

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

KENNETH GRIMM, Personal
Representative of the ESTATE
OF HELEN GRIMM, Deceased,

Plaintiff,

vs.

HON. RAYMOND R. CASHEN

No. 83-2872 NO

FORD MOTOR COMPANY, a foreign
corporation, UNION CARBIDE
CORPORATION, a foreign
corporation, DIAMOND SHAMROCK
CORPORATION, a foreign
corporation, STAUFFER CHEMICAL
COMPANY, a foreign corporation,
TENNECO, INCORPORATED, a foreign
corporation, UNIROYAL INCORPORATED,
a foreign corporation, ALLIED
CHEMICAL CORPORATION, a foreign
corporation, HOOKER CHEMICALS
& PLASTICS CORPORATION, a foreign
corporation, FIRESTONE TIRE &
RUBBER COMPANY, a foreign
corporation, B.F. GOODRICH
COMPANY, a foreign corporation,
GOODYEAR TIRE & RUBBER COMPANY,
a foreign corporation, Jointly
and Severally,

Defendants.

SUPPLEMENTAL BRIEF IN SUPPORT OF
DEFENDANT FORD MOTOR COMPANY'S
MOTION FOR SUMMARY JUDGMENT

I. Introduction

In his Answer To Defendants' Motion For Summary Judgment, Plaintiff argues that the Michigan Court of Appeals opinion in Larson v Johns-Manville Sales Corp., ____ Mich App ____, Slip Op 64286 (January 17, 1985), is not controlling because the case has been appealed by plaintiffs therein. Conspicuously absent from Plaintiff's Answer is any denial that the applicable statute of limitations bars

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the claims asserted by Plaintiff in his Complaint. The reason therefor is obvious: the claims asserted by Plaintiff in this action are clearly barred by Michigan law pre-dating Larson. Additionally, Larson is proper precedent.

II

ARGUMENT

A. Defendant's Reliance on Larson is Permissible and Appropriate.

Despite Plaintiff's assertions to the contrary, Larson should be considered by this Court in its resolution of Defendant's Motion For Summary Judgment. Plaintiff's cited authorities to the contrary are inapposite and clearly distinguishable. In People v George, 399 Mich 638, 250 NW 2d 491 (1977), the Michigan Supreme Court did not even discuss the import afforded a Court of Appeals opinion, which is subject to appeal, as it relates to other law suits. Rather, the opinion solely concerns the jurisdiction of the trial court to proceed with trial absent a determination on an application to appeal in the same case.

Plaintiff also cites People v Phillips, 416 Mich 63, 330 NW 2d 366 (1982) and Totzkay v DuBois, Slip Op 69698, 70269, in support of his argument. These cases are distinguishable. In People v Phillips, the court determined that a decision rendered by the Court of Appeals was not binding precedent justifying the prosecutor's reliance thereon where the decision was subsequently reversed in a Supreme Court opinion which "neither announced a departure from clear precedent nor decided an issue of first impression

whose resolution was not clearly foreshadowed." 416 Mich at 68. The court rejected the prosecutor's argument that the Court of Appeals decision was binding precedent during the seven month interval between the pronouncement by the Court of Appeals and its reversal by the Supreme Court.

Similarly, in Totzkay v DuBois, the Court of Appeals held plaintiff was unjustified in relying on an Appeals decision rendering the property protection provisions of Michigan's no-fault law unconstitutional where timely application to appeal was filed and the decision was later overturned.

Both of these cases are clearly different from the circumstances that confront this Court. The authorities cited by Plaintiff set forth circumstances where a party relied on a decision which forged new law or declared established law unconstitutional. In those cases the parties placed reliance on pioneering decisions. In Larson, however, the Michigan Court of Appeals followed the clear dictates of existing law. Indeed, the court rejected plaintiff's position, advocating a change in Michigan law, stating:

We believe that if a change in judicial policy of this magnitude is to occur (as is urged by plaintiff), such policy change should come from the Supreme Court or the legislature. Obviously, there are many broad factors going both ways that will contribute toward the formulation of a wise policy.
(Emphasis added)

Slip Opinion, at p. 10, Exhibit to Defendants' motion.

The Larson decision simply applies existing law to the factual setting before the court. The principles espoused by the Court of Appeals in Larson are long- established in Michigan and are controlling here.

B. Plaintiff's Claims Are Barred By The Applicable Michigan Statute of Limitations.

Existing Michigan law dictates that Plaintiff's claims be barred by the applicable statute of limitations. Plaintiff did not address or contest this in his Answer. The recent Michigan Supreme Court opinion in Hawkins v Regional Medical Laboratories, 415 Mich 420, 329 NW2d 729 (1982), establishes that the timeliness of Plaintiff's action here must be determined in accordance with the statute of limitations applicable to the liability theory of the underlying wrongful act. See Ortiz v Ferris, 128 Mich App 776, 341 NW 2d 215 (1983). As the appropriate statute of limitations period here is three years, if Plaintiff's decedent's claims accrued at any time prior to August 16, 1977 (three years prior to Plaintiff's decedent's death), Plaintiff's claims must be barred.

In determining when an action in tort for personal injury accrues, Michigan courts have adopted the formulation set forth by the Michigan Supreme Court in Connelley v Paul Ruddy's Equipment Repair and Service Company, 388 Mich 146, 200 NW2d 70 (1972). There, in an action for personal injury arising from an industrial accident, the court stated:

In the case of an action for damages arising out of tortious injury to a person, the cause of action accrues when all the elements of the cause of action have occurred and can be alleged in a proper complaint.

Those elements are four in number.

- (1) The existence of a legal duty by Defendant toward Plaintiff.
- (2) The breach of such duty.
- (3) Proximate cause or relationship between the breach of such duty and an injury to the Plaintiff.
- (4) The Plaintiff must have suffered damages.

388 Mich at 150.

See also Lefever v American Red Cross, 108 Mich App 61, 310 NW2d 278 (1981); American States Insurance Co., v Taubman Company, Inc., 352 F Supp 197 (ED Mich 1972); William C. Reichenbach Company v Michigan, 94 Mich App 323, 288 NW2d 622 (1979).

As admitted by Plaintiff in his Answer, Plaintiff's claims here arise from decedent's development of breast cancer, allegedly due to her exposure to PVC products during the time that she resided adjacent to the Ford Motor Company Mt. Clemens Vinyl Plant. Beginning on April 12, 1966, Plaintiff's decedent underwent various treatments for breast cancer. On August 16, 1980, Plaintiff's decedent died of breast cancer. "Plaintiff filed the instant wrongful death, products liability suit, claiming that decedent's death from breast cancer was caused by exposure to the polyvinyl chloride (PVC) products the (codefendants) supplied to Ford Motor Company no later than 1976. (Complaint, Paragraphs 8, 11-15)." Defendants' Motion for Summary Judgment, p. 2; Plaintiff's Answer thereto; and Amended Complaint, ¶18.

Thus, all elements necessary to Plaintiff's cause of action had accrued before August 16, 1977.

For this reason, together with the reasons set forth in Defendants' Motions for Summary Judgment and Briefs in Support thereof, Defendants' Motions for Summary Judgment should be granted.

Respectfully submitted,

DICKINSON, WRIGHT, MOON,
VAN DUSEN & FREEMAN

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by mailing the same to them at their respective business addresses as disclosed by pleadings of record herein, with postage fully prepaid thereon, on 2/28/85

Camellia R. Lonkley
Subscribed and sworn to before me, a Notary Public, on the above date.

Andrew J. Lammie
Wayne County, Mich.
My Commission Expires 1/12/88

BKCl/b/6