

SUPREME COURT OF NORTH DAKOTA

Mertz v. 999 Quebec, Inc.

780 N.W.2d 446 (N.D. 2010) · No. No. 20090031 · Decided March 24, 2010

SUMMARY

The Supreme Court of North Dakota considered an appeal from summary judgment dismissing Shirley Mertz’s survival action alleging asbestos-related injuries and death. The court held that the discovery rule does not toll accrual of a survival action beyond the decedent’s date of death, and treated the attempted appeal from the summary judgment order as an appeal from the subsequently entered judgment. The action was therefore barred by the applicable six-year statute of limitations.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Daniel J. Crothers; Gerald W. VandeWalle; Mary Muehlen Maring; Gary H. Lee, District Judge; Steven E. McCullough, District Judge
JURISDICTION	North Dakota
DECIDED	March 24, 2010
DOCKET	No. 20090031
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from a judgment dismissing a survival action on summary judgment grounds as barred by the statute of limitations.
STANDARD OF REVIEW	Summary judgment is reviewed to determine whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law.
PRECEDENTIAL VALUE	Published North Dakota Supreme Court decision; precedential as to the appealability and summary-judgment holdings, but no binding majority holding on post-death discovery-rule accrual.
PARTIES	Shirley Mertz v. 999 Quebec, Inc., A.H. Bennett Company, A.O. Smith Corporation, A.W. Chesterton Company, Airco, Inc., American Standard, Inc., Anchor Packing Company, Apollo Piping & Supply, Asbestos Corporation, Ltd., Atlas Turner, Inc., Australian Blue Asbestos, Pty., Bell & Gossett, Bell Asbestos Mines, Ltd., Bryan Steam Corporation, Building Sprinkler Company, Inc., Burnham Corporation, CBS Corporation, Carborundum Abrasives Company,

Carborundum Company, Certain-Teed Corporation, Chicago-Wilcox Manufacturing Company, Chromalox, Cleaver-Brooks, Division of Aqua-Chem, Inc., Crane Company, Crown Cork & Seal Company, Inc., CSR, Ltd., Dakota Welding Supply, Deltak, L.L.C., Detroit Stoker, Draxton Sales, Durabla Manufacturing Company, E.J. Lavino and Company, Inc., F.R.P. Products, Ltd., F & C Supply, Inc., Fargo-Moorhead Insulation Company, Firebrick Supply Co., Foster Products Corporation, Foster Wheeler Corporation, Garlock, Inc., General Electric Company, Georgia-Pacific Corp., Goodrich Corporation, Goodyear Tire & Rubber Company, Goulds Pumps, Inc., Greene, Tweed & Co., Guard-Line, Inc., H.B. Fuller Co., H.H. Robertson Company, Henry Vogt Machine Company, Hercules Chemical Company, Inc., Hickory Insulation Co., Hobart Brothers Co., Honeywell, Inc., Hydrotherm, Inc., Inductotherm Industries, Inc., Ingersoll-Rand Company, Insulation Services, Inc., International Vermiculite Co., J.H. France Refractories Company, The Jamar Company, John Crane, Inc., Johnston Boiler Co., Kelsey-Hayes Group, Kewanee Boiler Corporation, Lincoln Electric Co., Lochinvar, Mauritzon, Inc., McMaster Carr Supply Company, Mellema Company, Metropolitan Life Insurance Company, Minnesota Mining & Manufacturing, Murray Iron Works Company, Northern Plumbing & Heating, Inc., Northern Plumbing Supply, Inc., Norton Company, Owens-Illinois, Inc., The P.R. Sussman Company, Parker Boiler Co., Paul A. Douden, Paul W. Abbott, The Peerless Heater Company, Power Process Equipment, Inc., Praxair Distribution, Inc., Rapid-American Corporation, Research Cottrell, Inc., Rheem Manufacturing Company, Rhone-Poulenc, Inc., Riley Stoker Corporation, Rite-Hite Corporation, Ruud Manufacturing Company, S.O.S. Products Company, Inc., SEPCO Corporation, Singer Safety Company, Smith-Sharpe Company, Sprinkmann Sons Corporation, Sprinkmann Sons Corporation of Illinois, Superior Boiler Works, Inc., Sussman Electric Boilers, The Trane Co., Union Boiler Co., Union Carbide Corporation, Uniroyal, Inc., United Conveyor Corporation, Victor H. Leeby Company, Walker Jamar Company, Water Applications & Systems Corporation, Weil McLain Company, Whittier Filtration, Inc., Zurn Industries, Inc.

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QUESTIONS PRESENTED

1. Whether the appeal from an order granting summary judgment could be treated as an appeal from a subsequently entered consistent judgment.
2. Whether summary judgment was proper where the evidence created a genuine issue of material fact concerning when Allen Mertz or his family received notice that his cancer might have been caused by asbestos exposure.
3. Whether the discovery rule may extend accrual of a survival action beyond the decedent's death.

HOLDINGS

1. An order granting summary judgment is not independently appealable, but an attempted appeal may be treated as an appeal from a subsequently entered consistent judgment when such a judgment exists.
2. Summary judgment was improper because the record contained a genuine issue of material fact concerning when Allen Mertz or his survivors received information sufficient to place them on notice that asbestos exposure might have caused his cancer.
3. The court did not adopt a binding majority rule on whether the discovery rule may extend accrual of a survival action beyond the decedent's death because no three justices agreed on that issue.

KEY QUOTATIONS

“Therefore, there are not three votes to determine whether or not the discovery rule applies to extend the accrual of a survival action brought under N.D.C.C. § 28-01-26 beyond the date of the decedent's death.” (466)

“There are three votes to reverse and remand the matter for trial on the issue of when there was notice the exposure to asbestos was the possible cause of Allen Mertz's terminal illness.” (466)

FACTUAL BACKGROUND

Allen Mertz worked as a pipefitter for more than thirty years and was allegedly exposed to asbestos-containing products made or distributed by the defendants. He was diagnosed with lung cancer in 1995 and died in 1996. Shirley Mertz alleged that the family did not learn the cancer might be asbestos-related until after 2000 and that a doctor provided a written causation opinion in 2003. She filed a survival action on behalf of Allen Mertz's estate in 2005.

PROCEDURAL HISTORY

The district court granted defendants' motion for summary judgment, concluding that Allen Mertz and his family knew by 1995 that his lung cancer was asbestos-related and that the six-year limitations period had expired before the 2005 filing. Shirley Mertz appealed from the summary-judgment order. Because the order itself was not appealable, the Supreme Court treated the appeal as one from the subsequently entered consistent judgment. The Supreme Court reversed and remanded because a genuine issue of material fact existed concerning when the Mertz family received information sufficient to put them on notice of a potential asbestos-related claim.

DISPOSITION

REMAND INSTRUCTIONS

The district court was directed to conduct a trial on the merits and on all defenses, including when there was notice that asbestos exposure was a possible cause of Allen Mertz's terminal illness, the statute of limitations, and application of the discovery rule.

CASES CITED

- Farmers Union Oil Co. v. Smetana, 2009 ND 74, ¶ 7, 764 N.W.2d 665
- Alerus Fin., N.A. v. Western State Bank, 2008 ND 104, ¶ 15, 750 N.W.2d 412
- Wheeler v. Gardner, 2006 ND 24, ¶ 6, 708 N.W.2d 908
- Hulne v. International Harvester Co., 322 N.W.2d 474, 477 (N.D. 1982)
- Riemers v. Omdahl, 2004 ND 188, ¶ 6, 687 N.W.2d 445
- Wells v. First American Bank West, 1999 ND 170, ¶¶ 9-10, 598 N.W.2d 834
- Schanilec v. Grand Forks Clinic, Ltd., 1999 ND 165, ¶¶ 11, 13, 599 N.W.2d 253
- Hebron Public School District v. United States Gypsum Co., 475 N.W.2d 120, 121-26 (N.D. 1991)
- Biesterfeld v. Asbestos Corp. of America, 467 N.W.2d 730, 736 (N.D. 1991)
- Dunford v. Tryhus, 2009 ND 212, ¶ 9, 776 N.W.2d 539
- Redeker v. Johns-Manville Products Corp., 571 F. Supp. 1160, 1168 (W.D. Pa. 1983)
- Greene v. CSX Transportation, Inc., 843 So. 2d 157, 162-63 (Ala. 2002)
- Santos v. George Washington University Hospital, 980 A.2d 1070, 1073-76 (D.C. 2009)
- Trimper v. Porter-Hayden, 501 A.2d 446, 456-58 (Md. 1985)
- Pobieгло v. Monsanto Co., 521 N.E.2d 728, 732-33 (Mass. 1988)
- Pastierik v. Duquesne Light Co., 526 A.2d 323, 326-27 (Pa. 1987)
- Anthony v. Koppers Co., 436 A.2d 181, 184-85 (Pa. 1981)
- Eisenmann v. Cantor Bros., Inc., 567 F. Supp. 1347, 1353-54 (N.D. Ill. 1983)
- White v. Johns-Manville Corp., 693 P.2d 687, 695-97 (Wash. 1985)
- Sheets v. Graco, Inc., 292 N.W.2d 63, 66-67 (N.D. 1980)