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-

FORD MOTOR COMPANY, et al.

Defendants.
_____/

Case No. 83-2872-NO

Hon Raymond R. Cashen

AFFIDAVIT

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Dennis M. Haffey, being first duly sworn, states that the medical records attached as exhibits to Brief In Support of Defendants' Motion for Summary Judgment are true and accurate copies of certified records produced by hospitals and physicians pursuant to subpoenas from Record Copy Services; and the facts stated in that Brief are true to the best of his knowledge, information and belief.

Dennis M. Haffey

Subscribed and sworn to before me this 5th day of February, 1985.

DENISE M. MacDOUGALL
Notary Public, Wayne County, MI
My Commission Expires Oct. 4, 1987

ST. JOSEPH HOSPITAL
[redacted]

OPERATIVE RECORD

66-3527
Hosp. No. [redacted]

Name helen Grimm Room or Ward No. ____ Bed ____ Date [redacted]

Pre-operative diagnosis Cystic mastitis

Surgeon Dr. Mulligan Ass't. ____ Intern ____

Nurse ____ Anesthetist ____

Anesthetic ____

Time operation started ____ Finished ____

Operative Diagnosis [redacted] with no evidence of axillary adenopathy.

Operation ____

Drains (kind and number) ____

Details of operation and findings Under general anesthesia an incision was made in the lateral aspect of the breast. A [redacted] was done with moderate section of the areola left in place. The patient had a severe type of cancer phobia and the mastectomy was performed in this fashion for this condition. The tail was removed as well and all breast tissue was carefully dissected free. The area was closed with drainage and a double layer sture of Tevdek interrupted sutures. Patient left the operating room in good condition.

PTM/sbg

[redacted] M. D.
Signature of Surgeon

T2

URL 09629

EXHIBIT 1 - p. 1

PHYSICAL EXAMINATION

Room: 303
Dr. Mulligan

HOSPITAL REGULATION: All Positive and Important Negative Findings Shall be Recorded.

ORDER OF RECORDING
1. General
2. Skin
3. Eyes
4. Ears
5. Nose
6. Mouth
7. Throat
8. Neck
9. Chest
10. Heart
11. Abdomen
12. Genitalia
13. Lymphatics
14. Rectal Female
15. Lungs
16. Extremities
17. Neurological
18. Rectal
19. Vaginal
20. Diagnosis

Date

T. P. R. Pulse Resp. Blood Pressure

GENERAL: An adult female not acutely ill, cooperative and intelligent.

HEAD: Negative.

EYES: Pupils react to light and accommodation and are equal and regular.

EARS: Negative.

HEART: Heart sounds are regular, rhythmical, good quality and good duration. No murmurs.

CHEST: Normal excursion, palpation, percussion and auscultation.

PELVIC: Not examined.

ABDOMEN: No masses and no tenderness.

SKIN: Negative.

REFLEXES: Patellar Achilles are normal.

IMPRESSION: [redacted]

DR. MULLIGAN/mtd

M. D.

T7

URL 09830

EXHIBIT 1 - p. 2

The Cottage Hospital of Grosse Pointe

DISCHARGE SUMMARY

Hospital No. 47939

Name GRIMM, HELEN Room _____ Doctor E. H. AMBROSE, M.D.

THE FOLLOWING ITEMS MUST BE INCLUDED: A. Purpose of Admittance (State reason why admitted), B. Findings (State specifically what was found), C. Treatment (State specifically what was done), D. Patient's Response (State specifically how patient responded), E. Condition on Discharge, and F. Future Care Prescribed (State whether patient will be followed at home or in office).

ADMITTED: 4-8-75 DISCHARGED: 4-11-75

This 47 year old female was admitted to the hospital for [redacted] This lesion proved to be a benign fibrocystic disease and she is discharged home on the second postoperative day with the wound healing well. She will be followed as an outpatient for removal of sutures.

Final diagnosis: Fibrocystic disease, left breast, benign.

Operation: [redacted]

EA:vk

Cm 259-2

Doctor's Signature

A146

EXHIBIT 2

UBL 09831

The Cottage Hospital of Grosse Pointe

DISCHARGE SUMMARY

Hospital No. 61818

Name GRIMM, Helen V. Room Doctor R.H. Ambrose, M.D.

THE FOLLOWING ITEMS MUST BE INCLUDED: A. Purpose of Admittance (State reason why admitted), B. Findings (State specifically what was found), C. Treatment (State specifically what was done), D. Patient's Response (State specifically how patient responded), E. Condition on Discharge, and F. Future Care Prescribed (State whether patient will be followed at home or in office).

Admitted: [redacted] Discharged: 2-19-77

The patient is a 50 year old female who has a lesion in the left breast for approximately five months. This lesion has grown and is hard and there is at least one palpable axillary lymph node. A biopsy of the lesion proves it to be malignant and the patient underwent left radical mastectomy with skin graft. Her postoperative course was complicated by some considerable mental depression and also by a moderate wound infection in the upper portion of the wound. The pathologic report notes that all of the sectioned lymph nodes reveal evidence of metastatic disease. The bone and liver scans are normal as well as the chest x-ray. At the time of discharge the wound is healing satisfactorily and some of the sutures are out. The patient will be followed as an out patient in the office. She has had consultation with the oncologist and decision as to possible prophylactic chemotherapy or Cobalt therapy has not bee made at this time. She will be followed as an out patient.

Final Diagnosis: Carcinoma, left breast with axillary metastasis.

Secondary Diagnosis: Wound infection.

Operation: [redacted]

RHA:sp

[redacted] signature

EXHIBIT 3 - p. 1

URL 09832

THE COTTAGE HOSPITAL OF GROSSE POINTE

PATHOLOGIC REPORT

Patient's Name GRIMM, HELEN Age 50 Sex F Path. No. 70,422

Case No. 0616169 Room 327-3 Physician DR. AMBROSE Date [redacted]

Source of Specimen 1. Left breast biopsy with frozen section
2. Left breast

History

Pre-operative Diagnosis Left breast mass

Post-operative Diagnosis

GROSS: Part 1.
A portion of breast tissue measuring 4.0 x 3.0 x 1.5 cm. On section it presents an irregular grayish firm resilient area, measuring approximately 1.5 cm. in maximum dimension. ( ) FC:clg

FROZEN SECTION DIAGNOSIS: ADENOCARCINOMA, INFILTRATING DUCTAL CELL TYPE. FC:clg

Part 2.
The specimen consists of a left breast and pectoral muscles. There is a recent sutured, but unhealed, upper outer quadrant incision, approximately 8 cm. in length, which is in contact with a mass of firm, white, crisp cutting tumor, 3 x 3.5 cm., from which a biopsy has been removed. The skin in the area of incision is slightly thickened and considerably thickened below the nipple. There is no gross involvement of the nipple. Sections of muscle show whitish areas, probably of fibrosis. The lymph nodes are up to 2 cm. in diameter, appear to extend beyond their capsules into the surrounding fat. Several are matted together. (There are nineteen nodes proximal to the pectoralis minor, labelled as P. Most of these grossly feel and appear involved with tumor. There are two nodes beneath the pectoralis minor labelled M, both of which appear to be involved. There are three nodes distal to the pectoralis minor labelled D, one of which appears grossly involved.) A cube of tissue is taken for the ERA studies. JDL:clg

MICROSCOPIC AND FINAL DIAGNOSIS:
1. [redacted]
2. [redacted]
[redacted] TO ALL TWELVE REGIONAL AXILLARY LYMPH NODES EXAMINED.

A. CHRISTIE, M.D.

AC/em

PAS 6

URL 09833

PHYSICIAN'S COPY
Form CH-64L-Rev. 6-65

015

Saratoga General Hospital

CLINICAL RESUME

Patient's Name GRIMM, Helen

Hospital Number #278621

Physician DR. E. COELLO

The clinical resume should recapitulate concisely:

1. Date of admission
2. Date of discharge OR expiration
3. Final diagnosis include all primary and secondary diagnoses
4. Reason for hospitalization
5. Significant findings
6. Procedures performed
7. Course and treatment in hospital
8. Consultations
9. Complications
10. Condition of patient on discharge
11. Pertinent instructions given to the patient and/or family
    a. medication
    b. diet
    c. physical activity
    d. follow-up care

ADMITTED: 3-23-80
DISCHARGED: 3-29-80

HISTORY: This 53-year old white female had a left radical mastectomy performed for carcinoma of the breast on 2-4-77. Metastasis to the axillary nodes was present at that time. She received adjuvant chemotherapy from March of 1977 until August of 1977 and she remained well until December of 1977, when she developed metastatic nodules of the chest wall. A course of radiation therapy was administered, with control of her metastatic lesions being noted. In April of 1978, Mrs. Grimm developed a metastatic nodule in the opposite breast which required a right simple mastectomy. Chemotherapy was initiated in July of 1978 because of recurrence of metastatic lesions of the chest wall, which brought about a partial remission which lasted for approximately sixteen months. During the last four weeks prior to the present admission, there had been rapid marked progression of her malignancy, with enlargement of the metastatic nodules and the development of multiple ulcerative lesions having been noted. The disease had been limited to the chest wall and there was no clinical or radiological evidence of distant metastasis. The patient was admitted to Saratoga General Hospital on 3-23-80 for re-evaluation and a possible change in her chemotherapy.

PHYSICAL EXAMINATION: The physical examination on admission revealed a middle-aged white female in a surprisingly satisfactory general condition. Multiple large ulcerative lesions were present on the chest wall. There was no peripheral lymphadenopathy or organomegaly noted and the chest was clear to percussion and auscultation.

LABORATORY AND RADIOLOGICAL EVALUATIONS: The SMA-12 was within normal limits, except for slightly reduced total protein and serum albumin levels being noted. Hemoglobin was 8.7 grams per cent and the white blood cell count was 3,500. The platelets were adequate.

HOSPITAL COURSE: An attempt was made to transfuse packed cells, but this was unsuccessful because of the lack of peripheral veins. Chemotherapy with Mitomycin-C was administered, without any severe side effects being noted. Mrs. Grimm was discharged from the hospital on 3-29-80 and her condition was to be re-evaluated in three weeks.

URL 09834

2708

MTS: plb
DD: 4-10-80
DT: 4-18-80

E. COELLO, M.D.

08

EXHIBIT 4

PLEASE TYPEWRITE OR PRINT – EXCEPT SIGNATURES – ALL COPIES MUST BE LEGIBLE
USE ONLY BLACK INK

LF _____

CF _____

0183884 B

STATE OF MICHIGAN
DEPARTMENT OF PUBLIC HEALTH

STATE FILE NUMBER

CERTIFICATE OF DEATH

DECEDENT

1 DECEDENT NAME (First, Middle, Last): HELEN V. GRIMM
2 SEX: Female
3 DATE OF DEATH (Mo., Day, Yr.): Aug. 16, 1980
4 RACE: White
5a AGE – Last Birthday (Years): 54
5b UNDER 1 YEAR – MOS / DAYS
5c UNDER 1 DAY – HOURS / MINS
6 DATE OF BIRTH (Mo., Day, Yr.): May 22, 1926
7a COUNTY OF DEATH: Wayne
7b LOCATION OF DEATH (Check one and specify): XX Inside City Limits of Grosse Point; ☐ Inside Village Limits of; ☐ Twp. of
7c HOSPITAL OR OTHER INSTITUTION – If not in hospital, give street and number: Cottage Hospital
8 STATE OF BIRTH (If not in U.S.A. name country): Virginia
9 CITIZEN OF WHAT COUNTRY: USA
10 MARRIED (Never Married, Married, Widowed, Divorced) (Specify): Married
11 SURVIVING SPOUSE (If wife, give maiden name): Kenneth Grimm
12 WAS DECEDENT EVER IN U.S. ARMED FORCES? (Yes or No): NO
13 SOCIAL SECURITY NUMBER: 227-24-6713
14a USUAL OCCUPATION (Give kind of work done during most of working life, even if retired): Homemaker
14b KIND OF BUSINESS OR INDUSTRY: At Home
15 CURRENT RESIDENCE – STATE: Michigan
16 COUNTY: Macomb
17a LOCALITY (Check one and specify): ☐ Inside City Limits of; XX Inside Village Limits of: Chesterfield
17b STREET AND NUMBER: 50877 Fairchild Road

PARENTS

18 FATHER – NAME (First, Middle, Last): Willard Ransey
19 MOTHER – MAIDEN NAME (First, Middle, Last): Dora (No Record)

INFORMANT

20a INFORMANT (Signature): Mr. Kenneth Grimm
20b MAILING ADDRESS (Street or R.F.D. No., City or Town, State, Zip): 50877 Fairchild Rd, Mt. Clemens, MI 48045

CAUSE OF DEATH

21 IMMEDIATE CAUSE (Enter only one cause per line for (a), (b), and (c).)
PART I
(a) RESPIRATORY FAILURE — Interval between onset and death: 2 WEEKS
DUE TO, OR AS A CONSEQUENCE OF:
(b) [redacted] — Interval between onset and death: 2½ YEARS
DUE TO, OR AS A CONSEQUENCE OF:
(c) CARDI[redacted] — Interval between onset and death: 3½ YEARS
PART II OTHER SIGNIFICANT CONDITIONS – Conditions contributing to death but not related to cause given in PART I.

22 AUTOPSY (Specify Yes or No): NO
23 WAS CASE REFERRED TO MEDICAL EXAMINER? (Specify Yes or No): No

CERTIFIER

24a PLACE OF DEATH (Inside Hospital, Nursing Home, Residence, Other) (Specify): Hospital
24b IF HOSP. OR INST. – Outpatient or Inpatient (Specify): Inpatient

CERTIFYING PHYSICIAN
25a To the best of my knowledge, death occurred at the time, date and place and due to the cause(s) stated. (Signature and Title): [signature]
25b DATE SIGNED (Mo., Day, Yr.): 8/18/80
25c HOUR OF DEATH: 1:25 P M
25d NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER (Type or Print):

MEDICAL EXAMINER
26a ☐ This case reviewed and determined not to be a medical examiner's case. ☐ On the basis of examination and/or investigation in my opinion death occurred at the time, date and place and due to the cause(s) stated. (Signature and Title):
26b DATE SIGNED (Mo., Day, Yr.):
26c HOUR OF DEATH:
26d PRONOUNCED DEAD (Mo., Day, Yr.):
26e PRONOUNCED DEAD ON:
26f PRONOUNCED DEAD AT:

27 NAME AND ADDRESS OF CERTIFIER (PHYSICIAN OR MEDICAL EXAMINER) (Type or Print): EUDORO COELLO MD FRCP 23501 JEFFERSON ST CLAIR SHORES MICHIGAN 48080

28a ACCIDENT, SUICIDE, HOMICIDE OR PENDING INVEST. (Specify):
28b DATE OF INJURY (Mo., Day, Yr.):
28c HOUR OF INJURY:
28d DESCRIBE HOW INJURY OCCURRED:
28e INJURY AT WORK (Specify Yes or No):
28f PLACE OF INJURY – At home, farm, street, factory, office building, etc. (Specify):
28g LOCATION – Street or R.F.D. No., City, Village or Township, State:

DISPOSITION

29a BURIAL, CREMATION, REMOVAL, OTHER (Specify): Burial
29b CEMETERY OR CREMATORY – NAME: Cadillac Memorial Gardens
29c LOCATION – City, Village or Township, State: East Mt. Clemens, Mich 48043
DATE (Mo., Day, Yr.): Aug. 19, 1980
NAME OF FACILITY: Harold W. Vick Funeral Home
ADDRESS OF FACILITY: 140 S. Gratiot – Mt. Clemens, MI
FUNERAL SERVICE LICENSEE (Signature): Mary Vick Spaulding
REGISTRAR (Signature):
DATE RECEIVED BY REGISTRAR (Mo., Yr.):

R-3360 (4/78)

Michigan Public Act 343 of 1925, as amended, requires that the attending physician, or in the absence of an attending phys a medical examiner shall fill out and sign the medical certificate of death within 48 hours after death.

The funeral director is prior to disposing of the ortions of the certificate and obtaining a burial or removal p district where the death occurred.

dl

The Cottage Hospital of Grosse Pointe

DISCHARGE SUMMARY

Hospital No. 91932

Name GRIMM, Helen Room Doctor E. Gaglio, M.D.

THE FOLLOWING ITEMS MUST BE INCLUDED: A. Purpose of Admittance (State reason why admitted), B. Findings (State specifically what was found), C. Treatment (State specifically what was done), D. Patient's Response (State specifically how patient responded), E. Condition on Discharge, and F. Instructions on Discharge.

[redacted]

Instructions on Discharge: (Include physical activity, medication, diet and follow-up care.)

History: This 54 year old white female had a radical mastectomy February 4, 1977 for carcinoma of the breast with metastases to the axillary nodes. She had received chemotherapy from March, 1977 to August, 1977 and remained well until December, 1977 when she developed metastatic nodules in the chest wall. A course of radiation therapy was administered with a control of her metastatic lesions. In April, 1978 the patient developed a metastatic nodule in the opposite breast which required a simple mastectomy. Chemotherapy was started in July, 1978 with a combination of 5-FU and Cytoxan with induction of partial remission which lasted for approximately 16 months. Since March, 1980 Mrs. Grimm became progressively worse with rapid progression of the malignancy and enlargement of metastatic nodules. She developed multiple ulcerations in the chest wall. A therapeutic trial with Adriamycin and Methotrexate was unsuccessful. The patient was admitted to Cottage Hospital 8-9-80 for symptomatic care.

Physical examination: At the time of admission revealed a middle-aged white female complaining of generalized pain. Multiple large ulcerative lesions were present in the chest wall. There was no peripheral lymphadenopathy or organomegaly. The lungs were clear to percussion and auscultation.

Hospital course: After discussion of Mrs. Grimm's condition with her husband it was decided to administer only symptomatic non-supportive care. She deteriorated rapidly and finally expired 8-16-80. Death was attributed to respiratory failure. No post-mortem examination was done.

Final diagnosis: 1. [redacted]
2. [redacted]

EC/ef

[redacted]

Doctor's Signature

URL 09836

EXHIBIT 5 - p. 2

A-

GROSSE POINTE ONCOLOGY ASSOCIATES, P. C.

INTERNAL MEDICINE – MEDICAL ONCOLOGY

JOHN H. BURROWS, M.D., F.A.C.P.
EUDORO COELLO, M. D., F.R.C.P. (C)
ERWIN R. CASAS, M. D.
EUGENE J. AGNONE, JR., M. D.

23501 E. JEFFERSON
ST. CLAIR SHORES, MI 48080
778-9530

September 29, 1980

Mr. Timothy M. Casey
Vice President
Independent Liberty Life Insurance Co.
Home Office
Grand Rapids, Michigan 49503

Re: Helen V. Grimm, (Deceased)

Dear Mr. Casey:

Mrs. Helen Grimm had a left radical mastectomy in February 4, 1977, for carcinoma of the breast with metastases to axillary nodes. She developed chest wall metastases in December of 1977, and had a right simple mastectomy in April 28, 1978, for carcinoma of the breast.

Mrs. Grimm was extensively treated with radiation therapy and chemotherapy, and became totally disabled in January of 1979. She expired at Cottage Hosptital on August 16, 1980.

Sincerely yours,

Eudoro Coello, M.D., F.R.C.P.(C)

EC/dmw

URL 09837

EXHIBIT 5 - p.3

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ELIZABETH A. LARSON, Personal Representative of the Estate of LAWRENCE E. LARSON, Deceased,

Plaintiff-Appellant,

-vs- No. 64286

JOHNS MANVILLE SALES CORPORATION, PITTSBURG CORNING, EAGLE PICHER, KEENE BUILDING PRODUCTS CORPORATION, GALE CORPORATION, FIBREBOARD, CELOTEX, and CAREY CANADIAN MINES, LTD.,

Defendants-Appellees.

LUCILLE E. REVARD, Administratrix of the Estate of LEEMAN GEORGE REVARD, Deceased,

Plaintiff-Appellant,

-vs- No. 64287

JOHNS MANVILLE SALES CORPORATION, OWENS CORNING, PITTSBURG CORNING, EAGLE PICHER, KEENE BUILDING PRODUCTS CORPORATION, FIBREBOARD, CLEOTEX, and CAREY CANADIAN MINES, LTD.,

Defendants-Appellees.

TERRY L. BRIMMER, Executor of the Estate of LAWRENCE BRIMMER, Deceased,

Plaintiff-Appellant,

-vs- No. 64649

JOHNS MANVILLE SALES CORPORATION, OWENS CORNING, PITTSBURG CORNING, EAGLE PICHER, KEENE BUILDING PRODUCTS CORPORATION, FIBREBOARD, CLEOTEX, and CAREY CANADIAN MINES, LTD.,

Defendants-Appellees.

HAZEL E. GLAZIER, Executrix of the Estate of GEORGE GLAZIER, Deceased,

Plaintiff-Appellant,

-vs- No. 67510

FIBREBOARD CORPORATION,

Defendant-Appellee,

and

OWENS CORNING, PITTSBURG CORNING, EAGLE PICHER, KEENE CORPORATION, KEENE BUILDING PRODUCTS, GALE CORPORATION, CELOTEX, and CAREY CANADIAN MINES, LTD.,

Defendants.

BEFORE: Beasley, P.J.; R.S. Gribbs and J.R. Ernst,* JJ.

BEASLEY, J.

These four asbestos-related products liability cases were consolidated for hearing in the trial court and on appeal. Plaintiffs each appeal from similar orders granting summary judgment to defendants on the ground that plaintiffs' actions were barred by expiration of the statute of limitations.

These four product liability actions are identical in most significant respects. Each case is a wrongful death action brought by the personal representative of the estate on behalf of the statutory beneficiaries due to the death of the decedent from an asbestos-related disease or diseases. [redacted] The decedent in each case was an insulation worker, exposed to asbestos either by directly handling asbestos-containing insulation products manufactured by the various defendants, or by proximity to these products while they were being handled and used by fellow workers.

Glazier's complaint contends he was exposed while employed as an insulator during the years 1937-1972; Revard during 1948-1970; Larson from 1945-1972, and Brimmer from 1951-1969. Each of the four cases alleged that the decedents had, prior to death, contracted the disease asbestosis, which either caused the decedents' death or was a contributing cause of his death.

Asbestosis is a non-carcinogenic disease process caused by inhalation of asbestos fibers, and is characterized by a long latency period between exposure and apparent effect. Asbestosis is dictionary defined[1] as a fiberous induration of the lungs due to the irritation caused by inhalation of asbestos dust.

The Larson and Brimmer cases assert that death was solely a consequence of asbestosis and complications thereof. The Glazier and Revard cases differ, in that the cause of death was alleged to be a result of asbestosis and/or an independent asbestosis-related disease, namely, mesothelioma in the case of Glazier, and metastatic carcinoma of the lung in the case of Revard. Malignant mesothelioma is a cancer of the mesothelial cells lining the pleural and peritoneal membranes which envelop the lungs and the abdominal cavity. Unlike asbestosis, which may or may not be disabling or ultimately fatal, malignant mesothelioma is an invariably fatal tumor which also has a long latency period between initial exposure to asbestos and eventual manifestation of the disease.

Regardless of the diseases involved, the four wrongful death complaints contain identical liability allegations, as well as claims for relief. The plaintiffs file liability claims based on negligence, breach of warranty, strict liability and gross negligence. The damages in each case were sought for the physical and mental pain and suffering suffered by the decedent, as well as damages for loss of earning capacity and medical, funeral and burial expenses incurred by the estate. Damages were also sought for the loss of consortium suffered by the widows and the sons and daughters of the decedents. In each case, jury trial was demanded.

In all four cases, defendants denied material allegations made in the complaints and raised various affirmative defenses. In all four cases, each defendant alleged that the statute of limitations constituted a complete bar to the wrongful death actions. All parties engaged in considerable discovery in these four cases, after which motions for summary judgment were filed, alleging that each of the four cases was barred by expiration of the statute of limitations.

Throughout the oral argument and re-argument in all proceedings, plaintiffs stipulated that papers and memoranda submitted on behalf of one defendant, including arguments, could be considered to have been submitted on behalf of all defendants.

The crucial facts upon which summary judgment was awarded are not in dispute. Defendants in all four cases argued that each of the four plaintiffs was diagnosed as having asbestosis more than three years prior to his death. Since no personal injury action was filed based on asbestosis prior to the death of each decedent, all defendants argued that subsequent wrongful death actions were time barred regardless of whether or not they were filed on the basis of death due to asbestosis or due to a separate and distinct asbestos-related disease, namely, mesothelioma in the Glazier case, and metastatic carcinoma of the lung in the Revard case.

In each of the four cases, plaintiffs admitted that no personal injury actions due to asbestosis had accrued more than three years prior to the death of the decedents, and no personal actions were ever filed during the lifetimes of the decedents for asbestosis. Thus, the personal injury actions for asbestosis were time barred in all four cases prior to the death of the decedents. However, in all four cases, plaintiffs argued that the barring of the personal injury actions for asbestosis did not bar wrongful death actions brought on behalf of statutory beneficiaries which sought damages under the wrongful death act for deaths due to asbestosis or separate and distinct asbestos-related diseases.

The following are the relevant dates concerning the four cases:

Larson was diagnosed to have asbestosis no later than September 7, 1972. Assuming that Larson's personal injury action accrued no later than September 7, 1972, his personal injury action for asbestosis was time barred due to the statute of limitations no later than September 7, 1975.

Larson died August 26, 1977. The personal representative of Larson's estate filed a wrongful death complaint on January 10, 1980, some two and one-half years after Larson's death.

Brimmer knew that he had asbestosis no later than July 26, 1967, when he filed a worker's compensation claim to recover for its disabling impact. Assuming that Brimmer's personal injury action for asbestosis accrued at that time, his cause of action for asbestosis was time barred on July 26, 1970. Brimmer died on April 14, 1978, and the complaint under the wrongful death act was filed January 10, 1980.

Revard knew that he had asbestosis no later than February 10, 1971. Assuming that Revard's personal injury action for asbestosis accrued at that time, his action for asbestosis was time barred on February 10, 1974. Revard was diagnosed as having bronchogenic cancer in approximately January, 1977. Revard died on July 6, 1977, and a wrongful death action based on his death due to asbestosis and metastatic carcinoma of the lung was filed on October 31, 1979.

Glazier discovered he had asbestosis no later than March 28, 1973, when he filed a worker's compensation claim. Glazier was awarded worker compensation benefits for asbestosis in May, 1974. Assuming that Glazier's cause of action for asbestosis accrued on March 28, 1973, his personal injury action was time barred on March 28, 1976. Glazier died on November 1, 1977. The personal representative of Glazier's estate suggests that the mesothelioma was discovered approximately ten days before his death. The wrongful death action due to his death from asbestosis and malignant pleural mesothelioma was filed on October 31, 1979.

In the four cases, summary judgment was entered on the basis that a wrongful death action depended upon whether or not the decedent at the time of his death still could lawfully maintain a lifetime personal injury action for the underlying wrongful act or conduct upon which the wrongful

death action would be based. The trial court held that the wrongful death action was not a new cause of action, but rather, was a substitution for whatever viable personal injury action still existed at the time of the decedents' death. The trial court entered summary judgment in all four cases on the basis that the personal injury actions for asbestosis had not been initiated prior to death and were time barred at the time of death. The trial court considered separate and distinct diseases, namely, lung cancer in Revard and mesothelioma in Glazier, as further complications of asbestos exposure and not of the disease asbestosis. Nevertheless, the trial court ruled that if a decedent had awareness of an asbestos-related injury or damages, but not necessarily the proper medical characterization of the disease or the full extent of the disease, and the disease was disabling, that point in time began the running of the statute of limitations; and if no personal injury action was filed within three years, no later wrongful death action could be filed regardless of the cause of death.

On appeal, two issues are argued. First, appellants claim that the wrongful death act gives the personal representative of an estate a cause of action for damages grounded in products liability for causing the death of her husband where, at the time of his death, his cause of action for the same asbestos-related products liability action would have been barred by the applicable statute of limitations.

In resolving this issue, we look first to the Michigan Wrongful Death Act,[2] whose pertinent provisions for our purpose are:

> "(1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

All actions for such death, or injuries resulting in death, shall be brought only under this section."

The wrongful death statute does not contain a statute of limitations, but MCL 600.5805; MSA 27A.5805, as amended by Public Acts of 1978, No. 495, § 1, reads as follows:

"(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section. * * *

"(8) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property. * * *

"(9) The period of limitations is 3 years for a products liability action. However, in the case of a product which has been in use for not less than 10 years, the plaintiff, in proving a prima facie case, shall be required to do so without benefit of any presumption."

MCL 600.5827; MSA 27A.5827 provides when the period of limitations begins to run as follows:

"Except as otherwise expresly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

URL 09844

None of the parties dispute that the decedents had a personal injury cause of action during their lifetime against these defendants, which accrued when they were diagnosed as having asbestosis. In each case, this diagnosis occurred more than three years prior to the death of the decedents. No legal actions were ever filed during the lifetime of the decedents seeking damages from these defendants for asbestosis. Plaintiffs concede that personal injury actions for asbestosis were time barred during the lifetimes of the decedents. Yet, plaintiffs argue that the barring of a personal injury action for asbestosis does not bar a wrongful death action brought on behalf of statutory beneficiaries under the wrongful death act grounded upon asbestosis. In essense, plaintiffs argue that the wrongful death act confers an independent cause of action which can only accrue at the injured person's death. Since every plaintiff in these four

cases filed a complaint within three years within the date of their respective decedents' death, the plaintiffs argue that their actions were not time barred.

Recognizing that in Michigan wrongful death acts and survival acts have had checkered histories, we will not burden this opinion with detailed recitals and many references to cases dealing with these issues. Rather, we proceed directly to Hawkins v Regional Medical Laboratories, PC,[3] which we believe controls decision here.

In Hawkins, the Supreme Court said:

"Mr. Hawkins had a fully vested cause of action, if at all, on or about April 29, 1975, the date of the alleged wrongful act. He lived until January of 1976. His cause of action, if any, having accrued at the date of the wrongful act, the applicable limitations period began to run from that date. * * *

"We agree and expressly hold that in all actions brought under the wrongful death statute, the limitations period will be governed by the provision applicable to the liability theory of the underlying wrongful act. * * *

"Additionally, we hold that actions brought pursuant to MCL 600.2922; MSA 27A.2922 accrue as provided by the statutory provisions governing the underlying liability theory and not at the date of death."[4]

Applying Hawkins, we look to the wrongful act causing death, or injuries resulting in death, but not on the death itself. Under the statute, the liability of the tortfeasor exists where the deceased could have recovered if death had not ensued. Therefore, the cause of action accrues on the date of the wrongful act and the applicable limitations period begins to run from that date. The appropriate statute of limitations period is governed by the provision applicable to the liability theory of the underlying wrongful act.

Since a decedent's death does not create a new cause of action and any right of action for asbestosis against these defendants arose presumably when the decedents knew or should have known of their disease, we believe that the running of the statute of limitations against the injured person's right of action bars the statutory right of his personal representative to sue for the injured person's wrongful death.

In the instant case, as we have stated, the plaintiffs allege a wrongful death cause of action sounding in

products liability. All four plaintiffs concede that the three year period of limitations for products liability contained in MCL 600.5805(9); MSA 27A.5805(9) had run prior to commencement of their respective asbestosis claims. Applying the authorities referred to above, we conclude that the trial court was correct in awarding summary judgment in the four cases on these claims.

Second, plaintiffs claim that a wrongful death action based on the decedents' deaths from asbestos-related cancer, which was diagnosed less than six months prior to the decedents' death, may be brought even though no wrongful death action could have been filed if the decedent had died from asbestosis.

As previously indicated, the statute of limitations for products liability cases provides that a civil cause of action for damages for personal injuries must be filed within three years of the date it accrues or the cause of action is time barred.[5] Since the Legislature has not defined when a products liability action accrues, the general rule, which provides that the statute of limitations begins to run from the date of the alleged wrong, not from the time the wrong is discovered, would appear to apply.[6] This means that the claim accrues at the time the wrong upon which the claim is based was done, regardless of the time when damages result.

Previously, this court has held that the so-called "discovery rule" was not applicable in wrongful death cases based in products liability.[7] But, in Stoneman v Collier,[8] the plaintiff's damages were immediately apparent as a result of the defective product. On the other hand, the within plaintiffs contend that because of the latent nature of the decedents' illnesses, the causes of action did not accrue until the decedents knew or reasonably should have known of their injuries.

Regarding diseases with a long development

period, such as asbestosis, bronchogenic carcinoma, or mesothelioma, there are essentially three judicial points of view." With respect to when a statute of limitations begins to run in cases seeking to recover damages from the development of such a latent industrial or occupational disease, Annotation, 1 ALR 4th 117, 120-121 (1980) summarizes as follows:

> "(1) The 'general negligence' rule: The cause of action accrues, and the statute of limitation starts running at the person's initial exposure to the substance because the person has sustained an injury, and therefore all the elements of the cause of action are present. 'The running of the statute of limitations is not postponed by the fact that the actual or substantial damages occur until a later date.'
>
> "(2) The 'continuing negligence' rule: The statute of limitations starts running from the time of the person's last exposure to the substance or at the time of termination of employment.
>
> "(3) The 'discovery' rule: The statute of limitations for latent industrial or occupational diseases starts running from the date of discovery or diagnosis of the disease."

In Michigan, we have not yet squarely addressed the issue of when a cause of action accrues in a situation where exposure to a substance at work results in a latent disease. We are constrained to hold that the statute which suggests that the plaintiff's cause of action accrues at the time of the wrongful act is controlling.[9]

URL 09847

Plaintiffs argue, with some merit, that the present trend favors expansion of the period of the statute of limitations to apply the so-called discovery rule to products liability cases.[10] We believe that if a change in judicial policy of this magnitude is to occur, such a 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. We are aware that adoption of the so-called discovery rule would lead to reversal in the Revard case, where decedent was allegedly diagnosed as suffering a metastatic carcinoma of the lung or bronchogenic cancer approximately six weeks before his death, and in the Glazier case where mesothelioma was allegedly diagnosed approximately ten days before death. For the reasons indicated, we decline to adopt the discovery rule. We assume that in these cases, appeal will be taken to the

Supreme Court, a step with which we are in full accord, in the sense that it will be well to have a final word on this issue.

AFFIRMED.

/s/ William R. Beasley
/s/ Roman S. Gribbs

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1 See Stedman's Medical Dictionary, 116, 990 (Third unabridged Law Edition), 1972.

2 MCL 600.2922; MSA 27A.2922.

3 415 Mich 420; 329 NW2d 729 (1982).

4 Id. at pp 436-437.

5 MCL 600.5827; MSA 27A.5827 states that:

"The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

6 Connelly v Paul Ruddy's Equipment Repair & Service Co., 388 Mich 146; 200 NW2d 70 (1972).

7 Stoneman v Collier, 94 Mich App 187; 288 NW2d 405 (1979).

8 Id.

9 MCL 600.5827; MSA 27A.5827.

10 See 91 ALR 3rd 991 (1979); 1 ALR 4th 117 (1980).

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ELIZABETH A. LARSON, Personal Representative of the Estate of LAWRENCE E. LARSON, Deceased,

Plaintiff-Appellant,

-v- No. 64286

JOHNS MANVILLE SALES CORPORATION, PITTSBURG CORNING, EAGLE PICHER, KEENE BUILDING PRODUCTS CORPORATION, GALE CORPORATION, FIBREBOARD, CELOTEX, and CAREY CANADIAN MINES, LTD.,

Defendants-Appellees.

LUCILLE E. REVARD, Administratrix of the Estate of LEEMAN GEORGE REVARD, Deceased,

Plaintiff-Appellant,

-v- No. 64287

JOHNS MANVILLE SALES CORPORATION, OWENS CORNING, PITTSBURG CORNING, EAGLE PICHER, KEEN BUILDING PRODUCTS CORPORATION, FIBREBOARD, CELOTEX, and CAREY CANADIAN MINES, LTD.,

Defendants-Appellees.

TERRY L. BRIMMER, Executor of the Estate of LAWRENCE BRIMMER, Deceased,

Plaintiff-Appellant,

-v- No. 64649

JOHNS MANVILLE SALES CORPORATION, OWENS CORNING, PITTSBURG CORNING, EAGLE PICHER, KEEN BUILDING PRODUCTS CORPORATION, FIBREBOARD, CELOTEX, and CAREY CANADIAN MINES, LTD.,

Defendants-Appellees.

HAZEL S. GLAZIER, Executrix of the Estate of GEORGE GLAZIER, Deceased,

Plaintiff-Appellant,

-v- No. 67510

FIBREBOARD CORPORATION,

Defendant-Appellee,

and

OWENS CORNING, PITTSBURG CORNING, EAGLE PICHER, KEENE CORPORATION, KEENE BUILDING PRODUCTS, GALE CORPORATION, CELOTEX, and CAREY CANADIAN MINES, LTD.,

Defendants.

BEFORE: Beasley, P.J., R.S. Gribbs, and J.R. Ernst*, JJ.

J.R. ERNST, J. (concurring in part; dissenting in part).

I concur in the result reached by the majority on plaintiffs' wrongful death actions for death resulting from asbestosis. I agree with the majority that "any right of action for asbestosis against these defendants arose presumably when the decedents knew or should have known of their disease," and that the running of the statute of limitations during the lifetime of plaintiffs' deceased bars plaintiffs' statutory right as personal representatives to sue for wrongful death attributable to asbestosis.

I write, however, respectfully to dissent from the subsequent portion of the majority opinion which appears to suggest that, for latent disease cases, the cause of action accrues (and the statute of limitations begins to run) at the time of the wrongful act.

Since this opinion does not control the disposition of this action, an exhaustive analysis and review of authorities does not appear to be warranted. However, suffice it to note that both the Supreme Court and this Court have recognized and applied a discovery rule of accrual, where an element of the cause of action has occurred but cannot be pled in a proper complaint because it is not, with reasonable diligence, discoverable until some time after it has occurred. See, e.g., Parish v B F Goodrich Co, 395 Mich 271, 280; 235 NW2d 570 (1975); Williams v Polgar,

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*Circuit judge, sitting on the Court of Appeals by assignment.

391 Mich 6, 24-25; 215 NW2d 149 (1974); Bonney v The Upjohn Co, 129 Mich App 18, 23-24; 342 NW2d 551 (1983); Filcek v Utica Building Co, 131 Mich App 396; 345 NW2d 707 (1984). As Justice Brennan pointedly observed in Connelly v Paul Ruddy's Equipment Repair & Service Co, 388 Mich 146, 151; 200 NW2d 70 (1972), running the statute of limitations from the day the tortious force was put in motion would destroy plaintiffs' cause of action before it even arose. I perceive no cogent reason for applying a different rule to the present plaintiffs, claiming recovery for latent occupational or industrial disease resulting from exposure to noxious substances, than the rule that has been applied in other consumer product liability cases. The postulation that the statute of limitations is a statute of repose "intended to protect commercial and industrial interests by fixing a certain limit upon exposure to liability for faulty products and workmanship" has been unequivocally rejected by the Supreme Court. Ruddy, supra, p 151. It should also be noted that the Legislature has recognized the discovery rule of accrual in actions for breach of warranty. Plaintiffs' claims predicated on a theory of implied warranty are governed by MCL 600.5833; 27A.5833, which provides that "the claim accrues at the time the breach of warranty is discovered or reasonably should be discovered." See Parish v B F Goodrich, supra, p 281; Williams v Polgar, supra, p 24 n 16.

It is my opinion that the claims of plaintiffs Revard and Glazier for wrongful death due to bronchogenic carcinoma and mesothelioma, respectively, are timely. The trial court found that bronchogenic carcinoma and mesothelioma were not complications of the disease of asbestosis. Rather, they were separate and distinct diseases resulting from asbestos exposure. Despite this finding, the majority has concluded that the diagnosis of the disease asbestosis started the clock running as to all of plaintiffs' claims for damages resulting from exposure to asbestos, including future cancer. This ignores the fact that during such time plaintiffs would have been unable to recover

damages for future occurring asbestos-induced cancer, because such potential injury was at that time merely speculative and incapable of proof to a reasonable certainty.

In Wilson v Johns-Manville Sales Corp, 221 US App DC 337; 684 F 2d 111 (1982); Fearson v Johns-Manville Sales Corp, 525 F Supp 671 (D DC, 1981); and Pierce v Johns-Manville Sales Corp, 296 Md 670; 464 A2d 1020 (1983), the courts comprehensively addressed this issue and, in each case, concluded that a diagnosis of asbestosis did not start the running of the period of limitation on plaintiff's right to sue for mesothelioma or bronchogenic carcinoma, attributable to the same asbestos exposure, but not manifest until after a claim for asbestosis had become barred. In Fearson, supra, the Court observed:

> "The plaintiff's illustration of this point by way of a hypothetical clarifies this reasoning. Suppose an individual takes a drug which causes a skin rash which disappears in a few days and no legal action is brought because of the minimal harm caused. Years later, the individual discovers that he or she has cancer which resulted from the use of the same product. Under defendant's theory, the failure to sue for the skin rash would bar the suit for cancer." 525 F Supp 674 n 4.

See also Jackson v Johns-Manville Sales Corp, 727 F2d 506 (CA 5, 1984).

In Funk v General Motors Corporation, 392 Mich 91, 104; 220 NW2d 641 (1974), the Supreme Court stated that "[t]he policy behind the law of torts is more than compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury." The rule adopted by the majority does not advance either of these purposes. Absent clear directive from the Legislature or the Supreme Court to the contrary, I believe this Court should adopt the analysis and conclusions reached in Wilson, supra; Fearson, supra; and Pierce, supra, and hold that, the earlier diagnosis of asbestosis notwithstanding, the statute of limitations did not commence to run as to the cancer claims of Revard and Graeler until all elements necessary for a cause of action for such injury were present.

/s/ J. Richard Ernst

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-

Case No. 83-2872-NO

Hon. Raymond R. Cashen

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, INC., a foreign corporation, TENNECO CHEMICALS, INC., a foreign corporation, UNIROYAL, INC., a foreign corporation, ALLIED CHEMICAL CORPORATION, a foreign corporation, HOOKER CHEMICALS & PLASTICS CORP., a foreign corporation, FIRESTONE TIRE & RUBBER COMPANY, a foreign corporation, B. F. GOODRICH COMPANY, a foreign corporation, GOODYEAR TIRE & RUBBER COMPANY, a foreign corporations, jointly and severally,

Defendants.
_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Anne Cramton, being first duly sworn, deposes and says that on the 5th day of February, 1985, she did serve copies of Uniroyal, Inc., Union Carbide Corporation, Tenneco Resins, Inc., Allied Chemical Corporation, Occidental Chemical Corporation and The Firestone Tire & Rubber Company's Motion For Summary Judgment, Brief in Support of Defendants' Motion For Summary Judgment, Notice of Hearing thereon and a Proof of Service upon the following:

Francis P. Hughes
Attorney for Plaintiff
1000 W. University Drive
Suite 314
Rochester, MI 48063

W. Gerald Warren
Attorney for Defendant-Ford Motor Co.
800 First National Bldg.
Detroit, MI 48226

Ralph Valitutti, Jr.
Attorney for Defendant-Diamond Shamrock Corp.
2000 Buhl Building
Detroit, MI 48226

Ralph R. Safford
Attorney for Defendant-Stauffer Chemical Co.
100 W. Long Lake Rd., Suite 100
Bloomfield Hills, MI 48013

Ralph W. Barbier, Jr.
Attorney for Defendant-B. F. Goodrich Co.
34820 Harper Avenue
Mt. Clemens, MI 48043

John J. Lynch
Attorney for Defendant-Goodyear Tire & Rubber Co.
333 W. Fort, Suite 1600
Detroit, MI 48226

by placing copies of said pleadings in envelopes addressed as set forth above with first-class postage prepaid thereon and depositing the same in the United States Mail receptacle located in the Renaissance Center, Detroit, Michigan.

Anne Cramton

Anne Cramton

Subscribed and sworn to before me
this 5th day of February, 1985.

DENISE M. MacDOUGALL
Notary Public, Wayne County, MI
My Commission Expires Oct. 4, 1987