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Castorena v. General Elec. Appellant's Brief Dckt. 35123

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MILDRED CASTORENA, et al.,

Plaintiffs-Appellants,

vs.

GENERAL ELECTRIC, et al.,

Defendants-Respondents.

WILLIS EUGENE NORTON, SR.,

Plaintiffs-Appellants,

vs.

GENERAL ELECTRIC, et al.,

Defendants-Respondents.

JOHN D. ADAMSON et al.,

Plaintiffs-Appellants,

vs.

FMC CORPORATION, et al.,

Defendants-Respondents.

Case No. Consolidated Cases:

35123

35124

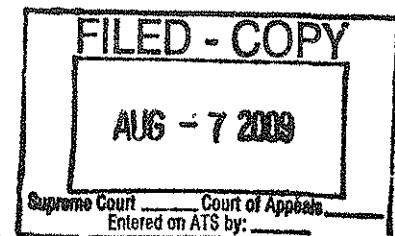
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APPELLANTS' JOINT BRIEF

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STATEMENT ON ORAL ARGUMENT

Appellants/Plaintiffs respectfully request oral argument. This appeal involves an issue essential to the fair administration of justice in the State of Idaho for the heirs of persons injured by the negligence of another who die from that injury but who do not die within two years of that injury. In a question of law of great significance to the jurisprudence of the state, this Court is called upon to decide if Idaho's Wrongful Death Statute means what it says and whether this Court's decision in *Chapman v. Cardiac Pacemakers, Inc.*, 105 Idaho 785, 673 P.2d 385, 386 (1983), which holds unequivocally that the limitation period under Idaho's wrongful death act begins on the date of the person's death and not the date of the injury causing the death, is still the law in Idaho. A final determination of this issue will have significant statewide impact for all personal injury claimants and will therefore provide guidance to courts and future litigants regarding their access to the courts of Idaho.

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STATEMENT OF THE ISSUES

I. Whether the Trial Courts Erred in Granting the Defendants' Motions for Summary Judgment on the Statute of Limitations in the Wrongful Death Claims.

II. Whether the Trial Courts' Rulings Deprive Idaho Citizens of Constitutional Rights.

STATEMENT OF THE CASE

A. The Nature of the Case.

In this consolidated appeal from two orders by two trial courts granting summary judgment on the statute of limitations, the facts are not in dispute. Wrongful death actions were brought by the heirs of John D. Stoor, Robert Branch, Jr., William D. Frasure and John H. Adamson asserting that as a result of continuous exposure to defendants' asbestos-containing materials and products each contracted asbestos-related diseases and subsequently died from those diseases.¹ The plaintiffs in each case filed suit alleging, among other causes of action, wrongful death claims. Each lawsuit was filed within two years following the date of the decedent's death although the decedents' were diagnosed with the injuries causing death more than two years prior to filing suit. In motions for summary judgment in each case, the defendants contended that the decedents had no causes of action at the time of their deaths because, based on the application of the condition precedent rule, their personal injury causes of action had expired more than two years before they died. Plaintiffs contended that, based on the plain language of Idaho's Wrongful Death Statute as well as a clear pronouncement from this Court in *Chapman v. Cardiac Pacemakers, Inc.*, 105 Idaho 785, 673 P.2d 385 (Idaho 1983), a cause of action for wrongful death accrues on the death of the

¹ John D. Stoor, Robert Branch, Jr., William D. Frasure and John H. Adamson are referred to in this brief as "decedents."

injured party. Ultimately both trial courts granted the defendants' motions for summary judgment having found that the plaintiffs' wrongful death causes of action were barred by the statute of limitations.

B. The Course of the Proceedings.

1. The *Castorena* Motion for Summary Judgment and Order.

On June 2, 2006, Civil Action CV-26-2474 styled *Mildred Castorena, et al. v. General Electric, et al.*, was filed in the Sixth Judicial District Court of Bannock County, Idaho. (R. Vol. I, 87-123).² The lawsuit was brought by a number of plaintiffs including, for purposes of this appeal, appellants Allene Stoor, individually and as spouse and personal representative of the Estate of John D. Stoor ("Stoor"), Stephanie Branch, individually and as personal representative of the Estate of Robert Branch, Jr. ("Branch") and Marlene Kisling, individually and as personal representative of the Estate of William D. Frasure ("Frasure").³ All personal representatives were citizens and residents of the state of Idaho. (R. Vol. I, 89). Plaintiffs, pursuant to the Idaho Wrongful Death Act, sued numerous defendant corporations who either manufactured or sold asbestos-containing products in Idaho asserting that exposure to asbestos caused injury and death to Stoor, Branch and Frasure. (R. Vol. I, 87-123).

² References to "R. Vol. ____" are to the volume and page number of the record prepared by the court clerk. References to "App. Ex. ____" are to documents included in the Appendix attached to this brief.

³ These personal representatives of the respective estates, along with John D. Adamson, are referred to in this brief as "plaintiffs."

Defendants Ingersoll-Rand and Westinghouse filed motions for summary judgment on November 9, 2007, seeking to dismiss the cases filed by the personal representatives of decedents, John D. Stoor, Robert Branch, Jr. and William D. Frasure. (R. Vol. V, 1110-1112) (R. Vol. V, 1128-1131) (R. Vol. V, 1137-1139). The basic premise of the defendants' motions for summary judgment was the same: Stoor, Branch and Frasure had objective proof of their injuries from exposure to asbestos more than two years prior to the dates of their deaths so their wrongful death causes of action, filed within two years of the date of death but more than two years after diagnosis, were barred by the statute of limitations because of the application of the condition precedent rule to Idaho's Wrongful Death Statute. (R. Vol. V., 1147). Sterling Fluid Systems (USA), LLC, along with the majority of the other defendants, filed a joinder to Westinghouse and Ingersoll-Rand's motion. (R. Vol. VI, 1494). After oral argument on December 10, 2007, the trial court issued a January 28, 2008 memorandum decision and order that denied the defendants' motions for summary judgment regarding the wrongful death claims. (R. Vol. VI, 1494). (App. Ex. "A").⁴ The court found that the language of I.C. § 5-311, the wrongful death statute, was "plain and unambiguous" and did not contain "condition precedent" language found in other wrongful death

⁴ The plaintiffs filed a motion to augment the record with this January 28, 2008 *Memorandum Decision and Order* that was omitted from the clerk's record. The document is attached in the Appendix for the convenience of this Court.

statutes allowing the heirs to maintain an action for wrongful death only if the decedent could have maintained an action if death had not ensued. (R. Vol. VI, 1495).

On February 8, 2008, defendant Sterling Fluid Systems (USA) LLC (“Sterling”) filed a motion for reconsideration of the court’s order denying the motions for summary judgment as to Stoor, Branch and Frasure. (Vol. VI, 1482-1484). In a memorandum decision and order dated March 18, 2008, the trial court reversed its original decision to deny the motion for summary judgment and dismissed the plaintiffs’ wrongful death claims. (Vol. VII, 1652). The court explained its rationale for now concluding that the literal omission of the condition precedent rule from Idaho’s Wrongful Death Statute was no longer controlling:

[W]hile the Wrongful Death Statute does not expressly contain the condition precedent language found in Lord Campbell’s Act, the Idaho Supreme Court interprets IC § 5-311 as if it did contain such language and has consistently and repeatedly required that the Wrongful Death Statute be read “as if it expressly contains the provision, “Whenever the wrongful act would have entitled the person injured to maintain an action if death had not ensued.”

(R. Vol. VII, 1651).

Following entry of this order, the trial court entered judgment against the plaintiffs/appellants. (R. Vol. VII, 1697-1700). A notice of appeal was filed by the plaintiffs and a certificate of appeal was issued on May 7, 2008. (R. Vol. VII, 1701-1705). On June 19, 2008, because the original judgment had been misfiled,

the trial court entered a final judgment as to the plaintiffs. (R. Vol. VII, 1720-1723). The order conditionally dismissing the appeal was withdrawn. (R. Vol. VII, 1728).

2. The *Adamson* Motion for Summary Judgment and Order.

On July 18, 2006, John D. Adamson, individually and in his capacity as personal representative of the Estate of John H. Adamson (“Adamson”), filed a wrongful death complaint in Idaho State District Court in Bannock County. (R. Vol. VIII, 1751- 1783). Adamson alleged that as a result of continuous exposure to defendants’ asbestos-containing materials and products his father, John H. Adamson (“decedent), contracted mesothelioma and died from this disease on July 20, 2004. (R. Vol. VIII, 1761).

On September 24, 2007, defendant Sterling Fluid Systems (USA) LLC (“Sterling”) filed a motion for final summary judgment alleging that there was no genuine issue of material fact that Adamson’s wrongful death claims against the defendant were barred because the decedent’s personal injury cause of action had expired in Idaho before his death. (R. Vol. IX, 2134-2141). Other defendants joined in the motion. (R. Vol. X, 2290-2322).

Adamson filed a response to Sterling’s motion for summary judgment asserting that his cause of action was timely filed because, pursuant to Idaho’s adoption of Lord Campbell’s Act from which the wrongful death statute codified

in I.C. §5-311 was derived, a new cause of action based on the same conduct was created. (R. Vol. 10. 2322a – 2322j). On April 9, 2008, the trial court issued a memorandum decision and order granting the defendants’ motion for summary judgment that became final and appealable on October 2, 2008. (R. Vol. XI, 2479 – 2489). On October 31, 2008, Adamson filed his notice of appeal. (R. Vol. XI, 2622 - 2629). This Court granted the defendants’ motion to consolidate appeals and consolidated Docket No. 35852 with Docket No. 35123 (Docket No. 34124 had been previously consolidated with Docket No. 35123) for purposes of briefing and oral argument. (Order 12/22/2008). (R. Vol. XI, 2635 – 2636).

C. Statement of Facts.

Facts relevant to the issue on appeal are not in dispute. Plaintiff Alene Stoor brought a wrongful death cause of action on behalf of her deceased husband John Stoor alleging that he was continually exposed to the defendants’ asbestos containing products at the FMC plant in Pocatello, Idaho from 1958 through 1992. (R. Vol. I, 87-124). (R. Vol. V, 1148-1149). As a result of John Stoor’s exposure to asbestos, he developed asbestos-related pleural abnormalities consistent with pneumoconiosis and pleural thickening of the chest wall. (R. Vol. V, 1148). This diagnosis was made on September 24, 2001 based upon a reading of an August 24, 1991 chest x-ray. (R. Vol. V, 1148). Subsequently, three personal injury actions were filed by John Stoor against various manufacturers of asbestos

containing products. (R. Vol. V, 1176-1179). Mr. Stoor died on June 13, 2004. (R. Vol. V, 1119). Less than two years after his death, on June 2, 2006, a wrongful death cause of action was filed on behalf of his estate against the defendants in this case. (R. Vol. V, 1119).

Robert Branch was exposed to the defendants' asbestos containing products from 1955 through 1989 when he was employed at the FMC plant in Pocatello, Idaho. (R. Vol. V, 1149). On July 1, 2003, a chest radiograph revealed that Mr. Branch suffered from chronic interstitial disease (one form of which is asbestosis). (R. Vol. V, 1149-1150). On September 7, 2006, Dr. Alvin Schonfeld read the 2003 chest radiographs of Robert Branch, Jr. and confirmed that there were pleural abnormalities consistent with penumoconiosis (one cause of which is inhalation of dust containing asbestos) and that pleural plaques (evidence of asbestos exposure) were present on July 1, 2003. (R. Vol. V, 1150). Mr. Branch died on July 11, 2005. (R. Vol. V, 1129). A wrongful death claim was asserted on behalf of the Estate of Robert Branch on June 2, 2006. (R. Vol. I, 87-124).

William D. Frasure was exposed to asbestos containing products through his employment at the FMC plant in Pocatello, Idaho from 1953 through 1988. (R. Vol. V, 1138). A consultation report reflected that a chest x-ray taken on August 24, 2000 confirmed that Mr. Frasure had pleural plaques suggestive of asbestos

disease. (R. Vol. V, 1138). Mr. Frasure died on February 17, 2006 and his widow filed a wrongful death claim on June 2, 2006. (R. Vol. I, 87-124).

On March 8, 2002, John H. Adamson was diagnosed with mesothelioma. (R. Vol. X, 2143). During his lifetime Mr. Adamson filed lawsuits in Mississippi and Georgia involving his exposure to asbestos. (R. Vol. X, 2144). He died on July 20, 2004. (R. Vol. X, 2144). Less than two years after his death, a wrongful death lawsuit was filed by John D. Adamson, his son, on behalf of his father's estate. (R. Vol. X, 2144).

STANDARD OF REVIEW

“In reviewing the district court's decision on a motion for summary judgment, the standard of review is whether there are any genuine issues of material fact, and, if not, whether the prevailing party was entitled to a judgment as a matter of law.” *Sacred Heart Med. Ctr. V. Boundary County*, 138 Idaho 534, 535, 66 P.3d 238, 239 (Idaho 2003). If the evidence shows that there are no disputed issues of fact, what remains is a question of law, over which the appellate court exercises free review. *Id.*; *see also, Thornock v. Boise Indep. Sch. Dist. No. 1*, 115 Idaho 466, 470, 767 P.2d 1241, 1245 (1988), *cert. denied*, 490 U.S. 1068, 109 S.Ct. 2069, 104 L.Ed.2d 634 (1989)(conclusions of law are subject to a *de novo* review by this Court). Constitutional issues are purely questions of law over which this Court exercises free review. *Harris v. State Dept. of Health & Welfare*, 123 Idaho 295, 297, 847 P.2d 1156, 1158 (1992).

STATEMENT OF THE ISSUES

I. The Trial Court Erred in Granting the Defendants' Motions for Summary Judgment on the Statute of Limitations in the Wrongful Death Claims.

A. The Trial Court Erred in Concluding that the Condition Precedent Rule Must Be Read Into Idaho's Wrongful Death Statute.

1. The trial courts' equivocal orders should be reversed.

The trial courts erred in granting summary judgment to the defendants and in finding that the accrual date of the decedents' wrongful death causes of action started on the date each decedent was diagnosed with the asbestos-related disease and not on the date of death. The trial courts, while granting summary judgment in the defendants' favor, recognized that there were substantial grounds for difference of opinion concerning the application of the condition precedent rule to Idaho's wrongful death statute. This is evidenced by the equivocal nature of the courts' decisions.

In fact, the trial court in the *Castorena* case initially ruled that the condition precedent rule *did not* apply to Idaho's wrongful death cause of action. In the *Memorandum Decision and Order* dated January 28, 2008, in the *Castorena* case, Judge Peter D. McDermott found that Idaho's wrongful death cause of action was separate and distinct from an action for personal injury and, as such, there was no condition precedent bar to the plaintiffs' claims and denied the defendants' motion for summary judgment. (R. Vol.

VII, 1641-1658 at 1648). (App. Ex. "A"). Turning to the plain language of the statute, the trial court gave effect to the statute as written stating:

It is instructive that the [Wrongful Death Statute] makes no mention and provides no provision for limitations on the wrongful death actions. Furthermore, a clear reading of the words and considering that the Idaho Legislature created another statute to address personal injury claims, this Court finds that the Wrongful Death Statute is an act separate from a personal injury cause of action. . . . **As such, there is no condition precedent bar to the Wrongful Death Plaintiffs' claims here.**

(R. Vol. VII, 1649) (emphasis added). In denying the defendants' summary judgment order, the trial court in *Castorena* was also persuaded by the fact that Idaho's Wrongful Death Statute did not contain the specific proviso allowing heirs to maintain an action for wrongful death only whenever the wrongful act would have entitled the person injured to maintain an action if death had not ensued. (*See id.*) (citations omitted).

The court reconsidered this decision at the request of the defendants and issued another memorandum order and decision citing case law that "implied" a condition precedent rule in Idaho's Wrongful Death Statute and dismissed the plaintiffs' wrongful death claims. (R. Vol. VII, 1641-1658 at 1651). The trial court noted that while "this Court remains convinced that the plain language of the Wrongful Death Statute should be followed and is opposed to judicial activism that assumes the true intent of the Legislature,

this Court is nonetheless required to follow established precedent.” (R. Vol. VII, 1641-1658 at 1652).

In the memorandum decision and order granting summary judgment dated April 9, 2008, in the *Adamson* case, the trial court acknowledged that this Court in *Chapman* ruled that death began the tolling in a wrongful death cause of action. (R. Vol. XI, 2479-2494 at 2485). However, the court determined that because there was a “tendency” to construe the wrongful death statute with the historical practice of requiring the decedent to have a valid cause of action on the date of death and because the “majority” of the relevant cases “seem to apply” the condition precedent rule, the court would do the same. (R. Vol. XI, 2485). Summary judgment was granted in favor of the defendant and judgment entered accordingly dismissing the plaintiffs’ case. (R. Vol. XI, 2489, 2459). The tentative and qualified nature of both decisions serves only to underscore the error inherent in the ultimate decision to dismiss the plaintiffs’ claims.

2. The condition precedent rule does not square with the plain language of Idaho’s Wrongful Death Statute nor with this Court’s clear holding in *Chapman* that a wrongful death cause of action accrues on the date of death.

To reach the erroneous conclusion that Idaho’s wrongful death statute contained a condition precedent, the trial courts had to ignore principles of statutory construction and a decision by this Court that held, without

restriction, that a cause of action for wrongful death accrued on the date of death. *See Chapman v. Cardiac Pacemakers, Inc.*, 105 Idaho 785, 673 P.2d 385 (1983).⁵ Construction of Idaho's wrongful death act must begin by putting the law in historical context. Both at common law prior to 1846 and in this jurisdiction prior to 1888, the heirs of a person whose death was caused by the wrongful act of another could not maintain a civil action for damages. "At common law if the victim of a tort died before he recovered a judgment, the victim's right of action also died." *Evans v. Twin Falls County*, 118 Idaho 210, 215, 796 P.2d 87, 92 (Idaho 1990) *citing* Prosser & Keeton on Torts, § 125(a) (5th ed.1984). Nor could such right of action could be continued by a representative of the decedent. *Vulk v. Haley*, 112 Idaho 855, 857, 736 P.2d 1309, 1311 (Idaho 1987). The common law required that, with the death of either party to a civil action, "the action is dead" and could be revived only by bringing a new action. *Moon v. Bullock*, 65 Idaho 594, 151 P.2d 765, 767 (Idaho 1944) *overruled on other grounds by Doggett v. Boiler Eng'g & Supply Co.*, 92 Idaho 888 (1970).

In an attempt to ameliorate the harsh effects of common law rules, the English Parliament enacted the Fatal Accidents Act in 1846, now more commonly known as Lord Campbell's Act, which granted wrongful death

⁵ *Chapman v. Cardiac Pacemakers, Inc.*, 105 Idaho 785, 673 P.2d 385 (1983) will be sometimes referred to as "*Chapman.*"

damages to survivors. The common law became the law of the State of Idaho, except so far as it was “not repugnant to, or inconsistent with, the constitution or laws of the United States” and in all cases not provided for in Idaho law, “is the rule of decision in all courts of this state.” I.C. § 73-116 (1995). Consequently, absent a specific statutory enactment, wrongful death claims could not be brought in Idaho.

The territorial legislature remedied this situation by modifying the common law rule precluding any claim on behalf of the relatives or dependents of a deceased person with the enactment of the first Idaho Wrongful Death Statute at its 1881 session. *Russell v. Cox*, 148 P.2d 221, 223 (Idaho 1944). (citations omitted). Importantly, Idaho’s wrongful death statute, while modeled after Lord Campbell’s Act, was inconsistent with the English statute in one critical respect. Lord Campbell’s Act states:

Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, **That whensoever the Death of a Person 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 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.

Bevan v. Vassar Farms, Inc., 117 Idaho 1038, 1040, 793 P.2d 711, 713 at fn 1 (Idaho 1990) *quoting* Lord Campbell's Act: An Act for compensating the Families of Persons killed by Accidents. 26th August 1846. The plain and unambiguous language of the Idaho Wrongful Death Statute reads:

(1) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case as may be just.

I.C. § 5-311. As observed by this Court, while the Idaho legislature modeled the Idaho Wrongful Death Statute after Lord Campbell's Act, the Idaho statute did not contain language mandating that the “act, neglect, or default must have been such as would have entitled the party injured to maintain an action therefore if death had not ensued.” *Sprouse v. Magee*, 46 Idaho 622, 269 P. 993, 994 (Idaho 1928)(citation omitted).

Using the statutory rules of construction employed by Idaho courts, interpretation of a statute begins with an examination of the statute's literal words. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (Idaho 1999) (citations omitted); *see also*, "Death Statutes," 3A *Sutherland Statutory Construction* § 73:5 (6th ed.)("[w]here the language of a statute is plain and unambiguous, this Court should give effect to the statute as written, without engaging in statutory construction"); *Albee v. Judy*, 136 Idaho 226, 231, 31 P.3d 248, 253 (Idaho 2001)("[o]nly where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations"). (citations omitted). However, a statute is not ambiguous merely because parties present differing interpretations to the court. *Payette River Property Owners Ass'n v. Board of Com'rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (Idaho 1999).

An examination of the literal language of Idaho's wrongful death statute as written by the state legislature reveals a straightforward premise: the statute is triggered by the death of the person on whose behalf a claim is initiated:

When the **death** of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives

on their behalf may maintain an action for damages against the person causing the **death**.

I.C. § 5-311 (emphasis added). Idaho's wrongful death statute does not impose a condition precedent on the right of the heirs of a person whose death was caused by the negligent acts of another to file suit with the statutorily prescribed limitations period. The plain terms of the wrongful death statute - not contrary implications - control its meaning. Had the legislature intended for the statute to include a condition precedent, it could have expressed such intent in plain English. As written, Idaho's wrongful death statute contains no condition precedent language and is to be given its plain, obvious and rational meaning. *See State, Dept. of Health & Welfare ex rel. Lisby v. Lisby*, 126 Idaho 776, 779, 890 P.2d 727, 730 (Idaho 1995).

3. This Court unequivocally holds, relying upon the plain language of the wrongful death statute, that a cause of action for wrongful death accrues on the death of the injured party, and not before.

Although the original Lord Campbell's Act contained an express provision limiting death actions to those cases where the deceased might have recovered damages had he lived, Idaho's wrongful death statute makes no mention of a condition precedent to wrongful death actions. Therefore, the wrongful death statute must be given its plain meaning and interpreted in

conjunction with Idaho law which has historically held that “the right to bring the wrongful death action accrued as of the date of death.” *Hogan v. Hermann*, 101 Idaho 893, 895, 623 P.2d 900, 902 (Idaho 1980) *citing Russell v. Cox*, 65 Idaho 534, 148 P.2d 221 (1944); *Whitley v. Spokane Ry. Co.*, 23 Idaho 642, 132 P. 121 (1913) *aff’d* 237 U.S. 487, 35 S.Ct. 655, 59 L.Ed. 1060; S. Speiser, *Recovery for Wrongful Death*, § 11:10 (2d ed. 1975); 22 Am.Jur.2d “Death” § 40 (1965); 97 A.L.R.2d 1151, 1154 s 3 (1964). An examination of the plain language of the wrongful death statute compels the conclusion that, under the statute as written, there is no mandate that the deceased have a viable claim at the time of death but, instead, simply identifies the death as the event that triggers the statute. And while there are Idaho cases that favor implying a condition precedent rule, this Court unequivocally pronounced in *Chapman* that, based on statutory construction, a cause of action for wrongful death accrues upon the death of the injured party and not before:

I.C. § 5-219 begins the statutory period of limitation at the time the cause of action accrues, and as noted above, defines accrual as the “time of the occurrence, act or omission complained of.” **However, the law is clear that a cause of action for wrongful death accrues on the death of the injured party, and not before.** *Hogan v. Hermann*, 101 Idaho 893, 623 P.2d 900 (1980); *Russell v. Cox*, 65 Idaho 534, 148 P.2d 221 (1944).

673 P.2d at 386-387 (emphasis added). The logic of equating the accrual date with the date of death is uncomplicated because the wrongful death cause of action “did not accrue to the decedent.” *Id.* This Court in *Chapman* relied heavily upon other Idaho case law for this conclusion and quoted from *Whitley v. Spokane Ry. Co.*, 23 Idaho 642, 132 P. 121 (1913), *aff'd*, 237 U.S. 487, 35 S.Ct. 655, 59 L.Ed. 1060 (1915):

‘[T]he action is allowed upon the theory that the wrongful death of the ancestor works a personal injury to his heirs, in that it deprives them of some pecuniary or other benefit which they would have received except for the death of the ancestor. The statute confers this right of action on the heirs ...’ 23 Idaho at 659, 132 P. 121. (Emphasis added.)

673 P.2d at 387. This Court then properly concluded:

The cause of action which accrues to an injured person during his lifetime is altogether separate from the cause of action accruing to the person's heirs should he die from that injury. *Russell v. Cox, supra*. Therefore, the “occurrence” giving rise to the cause of action is the decedent's wrongful death, and the statute of limitations must date from that event.

Id. (emphasis added). Like the defendants in the motions for summary judgment in this consolidated appeal, the defendant in *Chapman* argued that an action by the heirs of a deceased could only be brought if the deceased could have brought an action himself. In rejecting that argument, this Court stated:

The logic of the latter approach is that since the limitation period had run on the cause of action dating from the implanting of the pacemaker, or its failure, the decedent could not have brought suit at the time this action was filed, and thus the heirs could not have brought suit. However, the rule that heirs can bring an action only if the deceased could have is merely a means of indicating that Lord Campbell's Act did not enlarge the scope of tort liability but simply created a new cause of action based on the same conduct. In other words, the death must have been “wrongful” to the same degree conduct causing injury must be wrongful to be actionable. *Northern Pac. Ry. Co. v. Adams*, 192 U.S. 440, 24 S.Ct. 408, 48 L.Ed. 513 (1904).

We hold that the “occurrence, act or omission” which I.C. § 5-219 defines as the accrual of a cause of action refers to the death of the person, caused by the wrongful acts of another, and the running of the statute of limitation on the wrongful death cause of action begins from the date of death.

Chapman, 673 P.2d at 387. This, then, is not an issue decided by “implication” but by reading the literal language of the statute. This Court recognized in *Chapman* that the accrual date of an action for wrongful death is the date of death of the injured party regardless of whether or not the decedent had a viable cause of action at the time of death. This is still the law in Idaho applicable to all wrongful death claims.

4. Idaho’s wrongful death action is a separate statutory cause of action.

Idaho law is clear. A wrongful death action is not merely a continuation of a decedent’s personal injury claim. Nor is it a derivative cause of action. It is, rather, an entirely new cause of action created by

statute based on the death of the decedent in order to provide a mechanism for the heirs of the decedent to be compensated for their loss. In considering Idaho's wrongful death statute, then codified as Section 4100 of the Idaho Code, this Court said:

This brings us to a consideration of the nature of this cause of action and the status of respondent in the courts of Idaho. Section 4100 of the Rev. Codes authorizes the prosecution of an action by the "heirs or personal representatives" of a deceased person against a person wrongfully causing the death of such person, and any judgment obtained in such an action inures to the benefit of the heirs of the decedent and in no case becomes a part of the assets of the estate of the deceased. **Except for this statute, no such action could be prosecuted in this state and no such cause of action could accrue in this state.**

Whitley v. Spokane & I. Ry. Co., 132 P. 121, 126 (Idaho 1913) *aff'd*, 237 U.S. 487, 35 S. Ct. 655, 59 L.Ed. 1060 (1915) (emphasis added). This Court continued:

The cause of action is not anything that ever belonged to the decedent or to his estate. It never accrued to the decedent. The action is allowed upon the theory that the wrongful death of the ancestor works a personal injury to his heirs, in that it deprives them of some pecuniary or other benefit which they would have received except for the death of the ancestor. The statute confers this right of action on the heirs, and it gives it directly to them or a personal representative such as an executor or administrator; and, when such representative prosecutes the action, he does so as trustee for the heirs.

See id. With no limiting or conditional language in the statute, Idaho's wrongful death statute created an independent cause of action on its face and

did not predicate the right to bring the action on the existence of a separate cause of action held by the injured person prior to death. A wrongful death claim does not even arise until the death of the injured person. Only then do the decedent's heirs suffer a legal injury and have a right to bring a claim, pursuant to I.C. § 219(4), within two years of the date of death. This is in accord with the Restatement (Second) of Torts:

A cause of action for death is complete when death occurs. Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred. In some jurisdictions, however, the wrongful death acts take the form of statutes providing for the survival of the decedent's own cause of action, in which case the statute of limitations necessarily runs from the time of his original injury.

Restatement (Second) of Torts § 899 *Statutes of Limitations* (1979).

When actions for wrongful death were authorized in Idaho, this Court held that the common law rule preventing recovery from the personal representative of the deceased tortfeasor remained in force. *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 351, 33 P.3d 816, 825 at fn2 (Idaho 2001, J. Eismann concurring). In order to remedy this, the legislature enacted a survival statute that permitted tort actions, except actions for slander or libel, to survive the death of the wrongdoer. *Id. citing Evans v.*

Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990); I.C. § 5-327 (1998). This statute was separate and apart from the wrongful death statute and distinguished by various factors. For example, under Idaho's wrongful death statute, only the decedent's heirs may recover and only for the damages suffered by the heirs of the decedent because of his or her death, such as loss of guidance, support, etc. *Id.* Under Idaho's survival statute, the decedent's estate becomes the beneficiary and can sue for damages that the decedent could have sued for had he survived, while a wrongful death action involves the damages suffered by the heirs of the decedent because of his death, such as loss of guidance, support, etc. *Id.* The wrongful death causes of action instituted by the heirs of the decedents accrued on the date of their deaths and are timely filed even though the decedents' own causes of action for the injuries resulting in death would be barred.

B. The Trial Court Erred in Presuming That This Court Would Apply the Condition Precedent Rule to a Wrongful Death Claim.

All defendants as well as the trial courts relied heavily on *Adams v. Armstrong World Industries* in support of the supposition that this Court would apply the condition precedent rule in the statute of limitations context. (R. Vol. – 1648; 2483). *See Adams v. Armstrong World Indus., Inc.*, 596 F. Supp. 1407, 1412-14 (D. Idaho 1984), *appealed sub nom, Waters v.*

Armstrong World Indus., Inc., 773 F.2d 248 (9th Cir. 1985), *aff'd in part, rev'd in part*, 790 F.2d 893 (9th Cir.1986) *after remand*, 664 F.Supp. 463 (D.Idaho 1987), *judgment on limitations vacated on other grounds* 847 F.2d 589 (9th Cir.1988). The *Adams* court stated that “[t]he Idaho Supreme Court has never specifically addressed whether the heir may maintain a wrongful death action if the deceased, at the date of death, would have been barred by the statute of limitations” and then determined that “if faced with the question, the Idaho court would apply the condition precedent rule to the statute of limitations.” 596 F. Supp. at 1414.

On appeal in *Waters v. Armstrong* the Ninth Circuit Court of Appeals reiterated that “the Idaho Supreme Court has never determined whether an applicable statute of limitations can be a "condition precedent" whose failure would bar a cause of action for wrongful death under Idaho Code § 5-311 and certified that question to this Court. 773 F.2d at 250. Certification of that question was rejected because, as informed by this Court, prior decisions were “sufficient to give guidance for the determination of the Idaho law involved in this action.” 664 F. Supp. at 464.

Chapman, decided in the year before *Adams* remained the controlling authority and offered guidance to other courts because this decision, too, was based on a question certified from a federal district court, i.e.,

“whether, in a wrongful death action, the statute of limitations begins to run from the date of death or from the date of the injury from which death resulted.” 673 P.2d at 386 (emphasis added). This Court’s answer was straightforward. Idaho recognized a right of action in the heirs of a person whose death was caused by the negligence of another. *Id.* The statute of limitations for a wrongful death cause of action was two years from the accrual date. *See id.* And a wrongful death cause of action accrued **“on the death of the injured party, and not before.”** *Id.*

Undoubtedly the *Chapman* court was aware of, and indeed discussed and rejected, the reasoning of this Court in the 1934 case of *Helgeson v. Powell*, 54 Idaho 667, 34 P.2d 957, 961 (1934). 673 P.2d at 387. The defendants in *Helgeson*, much like the defendants in these cases, asserted that the accrual date of the wrongful death cause of action was limited by the date of the injury causing death. *Id.* at 387. This Court in *Chapman* dismissed the argument by saying that “the rule that heirs can bring an action only if the deceased could have is merely a means of indicating that Lord Campbell’s Act did not enlarge the scope of tort liability, but simply **created a new cause of action based on the same conduct.**” *Id.* The date of the injury was, therefore, considered but did not deter this Court from making the final pronouncement:

We hold that the “occurrence, act or omission” which I.C. § 5-219 defines as the accrual of a cause of action refers to the death of the person, caused by the wrongful acts of another, and the running of the statute of limitation on the wrongful death cause of action begins from the date of death.

Chapman, 673 P.2d at 387.

Evidently the trial courts’ reliance on *Helgeson* and other cases that implied a condition precedent in Idaho’s wrongful death statute was misinformed. This Court specifically addressed *Helgeson* in *Chapman* and chose not to limit the accrual date of the statute to the date of the injury causing death as was done in *Helgeson*. (R. Vol. VII, 1651). Inexplicably, the trial courts in their decisions in *Castorena* and *Adamson* relied upon *Helgeson* as authority for granting the defendants’ motion for summary judgment. The *Castorena* court, citing *Helgeson*, reconsidered its original decision to deny the defendants’ summary judgment and granted summary judgment saying the court was now aware of earlier case law and precedent by the Idaho Supreme Court that the wrongful death statute must be read *as if* it expressly contained the condition precedent language. (R. Vol. VII, 1651). Likewise, the court in *Adamson* was persuaded by *Helgeson* and granted summary judgment based on that decision because “[a]lthough the Court in *Chapman* determined that death began the tolling” more recent cases “seem to apply the condition precedent rule.” (R. Vol. XI, 284-285).

In effect, the trial courts ignored the analysis in *Chapman* and chose to presume that this Court would ignore its ultimate finding in that case. The “presumption” that this Court would apply the condition precedent rule to the statute of limitations is unfounded. Furthermore, it has long been the rule that changes in the common law by the adoption of a statute are not to be presumed, but must be clearly intended before they will be given effect. *Rook v. Trout*, 113 Idaho 652, 657, 747 P.2d 61, 66 (Idaho 1987) *overruled on other grounds by Sherwood v. Carter*, 119 Idaho 246, 805 P.2d 452 (Idaho 1991)(citations omitted). There is no evidence, and in fact there is evidence to the contrary, that based on the plain language of Idaho’s wrongful death statute the Idaho legislature intended to incorporate a condition precedent incorporated into Idaho’s wrongful death statute. The trial courts’ decisions to apply the condition precedent rule to the plaintiffs’ cases was error, pure and simple.

II. The Trial Courts’ Rulings Deprive Idaho Citizens of Constitutional Rights.

If the trial courts’ decision to impose a condition precedent on Idaho’s wrongful death is allowed to stand, the plaintiffs and all similarly situated plaintiffs will be deprived of access to Idaho courts and prevented from bringing their claims within the time expressly allowed by the wrongful death statute. Access to the courts of this state is a right

guaranteed to Idaho citizens pursuant to the “open courts” provision of Article I, § 18 of the Idaho Constitution which provides:

Justice to be freely and speedily administered.- Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice.

Idaho Constitution art. 1, § 18. *See also, Day v. Day*, 12 Idaho 556, 86 P. 531 (Idaho 1906)(“[u]nder the provisions of section 18, art. 1, Const. Idaho, as well as by the unwritten dictates of natural justice, the courts of this state are commanded to administer justice without prejudice”).

The trial courts’ decision to impose a condition precedent on Idaho’s Wrongful Death Act is in derogation of the open access principals of the Idaho Constitution because the effect is to time-bar a cause of action before it even accrues –and act of extreme prejudice. This, in turn, creates an unjust and even ludicrous state of affairs in which the decedents would have had to bring their wrongful death claims within two years of the date of the diagnosis of their injury, notwithstanding the fact that the decedents was still living two years after diagnosis and died more than two years after diagnosis. No wrongful death action could be filed while the decedents were still alive and, if one were filed, it would be dismissed. Nevertheless, this is the illogical result of a ruling that establishes the accrual of a wrongful death


cause action on the date of injury and not the date of death. The trial courts' decision effectively extinguished the plaintiffs' right to sue. This outcome violates fundamental principles of fairness and denies the beneficiaries of a person who dies because of the negligence of another more than two years after the infliction of an injury any remedy or access to the courts of Idaho.

CONCLUSION

For the reasons set out in this brief, Plaintiffs/Appellants request that this Court reverse the rulings of the trial courts dismissing their claims and deny the defendants' summary judgment motions based on the statute of limitations.

DATED this 6th day of August, 2009.

Respectfully submitted,



James C. Arnold/ISB# 3688
Petersen, Parkinson & Arnold, PLLC
Attorney for Plaintiffs/Appellants

APPENDIX INDEX

Exhibit A *Memorandum Decision and Order*, January 28, 2008

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon all counsel of record via email to the following:

DATED this 6th day of August, 2009.

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James C. Arnold

EXHIBIT "A"

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2008 JAN 30 PM 3: 09

BY [Signature] DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, et al.)
)
 Plaintiffs,)
)
 vs.)
)
 GENERAL ELECTRIC, et al.,)
)
 Defendants.)

Case No. CV-2006-2474-PI

ORDER

NOW, THEREFORE, IT IS HEREWITH ORDERED this Court's Decision dated
January 28, 2008 in *Norton v. General Electric, et al*, Bannock County Case CV2006-
2475-PI shall also apply in this case *Castorena, et al v. General Electric, et al* CV2006-
2474-PI. And a copy of said Decision is attached hereto and filed in this case.

IT IS SO ORDERED.

Dated this 30th day of January, 2008.

[Signature]
PETER D. McDERMOTT
District Judge

Copies to:
G. Patterson Keahey
Gary L. Cooper

STATE OF IDAHO }
County of Bannock } ss.



I hereby certify that the foregoing is a full, true and correct copy of an instrument as the same now remains on file and of record in my office.

WITNESS my hand and official seal hereto affixed


this 30 day of July 2009

DALE HATCH, CLERK OF THE DISTRICT COURT,
EX OFFICIO AUDITOR AND RECORDER.

By Deputy [Signature]

S

This is a copy of the original, which has been misplaced. The clerk back-dated the file stamp at my direction 5-5-09
Judge Peter D. McDermott

FILED
BANNOCK COUNTY,
CLERK OF THE COURT
2008 JAN 28 PM 12: 52
BY 
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, et al.)
)
Plaintiffs,)
)
vs.)
)
GENERAL ELECTRIC, et al.,)
)
Defendants.)

Case No. CV-2006-2474-PI
MEMORANDUM DECISION
and ORDER
STATE OF IDAHO
County of Bannock



I hereby certify that the foregoing is a full, true and correct copy of an instrument as the same now remains on file and of record in my office.
WITNESS my hand and official seal hereto affixed
this 30 day of July, 2009

DALE HATCH, CLERK OF THE DISTRICT COURT,
EX OFFICIO AUDITOR AND RECORDER.

By Deputy 

NATURE OF THE ACTION

This case is a products liability action wherein the Plaintiffs generally allege the Defendants are responsible for the manufacture of asbestos-containing products or machinery to which the Plaintiffs allege they were exposed. The Plaintiffs assert this exposure caused serious injury and/or death for which they are entitled to recover damages in this lawsuit.

CBS Corporation, a Delaware corporation, f/k/a Viacom, Inc., successor by merger to CBS Corporation, a Pennsylvania corporation, f/k/a Westinghouse Electric Corporation ("Westinghouse") and Ingersoll-Rand Corporation ("Ingersoll-Rand") (collectively referred to herein as "Moving Defendants") filed a Motion for Summary Judgment against Plaintiffs Robert L. Hronek and Norman L. Day (collectively referred to herein as "Plaintiffs" or "Personal Injury Plaintiffs"). The Moving Defendants also filed a Motion for Summary Judgment against Plaintiffs Alene Stoor, individually and as a spouse and personal representative of the Estate of John Stoor ("Stoor"), Stephanie Branch, individually and as personal representative of the Estate

of Robert Branch, Jr. ("Branch") and Marlene Kisling, individually and as personal representative of the Estate of William D. Frasure ("Frasure") (collectively referred to herein as "Plaintiffs" or "Wrongful Death Plaintiffs").

This Court heard oral arguments regarding these summary judgment motions on December 10, 2007, taking the case under advisement. After receiving oral arguments and reviewing the entire file, including the briefs filed by counsel, this Court enters the following Memorandum Decision and Order.

ISSUES

1. Whether to grant the Moving Defendants' Motion for Summary Judgment as to Personal Injury Plaintiffs Hronek and Day.
2. Whether to grant the Moving Defendants' Motion for Summary Judgment as to Wrongful Death Plaintiffs Stoor, Branch and Frasure.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment shall be rendered "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). This Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). If the evidence reveals no disputed issues of

material fact, then summary judgment should be granted. *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

If the moving party challenges an element of the non-moving party's case on the basis that no genuine issue of material fact exists, the burden now shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. *Tingley*, 125 Idaho at 90, 867 P.2d at 964. Summary judgment is properly granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by *affidavits* or as otherwise provided in this rule, must *set forth specific facts showing that there is a genuine issue for trial.*" I.R.C.P. 56(e) (emphasis added).

DISCUSSION

1. Whether to grant the Moving Defendants' Motion for Summary Judgment as to Personal Injury Plaintiffs Hronek and Day.

The complaint in this action was filed on June 2, 2006, and alleges nine counts, four of which are applicable to the Moving Defendants, including counts of negligence, strict liability, misrepresentation and battery, civil conspiracy and fraudulent concealment. Pursuant to their Motion for Summary Judgment, the Moving Defendants are requesting summary judgment on all of the above-named claims asserted against them.

a. **Whether Plaintiffs' negligence and strict liability claims are barred by the statute of limitations.**

First, the Moving Defendants argue that the Plaintiffs' negligence and strict liability claims are barred by the statute of limitations. Pursuant to Idaho Code ("IC") Section 5-219(4), personal injury actions must be brought within two years of the date the cause of action accrues. That section states in pertinent part:

5-219. Actions against officers, for penalties, on bonds, and for professional malpractice or for personal injuries. – Within two (2) years:

(4) An action to recover damages ... for an injury to the person, or for the death of one caused by the wrongful act or neglect of another, including any such action arising from breach of an implied warranty or implied covenant; ... the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, and, provided further, that an action ... must be commenced within ... two (2) years following the occurrence, act or omission complained of, whichever is later.

In addressing asbestos personal injury cases specifically, the Idaho Supreme Court has determined that a cause of action accrues "on the date the injury became 'objectively ascertainable.' This means that the cause of action accrues when 'objective medical proof would support the existence of an actual injury.'" *Brennan v. Owen-Corning Fiberglass Corp.*, 134 Idaho 800, 801, 10 P.3d 749, 750 (2000)(citing *Davis v. Moran*, 112 Idaho 703, 706, 735 P.2d 1014, 1020 (1987)). This rule applies even though the plaintiff may not be aware of the actual injury or its cause. *Id.* at 802, 10 P.3d at 751. The *Brennan* court further found that the cause of action accrues and the statute of limitation commences when objective medical proof would support the existence of an actual injury resulting from asbestos exposure. *Id.* Thus, if a plaintiff

fails to file suit within two years from the date of first objective medical proof of disease or injury, his or her claims are barred by the statute of limitations as set forth in IC § 5-219(4).

Facts that may constitute “objective medical proof that would support the existence of an actual injury resulting from exposure to asbestos,” thereby commencing the running of the statute of limitations, include: (1) an examination in order to detect asbestos-related diseases; (2) a chest x-ray which showed scarring of the lung of a kind that can be seen after asbestos exposure; (3) changes in the lung consistent with the type of injury and disease that can be seen after asbestos exposure; or (4) presence of pleural plaques or scarring in the lining of the lung which indicates asbestos exposure. *Id.* at 801.

In this case, objective medical proof establishes that both Plaintiff Hronek and Plaintiff Day suffered from asbestos-related injuries more than two years before the complaint was filed in this case on June 2, 2006. For example, “Hronek testified in his deposition that he was first told that he had an asbestos-related disease by his doctor, Dr. Christon, in 2000 while he was still working at FMC.” (Defs. Ingersoll-Rand and Westinghouse’s Statement of Undisputed Facts in Supp. of Mot. for Summ. J. against Hronek (“Hronek Statement of Undisputed Facts”), Nov. 9, 2007, ¶ 2.) Further, a radiograph taken of his chest on April 29, 2003, revealed the presence of pleural plaques. Dr. Schonfeld, the doctor retained by Hronek, read that radiograph on November 17, 2005. Dr. Schonfeld “concluded in an ILO ‘B-reading’ report of that date that the 04/29/03 radiograph revealed pleural abnormalities consistent with pneumoconiosis (one form of which is asbestosis) and the existence of pleural plaques (evidence of exposure to asbestos).” (*Id.* at ¶ 3.) Additionally, in a Claim Form filed against Pfizer, Inc., wherein Plaintiff Hronek

sought to recover compensation for his asbestos-related injury, Hronek admitted he “was diagnosed with asbestosis on 07/11/03, as a result of asbestos exposure from 1956 through 2001 at the FMC plant in Pocatello, Idaho.” (*Id.* at ¶ 5.) Hronek testified in his deposition that the information regarding his diagnosis of asbestosis included on the Claim Form was “accurate.” (*Id.*) Thus, it makes no difference that on November 17, 2005, the doctor retained by Hronek’s attorney confirmed the diagnosis of asbestos-related disease previously made by other medical doctors. Plaintiff Hronek’s admission that he had personal knowledge of his diagnosis of asbestos disease as early as 2000, and no later than July 11, 2003, is sufficient to commence the running of the limitation period under IC § 5-219(4). Because Hronek did not file his claim until June 2, 2006, his negligence and strict liability claims against Moving Defendants are barred by the statute of limitations.

The undisputed facts regarding Plaintiff Day similarly show that he suffered from asbestos-related injuries more than two years before the complaint was filed in this case. Like Hronek, Plaintiff Day admitted, through various documents, that he was diagnosed with asbestosis on February 17, 2004. (Defs. Ingersoll-Rand and Westinghouse’s Statement of Undisputed Facts in Supp. of Mot. for Summ. J. against Day (“Day Statement of Undisputed Facts”), Nov. 9, 2007, ¶¶ 5-6.) On March 20, 2004, a chest x-ray was taken of Day, “and a Chest X-Ray Report of that date was generated stating: ‘The patient states she (sic) has a history of pulmonary fibrosis secondary to asbestosis.’” (*Id.* at ¶ 8.) Also, on February 17, 2004, James W. Ballard, M.D., read a June 27, 2003, chest x-ray. Dr. Ballard “concluded in an ILO ‘B-reading’ report of that date that the 06/27/03 chest x-ray revealed parenchymal and pleural

Memorandum Decision and Order

Re: Ingersoll—Rand and Westinghouse’s Motions for Summary Judgment
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abnormalities consistent with pneumoconiosis (one form of which is asbestosis)." (*Id.* at ¶ 4.) Plaintiff Day's counsel also asked Alice Boylan, M.D., to review that same ILO "B-reading" report. "Dr. Boylan concluded: 'it is my opinion, to a reasonable degree of medical certainty, that the changes revealed in the ILO report of 2/17/04 are causally related to the disease asbestosis because of Mr. Day's occupational exposure to asbestos.'" (*Id.* at ¶ 6.) Further, in a Claim Form also filed against Pfizer, Inc., seeking to recover from Pfizer compensation for Day's asbestos-related injury, Day admitted he was diagnosed with asbestosis on February 17, 2004, the same date as Dr. Ballard's 02/17/04 "B-reading" report. (*Id.* at ¶ 5.) In addition, Day signed an affidavit wherein he "admitted that he was presently suffering from asbestosis and/or the physical disorder arising from or related to exposure to asbestos which was confirmed by a written diagnosis of a medical doctor on 02/17/04." (*Id.* at ¶ 7.) Thus, like Plaintiff Hronek, because Plaintiff Day did not file his claim until June 2, 2006, more than two years after the relevant February 17, 2004, date, his negligence and strict liability claims against Moving Defendants are barred by the statute of limitations.

In their response memorandum, Plaintiffs argue that "it was not until Dr. Schonfeld, a *qualified B-Reader*, actually read and interpreted the x-rays that plaintiffs' asbestos-related injuries became 'objectively ascertainable.'" (Pls.' Resp. to Defs. Ingersoll-Rand and Westinghouse's Mot. for Summ. J. against Personal Injury Pls. Hronek and Day, Nov. 27, 2007, 3.) While the Plaintiffs argue that the first objective medical proof of their asbestos-related injuries did not occur until November of 2005 when Dr. Alvin Schonfeld, a doctor retained by their attorney, reviewed old x-rays and old x-ray reports of other physicians, and confirmed the

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diagnoses of asbestos disease previously made by those other physicians, the undisputed proof, as set forth above, shows otherwise.

The Plaintiffs further argue that the limitation period contained in IC § 5-219(4) did not accrue until they became aware they were suffering from asbestos-related injuries. (*Id.* at 4.) In support of that argument, the Plaintiffs cite to the case of *Renner v. Edwards*, 93 Idaho 836, 475 P.2d 530 (1969). However, the Plaintiffs' reliance on that case is misplaced, as *Renner* was overruled by the 1971 amendment of IC § 5-219(4) wherein the Idaho Legislature created two discovery exceptions only -- one for leaving a foreign object in a body and the other for fraudulent concealment of a wrongful or negligent act of professional malpractice. The pertinent portion of that statute states:

[W]hen the action is for damages arising out of the placement and inadvertent, accidental or unintentional leaving of any foreign object in the body of any person by reason of the professional malpractice of any hospital, physician or other person or institution practicing any of the healing arts or when the fact of damage has, for the purpose of escaping responsibility therefor, been fraudulently and knowingly concealed from the injured party by an alleged wrongdoer standing at the time of the wrongful act, neglect or breach in a professional or commercial relationship with the injured party, the same shall be deemed to accrue when the injured party knows or in the exercise of reasonable care should have been put on inquiry regarding the condition or matter complained of

For cases falling outside of these two express exceptions, the 1971 amended version of IC § 5-219(4) provides that:

[I]n all other actions, whether arising from professional malpractice or otherwise, the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, and, provided further, that an action within the foregoing foreign object or fraudulent concealment exceptions must be commenced within one (1) year following the date of

accrual as aforesaid or two (2) years following the occurrence, act or omission complained of, whichever is later.

Further, the Idaho Supreme Court has specifically disagreed with the argument that damages must be objectively ascertainable to, or known by, the plaintiff in order to commence the running of the statute of limitations. That court held that such a rule “would amount to a discovery rule which our cases have expressly rejected in light of the legislature’s explicit rejection of the discovery rule, I.C. § 5-219(4).” *Davis*, 112 Idaho at 709, 735 P.2d at 1020. As such, whether or not a plaintiff knows or has been informed of his or her injury is not pertinent to a statute of limitation analysis under IC § 5-219(4). Therefore, based on the undisputed facts as set forth above, it is irrelevant that on November 17, 2005, Dr. Schonfeld, a doctor retained by Plaintiffs’ counsel, confirmed the diagnosis of asbestos-related disease previously made by other medical doctors since the Personal Injury Plaintiffs filed their complaint more than two years after their first diagnosis of asbestos-related disease. Therefore, the negligence and strict products liability claims of Plaintiffs Hronek and Day are barred by IC § 5-219(4).

The Plaintiffs also appear to argue that IC § 5-219(4) violates Art. 1, § 18 of the Idaho Constitution. (Pls.’ Resp. to Defs. Ingersoll-Rand and Westinghouse’s Mot. for Summ. J. against Personal Injury Pls. Hronek and Day at 4.) However, that argument is based on the assumption that Plaintiffs’ causes of action were barred by IC § 5-219(4) before they had actual knowledge or reasonably should have discovered their injuries. As the Plaintiffs argued: “The Moving Defendants [sic] assertions that this court should refuse to hold that a cause of action accrues under I.C. § 5-219(4) only after the injured party discovers (or reasonably should have

discovered) the facts giving rise to his or her cause of action, is seemingly oblivious to art. 1, § 18 of the Idaho Constitution” (Pls.’ Resp. to Defs.’ Ingersoll-Rand and Westinghouse’s Mot. for Summ. J. against Personal Injury Pls. Hronek and Day at 4.) Such assumption is unfounded since the undisputed facts demonstrate that both Plaintiffs Hronek and Day had actual knowledge of their asbestos-related injuries *more* than two years before they filed their complaint. As such, neither claim was barred by the limitation period before they became aware of their injuries, as this Court has already determined that Hronek and Day should have filed their complaint within the applicable limitation period. As such, this Court disregards the Plaintiffs’ attempt to now attack the constitutionality of IC § 5-219(4) since both Personal Injury Plaintiffs simply failed to file their claim in a timely manner.

b. Whether this Court should dismiss the remaining causes of action.

In their Memorandum in Support of Motion for Summary Judgment, the Moving Defendants argue that Counts Three and Four of the complaint, including the Plaintiffs’ claims for misrepresentation, battery, fraudulent concealment and civil conspiracy, should also be dismissed. In their Response to Defendants Ingersoll-Rand and Westinghouse’s Motion for Summary Judgment Against Personal Injury Plaintiffs Hronek and Day, the Plaintiffs only addressed one of the Moving Defendants’ arguments for dismissal – failure to plead misrepresentation with particularity. Specifically, the Plaintiffs stated: “This claim and the other allegations in Count Three of Plaintiff’s Complaint clearly satisfy Idaho’s law requiring misrepresentation to be pled with particularity.” (Pls.’ Resp. to Defs. Ingersoll-Rand and Westinghouse’s Mot. for Summ. J. against Personal Injury Pls. Hronek and Day at 6.)

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1. Whether the Plaintiffs pled their claims of fraudulent misrepresentation with any particularity.

Pursuant to Rule 9(b) of the Idaho Rules of Civil Procedure (IRCP), claims of fraud and misrepresentation must be pled with particularity. That rule states:

Rule 9(b). Fraud, mistake, condition of the mind, violation of civil or constitutional rights.

In all averments of fraud or mistake, or violation of civil or constitutional rights, the circumstances constituting fraud or mistake, or violation of civil or constitutional rights shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

To prove fraud, a plaintiff must establish the following elements:

(1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.

Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166, 1170 (2007) (citation omitted). Furthermore,

Rule 9(b) requires that "allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Silver Valley*

Partners, LLC v. De Motte, No. 06-429-N-ELJ, 2007 WL 2802315, at *4 (D. Idaho Sept. 24, 2007)(citation omitted). That court further stated:

"[T]here is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify false statements made by each and every defendant. Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result." *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir.2007) (citation omitted) "On the other hand, Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each

defendant separately of the allegations surrounding his alleged participation in the fraud. In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme.” *Id.* at 765-766 (citations and quotations omitted).

Id.

In this case, the Plaintiffs’ Complaint makes the same conclusory misrepresentation allegations against each of the 65 Defendants, without making any specific allegations that any representations, false or otherwise, were made by the Moving Defendants to Plaintiff Hronek or Plaintiff Day or that the Plaintiffs relied on representations made by those Defendants. For example, the Complaint includes allegations that the Moving Defendants “affirmatively misrepresent[ed] ... in advertising, labels and otherwise, that the asbestos containing products ... were safe in their ordinary and foreseeable use.” (Compl., June 2, 2006, ¶ 74(e)). The Complaint further alleges that “by placing [asbestos-containing products and/or machinery] on the market, [Moving Defendants] represented that they would safely do the job for which they were intended” (*Id.* at ¶ 82.) These allegations amount to general averments and do not satisfy the requirements of Rule 9(b) as the allegations of fraud here are not specific enough and do not “identify the role of each defendant in the alleged fraudulent scheme.” Thus, the Plaintiffs general averments directed at fraud are insufficient to satisfy the requirements of IRCP 9(b). *See Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 127, 106 P.3d 449, 453 (2005). As such, any fraud claims alleged by the Plaintiffs in Counts Three and Four should be dismissed for failure to plead with specificity.

Additionally, it is important to note that even if the Plaintiffs had satisfied the requirements of IRCP 9(b), they have failed to satisfy their burden pursuant to IRCP 56, as the

Plaintiffs have simply cited allegations included in their complaint and have failed to file any affidavits pertaining to their fraud claims.

2. Whether the Plaintiffs satisfied the requirements of IRCP 56.

Moreover, the Plaintiffs' failure to present any evidence or argument in opposition to the Defendants' other arguments is also viewed by this Court not only as a concession of those points, but as a further violation of Rule 56. As explained previously, Idaho law provides that a party against whom summary judgment is sought may not merely rest on the allegations contained in the complaint, but must come forward with evidence to contradict the assertions of the moving party in order to establish a genuine issue of material fact. As the Plaintiffs have failed to produce any affidavits regarding their claims of misrepresentation, battery, fraudulent concealment and/or civil conspiracy setting forth "specific facts showing that there is a genuine issue for trial", these claims must be dismissed pursuant to IRCP 56.

2. Whether to grant the Moving Defendants' Motion for Summary Judgment as to Wrongful Death Plaintiffs Stoor, Branch and Frasure.

The Moving Defendants also filed a Motion for Summary Judgment against Wrongful Death Plaintiffs Stoor, Branch and Frasure, which motion is similar to their request for summary judgment against Plaintiffs Hronek and Day as set forth previously.

a. Whether the Plaintiffs' negligence and strict liability claims are barred by the statute of limitations.

The Moving Defendants argue that, like Plaintiffs Hronek and Day, the decedents' claims for negligence and strict liability are also barred by the two-year statute of limitations contained in IC § 5-219(4) since objective medical proof established that the decedents suffered from

asbestos-related injuries more than two years before the complaint was filed in this case on June 2, 2006. As a result, the Moving Defendants contend the Wrongful Death Plaintiffs are now also barred from pursuing their claims. The Moving Defendants argue:

[A] condition precedent to pursuing a claim for wrongful death is that the decedent must have been able to maintain a cause of action had he lived. In other words, Wrongful Death Plaintiffs may not 'revive' decedents' negligence and strict products liability claims if the decedents' claims would have been barred by the statute of limitations, had their deaths not ensued.

(Def. Ingersoll-Rand and Westinghouse's Mem. in Supp. of Mot for Summ. J. against Wrongful Death Pls., Nov. 9, 2007, 11.)

1. Whether the decedents' claims were time-barred before their deaths.

As set forth above, pursuant to IC § 5-219(4), personal injury actions must be brought within two years of the date the cause of action accrues. That section states in pertinent part:

5-219. Actions against officers, for penalties, on bonds, and for professional malpractice or for personal injuries. – Within two (2) years:

(4) An action to recover damages ... for an injury to the person, or for the death of one caused by the wrongful act or neglect of another, including any such action arising from breach of an implied warranty or implied covenant; ... the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, and, provided further, that an action ... must be commenced within ... two (2) years following the occurrence, act or omission complained of, whichever is later.

In addressing asbestos personal injury cases specifically, the Idaho Supreme Court has determined that a cause of action accrues "on the date the injury became 'objectively ascertainable.' This means that the cause of action accrues when 'objective medical proof would

support the existence of an actual injury.” *Brennan v. Owen-Corning Fiberglass Corp.*, 134 Idaho 800, 801, 10 P.3d 749, 750 (2000)(citing *Davis v. Moran*, 112 Idaho 703, 706, 735 P.2d 1014, 1020 (1987)). This rule applies even though the plaintiff may not be aware of the actual injury or its cause. *Id.* at 802, 10 P.3d at 751. The *Brennan* court further found that the cause of action accrues and the statute of limitation commences when objective medical proof would support the existence of an actual injury resulting from asbestos exposure. *Id.* Thus, if a plaintiff fails to file suit within two years from the date of first objective medical proof of disease or injury, his or her claims are barred by the statute of limitations as set forth in IC § 5-219(4). The facts that may constitute “objective medical proof that would support the existence of an actual injury resulting from exposure to asbestos,” thereby commencing the running of the statute of limitations include: (1) an examination in order to detect asbestos-related diseases; (2) a chest x-ray which showed scarring of the lung of a kind that can be seen after asbestos exposure; (3) changes in the lung consistent with the type of injury and disease that can be seen after asbestos exposure; or (4) presence of pleural plaques or scarring in the lining of the lung which indicates asbestos exposure. *Id.* at 801.

In this case, objective medical proof establishes that the decedents suffered from asbestos-related injuries more than two years before the complaint was filed. In fact, the Plaintiffs do not dispute that the claims of the decedents would have been barred had they lived. For example, Stoor admitted, and the medical records establish, that he was diagnosed with an asbestos-related disease on or before September 28, 2001. (Def’s. Ingersoll-Rand and Westinghouse’s Statement of Undisputed Facts in Supp. of Mot. for Summ. J. against Stoor

(“Stoor Statement of Undisputed Facts”), Nov. 9, 2007, ¶¶ 3-8.) Specifically, a claim for personal injury arising from asbestos exposure filed in August of 2001 included statements that “Stoor had been diagnosed with the following asbestos-related injuries: bilateral pleural disease and nondisabling bilateral interstitial lung disease.” (*Id.* at ¶ 3, citations omitted.) Additionally, on September 28, 2001, Dr. Alvin J. Schonfeld read a chest radiograph taken of Stoor on August 24, 1991, and “concluded that Stoor had pleural abnormalities consistent with pneumoconiosis (one form of which is asbestos) and had pleural thickening of the chest wall.” (*Id.* at ¶ 4, citations omitted.) Since Stoor did not file his personal injury complaint within two years of either the 1991 radiograph or the 2001 diagnosis, his claims were time-barred.

Similar to Stoor, Branch had a chest radiograph taken on July 1, 2003, which indicated abnormalities consistent with asbestos and evidence of asbestos exposure. (Defs. Ingersoll-Rand and Westinghouse’s Statement of Undisputed Facts in Supp. of Mot. for Summ. J. against Branch (“Branch Statement of Undisputed Facts”), Nov. 9, 2007, ¶¶ 5-6.) In an emergency room visit on May 11, 2003, Branch also “reported a past medical history of, *inter alia*, asbestos exposure from working at the FMC plant.” (*Id.* at ¶ 4, citations omitted.) Thus, since Branch did not did not file a personal injury complaint relating to an asbestos-related injury within two years from the date of objective medical proof of injury, his personal injury claims were also barred by the statute of limitations.

Likewise, Frasure’s medical records establish that there were pleural plaques present suggesting asbestos disease. After a review of a chest x-ray taken of Frasure on August 24, 2000, Dr. James E. Pearl prepared a report, concluding that “[Frasure] does have pleural plaques

suggesting asbestos disease.” (Defs. Ingersoll-Rand and Westinghouse’s Statement of Undisputed Facts in Supp. of Mot. for Summ. J. against Frasure (“Frasure Statement of Undisputed Facts”), Nov. 9, 2007, ¶ 4.) On August 25, 2000, another chest x-ray was taken, showing ‘bilateral calcified pleural plaque consistent with asbestos exposure’ (*Id.* at ¶ 5.) Therefore, since Frasure also failed to file an actionable claim, his negligence and strict products liability claims were also barred by the statute of limitations.

2. Whether the Wrongful Death Plaintiffs’ negligence and strict liability claims are barred by the condition precedent rule.

As mentioned, the Moving Defendants contend that because the decedents’ claims would have been barred pursuant to IC § 5-219(4), the negligence and strict liability claims of the Wrongful Death Plaintiffs are also barred. The Moving Defendants argue that “a condition precedent to pursuing a claim for wrongful death is that the decedent must have been able to maintain a cause of action had he lived.” (Defs. Ingersoll-Rand and Westinghouse’s Mem. in Supp. of Mot. for Summ. J. against Wrongful Death Pls. at 11.) In support of that argument, the Plaintiffs rely heavily on a case decided in the United States District Court for the District of Idaho. That court, in applying Idaho law to an asbestos wrongful death case, determined that the condition precedent rule does apply in the statute of limitations context. *Adams v. Armstrong World Indus., Inc.*, 596 F.Supp. 1407, 1412, 1414 (D. Idaho 1984), *rev’d on other grounds sub nom. Waters v. Armstrong World Indus., Inc.*, 773 F.2d 248 (9th Cir. 1985). However, it is important to note that, in making that determination, the *Adams* court also conceded that “[t]he Idaho Supreme Court has never specifically addressed the question of whether the heirs may

maintain a wrongful death action if the deceased, at the date of his death, would have been barred by the statute of limitations.” Nevertheless, the U.S. District Court decided “that, if faced with the question, the Idaho court would apply the condition precedent rule to the statute of limitations situation, as it has done in situations involving contributory or comparative negligence.” *Id.* at 1414.

This Court declines to presuppose how the Idaho Supreme Court would rule. Instead, the first step is to turn to the relevant statutory language for guidance. “Judicial interpretation of a statute begins with an examination of the statute’s literal words.” *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct.App. 2000)(citing *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999)). It is well established that where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *Burnight*, 132 Idaho at 659, 978 P.2d at 219; *Escobar*, 134 Idaho at 389, 3 P.3d at 67. “The language of the statute is to be given its plain, obvious and rational meaning.” *Burnight*, 132 Idaho at 659, 978 P.2d at 219. Furthermore, “[i]f the language is clear and unambiguous, ... there is no occasion for the court to resort to legislative history or rules of statutory interpretation.” *Escobar*, 134 Idaho at 389, 3 P.3d at 67. However, when a court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. “To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history.” *Id.* “It is ‘incumbent upon a court to give a statute an interpretation,

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which will not render it a nullity.” *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct.App. 2001)(citing *State v. Nelson*, 119 Idaho 444, 447, 807 P.2d 1282, 1285 (Ct.App. 1991)).

§ 5-311. Suit for wrongful death by or against heirs or personal representatives – Damages. -

(1) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case as may be just.

The language of the Wrongful Death Statute is plain and unambiguous. As such, this Court must give effect to the statute as written, without engaging in statutory construction.

It is instructive that the act makes no mention and provides no provision for limitations on wrongful death actions. Furthermore, a clear reading of the words and considering that the Idaho Legislature created another statute to address personal injury claims, this Court finds that the Wrongful Death Statute is an act separate from a personal injury cause of action. In reaching that conclusion, this Court was influenced by the view expressed by the Idaho Supreme Court in the *Chapman* case:

[T]he law is clear that a cause of action for wrongful death accrues on the death of the injured party, and not before. ... This is so because the cause of action did not accrue to the decedent. ... The cause of action which accrues to an injured person during his lifetime is altogether separate from the cause of action accruing to the person’s heirs should he die from that injury. ... Therefore, the “occurrence” giving rise to the cause of action is the decedent’s wrongful *death*, and the statute of limitations must date from that event.

Chapman v. Cardiac Pacemakers, Inc., 105 Idaho 785, 786-87, 673 P.2d 385, 386-87 (1983) (citations omitted). Furthermore, as noted in the *Adams* case, “It is true that Idaho Code § 5-311 does not contain the proviso common to most wrongful death statutes allowing the heirs to maintain an action for wrongful death only ‘whenever the wrongful act would have entitled the person injured to maintain an action if death had not ensued.’” 596 F.Supp. at 1413.

Thus, the Wrongful Death Statute is a cause of action distinct and separate from an action for personal injury. As such, there is no condition precedent bar to the Wrongful Death Plaintiffs’ claim here. Furthermore, the relevant statute of limitations dates from the event of the decedent’s death. The claim in this case was filed on June 2, 2006. Stoor died on June 13, 2004; Branch died on July 11, 2005; Frasure died on February 17, 2006. Therefore, the Plaintiffs filed their complaint within the relevant time frame. As such, this Court declines to grant the Motion for Summary Judgment submitted by the Moving Defendants regarding this issue.

b. Whether this Court should dismiss the remaining causes of action.

Similar to their Motion for Summary Judgment against Plaintiffs Hronek and Day, the Moving Defendants are also arguing that Counts Three and Four, including claims of fraud or fraudulent concealment, misrepresentation and battery should be dismissed. However, in responding to that motion, the Wrongful Death Plaintiffs only addressed the Moving Defendants’ arguments regarding the issues of pleading fraud with particularity and whether Counts Three and Four are barred by the condition precedent rule. In referring to their claim of misrepresentation, the Moving Plaintiffs state: “This claim and the other allegations in Count Three of Plaintiff’s Complaint clearly satisfy Idaho’s law requiring misrepresentation to be pled

with particularity.” (Pls.’ Resp. to Defs. Ingersoll-Rand and Westinghouse’s Mot. for Summ. J. against Wrongful Death Pls. at 5.) The Wrongful Death Plaintiffs also argue that the allegations contained in Count Four “satisfy Idaho’s law and clearly and unambiguously set forth the claims upon which Plaintiff relies. Additionally, ... Plaintiff’s claims are not barred by the so-called ‘condition precedent rule.’” (*Id.* at 6-7.)

1. Whether the Wrongful Death Plaintiffs pled their claims of fraudulent misrepresentation with any particularity.

Pursuant to Rule 9(b) of the Idaho Rules of Civil Procedure (IRCP), claims of fraud and misrepresentation must be pled with particularity. That rule states:

Rule 9(b). Fraud, mistake, condition of the mind, violation of civil or constitutional rights.

In all averments of fraud or mistake, or violation of civil or constitutional rights, the circumstances constituting fraud or mistake, or violation of civil or constitutional rights shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

To prove fraud, a plaintiff must establish the following elements:

(1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.

Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166, 1170 (2007) (citation omitted). Furthermore, Rule 9(b) requires that “allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *Silver Valley*

Partners, LLC v. De Motte, No. 06-429-N-ELJ, 2007 WL 2802315, at *4 (D. Idaho Sept. 24, 2007)(citation omitted). That court further stated:

“[T]here is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify false statements made by each and every defendant. Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result.” Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir.2007) (citation omitted) “On the other hand, Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud. In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme.” *Id.* at 765-766 (citations and quotations omitted).

Id.

In this case, the Plaintiffs' Complaint makes the same conclusory misrepresentation allegations against each of the 65 Defendants, without making any specific allegations that any representations, false or otherwise, were made by the Moving Defendants. These allegations amount to general averments and do not satisfy the requirements of Rule 9(b), as the allegations of fraud here are not specific enough and do not “identify the role of each defendant in the alleged fraudulent scheme.” Thus, Plaintiffs general averments directed at fraud are insufficient to satisfy the requirements of IRCP 9(b). *See Dengler*, 141 Idaho at 127, 106 P.3d at 453. As such, any fraud claims alleged by Plaintiffs in Counts Three and Four should be dismissed for failure to plead with specificity.

In addition, even if the Plaintiffs had satisfied the requirements of IRCP 9(b), they have failed to satisfy their burden pursuant to IRCP 56, as the Plaintiffs have simply cited allegations included in their complaint and have failed to file any affidavits pertaining to their fraud claims.

2. Whether the Wrongful Death Plaintiffs' claims are barred by the condition precedent rule.

Based on this Court's prior determination as set forth above, there is no condition precedent rule since the Wrongful Death Statute is a cause of action distinct and separate from an action for personal injury. Clearly, the Wrongful Death Plaintiffs also filed their claim within the relevant time frame. As such, the claims of the Wrongful Death Plaintiffs are not dismissed for failure to satisfy the statute of limitations.

3. Whether the Plaintiffs satisfied the requirements of IRCP 56.

Moreover, the Plaintiffs' failure to present any evidence or argument in opposition to the Defendants' other arguments is also viewed by this Court not only as a concession of those points, but as a further violation of Rule 56. As explained previously, Idaho law provides that a party against whom summary judgment is sought may not merely rest on the allegations contained in the complaint, but must come forward with evidence to contradict the assertions of the moving party in order to establish a genuine issue of material fact. As the Plaintiffs have failed to produce any affidavits regarding their claims of fraud, fraudulent concealment, misrepresentation and/or battery setting forth "specific facts showing that there is a genuine issue for trial", these claims must be dismissed pursuant to the IRCP 56.

CONCLUSION

Based on the foregoing, this Court hereby GRANTS the Moving Defendants' Motion for Summary Judgment in part and DENIES the Motion for Summary Judgment in part.

Specifically, this Court GRANTS the Motion for Summary Judgment against all of the above-named Plaintiffs as to Counts Three and Four, including the claims of misrepresentation, battery, fraudulent concealment and civil conspiracy. This Court determined that the Plaintiffs failed to satisfy the requirements of IRCP 9(b), as the allegations of fraud were not specific enough. Furthermore, summary judgment as to those issues is appropriate because the Plaintiffs also failed to satisfy the requirements of IRCP 56. Pursuant to that rule, the party opposing a motion for summary judgment “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” The Plaintiffs offered nothing more than mere allegations and provided no evidence showing that there is a genuine issue for trial regarding those claims.

In addition, this Court also hereby GRANTS the Motion for Summary Judgment as to the negligence and strict liability claims submitted by Plaintiffs Hronek and Day. Objective medical proof established that both Plaintiff Hronek and Plaintiff Day suffered from asbestos-related injuries more than two years before their complaint was filed in this case on June 2, 2006. Therefore, their negligence and strict products liability claims are barred by the statute of limitations requirement contained in IC § 5-219(4). However, the Moving Defendants’ Motion for Summary Judgment as against the Wrongful Death Plaintiffs is hereby DENIED. Because the Wrongful Death Statute is a cause of action distinct and separate from an action for personal injury, there is no condition precedent bar to the claim submitted by the Wrongful Death

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Plaintiffs. Furthermore, the relevant statute of limitations dates from the event of the decedent's death, and the claim in this case was filed within the relevant time frame.

IT IS SO ORDERED.

Dated this 28 day of January, 2008.


PETER D. MCDERMOTT
DISTRICT JUDGE

