exception to § 28-01.3-08, N.D.C.C. However, Section 28-01.3-08, N.D.C.C. was declared unconstitutional. ***Dickie v. Farmers Union Oil Company*, 2000 ND 111, 611 N.W.2d 168**. An unconstitutional statute is so from its inception. ***The exception to the statute cannot be severed as it is meaningless without the statute***. Therefore, the six-year limitation period found at Section 28-01-16(1), N.D.C.C. applies. (*emphasis added.*)
>
> "Order Regarding Motions for Summary Judgment on Statute of Limitations Grounds", entered on July 18, 2000, in *Arlene (Noey) Hebert, et. al.* Burleigh County Asbestos Litigation - Set 13, Burleigh County Civil Nos. 96-C-1922, *et. seq.* slip opinion at page 2 thereof, **Supplemental Appendix of Plaintiffs/Appellants at page 441.**

¶ 10. Indeed, the Honorable Robert O. Wefald held previously as follows, in

a prior group of Morton County asbestos litigation cases:

> (Defendant) PDI's Motion for Summary Judgment on the Basis of Statute of Limitations seeks dismissal of the Complaints against it because the plaintiffs also have missed North Dakota's statute of limitations. **The applicable statute of limitations as found in N.D.C.C. 28-01-16 is six years**. PDI asserts the applicable statute of limitations is set forth in N.D.C.C. 28-01.3-08(4) . . .
>
> Plaintiffs note that our Supreme Court in *Dickie v. Farmers Union Oil Co. of LaMoure*, 2000 ND 111, 611 N.W.2d 168, held N.D.C.C. 28-01.3-08 unconstitutional. PDI asserts that what was held unconstitutional was the statute of repose language, but this Court notes nothing in our Supreme Court's opinion states the intention of limiting the unconstitutionality of N.D.C.C. § 28-01.3-08 to its statute of repose provisions while preserving the three year statute of limitations for asbestos claims. ***This Court is unwilling to find that part of NDCC 28-01.3-08 escaped our Supreme Court's holding that NDCC 28-01.3-08 is unconstitutional. Thus, the Court finds the applicable statute of limitations is six years***.
>
> "Order on Motions" entered June 7, 2005, slip opinion at pages 5-7 in *Charles Allen, et. al.* Morton County Civil Nos. 02-C-1680 and 02-C-1681, said slip opinion included at **Supplemental Appendix of Plaintiffs/Appellants pages 448-450**.

¶ 11. Furthermore, this result is certainly compelled by the legislative history attendant to N.D.C.C. § 28-01.3-08(3), and its identical statutory predecessor, former N.D.C.C. § 28-01.1-02(4). *See, the legislative history of these statutes, said legislative history being hereby incorporated by reference herein and included at* **Supplemental Appendix of Plaintiffs/Appellants pages 331-435,** specifically 1993 North Dakota Session Laws Chapter 324, at **Supplemental Appendix of Plaintiffs/Appellants at pages 422-426, and 428.**

¶ 12. In light of this legislative history, and the Court's prior acknowledgment

on this subject in *Mertz v. 999 Quebec, Inc.*, *supra*, 2010 ND 51, ¶¶ 8 n.1, and 28, 780 N.W.2d 446, 452 n.1 and 458-459, as well as these consistent trial court decisions, it is submitted the six-year limitations period of N.D.C.C. § 28-01-16(5) clearly is the applicable statute of limitations that governs the personal injury/survival action claims of the plaintiffs/appellants.

C. Even if defendant/appellee Phelps Dodge Industries' incorrect representation of the factual record of these cases were assumed, *arguendo*, to be accurate, entry of summary judgment on statute of limitations grounds would be erroneous nevertheless.

¶ 13. At pages 27-28 of their brief, the defendants/appellees Phelps Dodge Industries argue that seven (7) plaintiffs' claims are barred by the six-year statute of limitations of N.D.C.C. § 28-01-16(5), although these appellees fail to address the following alternative argument which was made by the plaintiffs in the trial court proceedings below.

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

> ***Even assuming arguendo that Mr. Foster knew that he had asbestosis in 1972, defendants failed to show the absence of a genuine issue as to another material fact--Foster's knowledge regarding causation. We cannot say as a matter of law that Foster knew or should have known*** before March 12, 1980 (two years before suit was filed) ***that his asbestosis was caused by his exposure to asbestos products manufactured by defendants and that these products were defective and unreasonably dangerous or that defendants' wrongful acts caused his condition***. See *Franzen II,* 377 N.W.2d at 662 ("knowledge of all the elements of the action"); *(emphasis added)*.
>
> 787 F. 2d at 393

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

¶ 16. For instance, in *Hebron Public School v. U.S. Gypsum*, 475 N.W.2d 120, 126 (N.D. 1991), an asbestos property damage case, the North Dakota Supreme Court explained:

> California courts, construing a statute of limitations that, like § 28-01-16 N.D.C.C., and the New York statute, CPLR § 203, commences to run when a cause of action has "accrued," have recognized a number of exceptions to the general rule and have applied the discovery rule in a variety of cases. ... "***[A] plaintiff's cause of action for property damage caused by latent construction defects accrues 'from the point in time when plaintiffs became aware of defendant's negligence as a cause*** [of damage to the property], or could have become so aware through the exercise of reasonable diligence.' (Citation omitted.)" *Allen v. Sundean,* 137 Cal.App.3d 216, 186 Cal.Rptr. 863, 866 (1982).
>
> Because of the range of our previous decisions applying a discovery rule in other actions in which such an argument would have been equally persuasive and in light of legislation incorporating discovery rules in either statutes of limitations, we decline to now hold that a discovery rule is not applicable to this action under § 28-01-16(1), N.D.C.C., to recover the costs of removing asbestos-containing acoustical ceiling plaster. To retreat to the constrictive logic Gypsum would have us now employ would be contrary to the current concept of the purpose of statutes of limitation apparent from decisions in other jurisdictions and as demonstrated by the previous decisions of this court and recent legislative enactments. . . .
>
> ***We conclude that*** for purposes off § 28-01-16, 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

¶ 17. Notably, the defendants/appellees in the instant cases made no threshold factual showing in the trial court record below to the effect that any of the plaintiffs or their decedents – in the language of *Foster v. Johns-Manville Sales Corp., supra* – "knew or should have known that (their or their decedents' asbestos diseases) were caused by his exposure to asbestos products manufactured by defendants ***and*** that these products were defective and unreasonably dangerous or that defendants' wrongful acts caused (their) condition(s)." *(emphasis added)*. *Foster v. Johns-Manville Sales Corp., supra*, 787 F.2d at 393.

¶ 18. Put simply, the defendants in the instant cases failed to even address in their motions for summary judgment – let alone establish – the **absence** of a genuine issue of material fact as to the ***additional factual issues of asbestos product identification and defect*** which were highlighted in *Foster v. Johns-Manville Sales Corp., supra.*

Dated this 8th day of September, 2010.

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