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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Vicki Doll, Representative of the Estate of Delton Doll, deceased,	Supreme Court No. 20140156 Cass Co. No. 2010-CV-02751
Ronald Just, Representative of the Estate of Robert Just, deceased,	Supreme Court No. 20140157 Cass Co. No. 2010-CV-02729
Ken Deitz and Jamie Deitz, as co-representatives of the Estate of James Deitz, deceased,	Supreme Court No. 20140158 Cass Co. No. 2010-CV-02735

Respondents,

v.

The Jamar Company, et al.,

Petitioners,

999 Quebec, Inc., et al.,

Defendants.

THE JAMAR COMPANY AND WALKER JAMAR COMPANY'S PETITION FOR SUPERVISORY WRIT

JOHNSON, KILLEN & SEILER, P.A.

By: /s/ Richard J. Leighton

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Jurisdictional Statement

¶01 The North Dakota Supreme Court has authority to issue supervisory writs under N.D. Const. Art. VI, § 2 and N.D.C.C. § 27-02-04. The Court can exercise its supervisory jurisdiction to review an oral ruling by the district court from the bench. *Helmers v. Sortino*, 545 N.W.2d 796, 798 (N.D. 1996).

Relief Sought

¶02 Petitioners The Jamar Company and Walker Jamar Company ("Jamar") petition the Court pursuant to N.D.R.App.P. 21 to exercise its supervisory jurisdiction to review the oral ruling made by the district court from the bench, denying Jamar's motion for injunctive relief, on the grounds that denial of immediate appellate review will create the substantial injustice of depriving Jamar of their statutory right to appeal from the denial of their motion for injunctive relief. In addition, denial of review of the district court's ruling will create the further substantial injustice of subjecting Jamar to these and other pending and future North Dakota claims in contradiction of the law of Minnesota, the State of Jamar's incorporation and dissolution, which bars claims against Jamar. The ruling sought to be reviewed is thus contrary to the application of the Full Faith and Credit Clause of the United States Constitution and the principle of comity.

Statement of the Issues

¶03 This Court should exercise its supervisory jurisdiction to review the district court's oral ruling from the bench denying Jamar's motion for injunctive relief to prevent substantial injustice.

¶04 In the absence of a means to properly serve Jamar and a legal basis to assert claims against Jamar, Jamar is entitled to immediate preventative relief from the multiplicity of lawsuits against it in North Dakota.

¶05 North Dakota courts are constitutionally required to accord Full Faith and Credit to Minnesota law, which bars claims against Jamar asserted more than two years after Jamar's dissolution in 1985.

Statement of the Case

¶06 Jamar has appealed from the district court's denial of their motions to dismiss and for preventative relief in response to plaintiffs' claims of asbestos-related diseases allegedly caused by asbestos-containing products installed or supplied by Jamar.

¶07 Plaintiffs commenced these actions against Jamar and others in July of 2010. (Doll Doc# 1, 4, 5; Just Doc# 1, 4, 5; Deitz Doc# 1, 4, 5). On June 27, 2013, Jamar timely filed their Motion to Dismiss and for Preventative Relief on Corporate Dissolution Grounds. (Doll Doc# 539; Just Doc# 727; Deitz Doc# 607). The hearing on all dispositive motions in these and other cases was held on March 3, 2014. (App. at 11-46). After hearing oral argument on Jamar's motions, the district court orally ruled from the bench that Jamar's motion for preventative relief in each of these cases was denied, and directed plaintiffs' counsel to submit proposed orders. (App. at 27, ll 23-25; 34, ll 13-16; 40, ll 24-25).[1]

¶08 The trial of these cases was scheduled for May 13, 2014. (Doll Doc# 1674, p. 2, ¶8; Just Doc# 1747, p. 2, ¶8; Deitz Doc# 1675, p. 2, ¶8). By April 29, 2014, plaintiffs'

[1] These three cases were part of a group of thirteen cases all set for dispositive motion hearing on March 3, 2014. Jamar's motion was first heard and ruled on in the Jensen case, Cass County No. 09-2010-CV-02721. (App. at 14-23). The same ruling was made by the district court in these three cases. (App. at 27, ll 23-25, 34, ll 13-16, 40, ll 24-25). Plaintiffs' claims against Jamar in the Jensen and nine other cases in the group were voluntarily dismissed with prejudice.

counsel had not submitted any proposed orders to the district court addressing Jamar's motions, and the district court had not issued any written orders addressing Jamar's motions. On that day, Jamar filed its Notices of Appeal in these cases. (Doll Doc# 2478; Just Doc# 2552; Deitz Doc# 2479). On May 5, 2014, the district court issued an order continuing the trial of these cases to July 29, 2014. (Doll Doc# 2542; Just Doc# 2600; Deitz Doc# 2560). To date, no proposed orders on Jamar's motions have been submitted to the district court, and the district court has not issued any written orders on Jamar's motions.

Statement of the Facts

¶09 The following facts relating to Jamar's corporate dissolution were found by the Minnesota Court of Appeals as set forth in the case of *Podvin v. The Jamar Company*, 655 N.W.2d 645, 646-47 (Minn. App. 2003);

> Walker Jamar Company (Walker Jamar), a closely held Minnesota corporation established in 1913, sold and installed ventilation systems, industrial roofing, and insulation. Some of these products contained asbestos.
>
> ****
>
> Walker Jamar reorganized in 1981 following a favorable letter ruling from the Internal Revenue Service on the tax consequences of its proposed restructuring. Although the record is not fully developed on this point, the companies maintain that the purpose for the reorganization was to insulate the construction activities of the company from potential liabilities stemming from the distribution of Walker Pug Mill, a product unrelated to this litigation. The restructuring included the formation of a different company, the Jamar Company (Jamar I), to take over most of the business of Walker Jamar and a holding company, Norwalk, Inc., to hold the stock of both Walker Jamar and Jamar I.
>
> Jamar I and Norwalk, Inc., filed their articles of incorporation with the Minnesota Secretary of State in February 1982. In May 1982, Jamar I assumed all assets and liabilities of Walker Jamar except those

> associated with the Walker Pug Mill product. Jamar I continued all other aspects of the original business, including ventilation, air conditioning, and insulation work.
>
> In 1983, the president and chairman of the board of Jamar I decided to sell the companies and retire. Initially he was unable to negotiate a successful sale and decided to dissolve the companies at the end of the fiscal year on January 31, 1985. But shortly before the proposed dissolution date, Jamar I instead sold its assets, including its name, to API, Inc., an existing Minnesota company specializing in industrial insulation, piping, sheet metal work, and energy conservation construction and minerals distribution.
>
> ****
>
> Although API purchased the right to use the name "The Jamar Company," the cash-for-assets transaction involved no sale of stock.
>
> When API purchased the assets of Jamar I, Jamar I merged into the parent company, Norwalk. A few months later, Norwalk merged into Walker Jamar. Walker Jamar's only remaining operation, the production and marketing of the Walker Pug Mill, had been discontinued for economic reasons in 1983. On July 17, 1985, Walker Jamar filed its notice of intent to dissolve. On August 12, 1985, Walker Jamar filed its articles of dissolution in accordance with Minn. Stat. § 302A.733 (1984); the same day, the secretary of state issued Walker Jamar's certificate of dissolution. After this date only the new Jamar (Jamar II), operated by API, remained a going concern.

¶10 In *Podvin*, the Minnesota Court of Appeals ruled that claims brought against Jamar more than two years after Jamar's dissolution are barred by the operation of Minnesota's corporate dissolution statutes. Further review of that decision was not sought from the Minnesota Supreme Court. Thus, the Minnesota Court of Appeals' decision in *Podvin* constitutes the final Minnesota appellate ruling on the bar of claims against Jamar. Following the *Podvin* decision, all 168 pending Minnesota claims against Jamar were dismissed. (App. at 19, ll 3-6; 48 ¶ 5). No further cases have been commenced against Jamar in Minnesota to date since the *Podvin* decision in 2003. (App. at 10, ¶ 4).

¶11 Prior to the district court's order denying Jamar's motion in this case, since 2001, no North Dakota court had denied Jamar's motion and four different North Dakota district court judges in three different counties in a total of 127 cases had granted Jamar's motion. (App. at 19, ll 3-8; 47-48, ¶¶ 2-3). In four separate Orders addressing seven prior groups of Grand Forks County asbestos cases, Judge Bohlman granted Jamar's motion for summary judgment on the ground that the Plaintiffs' claims were barred by the Minnesota corporate dissolution statute. Memorandum Decision & Order on Pre-Trial and Dispositive Motions in Grand Forks County Asbestos Cases Set 14 (October 9, 2002), at pp. 4-5 (Doll Doc# 541); Memorandum Decision & Order on Pending Discovery Motions, Dispositive Motions & Motions in Limine in Grand Forks County Asbestos Cases Set 15 (August 26, 2002), at p. 4 (Doll Doc# 542); Memorandum Decision & Order on Dispositive Motion & Motions in Limine in Grand Forks County Asbestos Cases Groups 10, 12 & 13 (November 20, 2001), at p. 4 (Doll Doc# 543); and Memorandum Decision & Order on Dispositive Motion & Motions in Limine in Grand Forks County Asbestos Cases Sets 9 & 11 (July 30, 2001), at pp. 6-8 (Doll Doc# 544).

¶12 On April 10, 2003, in the Morton County Sets E and G cases, Judge Jorgensen also granted Jamar's motion on corporate dissolution grounds, expressly adopting Judge Bohlman's October 9, 2002 decision. Order Upon Pending Motions in Morton County Asbestos Cases – Set E and Set G (April 10, 2003), at p. 2 (Doll Doc# 545).

¶13 On September 2, 2003, Judge Dawson also expressly adopted Judge Bohlman's reasoning, and granted Jamar's motion for summary judgment on

corporate dissolution grounds in a group of Cass County asbestos cases. Order on Motions for Summary Judgment and Motions for Partial Summary Judgment in Cass County Asbestos Litigation Waves 4 & 5 (September 2, 2003), at pp. 2-3 (Doll Doc# 546).

¶14 More recently, Judge Robreno, of the Federal District Court for the Eastern District of Pennsylvania, the Judge assigned to handle the pretrial proceedings of all federal asbestos cases, adopted the *Podvin* decision and granted Jamar's summary judgment motion on corporate dissolution grounds in 41 North Dakota federal court asbestos cases. *Various Plaintiffs v. Various Defendants*, No. MDL 875, 2012 WL 1431223 (E.D. Pa., April 23, 2012), at *6 (Doll Doc# 547).

Argument

I. This Court should exercise its supervisory jurisdiction to review the district court's oral ruling from the bench denying Jamar's motion for injunctive relief to prevent substantial injustice.

¶15 Pursuant to N.D. Const. Art. VI, §2, and N.D.C.C. §27-02-04, this Court may review a district court decision under its supervisory authority. *State ex rel. Madden v. Rustad*, 2012 ND 242, ¶5, 823 N.W.2d 767, 769. This Court has reviewed petitions for supervisory writs on a case-by-case basis, granting a writ if it is necessary to "rectify error and prevent injustice" when there is no adequate alternative remedy. *Heartview Foundation v. Glaser*, 361 N.W.2d 232, 233 (N.D. 1985). The availability of an eventual appeal is not a bar to the grant of a supervisory writ as "[a]vailability of an appeal after final judgment often falls short of sufficient protection . . . as the burden, expense, and delay involved in a trial renders an appeal from a final judgment an inadequate remedy." *Olson v. North Dakota Dist. Court*, 271 N.W.2d 574, 578 (N.D. 1978). In *Olson* the

court quoted the following from the United States Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S. Ct. 1507, 1522, 16 L. Ed. 2d 600 (1966): "Reversals are but palliatives; the cure lies in those remedial measures that will prevent injustice at its inception."

¶16 The district court's oral rulings from the bench denying Jamar's motion for injunctive relief in these cases are not ordinarily appealable orders. *Helmers v. Sortino*, 535 N.W.2d 796, 798 (N.D. 1996). However, when the denial of immediate appellate review will create a substantial injustice, this Court has exercised its supervisory jurisdiction to review such an oral ruling. *Id*. Jamar submits that under the circumstances of these cases, this Court should review the district court's oral ruling denying its motion for injunctive relief.

¶17 At the same time as the district court issued its oral rulings denying Jamar's motion for preventative relief in these cases on March 3, 2014, the district court directed plaintiffs' counsel to submit proposed orders documenting those rulings to the district court. At that time, the trial of the cases was scheduled for May 13, 2014. The district court did not set a deadline for plaintiffs' counsel to submit the proposed orders. As of April 29, 2014, just two weeks before the trial of the cases was scheduled to commence, plaintiffs' counsel had still not submitted any proposed orders on Jamar's motions to the district court, and the district court had not issued any written orders on Jamar's motions. Consequently, to protect its right to appeal from the March 3, 2014 rulings denying its motions, Jamar filed the notices of appeal from those rulings on April 29, 2014.

¶18 On May 5, 2014, the district court issued an order continuing the trial of the cases to July 29, 2014. However, to date, over 90 days after the district court's oral rulings

denying Jamar's motions for injunctive relief, plaintiffs' counsel has still not submitted any proposed orders on Jamar's motions to the district court, and the district court has not issued a written order denying Jamar's motion for injunctive relief.

¶19 The North Dakota legislature has granted a statutory right to appeal from an order that denies a motion for injunctive relief. N.D.C.C. § 28-27-02(3). Jamar contends that placing responsibility with opposing counsel for submitting the proposed order denying Jamar's motion for injunctive relief to the district court without any time limitation for submitting the order, along with the absence of a timely issued and filed written order on that motion by the district court, has prejudiced Jamar's legislatively-created statutory right to appeal what would be an appealable order denying Jamar's motion for injunctive relief. *See Belden v. Hambleton*, 554 N.W.2d 458, 460 (N.D. 1996) ("In order to successfully appeal an interlocutory order, the order must fall within the list of appealable orders codified in N.D.C.C. § 28-27-02.") Jamar submits that this denial of its statutory appellate right alone is a sufficient substantial injustice to warrant this Court's exercise of its supervisory jurisdiction to review the denial of Jamar's motion for injunctive relief.

¶20 Beyond that, however, Jamar further asserts that the district court's denial of Jamar's motion for injunctive relief, perpetuating North Dakota litigation against Minnesota corporations that properly dissolved under Minnesota law 29 years ago, in the face of Minnesota statutory and case law that bars such litigation against those corporations in Minnesota, creates an even greater substantial injustice to Jamar. The district court's ruling runs contrary to the application of the Full Faith and Credit Clause of the United States Constitution and the principle of comity by failing to apply Minnesota law as set forth in *Podvin v. The Jamar Co.*, 655 N.W.2d 645 (Minn. App.

2003), and *In re: Paul W. Abbott Company, Inc.*, 767 N.W.2d 14 (Minn. 2009), to bar the claims in these cases against Jamar. Correcting this error through immediate review will serve to prevent further disregard of a sister state's decisions regarding two of its former corporate citizens. It will also serve to put an end to the multiplicity of unwarranted North Dakota suits against Jamar.

¶21 Jamar requested the district court to enter judgment pursuant to N.D.R. Civ. P. 54(b) as part of its motion to dismiss and for preventative relief. The district court's denial of Jamar's entire motion necessarily includes a denial of that request. In submitting its request for Rule 54(b) certification, Jamar demonstrated that such certification was necessary to avoid prejudice and hardship to Jamar, and that Jamar's circumstances were unusual, compelling, and out of the ordinary. *See Dimond v. State Board of Higher Education*, 1999 ND 228, ¶15, 603 N.W.2d 66, 70.

¶22 Jamar is presently defending over 40 state court asbestos claims in North Dakota. All of these cases are scheduled for trial within a year, including eight within the next three months. Over 170 claims have been asserted against Jamar in North Dakota after the Minnesota Court of Appeals in the *Podvin* case ruled, on January 14, 2003, that asbestos claims asserted against Jamar more than two years after Jamar's corporate dissolution in 1985 were barred as a matter of law. (App. at 3, ¶ 8). Nevertheless, claims continue to be asserted against Jamar in North Dakota—six as recently as 2013, *id.*, requiring Jamar to expend the time, effort, and expense in defending those claims. Jamar respectfully submits that the issue it presents is sufficiently "unusual and compelling" to have warranted Rule 54(b) certification. A decision on this issue will impact on all pending and future claims against Jamar in

North Dakota by virtue of its res judicata effect. As the North Dakota Supreme Court stated in *Peterson v. Zerr*, 443 N.W.2d 293 (N.D. 1989):

> In cases in which the court has dismissed a claim, leaving others to be determined, or has dismissed the action against one or more but fewer than all the parties, the range of considerations narrows. There is no judgment to be executed, and the losing party pays out no money. The judgment imposes no liens. Under some circumstances a judgment might be sought for its res judicata effect.

443 N.W.2d at 300 (emphasis added) (quoting 6 Moore's Federal Practice ¶ 54.41[3], at pages 54-264—54-266 (1988)).

¶23 In *Bulman v. Hulstrand Construction Co.*, 503 N.W.2d 240 (N.D. 1993), the court noted: "The presence of a unique or controlling issue of law may be a relevant factor for consideration by the trial court in the Rule 54(b) equation." 503 N.W.2d at 241 (quoting *Janavaras v. National Union Property & Casualty Co.*, 449 N.W.2d 578, 580-81n.4 (N.D. 1989)). Jamar submits that the issue of whether pending and future claims can be asserted against Minnesota corporations that dissolved nearly 29 years ago is both unique and controlling with respect to asbestos claims against Jamar in North Dakota, as well as any North Dakota claims against any other foreign dissolved corporations. Interconnected with that issue is the even more unique and controlling constitutional issue of whether North Dakota courts must accord full faith and credit to a final appellate decision of the state of a foreign corporation's creation and dissolution regarding the interpretation of that state's law addressing the effect of corporate dissolution.

¶24 Moreover, "compliance with N.D.R. Civ. P. 54(b) is not necessary if the injunctive features of the appealed order 'serve an active rather than incidental purpose' and affect fundamental interests of the litigants." *Mann v. N.D. Tax Commissioner*, 2005

ND 36, ¶8, 692 N.W.2d 490, 494 (quoting *Fargo Women's Health Org. v. Lambs of Christ*, 488 N.W.2d 401, 406 (N.D. 1992)). The injunctive relief sought by Jamar serves the active purpose of imposing the same bar of claims against it as imposed by the courts of Minnesota, Jamar's State of incorporation and dissolution, through application of the Full Faith and Credit Clause of the United States Constitution and the principle of comity. Jamar submits that it has a fundamental interest in having its legally accomplished cessation of its existence and legal bar of claims against it following its dissolution as provided by the law of the state of its incorporation and dissolution recognized by North Dakota and all other states.

¶25 For all of these reasons, Jamar respectfully requests this Court to exercise its supervisory jurisdiction to review the district court's oral ruling denying Jamar's motion for injunctive relief.

II. In the absence of a means to properly serve Jamar and a legal basis to assert claims against Jamar, Jamar is entitled to immediate preventative relief from the multiplicity of lawsuits against it in North Dakota.

A. There is no means to properly serve Jamar.

¶26 At the time of Jamar's corporate dissolution in 1985, there were only two officers, shareholders, and directors of Jamar—Walker Jamar, Jr. and his brother, Norton Jamar. Norton Jamar died on August 21, 2008, and Walker Jamar, Jr. died on October 18, 2008. (App. at 2, ¶¶ 5-6). Neither the Secretary of State of North Dakota nor the Secretary of State of Minnesota will allow the appointment of an agent to receive a service of process on behalf of a dissolved corporation. *See* App. at 2, ¶ 7; 5, 8.

¶27 By virtue of their corporate dissolution, the dissolved Jamar corporations are no longer existing entities, and are thus not subject to a North Dakota court's personal jurisdiction.[2] Consequently, Jamar is not subject to service of North Dakota process. Assuming, only for the sake of argument, that Jamar is subject to the personal jurisdiction of the court, there is still no means to serve process on Jamar pursuant to N.D.Civ.P. 4(d)(3). There are no living officers, directors, or any other individuals associated with the dissolved Jamar corporations upon which service can be made pursuant to Rule 4(d)(3)(A) and 4(d)(2)(D). Moreover, according to both the North Dakota and Minnesota Secretary of State's offices, no agent can be appointed to receive service of process for a dissolved foreign corporation.[3] (App. at 2, ¶ 7; 5; 8). Consequently, this option does not provide a viable means for serving the dissolved Jamar corporations.

¶28 With respect to Rule 4(d)(3)(B)'s second option for service outside the state—as provided by the state in which service is to be made—Minnesota law provides that service on dissolved Minnesota corporations may be made on the Minnesota Secretary of State, "so long as claims are not barred under the provisions of the chapter that governed the business entity." Minn. Stat. § 5.25, subd. 5(b). As previously noted, in the *Podvin* case, the Minnesota Court of Appeals determined that claims against the dissolved Jamar corporations are barred by the provisions that

[2] While a corporation is included in North Dakota Rule of Civil Procedure 4(a)'s definition of "person," once Jamar dissolved, its corporate existence ceased, and thus, it is no longer subject to personal jurisdiction under N.D.R.Civ.P. 4(b). *See Brend v. Dome Development, Ltd.*, 418 N.W.2d 610, 611-12 (N.D. 1988) (stating that corporations cease to exist once they are dissolved).

[3] N.D.C.C. § 10-01.1-13(3)(b) states that the North Dakota Secretary of State is the agent for service of process "when a domestic entity has been dissolved," but there is no provision addressing service of process on a foreign dissolved corporation.

governed those corporations. Therefore, Minnesota law does not provide a viable means for service of process on the dissolved Jamar corporations.

¶29 The last option for service outside of the state pursuant to Rule 4(d)(3)(C) is "as directed by order of the court." However, there is no order directing how service is to be made on Jamar, and no such order has been sought.

¶30 In light of the foregoing, Jamar submits that there is no proper means to obtain service of process on Jamar. The dissolved Jamar corporations ceased to exist nearly 29 years ago, and there is no legal basis for any new claims to be asserted against Jamar at this time. For these reasons, Jamar also seeks permanent injunctive relief against any further claims.

B. <u>There is no legal basis to assert claims against Jamar</u>.

¶31 The issue of whether plaintiffs' claims can be brought against the dissolved Jamar corporations is purely a question of law. Questions of law are fully reviewable by this Court on appeal. *State ex rel. Storbakken v. Scott's Electric, Inc.,*, 2014 ND 97, ¶15, 846 N.W.2d 327, 332. This issue was addressed by the Minnesota Court of Appeals, which ruled that asbestos claims asserted against Jamar more than two years after Jamar's dissolution in 1985 are barred by Minnesota's corporate dissolution statutes. *Podvin v. The Jamar Company*, 655 N.W.2d 645 (Minn. App. 2003). In addition, as noted in the Statement of Facts, several North Dakota State district courts similarly ruled on numerous occasions that asbestos claims against Jamar are barred by the Minnesota corporate dissolution statutes.

¶32 It is undisputed that the law of the state of a corporation's incorporation governs the effect of its dissolution under that state's law. *In re National Surety Co.*,

283 N.Y. 68, 76-77, 27 N.E.2d 505, 508, *cert. denied*, 311 U.S. 707, 61 S.Ct. 175, 85 L.Ed. 459 (1940). In the *Podvin* case, the Minnesota Court of Appeals interpreted the law in effect at the time of Jamar's dissolution in 1985 in ruling that claims asserted against the dissolved Jamar corporations more than two years after their corporate dissolution were barred as a matter of law. Notably, in interpreting the applicability of Minnesota's corporate dissolution statute's provisions to the claims against Jamar, the Court in *Podvin* declined to apply a 1991 amendment to that statute, concluding that the amendment could not be applied to Jamar's dissolution in 1985 absent a specific legislative provision for such retroactive application. *Podvin, supra,* 645 N.W.2d at 650-51.

¶33 Plaintiffs contend that a 2007 amendment to Minnesota's corporate dissolution statute, Minn. Stat. § 302A.781, should apply to allow Plaintiff's claims against Jamar. That amendment, as enacted by the Minnesota Legislature in May of 2007, is as follows:

> Minnesota Statutes 2006, section 302A.781, is amended by adding a subdivision to read:
> Subd. 5. Other claims preserved. In addition to the claims in subdivision 4, all other statutory and common law rights of persons who may bring claims of injury to a person, including death, are not affected by dissolution under this chapter.
> EFFECTIVE DATE. This section is effective July 1, 2007.

2007 Minn. Laws, Ch. 54, Art. 5, § 6.

¶34 "The interpretation of a statute is a question of law, fully reviewable on appeal." *McDowell v. Gillie*, 2001 ND 91, ¶11, 626 N.W.2d 666, 671.

¶35 Jamar respectfully submits that for the same reasons that the Minnesota Court of Appeals in *Podvin* refused to apply a 1991 amendment to Jamar's 1985

dissolution, retroactive application of this 2007 amendment to Jamar's corporate dissolution would be directly contrary to well-established Minnesota statutory and case law. Minn. Stat. § 645.21 states as follows:

> **645.21. Presumption against retroactive effect**
> No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.

The presumption against retroactivity is a doctrine deeply rooted in Minnesota jurisprudence, because considerations of fairness demand that individuals should have an opportunity to know what the law is before they act. *Ubel v. State*, 547 N.W.2d 366, 370 (Minn. 1996), *cert. denied*, 519 U.S. 1057, 117 S.Ct. 686, 136 L.Ed.2d 610 (1997). As far back as 1948, the Minnesota Supreme Court has strictly enforced Minnesota's statutory presumption against the retroactivity of its laws, stating, in *George Benz Sons, Inc. v. Schenley Distillers Corp.*, 227 Minn. 249, 35 N.W.2d 436 (1948):

> Section 645.21 specifically provides that no law shall be construed to be retroactive in its application unless clearly so intended by the legislature, exemplifying the principles that laws must look forward, and that the courts will presume their enactment was for the future and not for the past. *White v. United States*, 191 U.S. 545, 24 S.Ct. 171, 48 L.Ed. 295. Laws are not to be construed retroactively unless clearly so intended by the legislature. *Brown v. Hughes*, 89 Minn. 150, 94 N.W. 438; *Board of Education of City of Duluth v. Anderson*, 205 Minn. 77, 285 N.W. 80.

227 Minn. at 254, 35 N.W.2d at 439.

> Retroactive applications of statutes . . . are not favored and will be given effect only when such intent is clearly and manifestly shown on the face of the statute.

Parish v. Quie, 294 N.W.2d 317, 318 (Minn. 1980).

> Section 645.21 requires that there be much clearer evidence of retroactive intent in the statute's language--such as mention of the

> word "retroactive"--before we determine that a statute was intended to be applied retroactively.

Duluth Firemen's Relief Association v. City of Duluth, 361 N.W.2d 381, 385 (Minn. 1985).

¶36 With respect to the 2007 amendment to Minn. Stat. § 302A.781 at issue here, there is absolutely nothing in the language of the law enacting that amendment that remotely indicates, let alone demonstrates, clear and manifest intent to apply that amendment retroactively. The express language of the law clearly states that it is an amendment as opposed to a clarification. The law states that section 302A.781 "is amended by adding a subdivision," denoting the addition of a new provision, as opposed to a modification or clarification of a pre-existing provision.

¶37 Application of an amendment to a statute depends on the conduct being regulated by the statute. *See Sletto v. Wesley Construction, Inc.*, 733 N.W.2d 838, 843 (Minn. App. 2007). In making this determination, the statute must be read as a whole. *See id*. at 845 ("A statute 'must be read so as to give effect to all of its provisions.'") (quoting *Reider v. Anoka-Hennepin School District No. 11*, 728 N.W.2d 246, 251 (Minn. 2007)).

¶38 Minn. Stat. § 302A.781 is entitled "Claims barred; exceptions." The purpose of the statute was clearly to express the effect of corporate dissolution on claims against the corporation. As stated in the 1981 Reporter Notes to Minn. Stat. § 302A.781, at the time of the statute's enactment:

> The goal of every dissolution, whether voluntary or involuntary, is to end the corporate existence as quickly and neatly as possible. . . . . Barring claims filed after dissolution serves to promote certainty and timely filing of claims.

¶39 The statute also contains certain narrow exceptions to the general bar of claims against dissolved corporations. For example, subd. 4 to § 302A.781 was added in 2006 to allow statutory homeowner warranty claims against dissolved corporations. 2006 Minn. Laws, Ch. 202, § 3. Notably, in enacting the subdivision, the Minnesota Legislature expressly stated that the amendment was "effective the day following final enactment and appl[ies] to actions pending on or commenced after that date . . . ." *Id.* at § 7. If the conduct regulated by the statute was actions brought against dissolved corporations, then there would have been no need for the legislature to expressly state that the amendment applied to actions pending on or commenced after the effective date of the amendment. However, because the statute regulates the effect of corporate dissolution, it is the date of a corporation's dissolution that determines the applicability of the statute. Therefore, the Minnesota Legislature determined that it was necessary to expressly state a contrary intention for the 2006 amendment to allow statutory homeowner warranty claims against dissolved corporations. Significantly, just one year later, the Minnesota Legislature did not see fit to add a similar statement with respect to the effective date of the 2007 amendment at issue in these cases, and simply stated that the amendment was effective July 1, 2007. Consequently, Jamar submits that by failing to expressly provide that the 2007 amendment applies to actions commenced on or after its effective date, the Minnesota Legislature tacitly affirmed that the amendment did not apply to corporations that had dissolved prior to the amendment's effective date.

¶40 This distinction in applicability of the amendment was evident to one corporation that attempted to complete its dissolution process that had been begun

many years earlier prior to the July 1, 2007 effective date of the amendment to Section 302A.781. Paul W. Abbott Company, Inc. ("Abbott"), a Minnesota insulating contractor, had started the corporate dissolution process in the early 1990's, but had never completed it. The corporation thus continued to be named as a defendant in asbestos litigation. The corporation then filed the documentation it believed necessary to complete the dissolution process with the Minnesota Secretary of State on June 27, 2007, just three days before the effective date of the amendment to the corporate dissolution statute allowing personal injury and wrongful death claims against dissolved corporations. Plaintiffs in ongoing Minnesota asbestos litigation sought to challenge the validity of Abbott's corporate dissolution. *In re Paul W. Abbott Company, Inc.*, 767 N.W.2d 14 (Minn. 2009). On appeal of a discovery issue in the case, the Minnesota Supreme Court did note that if the corporation had properly dissolved in the early 1990s when it first started the corporate dissolution process, the corporation "would have received the benefit of the statutory bar on claims against dissolved corporations." 767 N.W.2d at 16. Thus, the Minnesota Supreme Court effectively concluded that the 2007 amendment to Minn. Stat. § 302A.781 would not have retroactively applied to Paul W. Abbott Company's dissolution, if that dissolution was completed prior to the effective date of the amendment. That same reasoning logically applies to Jamar, which dissolved even earlier, in 1985.

¶41 In *Brugger v. Brugger*, 303 Minn. 488, 229 N.W.2d 131 (1975), the Minnesota Supreme Court addressed the effect of a statutory amendment reducing the age of majority from 21 to 18 on child support provisions of prior divorce decrees.

The Court noted that applying the change in the age of majority to prior divorce decrees would unreasonably upset the conclusions reached in arriving at those decrees based on the law in effect at that time. 303 Minn. at 492-494, 229 N.W.2d at 134-135. The Court stated:

> [I]t is doubtful that the legislature intended to affect support provisions in divorce decrees predating L. 1973, c. 725. The unreasonable result of applying in this case the change in the age of majority created by the statute in question is an even more persuasive argument for the conclusion in concluding that the legislature did not intend that judgments in divorce cases entered into prior to the effective date of the law changing the age of majority would be affected by it.

Id. at 492, 229 N.W.2d at 134. The Court also noted Minnesota's statutory presumption against giving statutes retroactive effect, as follows:

> The legislature has created a presumption against giving statutes retroactive effect. Minn. St. 645.21 provides: "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." . . . Thus, the statutory presumption should be applicable in this case unless the legislature clearly and manifestly intended to make the law in question apply retroactively to divorce decrees requiring support of children beyond 18 years of age. We find nothing in L. 1973, c. 725, s 74, which defines "child" as an individual under 18 years of age, that indicates the change in status should retroactively affect the support provision for minors in prior divorce decrees.

Id. at 494-495, 229 N.W.2d at 135-136.

¶42 Jamar submits that it would be equally unreasonable to allow personal injury and wrongful death claims against it based on a 2007 amendment to Minnesota's corporate dissolution statute enacted twenty-two years after Jamar exercised its decision to dissolve based on the statutory provisions that were in effect in 1985. This is the version of the law that Jamar relied on when it dissolved.

> [A] dissolved corporation should "be able to rely on the promise" of the dissolution statute that adhering to the statutorily defined

> procedures for dissolution and termination will protect against claims that accrue years after the dissolution.

Podvin v. The Jamar Company, 655 N.W.2d 645, 652 (Minn. App. 2003) (quoting *Onan v. Industrial Steel Corp.*, 770 F.Supp. 490, 494 (D. Minn. 1989)).

¶43 Accordingly, Jamar submits that the Minnesota law to be applied to these plaintiffs' claims against Jamar is the same law in effect at the time of Jamar's dissolution in 1985, which is the same law applied by the Minnesota Court of Appeals in the *Podvin* case. Consequently, there is nothing different about the claims asserted against Jamar in these cases from the claims asserted against Jamar in the *Podvin* case in Minnesota, or from the claims asserted in the cases in which other North Dakota State district courts have previously granted Jamar's motion for summary judgment on corporate dissolution grounds. The claims were all asserted against the dissolved Jamar corporations more than two years after Jamar's dissolution in 1985. Therefore, Jamar submits that claims against the dissolved Jamar corporations are barred as a matter of law, and there is no legal basis for the assertion of such claims against Jamar.

C. Jamar is entitled to immediate preventative relief from the multiplicity of lawsuits against it in North Dakota.

¶44 N.D.C.C. § 32-05-04(3) provides:

> Except when otherwise provided by this chapter, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:
>
> ****
>
> 3. When the restraint is necessary to prevent a multiplicity of judicial proceedings;
>
> ****

¶45 The circumstances under which injunctive relief is appropriate to prevent a multiplicity of judicial proceedings has been addressed in several cases. In *New York Life Ins. Co. v. Stoner*, 92 F.2d 845 (8th Cir. 1937), the Court of Appeals for the Eighth Circuit stated:

> To entitle plaintiff to maintain its suit in the nature of a bill of peace, there must be involved an identity of issues. The actions, the multiplicity of which plaintiff seeks to enjoin, must all be based upon like facts and depend upon the same questions of law so that the decision of one will be practically determinative of all.

92 F.2d at 848 (citing *Chicago & N.W. Ry. Co. v. Bauman*, 69 F.2d 171 (8th Cir. 1934)). The court further stated:

> Avoidance of the burden of numerous suits at law between the same or different parties where the issues are substantially the same, is a recognizable ground for equitable relief....

92 F.2d at 848 (quoting *DiGiovanni v. Camden Fire Ins. Ass'n.*, 296 U.S. 64, 56 S.Ct. 1, 4, 80 L.Ed. 47 (1935)).

¶46 In *Viestenz v. Arthur Tp.*, 54 N.W.2d 572 (1952), property owners sought an injunction against a township to restrain the township from permitting a road embankment to cause surface water to flood onto the property owners' land. In concluding that the property owners were entitled to injunctive relief, the North Dakota Supreme Court stated:

> The plaintiffs have the right to sue for damages for the trespass on their land by the unlawful acts of the defendants and for the nuisance created by the flooding of their lands. That, however, would mean an action every year the waters flooded their land. The actual duration of the flooding and the area covered may differ every year. A recurrent suit for damages is not an adequate remedy under the circumstances. Only in a court of equity can the situation be dealt with adequately and with justice to all concerned.

> 'As a general rule, where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. The fact that an injured person has the right of successive actions for the continuance of the wrong does not make it an adequate remedy at law which bars the jurisdiction of a court of equity to grant an injunction to restrain the continuance of the injury.' 43 C.J.S., Injunctions, § 24, p. 449.

54 N.W.2d at 578; *accord*, *Rynestad v. Clemetson*, 133 N.W.2d 559, 564 (N.D. 1965). By analogy, Jamar contends that asserting their corporate dissolution defense repeatedly every time a new asbestos claim is brought against them is not an adequate remedy at law, and that Jamar is therefore entitled to injunctive relief from repeated and continuous claims.

¶47 The following are other North Dakota Supreme Court cases in which injunctive relief was allowed to prevent a multiplicity of claims: *State ex rel. Ladd v. The District Court in and for Cass County*, 115 N.W. 675 (1908) (injunction may be appropriate to prohibit illegal and improper actions of the North Dakota Pure Food Commissioner to prevent a multiplicity of lawsuits against flour manufacturers); *Federal Land Bank of St. Paul v. Ziebarth*, 520 N.W.2d 51 (N.D. 1994) (injunction upheld against pro se litigants, who had a history of vexatious and meritless litigation over a property foreclosure, from filing any further actions relating to the property foreclosure without prior permission from the court); *Ronngren v. Beste*, 483 N.W.2d 191 (N.D. 1992) (upholding a district court order that ordered a party to dismiss separate actions filed relating to subjects already at issue in a pending proceeding in the interest of avoiding a multiplicity of suits pursuant to North Dakota Century Code Section 32-05-04(3)).

¶48 Over 170 asbestos claims have been brought against Jamar in North Dakota since January 14, 2003, the date of the Minnesota Court of Appeals decision in the *Podvin* case. Six of those claims were commenced as recently as 2013. Jamar's corporate dissolution legal defense is the same in all of these cases, and has been ruled on in Jamar's favor in asbestos cases by the Minnesota Court of Appeals in the *Podvin* case, by district courts in Grand Forks, Cass, and Morton Counties on several occasions in numerous asbestos cases in North Dakota. Nevertheless, plaintiffs continue to assert claims against Jamar in North Dakota. Jamar submits that it is entitled to injunctive relief to prevent the ongoing multiplicity of judicial proceedings against it in North Dakota, pursuant to North Dakota Century Code Section 32-05-04(3).

¶49 This Court applies the abuse of discretion standard of review to rulings on motions for injunctive relief. *State ex rel. Holloway v. First American Bank & Trust Co.*, 186 N.W.2d 573, 576 (N.D. 1971). Jamar submits that in the absence of a proper means to obtain service of process on Jamar, and the absence of a legal basis to assert claims against Jamar more than two years after Jamar's dissolution in 1985, the district court erred in denying Jamar's motion for preventative relief, and that error constituted an abuse of discretion sufficient to require reversal of the district court's ruling.

III. North Dakota Courts are constitutionally required to accord Full Faith and Credit to Minnesota law, which bars claims against Jamar asserted more than two years after Jamar's dissolution in 1985.

¶50 The Full Faith and Credit Clause of the United States Constitution provides as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Art. IV, § 1. This constitutional provision was enabled by Congress, through the Full Faith and Credit Act, which provides, in part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the course of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

¶51 In *1st Summit Bank v. Samuelson*, 580 N.W.2d 132 (N.D. 1998), the North Dakota Supreme Court stated the following with respect to the purpose of the Full Faith and Credit Clause:

> The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighted against the policy of the constitutional provision and the interest of the state whose judgment is challenged.

580 N.W.2d at 135 (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77, 56 S.Ct. 229, 234, 80 L.Ed. 220 (1935)). The Court in *Samuelson* went on to state: "Under the Full Faith and Credit Clause, North Dakota is obliged to recognize the judgments of a foreign state as our own, even though a similar judgment could not be obtained here." 580 N.W.2d at 135.

¶52 A further purpose of the Full Faith and Credit Clause as applied to judicial proceedings is to avoid re-litigation of the same issue in courts of another state. *Sutton v. Lieb*, 342 U.S. 402, 407, 72 S.Ct. 398, 401, 96 L.Ed. 448 (1952); *White v. Thomas*, 660 F.2d 680, 685 (5th Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148 (1982); *Jones v. State Farm Mutual Auto Ins. Co.*, 202 Mich. App. 393, 406-407, 509 N.W.2d 829, 837 (1993). Accordingly, in *Marin v. Augedahl*, 247 U.S. 142, 151-52, 38 S.Ct. 452, 455, 62 L.Ed. 1038 (1918), the United States Supreme Court ruled that a North Dakota court erred in not according full faith and credit to a Minnesota court ruling applying Minnesota law to issues involving an insolvent Minnesota corporation.

¶53 In light of the foregoing, Jamar respectfully submits that the Full Faith and Credit Clause of the United States Constitution requires North Dakota courts to apply the Minnesota Court of Appeals' decision in the *Podvin* case to claims against Jamar. Such an application leads to the irrefutable conclusion that those claims asserted against the dissolved Jamar corporations more than two years after those corporations' dissolution are barred, and Jamar is entitled to a dismissal of those claims as a matter of law.

¶54 As an alternative to the application of the Full Faith and Credit Clause, the Court can reach the same result through the application of the principle of comity. As the North Dakota Supreme Court stated in the case of *Hanson v. Scott*, 687 N.W.2d 247, 250 (N.D. 2004):

> Comity is a principle under which the courts of one state give effect to the laws of another state ... not as a rule of law, but rather out of deference or respect." *Trillium USA, Inc. v. Bd. of County Com'rs of Broward County*, 37 P.3d 1093, 1098 (Utah 2001). Courts apply

> comity "to foster cooperation, promote harmony, and build good will." *Id*. This Court has stated comity is "a willingness to grant a privilege, not as a matter of right, but out of deference and good will." *Dow v. Lillie, 26 N.D. 512, 529, 144 N.W. 1082, 1088 (1914)*.

In *Murphy v. Missouri & Kansas Land & Loan Co.*, 149 N.W. 957, 963 (1914), the North Dakota Supreme Court applied the principle of comity in concluding that the laws of Kansas applicable to a corporation created and dissolved under Kansas law would be followed in North Dakota.

¶55 In light of the foregoing, Jamar submits that the application of either the Full Faith and Credit Clause of the United States Constitution or the principle of comity require application of the Minnesota Court of Appeals' ruling in the *Podvin* case to North Dakota claims against the dissolved Jamar corporations such that those claims are barred as a matter of law.

Conclusion

¶56 Based on the foregoing, Jamar requests this Court to exercise its supervisory jurisdiction to review the district court's oral rulings denying Jamar's motions for injunctive relief in these cases.

Respectfully submitted,

Dated: June 18, 2014.

JOHNSON, KILLEN & SEILER, P.A.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Vicki Doll, Representative of the Estate of Delton Doll, deceased,	Supreme Court No. 20140156 Cass Co. No. 2010-CV-02751
Ronald Just, Representative of the Estate of Robert Just, deceased,	Supreme Court No. 20140157 Cass Co. No. 2010-CV-02729
Ken Deitz and Jamie Deitz, as co-representatives of the Estate of James Deitz, deceased,	Supreme Court No. 20140158 Cass Co. No. 2010-CV-02735

Respondents,

v.

AFFIDAVIT OF SERVICE

The Jamar Company, et al.,

Appellants,

999 Quebec, Inc., et al.,

Defendants.

STATE OF MINNESOTA)
)ss.
COUNTY OF ST. LOUIS)

Tammy M. Rolson, being first duly sworn upon oath, deposes and says that on the 18th day of June, 2014, she served the following in the above case:

1. **The Jamar Company and Walker Jamar Company's Petition for Supervisory Writ;**

2. **Petitioners' Appendix;**

3. **Affidavit of Service.**

Plaintiff's counsel, Judge Frank L. Racek, (BELOW) and all defense counsel of record (SEE ATTACHED MASTER SERVICE LIST) were served via electronic mail.

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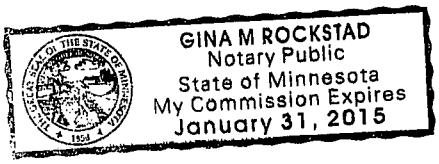
Tammy M. Rolson

Subscribed and sworn to before
me this 18th day of June, 2014.

Gina M. Rockstad
Notary Public



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