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SUPREME COURT
STATE OF WISCONSIN

No. 2012AP1493

DONALD CHRIST, individually and as Special Administrators of the Estate of GAIL P. CHRIST, deceased, JACQUELINE RADOSEVICH, individually and as Special Administrator of the Estate of GARY RADOSEVICH, deceased, MARY JANE BEAULIEU, individually and as Special Administrator of the Estate of WILLIAM BEAULIEU, deceased, PAUL CLARK, individually and as Special Administrator of the Estate of SHARON A. CLARK, deceased, BETTY GROSVOLD, individually and as Special Administrator of the Estate of VICTOR M. GROSVOLD, deceased, DIANNE PEDERSON, individually and as Special Administrator of the Estate of MAE H. HEATH, deceased, CARRIE DUSS, individually and as Special Administrator of the Estate of MARY HENNEMAN, deceased, and ARLENE CHRIST,

Plaintiffs-Appellants-Cross-Respondents,

DEBORAH SHERWOOD, individually and as Special Administrator of the Estate of GERALD F. CONLEY, deceased, RANDY S. HERMUNDSON, individually, DARLENE INSTENESS, individually and as Special

Administrator of the Estate of ROBERT A. INSTENESS, deceased, JOYCE JENSON, individually, JEAN M. LESKINEN, individually, PAUL T. MANNY, ANITA MANNY, DOUGLAS WINRICH, individually and as Special Administrator of the Estate of BARBARA WINRICH, deceased, BARBARA NELSON, individually and as Special Administrator of the Estate of TERRY NELSON, deceased, FAYE REITER, individually, DONALD SCHINDLER, individually and JEAN RUF, individually and as Special Administrator of the Estate of RICHARD R. RUF, deceased,

Plaintiffs,

v.

EXXON MOBIL CORPORATION, SUNOCO, INC., TEXACO DOWNSTREAM PROPERTIES, INC., FOUR STAR OIL AND GAS COMPANY, BP PRODUCTS NORTH AMERICA, INC., AND ASHLAND CHEMICAL COMPANY DIVISION OF ASHLAND, INC.,

Defendants-Respondents-Cross-Appellants-Petitioners,

SHELL CHEMICAL, L.P., CORNERSTONE NATURAL GAS COMPANY AND SHELL OIL COMPANY,

Defendants.

On Review of a Decision of the Court Of Appeals
Summarily Reversing Summary Judgment Entered
by the Eau Claire County Circuit Court the
Honorable Lisa A. Stark Presiding
Circuit Court Case No.: 06-CV-420

BRIEF OF DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS-PETITIONERS

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November 5, 2014

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STATEMENT OF ISSUES

1. Does Wis. Stat. § 893.54(1) extinguish non-medical malpractice survival actions commenced by special administrators more than three years after the date of the decedent's death?

Circuit Court's Answer: Yes. Expressly holding that the plaintiffs' "claims are barred under 893.54(1) and (2) [and t]he discovery rule applies to both" and that, pursuant to binding precedent, such actions accrue on the date that the decedent discovers, or with reasonable diligence should discover, his/her injury, but no later than the date of death. Actions brought more than three years after the date of death are extinguished by the statute of limitations.

Court Of Appeals's Answer: Summarily reversing the circuit court upon mischaracterizing that court's actual holding and remanding the case for a determination on the discovery rule.

2. Does Wis. Stat. § 893.54(2) extinguish non-medical malpractice wrongful death actions commenced by beneficiaries more than three years after the date of the decedent's death?

Circuit Court's Answer: Yes. Expressly holding that the plaintiffs' "claims are barred under 893.54(1) and (2) [and t]he discovery rule applies to both" and concluding that a wrongful death action "accrues at the time of death" pursuant to binding precedent.

Court Of Appeals's Answer: Summarily reversing the circuit court upon mischaracterizing that court's actual holding and remanding the case for a determination on the discovery rule.

3. When applying the discovery rule to survival and wrongful death claims, may a court look to a beneficiary's or special administrator's knowledge to determine when an injury to the decedent was discovered? In other words, was the plaintiffs' knowledge of the decedents' respective injuries in their capacity as beneficiaries and/or special administrators sufficient to invoke the discovery rule and thus delay the accrual of the survival and wrongful death claims?

Circuit Court's Answer: No. Only the decedent's knowledge is relevant to the application of the discovery rule in survival and/or wrongful death actions. Knowledge of a third party can neither trigger nor delay the accrual of an action. Since discovery cannot occur after death, the latest date that these actions accrue is the date of death.

Court Of Appeals's Answer: Unclear, but holding that "the discovery rule provides that the statute of limitations begins to run when the plaintiff discovers or should have discovered the injury and that the injury may have been caused by the defendant."

4. Did the court of appeals erroneously exercise its discretion by summarily reversing the

circuit court's decision dismissing the plaintiffs' claims?

Circuit Court's Answer: N/A.

Court Of Appeals's Answer: N/A.

5. Did the court of appeals violate Defendants' right to due process by summarily reversing the circuit court's decision dismissing the plaintiffs' claims?

Circuit Court's Answer: N/A.

Court Of Appeals's Answer: N/A.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ashland, Inc., BP Products North America, Inc., Exxon Mobil Corporation, Four Star Oil and Gas Company, Sunoco, Inc., Texaco Downstream Properties, Inc., and Union Oil Company of California d/b/a Unocal Corporation[1] (collectively

[1] Although Unocal is not listed in the caption above, it was a named party in the original complaint. (R.2.) The plaintiffs' first-amended complaint, however, identified Unocal as part of Texaco Downstream Properties. (R.41.) Unocal later corrected this by filing an amended notice of appearance identifying itself as a separate individual Defendant. (R.219.) During this appeal, the plaintiffs filed another amended complaint on

"Defendants")[2] assume that, in granting review, the Court has deemed this case appropriate for oral argument and publication. Defendants agree.

STATEMENT OF THE CASE

A. Nature Of The Case.

This appeal arises from a personal injury/ survival/wrongful death action originally filed on July 13, 2006 involving nine former employees of the Uniroyal tire manufacturing plant in Eau Claire, Wisconsin ("Uniroyal Eau Claire"). (R.2.) On December 28, 2007, the complaint was amended to add claims by nine more former employees. (R.41.)

Plaintiffs consist of the living former employees, the special administrators on behalf of deceased employees' estates and wrongful death beneficiaries. (*Id.*) They each alleged that the employees' occupational exposure to benzene-containing products caused their various diseases. (*Id.*) They

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August 17, 2012 to re-name Unocal as a defendant. (CCAP Dkt. No. 254.)

[2] Because there are multiple parties (15 Plaintiffs-Appellants-Cross-Respondents and seven (7) Defendants-Respondents-Cross-Appellants-Petitioners), strict adherence to Wis. Stat. § 809.19(1)(i) would be cumbersome. Therefore, for ease of reference the Petitioners will be referred to as Defendants and the Respondents will be referred to as Plaintiffs.

further alleged that Defendants shipped these products to the plant and are liable under theories of negligence and strict product liability. (*Id.*) The former employees worked at Uniroyal Eau Claire at various times between the 1960s and early 1990s. (*See generally* R.144, ¶¶ 1-170.)

B. Procedural Status Of The Case And Disposition By The Circuit Court And Court Of Appeals.

On March 5, 2012, Defendants moved to dismiss eight Plaintiffs on the ground that their claims were untimely pursuant to Wis. Stat. § 893.54 because they were commenced more than three years after the deaths of the deceased former employees("the Decedents") whose alleged injuries provided the bases for their action. (R.156-157.)

Specifically, Gail Christ and Gary Radosevich, who were named in the original 2006 complaint, died on December 15, 2002 and February 26, 1999, respectively. (R.157 at 4 n.4; R.144, ¶¶ 16, 129.) Thus, Radosevich died over seven years, and Christ died over three-and-a-half years, before Plaintiffs filed their complaint.

Likewise, of the nine employees named in the amended 2007 complaint: Mary Henneman died on June 19, 1995; Mae Heath died on June 1, 1996; William Beaulieu died on July 17, 1997; Sharon Clark died on May 17, 2001; and Victor Grosvold died on December 30, 2003. (R.157 at 4 n.5; R.144, ¶¶ 10,

19, 49, 55, 60.) Thus, these individuals died between four and almost 13 years before the amended complaint was filed.

In support of their contention that Plaintiffs' survival and wrongful death claims were untimely under Wis. Stat. § 893.54, Defendants cited *Terbush v. Boyle*, 217 Wis. 636, 259 N.W. 859 (1935) and *Estate of Merrill v. Jerrick* 231 Wis. 2d 546, 605 N.W.2d 645 (Ct. App. 1999), two cases that Defendants believed were directly on point.

In response to Defendants' motion, Plaintiffs advanced a novel approach to the accrual of section 893.54's three-year statute of limitations. Specifically, they argued that the discovery rule applied to delay the accrual date until they, as special administrators and wrongful death beneficiaries, were contacted by their attorneys and told that Defendants caused the Decedents' injuries and deaths. (R.158-163.) Defendants countered that the discovery rule only applied to the Decedents because they were the ones who were allegedly injured and that the claims accrued no later than their dates of death. (R.164.)

The circuit court specifically concluded that the discovery rule applied to Plaintiffs' survival and wrongful death claims. (App.000078.) However, applying the holdings of *Merrill* and *Miller v. Luther*, 170 Wis. 2d 429, 489 N.W.2d 651 (Ct. App. 1992), the circuit court held that the Decedents' claims were

time-barred because (1) the discovery rule applied to the Decedents, not to their beneficiaries or administrators; (2) the last possible date the Decedents could discover their injury was their date of death; (3) the Decedents' claims accrued no later than their dates of death; and (4) the complaint was filed more than three years after the Decedents' deaths. (App.000074-76. 000078-80.) Accordingly, the circuit court dismissed these claims on May 22, 2012. (R.240.)

On February 12, 2014, the court of appeals summarily reversed the circuit court's decision on the ground that the circuit court did not apply the discovery rule and remanded with instructions to apply the rule. (App.000003-4.) On March 3, 2014, Defendants moved for reconsideration of that decision and cited the circuit court's specific analysis wherein it applied the discovery rule, but held that the rule did not extend the accrual date for Plaintiffs' claims. (App.000010-13.) Nevertheless, the court of appeals denied the motion without analysis or explanation on June 30, 2014. (App.000018.) Defendants filed a petition for review on July 29, 2014, which was granted on October 6, 2014.

STANDARD OF REVIEW

Summary judgment dismissing a complaint as time-barred by the statute of limitations is reviewed *de novo*. *Sopha v Owens-Corning*, 230 Wis. 2d 212, 222, 601 N.W.2d 627 (1999). This Court, however, benefits from the analysis of the circuit court and applies the same methodology. *Id.* If the complaint states a claim and the pleading shows the existence of factual issues, the Court determines whether the movant has established a *prima facie* case for summary judgment. *Paul v. Skemp,* 2001 WI 42, ¶ 9, 242 Wis. 2d 507, 625 N.W.2d 860. If the movant establishes a defense to defeat the claim, the Court examines the opposing party's affidavits to determine if genuine issues of material fact exist. *Id.*

The discovery rule sets an objective "reasonable person" standard. Ordinarily, it is an issue of fact for the fact-finder. *Spitler v. Dean,* 148 Wis. 2d 630, 638, 436 N.W.2d 308 (1989). However, if the court concludes that only one reasonable conclusion can be drawn, the court may decide the question as a matter of law. *Hennekens v Hoerl*, 160 Wis. 2d 144, 172, 465 N.W.2d 812 (1991).

ARGUMENT

The issues before the Court focus on the accrual date for survival and wrongful death actions. Both issues, however, have already been decided by established precedent.

In *Terbush*, this Court has already determined that wrongful death actions accrue at the time of death. *Terbush*, 217 Wis. at 640. That *Terbush* predates this Court's pronouncement in *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983) that the discovery rule applies to "all tort actions" is of no moment. *Id.* at 560. This Court, as recently as 2009, acknowledged the continued force of *Terbush* in non-medical malpractice wrongful death cases. *Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67, ¶ 32, 318 Wis. 2d 553, 769 N.W.2d 481.

Likewise, in *Merrill*, when faced with the question of how to apply the discovery rule to a survival claim, the court of appeals specifically held that the claim could accrue "no later than [the decedent's] date of death when his claim vested with the estate's personal representative." *Merrill*, 231 Wis. 2d at 557. In doing so, the court of appeals ignored discovery by third parties, such as the decedent's personal representatives, and instead set the focus exclusively on the decedent for purposes of the discovery rule.

By ignoring the precedents set in *Terbush* and *Merrill* and instead expanding the discovery rule to third parties, the court of appeals has upset the procedure for applying the discovery rule this Court adopted in *Hansen.* This change leads to absurd results and distorts the balance between the litigants' competing interests. Moreover, by ignoring past precedent, refusing to acknowledge the circuit court's analysis and remanding the case with instructions to

apply the same rule that the circuit court already applied, the court of appeals acted arbitrarily and in violation of Defendants' constitutionally protected right in its statute of limitations defense.

I. The Court Of Appeals Eliminated The Statutes Of Limitation For Survival And Wrongful Death Claims.

> In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.

Adams v. Woods, 6 U.S. 336, 342 (1805).

"Statutes of limitation represent legislative policy decisions dictating when the courthouse doors close for particular litigants." *Castellani v. Bailey,* 218 Wis. 2d 245, 253-54, 578 N.W.2d 166 (1998). They "are found and approved in all systems of enlightened jurisprudence," to articulate the principle that it is more just "to put the adversary on notice to defend a claim within a specified period of time" than to permit unlimited prosecution of stale claims. *United States v. Kubrick,* 444 U.S. 111, 117 (1979). In essence, "although affording plaintiffs what the legislature deems a reasonable time" to file claims, statutes of limitation are designed to protect the parties from litigating claims where the truth may be obfuscated by "death or disappearance of witnesses," loss of evidence, and faded memories. *Id.*; *Korkow v. General Cas. Co. of Wisconsin,* 117 Wis. 2d 187, 198, 344 N.W.2d 108 (1984) (recognizing that these

limitations promote fair and prompt litigation and protect defendants from stale or fraudulent claims "brought after memories have faded or evidence has been lost").

Under Wisconsin law, "Defendants have a constitutional right to rely upon statutes of limitation to limit the claim against them." *Westphal v. E.I. duPont de Nemours & Co.,* 192 Wis. 2d 347, 373, 531 N.W.2d 386 (Ct. App. 1995). In fact, these limitations are viewed as "substantive statutes because they create and destroy rights." *Betthauser v. Med. Protective Co.,* 172 Wis. 2d 141, 149, 493 N.W.2d 40 (1992).

Prior to this Court's decision in *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983), the longstanding rule had been that a claim for personal injury accrued at the time of injury. *Id.* at 556. Recognizing that this rule yielded harsh results on those who were injured but had not discovered their injuries, this Court adopted the discovery rule, whereby an action accrued when the plaintiff discovered or should have discovered the injury. *Id.* at 558-59.

Although *Hansen* rebalanced the parties' competing interests to allow claimants greater opportunity to seek redress, it did not subordinate the vital public policy of discouraging stale claims:

> Although the discovery rule will allow actions to be filed more than three years after the date of

> injury, it will not leave defendants unprotected from stale and fraudulent claims. Under the rule a claim accrues when the injury is discovered or reasonably should have been discovered.

Id. at 559; *see also Claypool v. Levin*, 209 Wis. 2d 284, 295, 562 N.W.2d 584 (1997) ("This passage illustrates that the court was attempting to strike a balance between the conflicting public policies rather than completing subordinating the public policy of discouraging stale and fraudulent claims.").

Following *Hansen*, this Court further defined the discovery rule. However, each subsequent case involved a living person capable of discovering and enforcing their claim. Thus, their diligence in discovering their injury and its cause could be examined using the objective, reasonable person standard.

But the issue now before the Court is how to apply the discovery rule when the injured party is dead. Neither *Hansen* nor any other discovery rule case decided by this Court, provide an answer to that question because those decisions are limited to living plaintiffs.[3] *Cf. State v. Robertson*, 2003 WI App 84, ¶ 32, 263 Wis. 2d 349, 661 N.W.2d 105 ("Courts act

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[3] *See, e.g.*, *Gumz v. N.S.P.*, 2007 WI 135, 305 Wis. 2d 263, 742 N.W.2d 271; *Jacobs v. Nor-Lake Inc.*, 217 Wis. 2d 625, 579 N.W.2d 254 (1998); *Spitler v. Dean*, 148 Wis. 2d 630, 436 N.W.2d 308 (1989); *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 388 N.W.2d 140 (1986).

only to determine actual controversies-not to announce principles of law or to render purely advisory opinions.").

The court of appeals, on the other hand, answered this question in *Merrill*. But the court of appeals here inexplicably ignored *Merrill* as well as the *Beaver* decision it supposedly relied upon. Consequently, the court of appeals has expanded the discovery rule by delaying accrual of survival and wrongful death actions until third parties discover the decedent's injury and its cause. But this change conflicts with the balance of interests this Court has repeatedly recognized: (1) discouraging stale claims, and (2) providing claimants an opportunity to seek a remedy. *Hansen*, 113 Wis. 2d at 558-59.

To maintain that balance this Court requires plaintiffs to exercise "reasonable diligence" to discover the injury and its cause. *Borello*, 130 Wis. 2d at 416. Reasonable diligence is examined objectively from the perspective of an individual in the same circumstances as the injured plaintiff. *Merrill*, 231 Wis. 2d at 555 ("Thus, under the discovery rule, Merrill's claim accrued when a reasonable person with the same degree of mental and physical handicap and under the same or similar circumstances as Merrill should have discovered the injury, its cause, its nature and the defendants' identities.") (citing *Carlson v. Pepin Cnty*, 167 Wis. 2d 354, 353-54, 481 N.W.2d 498 (Ct. App. 1992).

Thus, this inquiry is only employed to examine the diligence of the injured party *See, e.g.*, *Spitler*, 148 Wis. 2d 638; *Borello*, 130 Wis. 2d at 411; *Hansen*, 113 Wis. 2d 560. It does not change simply because the injured party has died. *Merrill*, 231 Wis. 2d at 553-54. In other words, whether the injured party is alive or dead, the focus remains only on that individual's discovery and is not expanded to include third parties. *Id.* at 554.

But here, Plaintiffs failed to introduce evidence of the Decedents' discovery of their respective injuries. Instead, they simply proffered what they, as special administrators and/or wrongful death beneficiaries, were told by their attorneys years after the Decedents' dates of death. (R.158-163.) This proffer is insufficient for two reasons: (1) it relates to their discovery of the injury – not the decedents' discovery – and is thus contrary to the holding in *Merrill* and (2) there is no evidence of any diligence in spite of the fact that such proof has been a touchstone of the discovery rule ever since *Hansen*.[4] Thus, if the court of appeals's decision is allowed to stand and Plaintiffs' claims accrued when they were notified by their attorneys, absent any evidence of diligence, then the "reasonable diligence" standard and the

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[4] "The plaintiffs shoulder the burden of proving their case . . . , including demonstrating that the discovery rule applies to their independent causes of action." *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 117, 303 Wis. 2d 34, 734 N.W.2d 827 (Abrahamson, J., dissenting).

statute of limitations for survival claims have been completely eliminated.

Furthermore, it is necessary to maintain the focus of the discovery rule on the injured party because there is no yardstick that can reasonably be employed to measure the diligence of a third party. This is especially true when, as noted in *Merrill*, reasonable diligence is measured from the perspective of the person entitled to take advantage of the discovery rule. However, there is no way to meaningfully measure diligence of a third party. If diligence is examined from the perspective of the person bringing the claim, e.g., a special administrator, and that person has only a distant connection with the deceased and, consequently, no incentive to identify an injury or its cause, then reasonable diligence may be no diligence whatsoever. The test of reasonable diligence thus becomes meaningless and the balance sought to be maintained by *Hansen* has been abolished.

Because the special administrator need only be an interested party, the "discoverer" could potentially have no familial connection to the decedent whatsoever. Wis. Stat. § 856.07(1) ("Petition for administration of the estate of a decedent may be made by any person named in the will to act as personal representative or by any person interested"). In fact, allowing discovery by a special administrator to control the accrual date for a decedent's survival claim would enable prospective plaintiffs to game the

system by selecting the "perfect" administrator to protect stale claims. That is, beneficiaries whose diligence might not stand up to scrutiny could recruit a special administrator to pursue the claim knowing that that person would have no reason to exercise any diligence to discover the injury and who, therefore, could not be faulted for failing to discover the injury or its cause. Such a contrivance upsets the balance established in *Hansen* and renders a statute of limitations meaningless. In effect, under the scenario permitted by the court of appeals, once an injured party dies, the statute of limitations will never run.

But that cannot be the law. In fact, a case cited in *Merrill* demonstrates that third party discovery is irrelevant for purposes of the discovery rule. In *Washington v. United States*, 769 F.2d 1436 (9th Cir. 1985), a woman went into a coma after being injected with an anesthetic during childbirth. *Id.* at 1437. She remained in a coma for 14 years before she died. *Id.* After her death, but within the two year statute of limitations, her husband and children commenced an action against the physician. *Id.* The district court dismissed on statute of limitations grounds because the woman's husband knew of her injury and its cause at the time it occurred. *Id.* at 1438. The Ninth Circuit reversed, holding that the action did not accrue at the time of the injury because the woman was in a coma and could not discover her injury or cause. *Id.* at 1439. In other words, the discovery rule only applied to the decedent.

The Illinois Supreme Court reached a similar conclusion in *Advincula v. United Blood Services*, 678 N.E.2d 1009 (Ill. 1996). There, the decedent's spouse brought a survival claim after her husband contracted AIDS and died from a tainted blood transfusion. *Id.* at 1015. The defendant argued that the claim was untimely under the state's two-year statute of limitations because, even though the evidence was undisputed that the claim was filed within two years of when the decedent himself discovered his injury, the evidence also established that his spouse discovered the injury at an earlier time. *Id.* at 1029 (suggesting that the spouse discovered the injury between April 29 and May 16, 1987, but did not file the claim until May 26, 1989). The court rejected the attempt to extend the discovery rule to the spouse because "the actual plaintiff in such a derivative [survival] action is the deceased, and it is that person's knowledge of injury which triggers the limitations period." *Id.*; *see also Santos v. George Washington Univ. Hosp.*, 980 A.2d 1070, 1075-76 (D.C. 2009) ("the limitations period for a survival action begins to run (1) when the decedent … ascertained, or through the exercise of reasonable care and diligence should have ascertained, the nature and cause of his injury and some evidence of wrongdoing, or (2) at death, *whichever occurs first*.") (emphasis added).

As *Merrill*, *Washington* and *Advincula* all establish, the discovery by the decedent is the only relevant inquiry to determine when a survival claim

accrues. To broaden such an inquiry to third parties undermines *Hansen* and the purpose of statutes of limitations. In other words, if a survival claim does not accrue until a third party discovers it, then discovery will never be more than three years prior to filing the complaint because the date of such "discovery" will be completely under the control of the plaintiff.

II. Plaintiffs' Survival Actions Are Barred By Merrill.

Merrill involved a one-car accident that severely injured the passenger Shawn Merrill. *Merrill*, 231 Wis. 2d at 548. The driver of the car, Joseph Jerrick, observed Merrill slipping in and out of consciousness following the accident. *Id.* Merrill died from his injuries three days later. *Id.* Exactly three years after Shawn Merrill's death but more than three years from the date of the accident, his parents filed a survival claim. *Id.* at 548-49. Inasmuch as it was a single car accident, there was no doubt about the cause Merrill's injuries and, presumably, his parents were similarly aware of the cause. Thus, as to his parents, all of the requirements for application of the discovery rule were satisfied on the date of or very shortly after the accident. The defendant moved to dismiss the claim contending that it accrued at the time of the accident and was, therefore, untimely. *Id.* at 549, 553-54. The trial court agreed and dismissed the action. *Id.* at 549.

The court of appeals reversed on the ground that, because the decedent slipped in and out of

consciousness, a material issue of fact existed regarding when the decedent discovered his injury. *Id.* at 553. However, the court also held that, regardless of when the decedent may have discovered his injury, the survival claim accrued "no later than [the decedent's] date of death when his claim vested with the estate's personal representative." *Id.* at 557. The court concluded that such an accrual date was "logical because that is the point where family members are on notice that they must attend legally to their loved one's affairs." *Id.* at 557 n.8. Thus, in *Merrill*, the court of appeals refused to apply the discovery rule to the plaintiffs and insisted instead that it be applied solely to the decedent.

The precedent established in *Merrill* is clear – although the discovery rule applies in survival claims, it can only be used to establish an accrual date that precedes the decedent's death. If there is no evidence to establish an earlier accrual date, the action accrues "no later than [the decedent's date of death." *Id.* at 557.

The circuit court followed this precedent when it dismissed Plaintiffs' survival claims. (App.000078-79.) The court of appeals ignored it. But the court of appeals had no authority to do so.

A published decision by the court of appeals "has binding effect on all panels of the Court [of Appeals]." *In re Court of Appeals*, 82 Wis. 2d 369, 371, 263 N.W.2d 149 (1978). In fact, a "court of appeals may

not overrule, modify or withdraw language from a previously published decision of the court of appeals." *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Only this Court has that authority. *Id.* at 189.

Therefore, by summarily reversing the circuit court, the court of appeals abrogated *Merrill*. As this Court has previously warned: "When existing law 'is open to revision in every case, 'deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results."" *Johnson Controls v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. Accordingly, the court of appeals's failure to adhere to *stare decisis* demands reversal of its arbitrary and irrational decision. *State v. City of Oak Creek*, 2008 WI 9, ¶ 55 n.27, 232 Wis. 2d 612, 605 N.W.2d 526 ("Fidelity to precedent, the doctrine of *stare decisis* 'stand by things decided,' is fundamental to 'a society governed by the rule of law.'")

III. Plaintiffs' Wrongful Death Claims Are Barred By Terbush.

The Wisconsin legislature created wrongful death actions as part of the Revised Statutes of 1858, which allowed a person to recover damages for the wrongful death of another. *Terbush*, 217 Wis. at 638. Because this cause of action did not exist at common law, it is actionable only under the terms and conditions specified in the statutes and in the case law interpreting those statutes. *Delvaux v. Vanden Langenberg*, 130 Wis. 2d 464, 493-94, 387 N.W.2d

751, 764 (1986); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 312, 294 N.W.2d 437, 463 (1980).

Here, the issue before the circuit court was: "When did Plaintiffs' wrongful death claims accrue?" Neither section 895.03 nor section 895.04, the statutes governing these actions, specify a date for accrual. *Genrich*, 318 Wis. 2d 553, ¶ 26. However, this Court held that wrongful death claims accrue on the date of death. *Terbush*, 217 Wis. at 640. Since it was undisputed that Plaintiffs commenced their action more than three years after the Decedents died, the circuit court properly dismissed those claims as untimely under Wis. Stat. § 893.54(2). (App.000079-80.)[5]

Terbush is directly on point. "[A]n action for wrongful death accrues when death occurs." *Terbush*, 217 Wis. at 640. The court of appeals, however, ignored this precedent.

The fact that *Terbush* pre-dates *Hansen* was irrelevant for purposes of the court of appeals's analysis. *Hansen* involved a living plaintiff and thus did not address the accrual date for wrongful death actions. *Cf. Robertson*, 263 Wis. 2d 349, ¶ 32. ("Courts act only to determine actual controversies –

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[5] Whereas the circuit court actually relied on *Miller v. Luther*, 170 Wis. 2d 429, 489 N.W.2d 651 (1992) for its holding, *Miller*, in turn, relied on *Terbush*. *Id.* at 436.

not to announce principles of law or to render purely advisory opinions.")

Moreover, this Court's citation to *Terbush* in *Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67, 318 Wis. 2d 553, 769 N.W.2d 481, proves its continued vitality. There, this Court specifically cited *Terbush* when it "acknowledge[d] that some of [its] past decisions, outside the medical malpractice context, could be interpreted to conclude that claims for damages due to wrongful death accrue on the date of the decedent's death." *Genrich*, 318 Wis. 2d 553, ¶ 32; *see also id.*, ¶ 95 (Crooks, J., dissenting in part and concurring in part) ("In *Terbush*, the question was when did the [wrongful death] claim accrue …. This court, in a unanimous opinion … clearly answered the question: 'The action for wrongful death accrues at time of death"); *id.*, ¶ 50 (Bradley, J., concurring in part and dissenting in part) ("I instead conclude that a wrongful death claim accrues upon death"). If *Terbush* was no longer good law, the Court would have presumably said so. Instead, the majority, concurrences and dissents all cite to it for the proposition that non-medical malpractice wrongful death actions accrue at death.

Therefore, because the court of appeals had no authority to ignore, modify or overrule it, *Terbush* left no room for the court of appeals to reverse long-standing precedent or the circuit court's dismissal of Plaintiffs' wrongful death claims. *Cook*, 208 Wis. 2d at 189 ("The supreme court is the only state court

with the power to overrule, modify or withdraw language from a previous supreme court case.").

Moreover, extending the accrual of wrongful death actions beyond the date of death upsets the balance this Court maintained in *Hansen.* A wrongful death action is designed to compensate a family for the loss of the decedent. It is, however, necessarily triggered by a definite event – the decedent's death. As such, the decedent's beneficiaries "are immediately put on notice that they may proceed to determine the cause of death." *Pastierik v. Duguesne Light Co.*, 526 A.2d 323, 326 (Pa. 1987); *see also Merrill*, 231 Wis. 2d at 557 n.8 (noting that a survival claim accruing upon the death of the decedent is a "logical . . . point where family members are on notice that they must attend legally to their loved one's affairs"). Allowing the court of appeals's decision to stand creates

> a situation where "there seldom would be a prescribed and predictable period of time after which a claim would be barred." The application of a postdeath discovery rule . . . would produce "an unacceptable imbalance between affording plaintiffs a remedy and providing defendants the repose that is essential to stability in human affairs."

Pobieglo v. Monsanto Co., 521 N.E.2d 728, 733 (Mass. 1988) (internal citations omitted).

In other words, allowing plaintiffs to file a wrongful death claim whenever they discovered the cause of death would essentially negate the time

limit. *Johnson v. Koppers Co.*, 524 F. Supp. 1182, 1188 (N.D. Ohio 1981). "A wrongful claim could be filed whenever new scientific evidence linked a particular disease with exposure to a particular chemical, even though the death had occurred years earlier. The statute would essentially provide no limitation on the action." *Id.*

Therefore, permitting wrongful death actions to accrue after the date of death defeats "the very purpose" of a statute of limitations, which is to provide

> at some definitely ascertainable period, an end to litigation. If the persons who are designated beneficiaries of the right of action created may choose their own time for applying for the appointment of an administrator and consequently for setting the statute running, the [three]-year period of limitation so far as it applies to actions for wrongful death might as well have been omitted from the statute.

Greene v. CSX Transp., Inc., 843 So.2d 157, 162 (Ala. 2002) (quoting *Reading Co. v. Koons*, 271 U.S. 58, 65 (1926).

IV. Expanding The Reach Of The Discovery Rule To Third Parties Is Inconsistent With Wis. Stat. §§ 893.22 And 895.01.

Wisconsin's survival statute, Wis. Stat. § 895.01, "does not create a new cause of action unknown to common law. Rather, it changes the rule of common law that certain actions abate with death." *Merrill*,

231 Wis. 2d at 550. In essence, section 895.01 continues a claim that the decedent had while living.

To continue, a claim must first exist. BLACK'S LAW DICTIONARY 1009 (6th ed. 1991) (defining "survive" as "to continue to live or exist beyond the life, or existence of; ... to remain alive; exist in force or operation beyond any period or event specified"). By comparison, "abate" means "to do away with or nullify or lessen or diminish." *Id.* at 2. Thus, for an existing claim to survive, it must also have accrued so that there is a claim capable of present enforcement, a suable party against whom it may be enforced and a party who has a present right to enforce it. *Hansen*, 113 Wis. 2d at 554.

A party has a present right to enforce a claim when she has suffered actual damage, "harm that has already occurred or is reasonably certain to occur in the future." *Hennekens*, 160 Wis. 2d at 152. Thus, the purpose of a survival statute is simply to permit the continuation of an existing, accrued claim after the death of the person to whom the claim belonged. In other words, to survive the claim cannot accrue after death.

Evidence of the legislative intent that only existing claims survive a party's death is found in the savings clause of Wis. Stat. § 893.22, which states in part:

> If a person entitled to bring an action dies before the expiration of the time limited for the

> commencement of the action and the cause of action survives, an action may be commenced by the person's representatives after the expiration of that time and within one year from the person's death.

This provision demonstrates that expiration of the statute of limitations is measured from the perspective of the decedent. For example, the phrase "time limited for the commencement" can only refer directly to the action that the decedent was entitled to bring. Clearly, a person would not be entitled to bring an action if it had not first accrued. Likewise, if the first clause did not refer to an already-accrued cause of action, then the second clause, "and the cause of action survives" is nonsensical because an action does not survive if it does not already exist. There is no indication in the statute that the legislature intended for accrual to linger indefinitely after death.

The purpose behind section 893.22 also demonstrates that survival claims are viewed solely from the perspective of the decedent and must accrue at death. For example, courts have interpreted this savings clause to give a decedent's estate an extra year to file a claim if there was less than one year remaining on the applicable statute of limitations when the decedent died. *Walberg v. St. Francis Home, Inc.*, 2005 WI 64 ¶ 25, 281 Wis. 2d 99, 697 N.W.2d 36. In the event that more than a year remained on the applicable statute of limitations, the

decedent's estate would have that remaining time to file a survival action. *Id.*

The court of appeals's decision here leads to an absurd result. Specifically, so long as the decedent died with more than one year remaining on the applicable statute of limitations, the estate would have an unlimited time to file until some future descendant/heir discovered the injury and its cause, whereas the estate of a decedent who died with less than a year remaining is limited to one year. That cannot be the law. By establishing a three year limitations period, the legislature signaled its intent that these claims are not tolled in perpetuity. Instead, the only reasonable interpretation of section 893.22 in conjunction with Wis. Stat. § 893.54(1) is that the estate has no less than one year, but no more than three years, to file a survival claim after the date of death.

V. The Court Of Appeals's Decision Creates A New Class Of Plaintiffs In Survival Actions.

Although it ostensibly relied upon its decision in *Beaver v. Exxon Mobil Corporation*, 2012AP547 (Ct. App. May 9, 2013) (unpublished slip op), *review denied*, 2014 WI 3, 352 Wis. 2d 353, 842 N.W.2d 360,[6] the court of appeals changed the most critical feature

[6] The unpublished *Beaver* decision can be found at App.000083-96.

of that decision.[7] The *Beaver* court held that, once a defendant demonstrates that a survival claim has been filed beyond the three-year statute of limitations of Wis. Stat. § 893.54, "the burden shifts to the appellants to prove a different date of accrual based on the application of the discovery rule – when did *the decedents* know or should have known of their injuries and the causes of those injuries." *Id.*, ¶ 26 (emphasis added).

Here, the court of appeals made a subtle, but crucial, word change that impermissibly broadens the scope of that earlier decision. It replaced the word "decedent" with "plaintiff." (App.000003 ("The discovery rule provides that the statute of limitations begins to run when the plaintiff discovers or should have discovered the injury and that the injury may have been caused by the defendant.").) In fact, nowhere in its decision does the word "decedent" appear.

But the *Beaver* court's use of the terms "appellant" and "decedent" is significant because these terms have specific statutory definitions. *Compare* Wis. Stat. § 809.01(2) (defining "appellant" as "a person who files a notice of appeal" *with* Wis. Stat. §§ 54.01(5), 851.05 (defining "decedent" as "the deceased person whose estate is subject to administration"). If

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[7] Other than the fact that the work histories for the former employees in *Beaver* spanned from the 1930s to 1981, the plaintiffs in both actions filed identical complaints.

the knowledge of any plaintiff was sufficient to trigger the discovery rule, there was no reason to distinguish the *Beaver* plaintiffs ("appellants") from the "decedents." In this sense, *Beaver* is consistent with *Merrill* in that the discovery rule only applies to the decedent in survival/wrongful death claims. *Merrill*, 231 Wis. 2d at 557.[8]

Here, the court of appeals has replaced the term "decedent" with "plaintiff." This switch changes the examination required by the discovery rule in death cases. It permits anyone to discover and pursue a survival claim because a "plaintiff" can be anyone.

For instance, Plaintiffs are not only the special administrators for the Decedents' estates, but also heirs and wrongful death beneficiaries. Accepting the *Christ* court's language would allow any of these individuals to create a different accrual date. But this breaks with established precedent.

A. The discovery rule does not apply to wrongful death beneficiaries.

It is well settled that a "survival action is brought by the representative of the deceased for personal injury damage suffered by the deceased prior to his

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[8] The Court can take judicial notice of the fact that, although *Beaver* was remanded, the circuit court has removed the trial date and all other deadlines pending the outcome of this appeal, which the parties agree may be determinative of the outcome in *Beaver*. Wis. Stat. § 902.01(6).

death." *Prunty v. Schwantes*, 40 Wis. 2d 418, 422, 162 N.W.2d 34 (1968). A wrongful death action is brought by or on behalf of the deceased's beneficiaries for the injuries they suffered because of the deceased's death. *Bartholomew v. Patients Comp. Fund*, 2006 WI 91, ¶¶ 55, 59, 293 Wis. 2d 38, 717 N.W.2d 216. But that distinction is meaningless if beneficiaries can discover the survival claim and establish its date of accrual.

In *Lord v. Hubbell, Inc.*, a father of two minor children was electrocuted on the job and subsequently died. 210 Wis. 2d 150, 155. 563 N.W.2d 913 (Ct. App. 1997). The defendant moved to dismiss the estate's survival claim as barred by the three-year statute of limitations of Wis. Stat. § 893.54. *Id.* at 157.

The plaintiffs argued that the statute of limitations was tolled until the minor beneficiaries reached majority. *Id.* at 157. *Lord* rejected that argument by concluding that "testimony and evidence from [the beneficiaries] and relating to them is not part of the estate's survival claim." *Id.* at 166.

Lord thus establishes that accrual of a survival claim is not dependent upon the circumstances of third parties. Furthermore, if, pursuant to *Lord*, a beneficiary's circumstances are not relevant to the date the estate's survival claim accrues, then the date that a spouse, child or other beneficiary discovers the injury and its cause is likewise irrelevant in determining the accrual date.

Therefore, if survival and wrongful death actions do not accrue until a beneficiary or administrator discovers the decedent's injury and its cause, then the court of appeals has, in a summary disposition, scrapped *Lord*.

It has likewise scrapped the derivative nature of wrongful death claims. *Ruppa v. American States Ins. Co.*, 91 Wis. 2d 628, 646, 284 N.W.2d 318 (1979) ("One is liable to the plaintiff in an action under that [wrongful death] statute only if and to the extent that he would have been liable to the decedent had death not ensued."). If a beneficiary's discovery can resurrect a decedent's survival claim, then a wrongful death claim is not truly derivative. Instead, it controls the survival claim.

Therefore, as both *Ruppa* and *Lord* establish that a beneficiary's circumstances are irrelevant for purposes of a survival claim, a beneficiary's discovery of a decedent's injury is likewise irrelevant to determine the date the survival claim accrues.

B. The discovery rule does not apply to personal representatives or special administrators.

A survival claim belongs to the decedent's estate, not to any of the heirs. *Prunty*, 40 Wis. 2d at 422. The personal representative merely steps into the decedent's shoes to enforce a cause of action that had already accrued at the time of death. *Merrill*, 231 Wis. 2d at 554; *see also Advincula*, 678 N.E.2d at

1029 ("The Survival Act does not create a statutory cause of action. It merely allows a representative of the decedent to maintain the statutory or common law actions which had already accrued to the decedent before he died.").

Because a personal representative's authority derives from the decedent, the decedent's knowledge alone controls the accrual of a survival claim. *Advincula*, 678 N.E.2d at 1029 (holding that "a Survival Act is a derivative action based on injury to the decedent, but brought by the representatives of a deceased's estate in that capacity. Hence, for purposes of triggering the statutory limitation period, it is the date the deceased knew of his injury which is controlling"). Therefore, a personal representative's discovery of the injury and its cause cannot be used to either trigger accrual before the decedent's discovery or extend the accrual date after the decedent's date of death. *Merrill*, 231 Wis. 2d at 553-58 (court focused on the decedent's knowledge, not personal representatives or beneficiaries); *see also Anthony v. Koppers Co.*, 436 A.2d 181, 185 (Pa. 1981) (holding that survival claim could not accrue after death).

The circuit court clearly understood that only the Decedent's knowledge applied for purposes of the discovery rule:

> But it [*Merrill*] says, we conclude that the estate survival claim accrued when Merrill with reasonable diligence should have discovered his

> claim here no later than his date of death when his claim vested with the estate's personal representative. And I think when you read it in conjunction with the argument that Mr. Sullivan has made, the discovery had to take place by the person who is entitled to commence the claim. The person entitled to bring the claim is the plaintiff, deceased plaintiff.
>
> The deceased plaintiff couldn't have discovered his claim later than his date of death – or some of them are hers. At the time of their [death], those claims resided with personal representatives. If they hadn't accrued before, they have three years from the date of death, which would be the date of accrual according to Merrill versus Jerrick and that is because given the nature of the survival claim, they're standing in the shoes of a person who's deceased.
>
> Now, what that means is – and I understand the import of this is if somebody dies not knowing the nature of the tort giving rise to their injury for the person against whom the claim can be brought, they have three years under 893.54 and 893.22 in which to bring the claim, and if they discover it later, they're barred. But given the nature of the survival claim and the fact that the personal representative is standing in the shoes of the decedent, I understand Mr. Sullivan's argument, who could discover it, who should discover it.

(App.000074-75.)

In any event, whether a personal representative's discovery could even apply to the accrual of a survival claim is irrelevant in this case. Plaintiffs here are not

personal representatives, but instead special administrators. Like the "appellant/plaintiff" distinction above, the use of these different terms is significant because each has a separate and distinct statutory definition and duties.

Whereas a personal representative "succeeds to the interest of the decedent in all property of the decedent" and is charged with managing, distributing and discharging the decedent's estate, Wis. Stat. §§ 857.01, 857.03(1), a special administrator has been specifically excluded from the statutory definition of a personal representative. Wis. Stat. § 851.23 (stating that a personal representative "does not include a special administrator").

Therefore, unlike a personal representative, a special administrator does not step into the shoes of a decedent for purposes of a survival claim. Instead, whatever a special administrator may discover is even farther removed from that of a decedent and cannot be used to extend the accrual date for a survival claim.

VI. The Court of Appeals Acted Arbitrarily.

Section 802.08(2) provides that summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, 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." The facts here are

simple and, for the purposes of this appeal, undisputed: (1) Decedents were all Uniroyal employees allegedly exposed to benzene-containing products during their employment; (2) They all were diagnosed with various types of cancer months or years before they died; (3) Their deaths were caused by cancer; (4) the special administrators and wrongful death beneficiaries did not learn of the link between the Decedents' exposure and their cancer until notified by their attorneys; and (5) Both this notification and commencement of the action occurred more than three years after Decedents' deaths. (App.000002.)

Given these facts and to decide Defendants' motion, the circuit court was required to determine the date upon which each Plaintiff's claim accrued. After a lengthy hearing, the circuit court recognized that *Merrill* compelled a ruling that Plaintiffs' claims were untimely because: (1) the discovery rule only applied to the Decedents, not to their beneficiaries or administrators; (2) the last possible date the Decedents could discover their injuries was their dates of death; (3) the Decedents' claims accrued no later than their dates of death; and (4) the complaint was filed more than three years after those deaths. (App.000078-79.)[9] Accordingly, the circuit court

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[9] *Merrill*, 231 Wis. 2d at 557 (holding that a survival claim accrues "no later than [the decedent's] date of death when his claim vested with the estate's personal representative").

dismissed Plaintiffs' claims as untimely pursuant to Wis. Stat. § 893.54. (R.240.)

During its analysis, the circuit court acknowledged this Court's ruling in *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983) and took pains to make it clear it was applying the discovery rule. (App.000043 ("I do think the discovery rule applies to a wrongful death and survival claim, but it does not quite apply as plaintiffs would argue"); App.000062 ("But I think that the case of Merrill … speaks very clearly to this issue. First of all, the case states that's [sic] the fact that the victim is deceased does not preclude the application of the discovery rule to the survival claim, so the discovery rule does apply"); App.000078 ("Because this has been so convoluted, and I'm sure you heard it but I'll make it clear. In my opinion, old claims are barred under 893.54(1) and (2). *The discovery rule applies to both*.") (emphasis added).) However, because *Hansen* did not specifically address the date survival and wrongful death claims accrue, whereas *Merrill*, a post-*Hansen* decision did, the circuit court concluded that *Merrill* provided the clearest guidance for its ruling. (App.000074-76, 000078-79.)

Because the facts were undisputed, the circuit court properly employed the analysis required by Wis. Stat. § 802.08, the same rationale that appellate courts must apply. But rather than conduct that analysis, the court of appeals employed summary disposition pursuant to Wis. Stat. § 809.21; a

procedure ill-suited for the controversy at hand. *Wright v. Hasley*, 86 Wis. 2d 572, 578, 273 N.W.2d 319 (1979) (stating that "the mandatory language of [section 802.08] … call[s] for a more exacting appellate scrutiny")

Specifically, the court of appeals ignored the circuit court's analysis. It did not identify any error in application of the law or any genuine issues of material fact. Instead, it summarily concluded, *ipse dixit,* that the circuit court had not properly applied the discovery rule. (App.000003.) In effect, the court of appeals has ordered the circuit court to reapply the same legal standard it previously applied to the undisputed facts. Thus, the effect, if not the intent, of the court of appeals's ruling was to instruct the circuit court to reach a different conclusion.

Although an appellate court has discretion to summarily dispose of a matter under Wis. Stat. § 809.21, such a

> determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.

Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

The circuit court exercised discretion precisely according to the procedure required by Wis. Stat. § 802.08. It noted that there were no genuine issues of material fact and identified and applied the applicable law. The circuit had, quite obviously, applied the discovery rule as instructed by *Merrill*. But that analysis escaped notice by the court of appeals.

The court of appeals's decision is even more perplexing in light of the fact that, upon its motion for reconsideration, Defendants specifically pointed to the very portions of the circuit court's analysis applying the discovery rule to the facts of the case. (App.000010-13.) "Overlooking relevant evidence is not exercising discretion … if you forget an appointment, you don't explain your forgetfulness by saying that you must have been exercising discretion. Getting the facts backward … or simply overlooking a fact ... is an exercise not of discretion, but of laxity." *Munoz-Pacheco v. Holder*, 673 F.3d 741, 745 (7th Cir. 2012).

Nor is it based on sound logic or law. It seems that the court of appeals is under the mistaken impression that the discovery rule only extends the time a plaintiff has to file a cause of action. This is obviously not the case because Wis. Stat. § 893.22 already recognizes that a person may discover their injury

and its cause before death and that their action will accrue upon their discovery. This may result in their beneficiaries being denied a wrongful death recovery, even though that action accrues at death. *Terbush*, 217 Wis. at 640. And, although the discovery rule may extend the accrual date beyond the date of injury, its application is predicated upon a claimant's reasonable diligence in discovering the injury and its cause. In survival and wrongful death claims the discovery rule can only be used to determine an accrual date before death because the victim cannot discover anything after death. *Merrill*, 231 Wis. 2d at 557.

In sum, the court of appeals decision is irrational because it failed to apply established law to the undisputed facts. Moreover, remanding the case to the circuit court with instructions to apply the law it already applied, without specifying the supposed error made by the circuit court, is arbitrary. *Westring v. James*, 71 Wis. 2d 462, 477, 238 N.W.2d 695 (1976) ("Arbitrary action is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process."). These reasons alone justify reversal of the court of appeals's decision.

VII. The Court Of Appeals's Failure To Apply The Law To The Facts Of The Case Violated Defendants' Constitutional Rights.

Due process of law and the proper exercise of judicial discretion are sacrosanct tenets of Wisconsin and federal law. *Cf. Wolff v. McDonnell,* 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."). But in this case, the court of appeals breached all of these principles. Specifically, its summary disposition of Defendants' appeal did not apply the law to the undisputed facts, but instead ignored the applicable precedent and forged a new law that was illogical, unconstitutional and contrary to the applicable statutes, the opinions of the court of appeals and of this Court.

Due process under the Wisconsin Constitution is "the substantial equivalent" of its federal counterpart. *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff,* 418 U.S. at 558. "Due process 'bars certain arbitrary, wrongful government actions.'" *Smith*, 323 Wis. 2d 377, ¶ 14. "Substantive due process forbids a government from exercising power without any reasonable justification in the service of a legitimate governmental objective." *Id.* It "protects individuals against governmental actions that are arbitrary and wrong, 'regardless of the fairness of the procedures used to implement them.'" *Thorp v. Town of Lebanon,* 2000 WI 60, ¶ 45,

235 Wis. 2d 610, 612 N.W.2d 59, 75. "A substantive due process claim may apply to a violation of property interests." *Id.*

"An arbitrary action or decision is 'one that is either so unreasonable as to be without a rational basis, or one that is the result of an unconsidered, willful or irrational choice of conduct—a decision that has abandoned the 'sifting and winnowing' process so essential to reasoned and reasonable decision making.'" *Glacier State Distribution Servs., Inc. v. Wisconsin Dep't of Transp.,* 221 Wis. 2d 359, 369-70, 585 N.W.2d 652, 656 (Ct. App. 1998). The test of a court's discretion is whether it applied the correct legal standard to the facts of the case using a rational process to reach a conclusion that a reasonable judge could reach. *Loy v Bunderson,* 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

In this case, the court of appeals did not identify any genuine issues of material fact raised by the affidavits that would preclude summary judgment. Nor did it identify any error made by the circuit court in applying the law to the facts. It likewise did not employ a rational analysis of the circuit court's ruling. Instead, it simply reversed the circuit court and directed it to apply the discovery rule. The court of appeals did not explain how or why that rule should be applied differently than it was applied by the circuit court. But because it reversed the circuit court's ruling, the implication is that the circuit court should reach a different result. The court of appeals's

decision was, therefore, irrational and arbitrary and denied Defendants' rights to due process.

Additionally, when evaluating a substantive due process claim, the threshold inquiry is whether the plaintiff shows a deprivation of a liberty or property interest protected by the Constitution. *Regents v. Roth*, 408 U.S. 564, 569 (1972). To determine whether a property interest is protected by the Fourteenth Amendment, courts must look to whether state law recognizes and protects that interest. *Riedy v. Sperry*, 83 Wis. 2d 158, 164, 265 N.W.2d 475 (1978).

> In Wisconsin the running of the statute of limitations absolutely extinguishes the cause of action for in Wisconsin limitations are not treated as statutes of repose. The limitation of actions is a right as well as a remedy, extinguishing the right on one side and creating a right on the other, which is as of high dignity as regards judicial remedies as any other right and it is a right which enjoys constitutional protection.

Maryland Casualty Co. v. Beleznay, 245 Wis. 390, 393, 14 N.W.2d 177 (1944). Thus, "once a statute of limitations has run, the party relying on the statute has a vested property right in the statute-of-limitations defense." *Borello*, 130 Wis. 2d at 416. A "new law which changes the period of limitations cannot be applied retroactively to extinguish the right." *Id.*

Here, *Terbush* establishes that a wrongful death claim accrues on the date of death, whereas *Merrill* limits the application of the discovery rule in survival actions to the decedents. *Terbush*, 217 Wis. at 640 ("The action for wrongful death accrues at time of death"); *Merrill*, 231 Wis. 2d at 557 (holding that a survival claim accrued "no later than [the decedent's] date of death when his claim vested with the estate's personal representative"). Thus, under established Wisconsin law, Plaintiffs' claims accrued no later than the dates of the Decedents' deaths. Therefore, upon the expiration of the three-year limitations period, Plaintiffs' right to a remedy was extinguished and Defendants acquired a property right conferred by the expiration of the statute of limitation. *Westpahl*, 192 Wis. 2d at 373; *Betthauser*, 172 Wis. 2d at 149. By failing to honor that right, the court of appeals violated Defendants' rights under the Wisconsin and United States Constitutions and rendered Defendants "victim[s] of the court's denial of due process." *Borello*, 130 Wis. 2d at 419.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court reverse the decision of the court of appeals and reinstate and affirm the decision of the circuit court granting Defendants summary judgment and dismissing Plaintiffs' claims as untimely pursuant to Wis. Stat. § 893.54.

Dated: November 5, 2014.

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CERTIFICATE OF LENGTH AND FORM

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ 809.63 and 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,095 words.

Dated November 5, 2014.

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CERTIFICATION OF ELECTRONICALLY FILED BRIEF

Pursuant to Wis. Stat. §§ 809.19(12)(f) and 809.63, I hereby certify that the content of the electronic copy of the petition for review filed herewith is identical to the content of the paper copy of the petition filed this day with the Clerk of the Wisconsin Supreme Court.

Dated November 5, 2014.

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STATE OF WISCONSIN
SUPREME COURT
CASE NO. 12 AP 1493

DONALD CHRIST, individually and as Special Administrators of the Estate of GAIL P. CHRIST, deceased,
JACQUELINE RADOSEVICH, individually and as Special Administrator of the Estate of GARY RADOSEVICH, deceased,
MARY JANE BEAULIEU, individually and as Special Administrator of the Estate of WILLIAM BEAULIEU, deceased,
PAUL CLARK, individually and as Special Administrator of the Estate of SHARON A. CLARK, deceased,
BETTY GROSVOLD, individually and as Special Administrator of the Estate of VICTOR M. GROSVOLD, deceased,
DIANNE PEDERSON, individually and as Special Administrator of the Estate of MAE H. HEATH, deceased,
CARRIE DUSS, individually and as Special Administrator of the Estate of MARY HENNEMAN, deceased and Arlene Christ,

Plaintiffs-Appellants-Cross-Respondents,

DEBORAH SHERWOOD, individually and as Special Administrator of the Estate of GERALD CONLEY, deceased,
RANDY S. HERMUNDSON, individually,
DARLENE INSTENESS, individually and as Special Administrator of the Estate of ROBERT A. INSTENESS, deceased,
JOYCE JENSON individually, JEAN M. LESKINEN, individually,
PAUL T. MANNY, ANITA MANNY,
DOUGLAS WINRICH, individually and as Special Administrator of the Estate of BARBARA WINRICH, deceased,
BARBARA NELSON, individually and as Special Administrator of the Estate of TERRY NELSON, deceased
FAYE REITER, individually, DONALD SCHINDLER, individually,
and JEAN RUF, individually and as Special Administrator of the Estate of RICHARD R. RUFF, deceased,
and DONALD SCHINDLER, individually,

Plaintiffs,

v.

EXXON MOBIL CORPORATION, SUNOCO, INC., TEXACO DOWNSTREAM PROPERTIES, INC., FOUR STAR OIL AND GAS COMPANY, BP PRODUCTS NORTH AMERICA, INC. and ASHLAND CHEMICAL COMPANY DIVISION OF ASHLAND, INC.,

Defendants-Respondents-Cross-Appellants-Petitioners,

SHELL CHEMICAL, L.P., CORNERSTONE NATURAL GAS COMPANY and SHELL OIL COMPANY,

Defendants.

Review of a Decision of the Court of Appeals Reversing a Judgment by the Eau Claire County Circuit Court, the Honorable Lisa A. Stark Presiding, Circuit Court Case No. 06 CV 420

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STATEMENT OF ISSUES

1. Is there a legislatively created discovery rule applicable to wrongful death claims which renders the common law discovery rule inapplicable?

   TRIAL COURT ANSWER: Yes.

   COURT OF APPEALS ANSWER: No.

2. Is there a legislatively created discovery rule applicable to survival claims which renders the common law discovery rule inapplicable?

   TRIAL COURT ANSWER: Yes.

   COURT OF APPEALS ANSWER: No.

3. If the discovery rule applies to plaintiffs' claims, were they filed with three years of the date they were discovered or should have been discovered.

   Not addressed by the trial court or Court of Appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs believe that both oral argument and publication of this court's decision are appropriate.

STATEMENT OF FACTS AND OF THE CASE

This appeal arises out of tort claims filed by former employees of Uniroyal, Inc.'s now closed Eau Claire tire plant, and by the estates and beneficiaries of deceased former employees. The defendants[1] are large, multi-national oil companies. The claims allege negligence and strict product liability against suppliers of benzene-containing petroleum products to the facility. Plaintiffs allege that exposure to these products was a cause of the workers' illnesses and deaths. This appeal concerns the trial court's dismissal of the claims of seven of the plaintiffs on statute of limitations grounds.

Plaintiffs commenced this action on July 13, 2006 by filing a summons and complaint with the Clerk of Court for Eau Claire County. (R.1 and 2). The case proceeded through a lengthy discovery phase and there was a significant delay occasioned by the bankruptcy filing of defendant Tronox, Inc., which resulted in a stay of almost two and a half years. (R.121 and 229) The procedural history of the case prior to the filing of the dismissal motion is not relevant to the issues on this appeal. However, it is worth noting that the dismissal motion could have been brought at any time during the litigation, even prior to the filing of an answer.

On March 5, 2012, defendants Exxon Mobil Corporation, Sunoco, Inc., Texaco Downstream Properties, Inc., Four Star Oil and Gas Company, BP Products

[1] As the petitioners did, the terms "plaintiffs" and "defendants" will be used for convenience when referring to the parties to this appeal.

North America, Inc. and Ashland Inc. filed a motion asking the court to dismiss the claims of the seven plaintiffs-appellants for failing to comply with a three-year statute of limitations. (The remaining defendants had either settled or had the claims against them dismissed.) The motion was accompanied by a seven page brief, and was not accompanied by any affidavits or other evidentiary submissions. (R.157) The motion addressed claims brought by families for workers who had died more than three years prior to the filing of the claims. Defendants took the position that the discovery rule did not apply to these plaintiffs' claims, whether they were wrongful death claims or the estates' survival claims. Defendants contended that under no circumstances could tort claims be brought more than three years after the date of death. Plaintiffs opposed the motion. They argued that plaintiffs' claims had not accrued more than three years prior the date of filing and that they were therefore timely under the discovery rule.

A separate case involving the same issues and same defendants had been filed by other plaintiffs. *Beaver v. Exxon Mobil Corp.*, Eau Claire Co. Case No. 09 CV 621. *Beaver* had been assigned to a different branch. The *Beaver* claims had been dismissed several months earlier on the same grounds by Judge William M. Gabler, Sr.

The court heard argument on the motion on April 30, 2012. Following argument, the court issued an oral ruling from the bench:

> I think the accrual of the cause of action take place when you

> have a claim capable of present enforcement unless there's a statutory statement or law to limit it and that's what I'm finding that there are in these cases.
>
> The case law has limited it further and we'll find out from the Court of Appeals if I'm wrong….

(R.267:58-59) (Pet. App. 76-77) In other words, the court found that the discovery rule did not apply in this case because there was law that limited its application.

A written order in conformity with the oral ruling was issued indicating that the dismissal was "for reasons set forth on the record". (R. 240:1) The dismissed plaintiffs appealed from that order.[2]

Prior to the Court of Appeals deciding this case, it reached a decision in *Beaver*. The Court of Appeals overturned the dismissal of the claims and remanded them to the circuit court. *Beaver v. Exxon Mobil Corp.*, 2013 WI App 84 (unpublished) ("*Beaver*") (Pet. App. 83-96). Following the denial of a motion for reconsideration, a petition for review was filed and was rejected by this court. 2014 WI 3.

After its *Beaver* decision, the Court of Appeal decided this case. It concluded:

> We are persuaded by the analysis and decision in *Beaver*. Accordingly, we hold that the wrongful death and survival claims of *Christ et al.* are subject to the discovery rule, and we reverse the circuit court's judgment dismissing the claims of *Christ et al.* and remand for further proceedings. We do not determine whether, under the discovery rule, the claims of *Christ et al.* were timely, and we do not

[2] The Defendants-Respondents cross-appealed on a separate issue. The cross-appeal was unsuccessful and is not before the court.

> reach any issue pertaining to the merits of these claims. We leave these determinations for the circuit court on remand.

Christ at 3-4 (Pet. App. 3-4). As in *Beaver*, defendants brought a motion for reconsideration which was denied. They petitioned this court for review of the Court of Appeals' decision. The petition was granted as to the issues it raised. Additional facts will be set forth in the argument section of this brief, as appropriate.

ARGUMENT

I. SUMMARY: THE DISCOVERY RULE APPLIES TO PLAINTIFFS' CLAIMS.

A. Wrongful Death Claims.

The law allows certain relatives of a decedent a claim for wrongful death. Sec. 895.04(2), Stats. A wrongful death claim is subject to a three year statute of limitations. Sec. 893.54(2), Stats. Wrongful death claims are not subject to a legislatively created discovery rule. Accordingly, under *Hansen v. A.H. Robins Co.*, 113 Wis.2d 550, 335 N.W.2d 578 (1983), wrongful death claims are subject to its judicially created discovery rule.

B. Survival Claims.

A party's estate is entitled to bring claims that decedent, if alive, could have brought. *See* § 877.01, Stats. Those claims are subject to a three year statute of limitations. Section 893.54(1). However, § 877.01 does not establish a cause of action. Here, the causes of action are the tort claims that the decedents would have been able to bring had they lived. There is no legislatively created discovery rule for the underlying tort claims regardless of who brought them. Therefore, under *Hansen*, these survivorship claims are subject to the judicially created discovery rule.

II. THE COMMON LAW DISCOVERY RULE APPLIES TO ALL TORT CLAIMS, ABSENT THOSE WHICH ARE GOVERNED BY A LEGISLATIVELY CREATED DISCOVERY RULE.

The Court of Appeals properly determined that the discovery ruled applied to plaintiffs' survival and wrongful death claims. Plaintiffs' wrongful death and survival claims are subject to the three year statute of limitations set forth in § 893.54(1) and (2). It is undisputed that the claims at issue were filed more than three years after decedents' deaths. However, because these claims are governed by the common law discovery rule, they were timely filed. At minimum, as the Court of Appeals held, a factual issue exists as to when the claims were discovered which precludes the grant of defendants' motion.

Under the discovery rule, "a claim does not accrue until the injury is discovered or in the exercise of reasonable diligence should be discovered." *Hansen*, 113 Wis. 2d at 560, 335 N.W.2d 578. The *Hansen* court specifically adopted the discovery rule for "all tort actions other than those already governed by a legislatively created discovery rule." *Id.*

The discovery rule balances the two conflicting public policies raised by the statute of limitations by allowing actions to be file more than three years after the date of the injury, but not leaving defendants "unprotected from stale and fraudulent claims." *Hansen,* 113 Wis. 2d at 558, 335 N.W.2d 578. The court explained the significance of the public policy of allowing meritorious claims as follows:

> It is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury. Although theoretically a claim is capable of enforcement as soon as the injury occurs, as a practical matter a claim cannot be enforced until the claimant discovers the injury and the accompanying right of action. In some cases the claim will be time barred before the harm is or could be discovered, making it impossible for the injured party to seek redress. Under these circumstances the statute of limitations works to punish victims who are blameless for the delay and to benefit wrongdoers by barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions. In short, we conclude that the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions.

Id. at 559, 335 N.W.2d 578.

In *Borello v. U.S. Oil Co.,* 130 Wis. 2d 397, 388 N.W.2d 140 (1986), this court articulated the standard for "reasonable diligence" in discovering a claim. "Under Wisconsin law, a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of injury but also that the injury was probably caused by the defendant's conduct or product." *Borello*, at 421, 388 N.W.2d 140. In other words, discovery does not occur until there is information available to the claimant of the nature of the injury, the cause of the injury and the defendant's part in that cause. *Id.,* at 414, 388 N.W.2d 140. Injury and belief of its cause, even if correct, do not trigger the period of limitations. *Id.* at 413, 388 N.W.2d 140. Rather, a plaintiff must have objective evidence setting forth the defendant's part in causing the injury before the limitation period is triggered. *Id.* at 411-14, 388 N.W.2d 140.

In *Borello,* the court rejected the notion that a layperson's subjective belief that a defendant's tortious conduct caused injury was sufficient to trigger the limitation period. The court found that the discovery rule was not triggered until plaintiff obtained an expert opinion regarding causation. *Id.* "Where the cause and effect relationship is not readily apparent, a layperson's subjective belief of the cause is not sufficient to start the statute of limitations running." *Id*. at 412, 388 N.W.2d 140. The court found that the plaintiff's subjective hunch of causation would not mark the accrual of the cause of action under the discovery rule, stating "[n]ot until Dr. Fishburn made his diagnosis and findings was there any reasonable likelihood for an objective belief of a cause-and-effect relationship between the injury and the defective furnace." *Id*. at 404, 388 N.W.2d 140. The court also noted that "[o]nly when a diagnosis was made could her condition be related to a cause." *Id*. at 409, 388 N.W.2d 140.

The *Borello* rule was reiterated by the Court of Appeals in *Goff v. Seldera*, 202 Wis.2d 600, 550 N.W.2d 144 (Ct. App. 1996). *Goff* involved the question of when the plaintiff should have become aware of the defendant's medical malpractice. In finding that summary judgment was not appropriate based on the running of the statute of limitations, the court noted that while in some matters an initial suspicion of injury and causation might trigger the discovery or the obligation to exercise reasonable diligence in discovering the injury, "in another case, a greater degree of certainty may be required." *Goff*, at 611-12, 550 N.W.2d

144. The court noted that every case must be decided on its own set of facts from the standpoint of the reasonable person, and *this is almost always a question of fact*. *Id.* (emphasis added).

III. WISCONSIN APPLIES THE DISCOVERY RULE TO WRONGFUL DEATH AND SURVIVAL CLAIMS.

A wrongful death action generally accrues at the time of the death, but the accrual is subject to the discovery rule. The death of an individual, in and of itself, does not, as a matter of law, trigger the discovery rule. *Groom v. Professionals Ins. Co.,* 179 Wis. 2d 241, 248, 507 N.W.2d 121 (Ct. App. 1993). In *Groom,* a plaintiff, individually and as special administrator of her husband's estate, brought an action against a doctor for the death of her husband. *Id.* at 245, 507 N.W.2d 121. She later amended her complaint to add another doctor and his medical group, but the trial court dismissed her amended complaint as barred by the statute of limitations, because the amended complaint was filed more than one year after she should have discovered her claims against the additional doctor. *Id.* The appellate court held that the date of discovery (for both the wrongful death and the survival claim), was the day hospital records were sent to the wife, which was well after the husband's death. *Id.* at 248, 507 N.W.2d 121. The fact of death didn't automatically trigger the discovery rule for either the wrongful death or the survival action. *Id.* To the contrary, the cause of action accrued when plaintiff knew to a reasonable probability,

or in the exercise of reasonable diligence should have known, the fact of injury and person who caused injury. *Id.*

The discovery rule has been applied multiple times to death claims in Wisconsin. See e.g., *Groom*, 179 Wis. 2d at 248, 507 N.W.2d 121; *Estate of Hegarty ex rel. Hegarty v. Beauchaine*, 249 Wis.2d 142, 156-57, 638 N.W.2d 355 (Ct. App. 2001); and *Awve v. Physicians Ins. Co.,* 181 Wis.2d 815, 819-20, 512 N.W.2d 216 (Ct. App.1994). Defendants have contended that those cases are not applicable because they apply § 893.55, Stats., the legislatively created discovery rule for medical malpractice claims, rather than the common law rule established in *Hansen*.

Defendants' conclusion is misplaced. The fact that plaintiffs' claims aren't governed by § 893.55 does not compel the conclusion that they are not subject to the discovery rule. The fact that these claims aren't governed by § 893.55 means that the broader common law *Hansen* rule applies. See *Miller by Sommer v. Kretz*, 191 Wis.2d 573, 580-81, 531 N.W.2d 93 (Ct. App. 1995).

Medical negligence and common law discovery rule cases frequently cite to one another and this court has held that they are to be applied in the same manner. See e.g. *Claypool v. Levin*, 209 Wis.2d 284, 299-300, 562 N.W.2d 584 (1997) ("…[T]he same analysis should be used to determine when discovery occurs under the statutory discovery rule contained in Wis. Stat. § 893.55(1)(b) and the discovery rule established in *Hansen*.").

A conclusion that a discovery rule only applied to death claims arising from medical negligence would be nonsensical. All of the reasons for the discovery rule outlined by the court in *Hansen* and *Borello* apply with equal force to these claims – deaths caused by workplace exposure to toxins where the causal link between the exposure and the illness would not have been apparent to a layperson. Moreover, applying the discovery rule to death claims in only chapter 655 cases would lead to absurd results. For example, in a wrongful death claim arising from a surgery, the claim against the nurse would be time-barred, while the claim against the surgeon would be governed by a discovery rule. See Wis. Stat. § 655.002(1). This result is not called for by the court's decisions on the common law discovery rule.

IV. THERE IS NO LAW PREVENTING THE APPLICATION OF THE DISCOVERY RULE TO PLAINTIFFS' CLAIMS.

A. There Is No Law Preventing The Application Of The Discovery Rule To Wrongful Death Claims.

Defendants argue that this court's decision in *Terbush v. Boyle*, 217 Wis. 636, 259 N.W. 859 (1935) operates to bar the wrongful death claims. *Terbush* does state that a wrongful death action accrues at the time of death. However, *Terbush* was decided 48 years prior to the adoption of the discovery rule in *Hansen*. *Hansen* established the rule that "a claim does not accrue until the injury is discovered or in the exercise of reasonable diligence should be discovered." *Id.*, at 560, 259 N.W. 859. The *Hansen* court specifically adopted the discovery rule for "all tort actions other than those already governed by a legislatively created

discovery rule." *Id.* It is not disputed that a wrongful death action is a tort claim, nor is it claimed that there is a legislatively created discovery rule applicable to wrongful death claims.

While this court has said that *Terbush* "could be interpreted" as holding that claims for wrongful death accrue on the date of death, the court did not say it should be interpreted that way. *Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67 ¶ 32, 318 Wis.2d 553, 769 N.W.2d 481. *Genrich* was not a discovery rule case and did not consider how the discovery rule applied to wrongful death claims. It decided only that the medical malpractice statute of limitation applied to the claim before it rather than the wrongful death statute of limitation. It determined that a spouse's wrongful death claim had accrued, not on the date of death, but on the date of injury. *Id.* *Genrich* was careful to note that *Terbush* had been reversed, albeit on other grounds. *Id.* The Supreme Court has not suggested, post-*Hansen*, that the discovery rule does not apply to common law wrongful death claims.

Defendants also argue that because a wrongful death claim is derivative of a survival claim, the wrongful death claims are time barred because the survival claims are time barred. They contend that the Court of Appeals decision in this case and *Beaver* thus conflict with *Ruppa v. American States Ins. Co.*, 91 Wis.2d 628, 284 N.W.2d 318 (1979). For reasons stated in sec. IV B, the survival claims are not time barred. As they are not time barred, *Ruppa* is inapplicable.

Furthermore, defendants misinterpret *Ruppa.* *Ruppa* involved the validity

of a liability waiver. Plaintiffs claimed that even if the decedent had released any claims against the defendants, his wrongful death beneficiaries had not. *Id.* at 646, 284 N.W.2d 318. The court found that the wrongful death claim was derivative of whatever tort claims the decedent had possessed and, having released his claims, the wrongful death beneficiaries could not recover. *Id.*

The *Ruppa* court didn't say that wrongful death claims are derivative of survival claims – only that they are derivative of the decedent's tort claims. As *Ruppa* held, "One is liable to the plaintiff in an action under [the wrongful death] statute only if and to the extent that he would have been liable to the decedent had death not ensued." *Id*. at 646, 284 N.W.2d 318. If the decedents named in this case had not died, they would be pursuing their claim in the same manner as all of the living plaintiffs. Since their claims would not be barred if they were alive, the wrongful death claims are also not barred.

The law in other jurisdictions is of only limited usefulness in interpreting Wisconsin's common law discovery rule. However, other jurisdictions have held that the application of the discovery rule is appropriate in cases involving latent diseases arising from product exposure, including disease resulting in a wrongful death claim. *See Dimedio v. Consolidated Rail Corp.,* 649 F. Supp. 1340, 1346-47 (D. Del. 1986) (Discovery rule applied and the cause of action was held to accrue when plaintiff was charged with knowledge that death was attributable to asbestos exposure); *Frederick v. Calbio Pharmaceuticals,* 89 Cal. App. 3d 49, 57-58, 152

Cal. Rptr. 292 (1979) (The accrual for wrongful death actions is the date of death for normal situations; an exception is a wrongful death action for a "blamelessly ignorant" plaintiff);

Dimedio offers a helpful discussion on the grounds courts have relied upon in determining whether the discovery rule applies to wrongful death claims:

> The critical distinction between cases holding that the discovery rule may toll the statute of limitations in favor of wrongful death claimants and cases holding otherwise is the limiting language of the statutes. Some statutes of limitations clearly provide that actions for wrongful death are barred if not brought within a certain time after the death of the decedent. Given such an unequivocal expression of legislative intent, courts generally hold that the discovery rule cannot delay the running of the statute. *See, e.g., Trimper v. Porter-Hayden,* 305 Md. 31, 501 A.2d 446 (1985); *DeCosse v. Armstrong Cork Co.,* 319 N.W.2d 45 (Minn.1982); *Presslaff v. Robins,* 168 N.J.Super. 543, 403 A.2d 939 (App.Div.1979); *Morano v. St. Francis Hosp.,* 100 Misc.2d 621, 420 N.Y.S.2d 92 (N.Y.Sup.Ct.1979); *Krueger v. St. Joseph's Hosp.,* 305 N.W.2d 18 (N.D.1981). Other statutes of limitations, including 10 *Del.C.* § 8107, provide instead that actions for wrongful death are barred if not brought within a certain time after they "accrue." Courts faced with this more ambiguous indication of legislative intent uniformly have held that wrongful death actions do not accrue until the plaintiff is chargeable with knowledge that the decedent's death is attributable to some tortious conduct. *See, e.g., Pastierik v. Duquesne Light Co.,* 341 Pa.Super. 329, 491 A.2d 841 (1985), *appeal granted,* 509 Pa. 541, 505 A.2d 254 (1986); *McCroskey v. Bryant Air Conditioning Co.,* 524 S.W.2d 487 (Tenn.1975); *White v. Johns-Manville Corp.,* 103 Wash.2d 344, 693 P.2d 687 (1985).

Dimideo at 1344 (footnote omitted). Wisconsin falls squarely into the second category. Section 893.54 provides:

> The following actions shall be commenced within three years or be barred… (2) An action brought to recover damages for death caused

by the wrongful act, neglect of default of another.

The statute does not indicate when a wrongful death action accrues, and does not require it to be brought within three years of the date of death. Nothing in the law precludes the application of the discovery rule to wrongful death claims.

B. There Is No Law Preventing The Application Of The Discovery Rule To Survival Claims.

1. *Merrill* Does Not Bar The Application Of The Discovery Rule To Survival Claims.

Defendants contend that *Estate of Merrill ex rel. Mortenson v. Jerrick*, 231 Wis.2d 546, 605 N.W.2d 645 (Ct. App. 1999) holds that a survival claim always accrues at the time of the decedent's death. *Merrill* is a case in which the plaintiff prevailed on its discovery rule argument and is easily distinguishable.

In *Merrill,* there was no dispute regarding the facts of the accident or the identity of the person who caused the injury. *Merrill* involved a single vehicle accident which occurred due to the negligence of the vehicle's driver. The dispute was whether the injured passenger who slipped into a coma, and ultimately passed away, should be held to have discovered his claim while he was alive. His estate filed a claim more than three years after the accident, but less than three years after the date of death. No party took the position that a claim would be barred if filed more than three years after the death because that was not the issue in the case. Instead, the estate argued that it was entitled to three years from the date of death to file suit; defendant argued for a lesser period, three years from the date of accident.

The court in *Merrill* held that the fact "the victim is deceased does not preclude the application of the discovery rule to the survival claim". *Id*., at 554, 605 N.W.2d 645. When the defendant complained that the court's ruling meant that if someone died without discovering their claim, it would never accrue and their estate would have an unlimited time to file suit, the court declined to address the argument, deeming it hypothetical. In fact, it said "That issue is not before us." *Id*., at 556, 605 Wis.2d 645. In a footnote, it indicated that while it declined to address the issue, the Eighth Circuit had remarked in dicta, in a case which decided that a comatose victim's claim accrues when a guardian is appointed, that had the comatose victim died, his survivorship claim would have accrued at the time of death. *Id,*, at 557 n. 8, 605 N.W.2d 645.

The court in *Merrill* made a factual finding specific to that case that "the estate's survival claim accrued when Merrill [the injured passenger] with reasonable diligence should have discovered his claim, **here**, no later than his date of death when his claim vested with the estate's personal representative." *Id.* at 557, 605 N.W.2d 645 (emphasis added).

The *Merrill* court did not hold that in every factual situation a survival claim accrues at death. The law is to the contrary. *Groom,* 179 Wis. 2d at 248, 507 N.W.2d 121. Rather, the Court of Appeals' holding in *Merrill* can be summarized: If a person is injured under circumstances where he should be aware of his claim, but is under a disability which prevented him from discovering his claim, his claim will

not run prior to three years from the date of his death. If there is language in the Court of Appeals' opinion which can be read more broadly, this court should not follow it.

2. Wisconsin Statutes Do Not Bar The Application Of The Discovery Rule To Survival Claims.

Section 895.01, which authorizes survival claims, contains no limitation on actions and no language stating when a survival claim accrues. Defendants argue that sec. 893.22 limits the *Hansen* discovery rule in survival claims. Section 893.22 is a tolling statute which gives an estate additional time to file suit if the decedent passes away less than one year before the statute was to run.

Section 893.22 does not apply because there is no evidence that these claims accrued prior to the decedents' deaths. Defendants do not take the position that the claims accrued at some earlier time, such as when decedents were exposed to the benzene or when they were diagnosed with cancer. Instead, they allege that the claims accrued upon death. However, if the claim accrued upon or after death, the tolling statute does not apply.

Defendants' explanation of how the statute works might have made sense in a pre-discovery rule world. Section 895.01 pre-dates *Hansen.* Prior to *Hansen*, all survival claims would accrue at the time of injury prior to a decedent's death. Section 893.22 would not limit the ability to bring a survival claim. Rather it would allow an estate to bring a claim that would have run between the date of

death and the one year anniversary of the death prior to that one year anniversary. Unless a claim would have run within this one year window, this statute is of no effect.

The presumption that the discovery rule applies except where the legislature specifies otherwise is consistent with the perception that the determination as to when a cause of action accrues is a judicial function in the absence of legislative definition of that term. The legislature has not limited the application of the discovery rule in a survival cause of action.

As the Alaska Supreme Court held in *Sinka v. Northern Commercial Company,* 491 P.2d 116, 119 (Alaska 1971):

> In our view, *the survivorship statute, ... was not intended to shorten the specific statutory provisions governing a cause of action* but to extend the statutory period where it otherwise would have expired within a year after the death.

Section 893.22 was also intended to extend the time period for filing a claim when it would otherwise have run within one year of the date of death. It was not intended to shorten the statute of limitations applicable to the underlying tort claims or to set forth when those claims accrue.

Decisions from courts in other states support the position that the discovery rule applies to a survival action. The Supreme Court of Washington held that the discovery rule applied to toll the statute of limitations applicable to

a survival action in *White v. Johns-Manville Corp.,* 103 Wash.2d 344, 693 P.2d 687 (1985). The Washington survival statute provided:

> All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter ..."

Id. at 695 (quoting RCW 4.20.046(1)). The Supreme Court of Washington acknowledged that courts are split on this issue whether the discovery rule applies to survival actions. *Id.* Rejecting the rationales of those courts holding the discovery rule does not apply, the court reasoned:

> Defendants confuse the existence of a cause of action and the accrual of a cause of action; while the plaintiff in the present case may have been injured by defendants during his life, his cause of action did not accrue unless he discovered, or should have discovered, the cause of his injuries. Since the decedent would have benefitted from the discovery rule had he not died, his representatives should likewise benefit from it.

Id. at 696 (citations omitted).

Application of the discovery rule to survival actions also finds support in *Eisenmann v. Cantor Bros., Inc.,* 567 F.Supp. 1347 (N.D.Ill.1983). The court applied Illinois law in determining whether the discovery rule was applicable to a survival action. *Id.* at 1349.The wife, the administratrix of the estate of her deceased husband, brought a survival action alleging her husband developed chronic lymphocytic leukemia, which led to his death, because of exposure to benzene at his employment. *Id.* at 1348-49. The court concluded the Illinois

Supreme Court had not expressly stated its view on whether the discovery rule applied under the Illinois Survival Act or the Wrongful Death Act. *Id.* at 1350. The court considered Illinois law and provided several reasons for its conclusion that the discovery rule applied to the Survival Act. First, it reasoned that the recovery under the survival action is for the personal injury to the decedent between his injury and his death and becomes part of the estate, subject to the obligation of the estate. *Id.* at 1351. Second, it noted that the survival cause of action was meant to fully compensate for the personal injuries sustained and to ensure wrongdoers were not relieved of some portion of their liability because their acts had caused death. *Id.* at 1351. Third, the court emphasized that the discovery rule is "the only fair means by which a statute of limitations can be applied in a case where an injury is both slowly and invidiously progressive." *Id.*at 1352-53. Finally, the court stated: "If, as is manifest, Mr. Eisenmann would have had the benefit of the discovery rule if he brought a tort action in his own name, neither policy nor logic will support a contrary result due to his death." *Id.* at 1353.

The same analysis applies here. There is no basis in the law or in policy to not allow a decedent the benefit of the discovery rule. If there is less than a year remaining on the statute of limitations at the time of death, the estate has a year to file. If there is more than a year remaining, the normal three year statute of limitation applies. And, if the claim hasn't accrued, the estate has three years from the time that, in the exercise of reasonable diligence, the personal representative,

heirs or beneficiaries should have discovered the claim.

V. THE LAW CONTAINS ADEQUATE SAFEGUARDS TO PROTECT DEFENDANTS AGAINST STALE CLAIMS.

Applying the discovery rule in death claims does not result in unfairness to tortfeasors. Defendants make the argument that public policy dictates dismissal of plaintiffs' claims because to do otherwise would create "a situation where 'there seldom would be a prescribed and predictable period of time after which a claim would be barred.' The application of a post death discovery rule…would produce 'an unacceptable imbalance between affording plaintiffs a remedy and providing defendants the repose that is essential to stability in human affairs.'" (R.164:13) Defendants do not seek to have the court bar only these specific claims on public policy grounds. Rather, they seek a ruling that public policy bars all survival and wrongful death claims brought more than three years following a decedent's death.

The general policies underlying adoption of the discovery rule apply with equal force to survival and wrongful death claims. It is equally unfair to bar these claims prior to the claimant having knowledge of their existence. Defendants' policy arguments would apply with equal force to the application of the discovery rule to any tort claim. They claim unless there is a fixed period of years after which a claim can no longer be brought, there is essentially no statute of limitations and too great a potential for stale claims.

However, this court has already stated that the discovery rule applies in the absence of a legislatively created discovery rule. The legislature has had the ability post-*Hansen* to limit the application of the discovery rule in survival or wrongful death actions. It has elected not to do so.

It is also worth noting that defendants have a remedy if the passage of time has made it inequitable that these claims be brought against them. Wisconsin law permits courts to deny liability on public policy grounds in certain claims, even when negligence and cause exist. *Alwin v. State Farm Fire & Casualty Co*., 2000 WI App 92, ¶ 12, 234 Wis.2d 441, 610 N.W.2d 218 (recognizing that "public policy considerations may preclude liability even where negligence and negligence as a cause-in-fact of injury are present"). In doing so, the court applies a multifactor test and engages in judicial line drawing, "endeavor[ing] to make a rule in each case that will be practical and in keeping with the general understanding of mankind." *See Fandrey ex rel. Connell v. American Family Mut. Ins. Co*., 2004 WI 62 ¶ 15, 272 Wis.2d 46, 680 N.W.2d 345. Among the factors the court will consider are whether allowing recovery "would place too unreasonable a burden upon [the tortfeasor]"; whether allowing recovery would be "too likely to open the way to fraudulent claims"; and whether allowing recovery "would 'enter a field that has no sensible or just stopping point. *Id.* at ¶ 1, n. 1.

This protection is absent in some other jurisdictions which do not apply the common law discovery rule to survival or wrongful death claims. Such an

analysis is a completely separate basis for dismissing a claim, and was not the basis for the present motion to dismiss on statute of limitations grounds. To the extent that defendants are claiming prejudice based on the timeliness of the filing, they can present the court with the facts specific to these claims and seek dismissal, rather than urging that the court reject the discovery rule on public policy grounds with respect to all death claims. The case has been pending since 2006 – if defendants believe that these claims should be barred on public policy grounds, they could have raised that issue, and still can raise that issue. However, while defendants complain about the potential prejudice to a defendant when a claim is brought well after the injury, they offer no evidence of prejudice relating to these specific claims. Application of a public policy defense to these specific claims is the appropriate way to address any claimed prejudice. There is no reason to deny claimants the protection of the discovery rule when there is no showing that their claims create any unfair prejudice to the defendants.

VI. THE ISSUE OF WHEN PLAINTIFFS DISCOVERED THEIR CLAIMS, HAD THE DISCOVERY RULE BEEN APPLIED, WAS NOT BEFORE THE CIRCUIT COURT.

Realizing that they were unlikely to prevail on this argument that the discovery rule did not apply to plaintiffs' claims, defendants shifted gear on appeal and argued that even if the discovery rule applied, plaintiff had failed to make the necessary factual showing as to when their claims accrued under the discovery

rule. However, that issue was not before the circuit court.

In its initial motion to dismiss, defendants asserted that the three year statute of limitations applied to bar the claims of certain decedents. They did not explicitly address the discovery rule. (R. 157). Plaintiffs raised the discovery rule in opposition to the motion and argued that the claims had not accrued until the decedent employees, or a beneficiary or heir in position to assert a claim, discovered them. (R. 158). In response, defendants made two arguments: 1) They contended that all survival actions had to be brought pursuant to § 893.22 within 3 years of the date of death, regardless of when the claim was discovered (R. 164, 6-8); and 2) they contended that the wrongful death claims were properly barred on public policy grounds. (R. 164; 3, 11-14).

The court held oral argument on April 30, 2012. Defendants' position changed from that set forth in its briefs. They now claimed that the wrongful death claims should also be barred as a matter of law pursuant to *Merrill*. They withdrew their public policy argument, acknowledging that barring the claims on that basis would require a full airing of the public policy factors precluding suit and that they had not properly briefed that issue in the motion. (Pet. App. 34)

Defense counsel, on multiple occasions, stated that if the court determined that the discovery rule applied to the claims, there would have to be a later motion regarding its application:

[T]here will be a motion brought, you know, with the other

> summary judgment motions that will address the question of whether the plaintiffs have complied with the statute in terms of the timing of the claim based on the facts of when they did discover or should have discovered the connection between the injury and the defendant's [sic] potential claim. That is the motion that we will be pursuing down the road. That requires other evidence, and our motion was brought strictly on the pleadings.
>
> Understandably it's been converted to a summary judgment motion based on other materials that have been provided by plaintiffs, but our motion that will be brought in July will rest on other evidence that we will be providing to the court so that the Court can make that judgment as to whether or not the plaintiffs' claims are timely….
>
> TRIAL COURT: Okay. And if the claim survives today, I understand you would be arguing that: one, you need a personal representative to make allegations with respect to discovery and; two there are other facts you would present to the court to address the date of discovery which you would argue on summary judgment leaves no question of material fact. But that is not for today either.

(Pet. App. 27). Defense counsel repeatedly asserted that the basis for the motion to dismiss was that the statute of limitations ran no later than three years after the date of death, regardless of when the claim was discovered because no one, besides the decedent, has a right to extend the limitations period by discovery of the claim. (Pet. App. 25, 27, 29, 38, 48, 52, 54-55, 56-57)

In its analysis, the trial court specifically noted that, for the purposes of the motion, it was concluding that there had been no discovery of the claim until 2006, the year in which suit was filed.

> TRIAL COURT: …I have to view inferences in the light

> most favorable to the parties to which a motion is brought. So, for purposes of this motion, I have to assume that the information in 2006 about the discovery of that relationship is correct and that's the only information that I have on which to base any decision and, therefore, it would seem discovery—at least from what I have right now in 2006.
>
> And since all the actions were brought within three years of that date, the plaintiffs argue that their claims should survive….
>
> The defendants argue in response to the discovery rule that it's not applicable to wrongful death claims and that the cause of action accrues at death….
>
> …I don't know what the decedent knew. All I know if what the people who survived them found out, and I am inferring that [this was] the first inkling anybody had about the causal relationship for purposes of this motion only. Whether it meets the necessary burden at a later date or rises to a material question of fact will remain to be seen, but that's not the basis here. I am assuming that the date of discovery for the purpose of the motion, 2006.

(Pet. App. 42, 43, 58) (emphasis added).

The court assumed that discovery occurred in 2006, the year the suit was filed. It indicated that it remained to be seen what the evidence would be as to the specific date of discovery, but that was not the basis of this motion and it would wait to rule on that issue until it was properly before the court.

When the court finally ruled, it held that the claims were time barred because, as a matter of law, such claims must be brought within three years of decedent's date of death:

> I think the state of the law is that the cause of action accrues

at the time of discovery. It was not discovered until 2006. There's no difference to treat a wrongful death claim. No policy reason to treat a wrongful death claim differently from any other tort claim. I understand the desire for certainty and the need to get estates adjudicated with the nature and extent of the damages is no less egregious, sometimes perhaps even more so, and policy-wise I don't see any reason to treat them differently.

But if the law says that the cause of action accrues the wrongful death from the date of death, these cases are time barred. That is what I read *Merrill v. Jerrick* and *Miller v. Luther* to say. *Merrill v. Jerrick* also says that survival claims accrued at the date of death in that case. But they also say that it accrues when – well, strike that.

I'm going to stick with the way I came in here. I'm dismissing both claims, and I'm sorry for flip-flopping, but, you know, I'm reading these cases and the wording is not consistent and it's clear, but looking further at the - - this particular the paragraph 18, *Merrill v. Jerrick* page 557 and I read it several times. What hung me up before was here making this case distinguishable, which is why I felt it was appropriate to let the survival claims survive. But it says, we conclude that the estate survival claim accrued when *Merrill* with reasonable diligence should have discovered his claim here no later than his date of death when his claim vested with the estate's personal representative. And I think when you read it in conjunction with the argument that Mr. Sullivan has made, the discovery had to take place by the person who is entitled to commence the claim. The person entitled to bring the claim is the plaintiff, deceased plaintiff.

The deceased plaintiff couldn't have discovered his claim later than his date of death - - or some of them are hers. At the time of their date, those claims resided with personal representatives. If they hadn't accrued before, they have three years from the date of death, which would be the date of accrual according to *Merrill versus Jerrick* and that is because given the nature of that survival claim, they're standing in the shoes of a person who's deceased.

> Now, what that means is - - and I understand the import of this is if somebody dies not knowing the nature of the tort giving rise to their injury for the person against whom the claim can be brought, they have three years under 893.54 and 893.22 in which to bring the claim, and if they discover it later, they're barred….
>
> Similarly when a person dies the family and friends will know that someone will have to take over his affairs. In this case, the plaintiff's family, expecting him to recuperate and take care of his own affairs. In a death case, therefore, unlike this situation, it's fair for the claim to accrue at the time of death discussing a different type of a case, comatose plaintiffs. I think I'm just going to leave it as it is. I think both cases are time-barred by the statute of limitations.
>
> …I think accrual the accrual of a cause of action takes place when you have a claim capable of present enforcement unless there's a statutory statement or law to limit it and that's what I am finding that there are in these cases.

(Pet. App. 73-77) (emphasis added).

The court found that the statutory language of §§ 893.54 and 893.22, together with *Merrill*, required both survival claims and wrongful death claims to be brought within three years of the date of death, notwithstanding when the injury was discovered. The court concluded, under those circumstances, it was immaterial when the decedent or his heirs had possessed a claim capable of present enforcement.

The issue in this case, in the trial court and on appeal, was the legal question of whether application of the discovery rule could result in a wrongful death or survival action accruing more than three years beyond decedent's date of

death. Defendants contended that the discovery rule only applied to the injured party. Once the injured party died having not discovered the claim, no other party was capable of discovering the claim. Therefore, they asserted the statute of limitations accrued, at the latest, on the date of death and ran three years from that date without the possibility of a later accrual by application of the discovery rule.

The trial court clearly articulated that she was assuming discovery in 2006 and any factual issue as to the actual date of discovery, if raised by defendants, would be decided in a later motion. If this court affirms that the discovery rule applies to wrongful death and survival claims, the case must be remanded to the circuit court to determine when the claims accrued.

VII. EVEN IF THE COURT REACHES THE ISSUE, THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHEN THE CLAIMS IN THIS CASE WERE DISCOVERED.

A. Defendants Have Not Met Their Burden And There Is, At Minimum, A Genuine Issue Of Fact As To When Plaintiffs' Claims Accrued For Purpose Of The Discovery Rule.

1. Defendants Have The Burden Of Proof To Establish When The Claims Accrued.

Plaintiffs contended that defendants bore the burden of proof on the statute of limitations, including the burden of showing when the claims accrued for purposes of the discovery rule. (R.64:2) Defendants argued that plaintiffs bear the burden on the discovery rule, citing a concurring and dissenting opinion by Justice Abrahamson in *Doe v. Archdiocese of Milwaukee*, 2007 WI 95,¶ 117, 303

Wis.2d 34, 734 N.W.2d 827 joined in by one other justice. Defendants are wrong.

Defendants have the burden of proving its affirmative defense that the statute of limitations had expired. *See Kurt Van Engel Com'n Co. v. Zingale,* 2005 WI App 82, ¶ 42, 280 Wis.2d 777, 696 N.W.2d 280. A claim does "not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of injury but also that the injury was probably caused by the defendant's conduct." *Borello,* 130 Wis.2d at 411, 388 N.W.2d 140. In other words, "discovery does not occur until there is information available to the claimant of the nature of [the] injury, the cause of [the] injury, *and the defendant's part in that cause.*" *Id.* at 414, 388 N.W.2d 140 (emphasis added). "[I]njury and *belief* of its cause, even if correct, do not in themselves trigger the period of limitations." *Id.* at 413, 388 N.W.2d 140 (emphasis added). A plaintiff must also have objective evidence setting forth the defendant's part in causing the injury. *See id.* at 411–14, 388 N.W.2d 140.

Wis. J.I. – Civil 950 (2009) addresses the discovery rule. It states:

> Question __ asks whether (plaintiff) knew, or should (he) (she) with the exercise of reasonable diligence should have known, on or before (the date when the statute of limitations would have run that ___ was a cause of (damage) (injury) to ____.
>
> To answer this question "yes", you must be satisfied that, prior to (date), (plaintiff) knew or with the exercise of reasonable diligence should have known the following:
>
> First, that (he)(she) (suffered damages) (was injured).

> Second, that (his)(her)(damages)(injuries) were probably caused by (defendant)'s conduct.
>
> "Reasonable diligence" means the diligence the great majority of persons would use in the same or similar circumstances to discover the cause of the (damages)(injuries).

Under Wis. J.I. – Civil 200 the burden is on the party that contends the questions should be answered "yes."[4] Under current Wisconsin law, defendant has the burden of proof on its affirmative defense of statute of limitations, including the burden of proving when the claim accrued. The relevant holding of *Doe*, taken from the majority's opinion is:

> [W]e deny the motion to dismiss the fraud claims because we conclude that, based solely on the complaints, we cannot determine when the plaintiffs knew or should have known of the Archdiocese's alleged knowledge of the priests' past histories of sexual molestation of children. Therefore, their claims may or may not be time-barred by Wis. Stat. 893.93(1)(b), depending on when the claims for fraud accrued. The date of discovery is usually a question of fact. *See Borello,* 130 Wis.2d at 404, 388 N.W.2d 140....
>
> Since a motion to dismiss does not present the opportunity to fully develop the facts surrounding the Archdiocese's argument that plaintiffs' fraud claims accrued more than six years before the date on which they were filed, we conclude that the claims for fraud survive the motion to dismiss.

Doe, at ¶¶ 61-62. Defendants bear the burden on this issue and determination of the accrual issue is not appropriate on motion to dismiss.

2. There Are Genuine Issues Of Material Fact As To When The Plaintiffs' Claims Accrued Under The Discovery Rule.

[4] While the Wisconsin Civil Jury Instructions are not binding precedent, they are persuasive authority and are frequently cited by this State's appellate courts. See *Nommensen v. American Continental Ins. Co.*, 2001 WI 112, ¶¶37 and 47, 246 Wis.2d 132, 629 N.W.2d 301.

In this case, questions of fact remain regarding when plaintiffs should have learned of defendants' role in the benzene exposure and the causal link to the subsequent illnesses and deaths. Defendants did not argue that the specific facts of any claim led to discovery more than three years prior to the filing of the claims. The seven plaintiffs all submitted affidavits or sworn interrogatory answers indicating that they were all unsure of the link between their loved one's death and exposure to defendants' chemicals until shortly before they filed suit. (R. 159: 160, 161, 162, 163: 3, 8, 12).

While true that "[p]laintiffs may not close their eyes to means of information reasonably accessible to them and must in good faith apply their attention to those particulars which may be inferred to be within their reach," *Groom,* 179 Wis.2d at 251, one's subjective belief of the cause cannot, as a matter of law, be sufficient to start the statute of limitations running. *Borello,* 130 Wis.2d at 412. Plaintiffs lacked information regarding the cause of the injury and the defendants' part in it.

There are genuine issues of material fact as to the accrual date for both types of claims.

a. Wrongful death claims.

The wrongful death claims were at all times possessed by the wrongful death beneficiaries and never possessed by the decedents. It is the knowledge of those beneficiaries which is relevant. Here, the only evidence is that their claims

did not accrue until shortly before they filed their complaints. (R.159-163).[5]

b. Survival claims.

Defendants take the position, for the purpose of this motion, that the statute of limitations accrued at the time of death. Accordingly, as defendants make no assertion the claims accrued before death, decedents' knowledge is irrelevant.[6] What is relevant is the knowledge possessed by the parties entitled to bring the claims. In this case, the special administrators, spouses or children of the deceased, provided affidavits showing the claims accrued less than three years prior to the complaints.

At minimum, there are genuine issues of material fact regarding when, with reasonable diligence, plaintiffs should have discovered their claims.

VIII. THE COURT OF APPEALS DECISION DOES NOT ALTER EXISTING LAW.

Defendants make a semantic argument that the discovery rule applies to wrongful death and survival claims, but that the only the knowledge of the decedent is relevant to determine when the claim accrues. They cite to no case law which holds that only a decedent's knowledge is relevant to determine when

[5] The result would be different if there was evidence that the decedents' tort claims accrued prior to their deaths. However, that question is not before the court as there is no contention that the tort claims accrued prior to their deaths.

[6] Even if defendants contended that the claims accrued prior to death, the affidavits would raise a genuine issue of fact as to whether the date of accrual was later. When a loved one's family had no idea as to the cause of their illness, it is a reasonable inference that the decedent himself also had no knowledge.

claims accrue.

Defendants latch onto a sentence in *Beaver* stating if the statute has on its face run, that the burden shift to plaintiffs to show "when the decedents knew or should have known of their injuries". *Id.* at ¶ 26. Defendants claim that statement means only decedent's knowledge is relevant to determine when the claim accrued and that therefore it accrues no later than three years after the victim's death. However, that is not what *Beaver* says or holds. If the Court of Appeals had concluded this, the dismissals would have been upheld as it was undisputed that the claims were filed more than three years after the victims' dates of death.

What the court held is that the decedents' knowledge is relevant. The claims accrued if decedents discovered them during their lifetimes. Plaintiffs will show that decedents did not know or have reason to know of their claims during their lifetimes. At the point the issue will be when a party with a right to assert a claim for decedent's injury discovered the claim. Plaintiffs will show that it was less than three years prior to the suit being filed.

Wisconsin law holds that claims don't accrue "until there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." *Pritzlaff,* 194 Wis.2d at 315. Accrual does not occur until there is information available to the claimant of the nature of the injury, the cause of the injury and the defendant's part in that cause. *Borello,* 130 Wis.2d at 414, 388 N.W.2d 140. There is no law qualifying these rules and holding

that only a decedent's knowledge, as opposed the knowledge of a "party" or "claimant" is relevant. If defendants' are correct in stating that only the decedent's knowledge is relevant, and if decedent never discovered his or her claim, the logical conclusion is that under Wisconsin law the claim never accrues and therefore can never be extinguished by the statute of limitations. This is not a reasonable reading of the law nor is it a reasonable result.

Defendants contend that the testimony of family members is irrelevant to a survival claim and that the Court of Appeals decisions in *Christ* and *Beaver* therefore conflict with *Lord v. Hubbell, Inc.,* 210 Wis. 2d 150, 563 N.W.2d 913 (Ct. App. 1997). *Lord* held that in the case of the death of a parent to minor children, the survival action was subject to the three year statute of limitation without tolling while the wrongful death action was tolled until they reached majority.[3]

Lord was not a discovery rule case and it said nothing about what happens if the decedent had no knowledge of the claim prior to his death. A cause of action arises when "there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." *Pritzlaff,* 194 Wis.2d at 315, 533 N.W.2d 780. In the situation where the claim did

[3] If nothing else, *Lord* puts to rest defendants' argument that, under *Ruppa*, a wrongful death claim cannot be brought if the survival action is barred. As noted earlier, a wrongful death claim is substantively derivative of the claims the decedent would have had (which is different from the survival claim), but is subject to its own procedures, potentially resulting, as in *Lord*, in different deadlines for bringing survival and wrongful death claims arising out of the same injury.

not accrue prior to death, the relevant question is when "a party with a present right to enforce the claim" discovered the claim. In this case, those parties are the wrongful death claimants and the beneficiaries of the decedents' estates.[4] There is no contention on motion to dismiss that the claims accrued during decedent's lifetime – to the contrary, defendants assume the claims accrued upon their death. Accordingly, the knowledge of parties entitled to bring or benefit from the claim is relevant to determining when the claim accrued. As indicated by the Court of Appeals, that determination cannot be made on review of defendants' motion to dismiss.

IX. THE COURT OF APPEALS DECISION WAS NOT ARBITRARY, NOR ARE THE PROCEDURAL DETERMINATIONS BY THAT COURT RELEVENT TO THIS COURT'S DECISION.

Defendants claim that the Court of Appeals decision was arbitrary. Given that this court will apply de novo review to the circuit court's decision on summary judgment, it is hard to see how it makes a difference, other than as an opportunity to take a swipe at the Court of Appeals. Presumably this court will rule on the substantive issue before it, and not simply vacate the Court of Appeals decision and remand the matter to it for further consideration.

The issues in this appeal are identical to those decided in *Beaver v. Exxon*

[4] Defendants mischaracterize plaintiffs' position as being that a claim accrues when it is discovered by a special administrator or wrongful death beneficiary. The claim accrues when it was discovered by an heir or beneficiary or another "party with a present right to enforce it." *Pritzlaff,* 194 Wis.2d at 315, 533 N.W.2d at 785. A special administrator was then appointed for the purpose of pursuing the claim.

Mobil Corp. The Court of Appeals had already issued a decision in *Beaver* and rejected a motion for reconsideration. This court had denied a petition for review. Issuing a summary disposition was proper and was within the authority of the Court of Appeals. Section 809.21, Stats.

Defendants are harshly critical of the Court of Appeals and contend that it misunderstood the trial court's analysis and gave short shrift to their arguments by deciding the case summarily. Defendants are wrong – the Court of Appeals understood and properly overruled the trial court. The premise of defendants' argument is that the circuit court had applied the discovery rule to the facts of this case and the Court of Appeals ignored its determination. As discussed in sec. VI, this is a false premise. The circuit court assumed that the claims were discovered in 2006 and explicitly held that if the actual date of discovery was determined to be relevant, it would be taken up in a later motion.

However, it also makes no difference whether the Court of Appeals understood the trial court's analysis. It reviewed the trial court decision de novo. *Christ*, at 3. It owes no deference to the trial court's analysis. Whether it properly interpreted the trial court's analysis does not affect whether its decision on de novo review was correct.

X. THERE IS NO CONSTITUTIONAL ISSUE BEFORE THE COURT.

Defendants claim that their due process rights are violated by the application of the discovery rule to their claims. The argument pre-supposes that

that the statute of limitation had run and the courts are seeking to revive the claims.

Defendants merely add a constitutional gloss to their statutory and common law arguments. If the court determines that the discovery rule does not apply and that the statutes have run, it will presumably order the claims dismissed on that basis. If the court determines that the statutes have not run, defendants never acquired a vested right in their running and they are not being deprived of any property interest. The constitution does not require the court to apply the discovery rule in the manner advanced by defendants. As in *Hansen*, the defendants are not constitutionally entitled to a particular judicial determination of when a claim accrues.

CONCLUSION

The discovery rule applies, and should continue to apply, to wrongful death and survival claims. The Court of Appeals should be affirmed.

Dated: November 25, 2014

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced using the following font: Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,231 words.

I further certify that I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: November 25, 2014.

Respectfully submitted,

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SUPREME COURT
STATE OF WISCONSIN

No. 2012AP1493

DONALD CHRIST, individually and as Special Administrators of the Estate of GAIL P. CHRIST, deceased, JACQUELINE RADOSEVICH, individually and as Special Administrator of the Estate of GARY RADOSEVICH, deceased, MARY JANE BEAULIEU, individually and as Special Administrator of the Estate of WILLIAM BEAULIEU, deceased, PAUL CLARK, individually and as Special Administrator of the Estate of SHARON A. CLARK, deceased, BETTY GROSVOLD, individually and as Special Administrator of the Estate of VICTOR M. GROSVOLD, deceased, DIANNE PEDERSON, individually and as Special Administrator of the Estate of MAE H. HEATH, deceased, CARRIE DUSS, individually and as Special Administrator of the Estate of MARY HENNEMAN, deceased, and ARLENE CHRIST,

Plaintiffs-Appellants-Cross-Respondents,

DEBORAH SHERWOOD, individually and as Special Administrator of the Estate of GERALD F. CONLEY, deceased, RANDY S. HERMUNDSON, individually, DARLENE INSTENESS, individually and as Special

Administrator of the Estate of ROBERT A. INSTENESS, deceased, JOYCE JENSON, individually, JEAN M. LESKINEN, individually, PAUL T. MANNY, ANITA MANNY, DOUGLAS WINRICH, individually and as Special Administrator of the Estate of BARBARA WINRICH, deceased, BARBARA NELSON, individually and as Special Administrator of the Estate of TERRY NELSON, deceased, FAYE REITER, individually, DONALD SCHINDLER, individually and JEAN RUF, individually and as Special Administrator of the Estate of RICHARD R. RUF, deceased,

Plaintiffs,

v.

EXXON MOBIL CORPORATION, SUNOCO, INC., TEXACO DOWNSTREAM PROPERTIES, INC., FOUR STAR OIL AND GAS COMPANY, BP PRODUCTS NORTH AMERICA, INC., AND ASHLAND CHEMICAL COMPANY DIVISION OF ASHLAND, INC.,

Defendants-Respondents-Cross-Appellants-Petitioners,

SHELL CHEMICAL, L.P., CORNERSTONE NATURAL GAS COMPANY AND SHELL OIL COMPANY,

Defendants.

On Review of a Decision of the Court Of Appeals
Summarily Reversing Summary Judgment Entered
by the Eau Claire County Circuit Court the
Honorable Lisa A. Stark Presiding
Circuit Court Case No.: 06-CV-420

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December 10, 2014

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ARGUMENT

Rather than engage Defendants' arguments, Plaintiffs' response is directed at straw men. They misstate Defendants' position, the circuit court's ruling, precedent and the relevant facts. Space constraints do not permit rebuttal to every distortion of the record or the law, but some bear mentioning.

I. Plaintiffs' Claims Are Untimely Because They Were Commenced More Than Three Years After The Latest Possible Date They Could Have Accrued.

Despite Plaintiffs' mischaracterization of Defendants' position, Defendants have consistently argued that:

1. Death claims accrue when a decedent discovers or, in the exercise of reasonable diligence, should have discovered the cause of his injuries. *Merrill v. Jerrick*, 231 Wis. 2d 546, 553, 557-58, 605 N.W.2d 645 (Ct. App. 1999).

2. Because a decedent's ability to discover his injury ends at death, that date marks the latest survival actions can accrue. *Id.* at 557.

3. Since Plaintiffs' complaint was filed more than three years after that date, it was untimely.

Thus, notwithstanding Plaintiffs' contention, there is no reason to remand this case to determine when the

claims were discovered or reasonably should have been discovered.

Plaintiffs provided affidavits stating that they discovered the claims in 2006, shortly before this action was commenced. (App.000041-42.) The circuit court assumed those facts as true. (App.000042, 000059.) But it also determined that "[t]he person entitled to bring the claim is the plaintiff, deceased plaintiff." (App.000074).

Therefore, the only relevant discovery is that of the Decedents. (App.000074-75.) *See also Lord v. Hubbell*, 210 Wis. 2d 150, 166, 563 N.W.2d 913 (Ct. App. 1997) ("[T]estimony and evidence from [the beneficiaries] and relating to them is not part of the estate's survival claim."). But there is no need to determine when the Decedents discovered or reasonably should have discovered their claims because, as noted by the circuit court, such discovery would obviously have occurred before they died. (App.00079-80 (stating that since the Decedents were dead, they were "no longer" able to discover the "base for the claim to enforce"); App.000074-76 (concluding that whatever relevant knowledge the Decedents possessed about their respective claims was limited to their lifetimes).)

Accordingly, as Plaintiffs concede that their actions were commenced more than three years after the Decedents' deaths, (Resp. Br. at 8), their claims are barred.

II. The Circuit Court Applied The Proper Rule Of Law.

Plaintiffs argue that the circuit court held that "a legislatively created discovery rule … render[ed] the common law discovery rule inapplicable" to death claims. (Resp. Br. at 1.) That they are unable to provide a record reference is not surprising since the circuit court did no such thing. Instead, it specifically acknowledged *Hansen* and concluded that *Merrill* controlled the application of the discovery rule in death cases. (App.000043, 000062, 000074-79.)

In *Merrill*, the decedent's personal representatives filed a survival claim more than three years from the date of injury, but within three years from the date of death. *Merrill*, 231 Wis. 2d at 548. Because the decedent had periods of consciousness prior to death the court of appeals ruled that there was a genuine question of fact whether he discovered his injury before death. *Id.* at 553. Accordingly, it remanded the matter for a determination regarding what the decedent knew and when he knew it. *Id.* However, the court also concluded "that the estate's survival claim accrued when Merrill with reasonable diligence should have discovered his claim, here, no later than his date of death when his claim vested with the estate's personal representative." *Id.* at 557.

The plaintiffs (the decedent's parents) were well-aware of his injuries and were presumably aware of these facts on or near the date of the accident. *Id.* at 548 (stating that the parents had settled their

wrongful death claim two years before commencing their son's survival claim). Thus, if discovery by third parties controlled the application of the discovery rule, then the court could have simply determined when the parents had discovered their son's cause of action.

Instead, the court expressly recognized that "[t]he personal representative 'stands in the shoes' of the decedent, and the estate is entitled only to what the decedent would have had if the decedent were living." *Id.* at 554. Furthermore, by citing favorably to *Lord v. Hubbell*, *id.* at 549-50, the court was well aware of that court's holding, as noted above, that a beneficiary's "testimony and evidence" is "not part of the estate's survival claim." *Lord*, 210 Wis. 2d at 166. Therefore, applied together, *Merrill* and *Lord* hold that the date a tort victim's claim accrues is based upon her discovery of the injury and its cause, and that date is not triggered by any third party's discovery of the claim. *See also Advincula v. United Blood Servs.*, 678 N.E.2d 1009, 1029 (Ill. 1996) ("The actual plaintiff in [a survival] action is the deceased, and it is that person's knowledge of injury which triggers the limitation period.").

This point was persuasively made by the Illinois court of appeals's decision in *Gale v. Williams*, 701 N.E.2d 808 (Ill. Ct. App. 1998). There, the decedent's mother, as administrator of her son's estate, sued his former divorce attorney for malpractice due to the attorney's failure to change the beneficiary of the

son's life insurance policy from his ex-wife. *Id.* at 809-810. Although the mother filed suit beyond the two-year statute of limitations, she argued that the survival claim was timely because she was unaware that the attorney had failed to switch the beneficiary until after her son died. *Id.* at 811-12.

In rejecting the mother's argument, the court concluded:

> Plaintiff's argument is flawed because she attempts to attribute knowledge of the attorney's alleged negligence to herself rather than to the decedent. Count II of plaintiff's complaint was brought on behalf of the estate of Dennis Gale, which means that for purposes of count II, it is as if Dennis Gale himself is bringing the cause of action for legal malpractice. Therefore, it is Dennis Gale's knowledge of the injury that is at issue and the statute of limitations begins to toll when the decedent knew or reasonably should have known that the alleged act or negligence occurred.

Id. at 812.

Therefore, the circuit court here properly rejected Plaintiffs' attempt to shift the focus of the discovery rule from the alleged tort victims to themselves personally. (App.000074-75.) Instead, the timeliness of Plaintiffs' complaint rested entirely on the discovery by the Decedents, which naturally ended upon their deaths when their claims vested with their representatives. *Merrill*, 231 Wis. 2d at 557.

III. *Merrill*, *Lord*, *Ruppa*, *Terbush* And *Hansen* Are Congruous.

Death cases present facts and policy considerations that are different than those in injury cases. Yet rather than confront these differences and policy choices that necessarily attend to an extension of the discovery rule to third parties, Plaintiffs retreat to a less ambitious argument that hinges upon their misinterpretation of *Hansen*.

Hansen does not, however, provide the relief they suggest. Indeed, the objectives sought to be advanced in *Hansen* would be frustrated by extending the discovery rule to third parties.

Hansen, like every discovery rule case that followed it, except *Merrill*, addressed the claim of a living person. Thus, *Hansen* only speaks of the discovery rule in the context of a living plaintiff. Nothing within *Hansen* or its progeny extends the discovery rule to third parties, such as personal representatives, wrongful death beneficiaries or special administrators. Because doing so would not only encourage stale and fraudulent claims, as Defendants described in their opening brief, but would also bar meritorious claims. *See, e.g.*, *Washington v. U.S.*, 769 F.2d 1436, 1438-39 (9th Cir. 1985) (refusing to impute knowledge of husband onto wife to find her personal injury claim untimely); *Advincula*, 678 N.E.2d at 1029-30 (refusing to impute knowledge of wife onto husband's survival claim to render claim untimely).

This point was made in *Merrill*. If discovery by the third parties (the parents) had triggered the date of accrual for the actual victim, then the survival claim would have been dismissed because the parents discovered the injury and its cause on or near the date of their son's accident, which was more than three years before the action was commenced. *Merrill*, 231 Wis. 2d at 548. Instead, as *Merrill* noted, the focus of the discovery rule is not on third parties, but rather on the tort victim. *Id.* at 554. Maintaining the focus on the victim preserves a victim's right of recovery, which was what *Hansen* sought to achieve.

To emphasize this point the *Merrill* court cited *Washington v. United States*, 769 F.2d 1436 (9th Cir. 1984), wherein the Ninth Circuit Court of Appeals concluded that the comatose victim's survival claim did not accrue when her husband discovered the cause of her injury. *Id.* at 1438. Instead, the focus remained on the comatose victim. *Id.* at 1439. Her action only accrued when she died because she was then no longer able to discover her claim. *Id.*

If the rule were otherwise and a survival action accrued when it was discovered by a third party, as advocated by Plaintiffs and as seemingly endorsed in this case by the court of appeals, then the comatose victim's claim in *Washington* would have been extinguished long before her death. Thus, even if she had regained consciousness several years after the injury, she would not have been entitled to pursue her claim because there is only one date that the

claim can accrue and that would be the date her husband had discovered her injury and its cause. Clearly, such a result contravenes the purpose of *Hansen* and is thus absurd.

Limiting discovery to the decedent, on the other hand, harmonizes all of the jurisprudence pertaining to death. For example, because the testimony of a beneficiary is irrelevant to a survival claim (*Lord*), the discovery rule is limited to the decedent alone (*Merrill*). If the decedent was aware of his cause of action prior to death, then his claim accrues upon that discovery (*Hansen*). In the event there was less than one year remaining on Wis. Stat. § 893.54(1)'s three-year statute of limitations when the decedent died, his personal representative would receive an extra year to file the survival claim (section 893.22). If, however, the decedent had not discovered his cause of action prior to death, the estate would receive the full three-year period from the date of death to file the survival claim, a period the legislature has deemed sufficient to protect the interests of tort victims,[1] because that was the date the decedent's beneficiaries are placed on notice to attend to the decedent's legal affairs (*Merrill*).

Likewise, if the decedent discovered his injury before death, the timeliness of the wrongful death

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[1] *Cf. Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67, ¶ 47, 318 Wis. 2d 628, 769 N.W.2d 481 (noting that it is not the Court's "place to question the policy decisions of the legislature").

action would be based on the decedent's discovery because of that action's derivative status (*Ruppa*). If there was no such discovery, then the beneficiaries would be entitled to file their claim within three years of the date of death, which was when the action accrued (*Terbush*).

Thus, when interpreted together, existing law satisfies the underlying purposes of *Hansen* to provide a tort victim with an opportunity for remedy and to protect defendants from stale or fraudulent claims. Therefore, nothing in *Hansen* overrules the above cases or otherwise expands the accrual date for a survival claim past the date of death.

IV. A Comparison With The Specific Discovery Rule Procedure For Medical Malpractice Claims Is Inapt.

Wis. Stat. § 893.55(1m)(b) provides the discovery rule for medical malpractice actions as follows: "One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that an action may not be commenced under this paragraph more than 5 years from the date of the act or omission." By itself, this section provides little insight regarding who the rule applies to. However, statutes are not interpreted in isolation. *Watton v. Hegarty*, 2008 WI 74, ¶ 14, 311 Wis. 2d 52, 751 N.W.2d 369. Rather, they are interpreted "as part of a whole, in relation to the language of surrounding or closely-related statutes." *Id.*

The contextual scope for section 893.55(1m)(b) is found in subsections (2) and (3), which expand the discovery rule in instances of fraudulent concealment and the presence of foreign objects in a victim's body. Wis. Stat. §§ 893.55(2)-(3). In both provisions, the legislature limited discovery to the "patient" alone. *Id.* Considering that subsection (1m)(b) does not contain this qualifying term, one can assume the legislature intended section 893.55(1m)(b) to apply to individuals other than the patient. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 39, 271 Wis. 2d 633, 681 N.W.2d 110 ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there").

This conclusion is reasonable in light of the provision's five-year statute of repose. If this provision did not encompass third parties, certain victims, such as minors over the age of 10 or patients with mental disabilities due to malpractice, may never get the opportunity to seek a remedy. Wis. Stat. § 893.56 (medical malpractice actions tolled for minors under the age of 10); *but see id.* § 893.16(3) ("A disability does not exist … unless it existed when the cause of action accrued."); *Carlson v. Pepin Cnty*, 167 Wis. 2d 345, 481 N.W.2d 498 (Ct. App. 1992) (rejecting the plaintiff's argument that his being in a coma and having permanent brain damage constituted a disability under section 893.16 because both were the result of an accident and did not precede it). At best, their claims would be tolled for a maximum of five years.

By comparison, ordinary tort victims do not face the same statutory limitations. First, they do not face a five-year statute of repose. Thus, so long as they exercise reasonable diligence, they are free to commence a claim anytime within three years of discovering their cause of action. *Washington*, 769 F.2d at 1439 (comatose wife's claims tolled for 14 years), *cited by*, *Merrill*, 231 Wis. 2d at 553 n.6. Second, minors have a more expansive tolling statute in non-medical malpractice cases. Wis. Stat. § 893.16(1) (minor's claims must be filed before they reach the age of 20). Finally, when deciding when a non-medical malpractice action accrues, a court will determine "when a reasonable person with the same degree of mental and physical handicap and under the same or similar circumstances" as the victim would have discovered the injury. *Merrill*, 231 Wis. 2d at 552-53. Thus, a non-medical malpractice victim's mental disabilities can toll a claim beyond five years. *Carlson*, 167 Wis. 2d at 354 (reversing dismissal of plaintiff's complaint filed seven years after accident and remanding to determine whether person with plaintiff's mental disability could have discovered his injury).

Therefore, because the statutory protections afforded medical malpractice plaintiffs are considerably less than those injured by ordinary negligence, it is entirely reasonable that the legislature expanded the discovery rule to third parties in medical malpractice actions. Conversely, because non-medical malpractice victims are already

adequately protected, there is no need to expand the discovery rule to third parties.

V. Extending The Discovery Rule To Third Parties Eviscerates Reasonable Diligence And The Statute Of Limitations.

Unable to rebut the many jurisprudential, logical and practical obstacles necessarily associated with applying the discovery rule to third parties, Plaintiffs simply ignore them. Plaintiffs' failure to acknowledge these obstacles is a *sub silentio* concession that no resolution exists.

For example, accepting Plaintiffs' position requires the Court to overturn *Merrill* and *Terbush*.[2] But "any departure from the doctrine of stare decisis demands special justification." *Schultz v. Natwick*, 2002 WI 125, ¶ 37, 257 Wis. 2d 19, 653 N.W.2d 266. Neither Plaintiffs nor the court of appeals offer any such justification. Because *Merrill* and *Terbush* both complement *Hansen*, there is no justification for overturning established precedent.

In addition, Plaintiffs offer no explanation of how *Hansen*'s reasonable diligence requirement can be applied to anyone other than the injured party. Were

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[2] Every member of the *Genrich* Court acknowledged *Terbush* for its holding that wrongful death actions accrue on the date of death. *Genrich* 318 Wis. 2d 628, ¶¶ 32, 50, 95. Thus, if it was not clear before, it certainly was clear after *Genrich* that *Terbush,* notwithstanding its age, remains good law.

that the rule, then the defendant in *Merrill* should have been entitled to dismissal of the survival claim. Likewise, other similarly situated defendants could point to the discovery of the injury by "an heir, beneficiary or other party with a right to enforce"[3] the claim to establish a date of discovery and accrual without regard to the date that the injured person discovered or should have discovered it.

Finally, extending the discovery rule to third parties not only introduces needless legal and factual complexity into a case, but effectively eviscerates both the reasonable diligence standard and the tolling statute of Wis. Stat. § 893.16. Rather than protect minors, comatose victims or victims with mental disabilities, the discovery rule could be used to accelerate the accrual date based upon a showing that a third party (and not the actual victim) should have discovered the injury.

Obviously, neither *Hansen* nor the legislature intended these protections to be circumvented by the discovery rule. But this is exactly what must and will happen if Plaintiffs' position is accepted and applied to all parties. Therefore, the Court must decline Plaintiffs' invitation to reject or otherwise modify *Merrill* and *Terbush*.

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[3] (Resp. Br. at 22-23, 26.)

CONCLUSION

Defendants respectfully submit that this Court should:

1. Affirm *Terbush* that a wrongful death claim accrues on the tort victim's date of death;
2. Affirm *Merrill* that a survival action accrues no later than the deceased tort victim's date of death.

Therefore, the Court should reverse the court of appeals and reinstate the judgment of the circuit court dismissing Plaintiffs' claims.

Dated: December 10, 2014.

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CERTIFICATE OF LENGTH AND FORM

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §§ 809.63 and 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this reply brief is 2,998 words.

Dated December 10, 2014.

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CERTIFICATION OF ELECTRONICALLY FILED BRIEF

Pursuant to Wis. Stat. §§ 809.19(12)(f) and 809.63, I hereby certify that the content of the electronic copy of the brief filed herewith is identical to the content of the paper copy of the brief filed this day with the Clerk of the Wisconsin Supreme Court.

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