NO. A12-609

State of Minnesota
In Court of Appeals

Barbara Lamere, Trustee for the heirs and next-of-kin of Sergeant Major Thomas C. Lamere, deceased,

Appellant,

vs.

St. Jude Medical, Inc. and St. Jude Medical, S.C., Inc.,

Respondents/Cross-Appellants.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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ARGUMENT

I. THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE WRONGFUL DEATH STATUTE DEMONSTRATES THE LEGISLATIVE INTENT TO BAR STALE WRONGFUL DEATH ACTIONS LIKE THIS ONE.

Whether Appellant's claim is time-barred by Minnesota law turns on the statutory construction of the mandatory requirement in Minn. Stat. § 573.02, subd. 1, that a wrongful death action "must be commenced within six years of the [wrongful] act or omission [that allegedly caused the death]." (Emphasis added). The Minnesota Supreme Court has repeatedly confirmed that the plain meaning of this statutory language is clear and that the legislature, in adopting the requirement that wrongful death actions must be commenced within six years of the alleged wrongful "act or omission," expressed its intent to bar some wrongful death actions before they accrue in the interest of preventing litigation of stale claims. *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45, 48, 50 (Minn. 1982); *Bonhiver v. Fugelso, Porter, Simich and Whiteman, Inc.*, 355 N.W.2d 138, 142 (Minn. 1984) (quoting *DeCosse*); *DeRogatis v. Mayo Clinic*, 390 N.W.2d 773 (Minn. 1986); *Kensinger v. Kippen*, 390 N.W.2d 815, 817 (Minn. Ct. App. 1986). Where the legislative intent "is clearly discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted" and courts must apply the statute's plain meaning. *Murphy v. Allina Health System*, 668 N.W.2d 17, 21 (Minn. 2003) (citation omitted).

While the trial court and Appellant may question the wisdom or fairness of this principle and the prospect of this claim being time-barred before it accrued, it is not for the trial court or this Court "to encroach upon the legislative function by a construction of

a statute which does violence to the plain intention of the lawmaking body." *Cashman v. Hedberg*, 10 N.W.2d 388, 393-94 (Minn. 1943). The trial court's construction that Appellant urges this Court to uphold "does violence" to the plain legislative intent and the plain language adopted to effect this intention.

In *DeRogatis*, when faced with the same issue that this case presents – can the limitation period begin to run prior to the date of "manifestation of injury or disease" or date of death so as to extinguish the right of the wrongful death trustee to commence suit before it arises – the Minnesota Supreme Court answered "yes." 390 N.W.2d at 775-76.

DeRogatis involved a wrongful death action predicated upon medical malpractice with the federal court asking the Minnesota Supreme Court to construe Minn. Stat. §§ 573.02, subd. 1 (1984) and 541.07(1) (1984) and determine when the limitation period begins to run. At the time, Minn. Stat. § 573.02, subd. 1 provided that a "general" wrongful death action may be commenced within three years after the date of death provided that the action must be brought within six years after the act or omission that allegedly caused the death, while wrongful death actions based on medical malpractice had to be commenced "within the time set forth in section 541.07." *DeRogatis*, 390 N.W.2d at 775. At the time, section 541.07(1) required that all actions for medical malpractice must be commenced within two years of the last treatment date. *Id.* Both parties agreed that the two-year limitation period of section 541.07(1) applied but disagreed on when that limitation period began to run – at the time of the alleged malpractice or on the date of death. *Id.*

The Minnesota Supreme Court held that the limitation period for a wrongful death action predicated on alleged medical malpractice begins to run not on the date of death, but on the last date of treatment (i.e. the date of the last potentially wrongful act or omission). *Id.* at 776; *see Grondahl v. Bulluck*, 318 N.W.2d 240, 242-43 (Minn. 1982) (limitation period for medical malpractice commences when treatment ceases regardless of when injury is discovered). In reaching its conclusion that the trustee's wrongful death action expired before the decedent's death, the Court reaffirmed its interpretation of the 1978 amendments to the wrongful death statute, stating again that a wrongful death action can expire before injury or death triggers the right to bring the action, and that this was the intent of the legislature. *DeRogatis*, 390 N.W.2d at 776 (confirming *DeCosse*).

The legislature's adoption and retention of the "must be commenced within six years of the act or omission" provision serves the same purpose and function as the "within the time set forth in section 541.07" provision. Specifically, it ties the commencement of a general wrongful death action to the alleged wrongful act or omission and requires that the action be commenced within a specific time following that act or omission just as section 541.07 ties the commencement of a malpractice wrongful death action to the alleged malpractice. *Kensinger*, 390 N.W2d at 817-18 (medical malpractice wrongful death limitations period begins to run on date of last treatment); *Murphy*, 668 N.W.2d at 21-22 (same).

Appellant's unsupported statement that "St. Jude, on the other hand, points to no appellate decisions in which the limitations period triggered by the 'act or omission' causing the death has been deemed to begin running before the decedent has suffered any

manifestation of injury" (A. Resp. Br. at 18) is incorrect and directly refuted by all of the cases St. Jude Medical has previously cited, which hold just that. *See Bonhiver*, 355 N.W.2d at 142; *DeRogatis*, 390 N.W.2d at 775-76, *Murphy*, 668 N.W.2d at 21-22; *Kensinger*, 390 N.W.2d at 817-18.

No statutory language makes any reference to "manifestation of injury or disease," and neither that verbiage nor concept can be legitimately read into the statute without "doing violence" to the plain legislative intent. If the legislature had intended to tie the six-year limitation period to some "manifestation of injury or disease," "date of death," or "discovery" of the negligence or injury, it could have specifically worded the statute to say so or adopted tolling language. The legislature has not made any such modification to the statute in more than thirty years since the six-year provision came into being. And the Minnesota Supreme Court expressly rejected the proposition that the wrongful death limitations periods can be tolled by the failure to discover that the death was caused by a wrongful act. *DeCosse*, 319 N.W.2d at 51 ("[W]e still feel compelled to reject the discovery rule."). "[The legislature] could reasonably desire in the <u>interest of repose</u> not to apply the so-called discovery rule [citation omitted] to wrongful death actions." *Id.* at 50 (emphasis added).

Appellant argues that the statute cannot be construed to bar the right to bring a wrongful death action prior to its accrual by death or some "manifestation of injury or disease." (A. Resp. Brief at 14-15). But the Minnesota Supreme Court repeatedly held that the statutory language dictates precisely that construction. *DeCosse*, 319 N.W.2d at 48; *Bonhiver*, 355 N.W.2d at 142; *DeRogatis*, 390 N.W.2d at 775-76. Although neither

DeCosse nor *Bonhiver* involved or required construction of the "must be commenced within six years of the [wrongful] act or omission" provision at issue here, in both cases, the Minnesota Supreme Court noted the provision, which had been incorporated by recent amendment [1978], and stated:

> Despite any injustice or illogic to such an approach [time-barring a wrongful death action before injury or death triggers accrual of the right to bring the action], the plain meaning of the statute seems to be clear. By the 1978 amendment the legislature is expressing its intention to bar actions for some deaths caused by wrongful acts or omissions even if they are brought on the day of death.

DeCosse, 319 N.W.2d at 48 (emphasis added). This precedent could not be clearer and the holding is not open to reasonable debate.

Despite the trial court's and Appellant's assertions to the contrary, the *DeCosse* court's finding that asbestos-related wrongful death actions accrue either upon "the manifestation of the fatal disease in a way that is causally linked to asbestos, or upon the date of death, whichever is earlier," simply cannot be extended to this case. *DeCosse*, 319 N.W.2d at 52. The *DeCosse* decision limited its judicially-created exception "because of the unique character of asbestos-related deaths" and expressly confined its holding to "wrongful death actions brought in connection with those deaths." *Id.* at 48, 52 (emphasis added); *Bonhiver*, 355 N.W.2d at 142.[1]

Appellant's and the trial court's argument that *Bonhiver* supports extension of this expressly-limited *DeCosse* holding is unsound and misplaced. In *Bonhiver*, the decedent

[1] Appellant has cited no Minnesota appellate decision expanding the *DeCosse* holding to any non-asbestos wrongful death action.

brought a personal injury suit against a property owner for premises liability less than one year after she fell and broke her hip. She died two and one-half years after her fall and, over four years after that, her husband petitioned the court to continue the personal injury suit initiated over six years earlier as a wrongful death action under Minn. Stat. § 573.02, subd. 1 (1976).

Appellant's assertion that the *Bonhiver* court "deemed" that the "act or omission" giving rise to the suit occurred on the "'date of [the decedent's] fall' for purposes of applying the wrongful death statute of limitations" is wrong. (A. Resp. Br. at 16-17). Rather, the Minnesota Supreme Court ruled that the 1976 statute's requirement to commence a wrongful death action within three years of the act or omission did not apply to the trustee's action to continue the personal injury action the decedent commenced prior to her death. *Bonhiver*, 355 N.W.2d at 142-43.

But the *Bonhiver* court stated that, if the three-year limitation period had applied, the trustee should have brought his suit within three years of the date of the decedent's fall, at the latest. *Id.* at 141 (emphasis added). This qualification demonstrates the *Bonhiver* court's recognition that the negligent "act or omission" triggers the running of the limitations period, which the court more fully explained in its later discussion of the 1978 amendments to the statute and its *DeCosse* decision. *Id.* at 142. The decedent's claim that defendants were negligent in failing to warn of a sudden elevation change was an "act or omission" that was ongoing at the time of her fall. Thus, in Bonhiver, though the "act or omission" coincided with the date of decedent's injury, it was the "act or omission" that triggered the limitation period to start running – not the decedent's injury.

The Bonhiver decision does not disclose when the stairs at issue were designed or constructed, hence the court's use of the phrase "at the latest."

The *Bonhiver* court never equated the "act or omission" language in the statute with the "date of [the decedent's] fall," as Appellant suggests.[2] Instead, the court confirmed its prior decisions that "meeting the requirements of the limitation period was a 'condition' precedent to the right to bring a wrongful death action," and that the "plain meaning of the statute seems to be clear" – the legislature intends to bar actions for some deaths caused by wrongful acts or omissions even if brought on the day of death. *Id.*; *DeCosse*, 319 N.W.2d at 48; *see DeRogatis*, 390 N.W.2d at 775-76; *Murphy*, 668 N.W.2d at 23, fn.2 (citation omitted)[3].

There is no credible or rational argument that an "act or omission" can denote or somehow be construed to mean the decedent's death or a "manifestation of injury or disease." An "act or omission" plainly means and refers to some discrete activity, action, or failure to act, of the defendant; whereas the death or a "manifestation of injury or

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[2] Appellant's reliance on *Henry v. Raynor Manufacturing Co.*, 753 F. Supp. 278, 280 (D. Minn. 1990), is equally misplaced because *Henry* lacks precedential effect and departs from controlling Minnesota state authorities in finding that the "act or omission refers to the date of the accident that causes death." Like Appellant, *Henry* misinterprets the *Bonhiver* decision for the reasons stated above, and incorrectly construes the wrongful death statute contravening controlling Minnesota precedent. Moreover, any discussion of Section 573.02, subd. 1 in *Henry* is dicta because the court ruled that the more particular provisions in Minn. Stat. § 541.051, which applies to wrongful death actions arising out of defects in improvements to real property, applied and barred plaintiff's claims. Minn. Stat. § 645.26, subd. 1.

[3] Noting that "because the limitations period is an element of the cause of action in wrongful-death claims, a defendant may, in certain circumstances, have a vested right in the limitations period" such that constitutional or other constraints may limit the legislature's or the court's power to retroactively revive expired claims.

disease" refers to the condition of the decedent. There is no logical way to bend or twist the legislative language of the defendant's "act or omission" to encompass the decedent's condition or disease state. To do so would be to reach an outcome directly at odds with the legislative intent by grossly distorting the plain meaning of the statutory language.

The Minnesota legislature has retained the six-year-repose provision in the wrongful death statute for more than thirty years, without modification, to manage its justified concern about causes of action arising from acts or omissions occurring years and decades ago. The provision reflects the legislative conclusion that a point in time arrives beyond which a potential defendant cannot be liable for past conduct. Long lapses of time result in the absence and unavailability of critical evidence and witnesses as well as faded memories. These concerns are particularly apt here where the alleged acts or omissions of St. Jude Medical, upon which Appellant bases her claim, occurred over twenty years ago. This Court is obligated to apply the plain meaning of the statute's unambiguous language, based on clear, controlling precedent. This claim is time-barred under Minnesota law, and should be dismissed. *Murphy*, 668 N.W.2d at 21.

II. MINNESOTA'S INTERESTS IN PREVENTING LITIGATION OF STALE CLAIMS AND DISCOURAGING FORUM SHOPPING REQUIRE APPLICATION OF CALIFORNIA'S LIMITATIONS PERIOD.

A conflict of law arises only arises if the applicable principles of statutory construction and controlling Minnesota precedent are ignored to support a finding that this wrongful death action is not time-barred under Minnesota law. In that event, California's two-year limitation period must apply under the Uniform Conflict of Laws – Limitations Act, Minn. Stat. § 541.31, subd. 1(a)(1), or a proper choice-of-law analysis.

The UCLLA mandates that this Court apply California's two-year limitation period to this long-time California resident's claim arising from the manufacture of a mechanical heart valve that left St. Jude Medical's hands and control nearly twenty-five years ago. Minn. Stat. § 541.31, subd. 1(a)(1).[4]

Minnesota's choice-of-law rules also mandate that California's limitations period applies and that this California-centered action be dismissed.[5] The same public policy concerns that militate in favor of giving section 573.02 its plain meaning and barring wrongful death actions not brought within six years of the alleged wrongful act or omission also weigh in favor of applying California's two-year limitations period. California's two-year limitations period most effectively recognizes the policy interests

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[4] Appellant's assertion that application of the UCLLA was not raised below is refuted by the fact that St. Jude Medical has always contended that California law applies to bar this claim and the trial court analyzed and interpreted (albeit incorrectly) the *Fleeger* decision, where the Minnesota Supreme Court specifically addressed the 2004 enactment of the UCLLA and its applicability to claims of non-Minnesotans like Appellant. At the very least, the issue was implicit in the arguments below and should be considered by this Court. *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687-88 (Minn. 1997).

[5] There can be no legitimate dispute that the conflict between California's and Minnesota's laws is a substantive one for conflicts-of-law purposes. *In re Daniel's Estate*, 294 N.W. 465, 470 (Minn. 1940) (recognizing exception to general rule that statutes of limitations are procedural when it applies to right created by statute); *Danielson v. Nat'l Supply, Co.*, 670 N.W.2d 1, 6 n. 2. (Minn. Ct. App. 2003) (The limitation period in a right created by statute is substantive because "the limitation period [acts as] a condition of the right rather than as an actual statute of limitations."). *Fleeger's* reference to statutes of limitations being "procedural" is inapposite and does not apply here because the *Fleeger* decision dealt only with general statutes of limitation (*i.e.* Minn. Stat. § 541.05). Limitations periods contained within statutorily-created causes of action in derogation of common law, like Minnesota's wrongful death statute, were not at issue or considered in *Fleeger*. Accordingly, if Minn. Stat. § 541.31, subd. 1(a)(1) does not resolve the issue, a choice-of-law analysis is required.

of Appellant's home state while advancing Minnesota's interests in preventing litigation of stale claims that are barred in Appellant's home state. *Schumacher v. Schumacher*, 676 N.W.2d 685, 691 (Minn. Ct. App. 2004) (in considering which law will advance governmental interest of Minnesota, court considers public policy of both forums).

California and Minnesota share an interest in preventing litigation of stale claims like this one. California uses a two-year limitations period to limit stale claims and their problems of proof, surprise, or abuse of the legal system. Likewise, Minnesota has adopted legislation that demonstrates its interest in avoiding those same burdens by including the six-year provision in the wrongful death statute, and the shorter limitation provision relating to professional malpractice, as two means to advance those governmental interests. Minn. Stat. §573.02, subd. 1; *Kensinger*, 390 N.W.2d at 817. When construed to give effect to its plain meaning, the wrongful death statute, and those like it, assures Minnesota medical professionals and businesses that there is a time beyond which they cannot be held responsible for some plaintiffs' misfortunes and allows them to manage their affairs without the potential for unknown and indefinite liability.

Minnesota also has an interest in discouraging forum shopping by plaintiffs with out-of-state claims that are barred by their home states' limitations periods. *Jepson v. General Cas. Co. of Wisconsin*, 513 N.W.2d 467 (1994) ("Minnesota does not encourage forum shopping 'because it frustrates the maintenance of interstate order.'"(citation omitted)); *Schumacher*, 676 N.W2d at 690-91. To address both interests, the legislature adopted the UCLLA, which provides that when a claim brought in Minnesota is based upon the substantive law of another state, Minnesota will "borrow" the limitations period

of that state and apply that period rather than Minnesota's. Minn. Stat. § 541.31. Appellant's claim is based on the substantive law of California because the device was implanted in California nearly twenty-five years ago and the Decedent's physicians monitored and treated his significant heart conditions in California for nearly twenty years until he passed away in California. There is no reason why Appellant could not and did not file her action in California.

However significant Minnesota's interest, if any, in compensating non-Minnesotans for allegedly negligent conduct that occurred nearly twenty-five years ago, these other significant interests as clearly defined by the Minnesota legislature and common law outweigh the value placed on tort compensation. *Schumacher*, 676 N.W.2d at 691 (Iowa's interest in granting immunity for some injuries outweighs Minnesota's interest in compensating injured Minnesotans). Therefore, applying California's two-year limitations period most effectively maintains interstate order and advances Minnesota's interests.

CONCLUSION

The tenets of statutory construction and controlling precedent require that the legislature's chosen words "act or omission" be given their clear and plain meaning in construing Minn. Stat. § 573.02, subd. 1. When the Court does that, the only possible conclusion to this litigation is dismissal of this action as time-barred under both the California and Minnesota limitations periods. For all of the reasons stated, the St. Jude Medical Respondents respectfully request that the Court reverse the trial court's statute of limitations ruling and direct that Appellant's action also be dismissed as time-barred.

Respectfully submitted,

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Dated: 9/4/12

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned, counsel for the St. Jude Medical Respondents/Cross-Appellants, in compliance with Minnesota Rules of Civil Appellate Procedure certifies as follows:

(1) That the Reply Brief of Respondents/Cross-Appellants was prepared in 13-point, proportionately-spaced typeface, using Microsoft Word 2010; and

(2) That the Reply Brief contains 3262 words, based upon a word processing count that was designed to include all text, including headings, footnotes, and quotations.

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