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STATE OF MONTANA

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

No. DA-08-0439

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JULIE CHRISKE,

Appellant,

-vs-

STATE OF MONTANA ex rel Department
of Corrections and Institutions,

Appellee.

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# APPELLEE'S BRIEF

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On Appeal From the Fifth Judicial District Court,
Jefferson County, Cause No. DV-2004-10288
Honorable Loren Tucker, District Judge, Presiding

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## STATEMENT OF THE ISSUE

Did the District Court properly grant the State summary judgment based on the expiration of the three-year statute of limitations for torts?

## STATEMENT OF THE CASE

Julie Chriske (Chriske) lived at the Mountain View School (Mountain View), a State juvenile facility in Helena, for less than a year in the early 1970s. After Chriske's discharge in July of 1973, State workers periodically visited Chriske for two additional years as part of an aftercare program.

Chriske filed a complaint against the State of Montana Department of Corrections and Institutions (State) on August 2, 2004, more than 29 years after her last visit from State aftercare workers. Chriske alleged that the aftercare workers long ago had allowed her to purchase cigarettes and occasionally had supplied her with cigarettes. Chriske claimed that she had learned for the first time on August 2, 2001, that she suffered from "various tobacco-related diseases." Chriske alleged that the State's policies and actions had caused her to become addicted to cigarettes and to develop her "various tobacco-related diseases."

The District Court granted partial Summary Judgment to the State on August 8, 2005. The court ruled that sovereign immunity barred any portions

of Chriske's claims arising before July 1, 1973. The court's order barred consideration of the State's actions during the time Chriske was a resident at Mountain View. Chriske has not appealed the 2005 Summary Judgment Order. The only allegations that then remained to be adjudicated involved the alleged actions of the State aftercare workers' during the roughly two-year period between July 1, 1973 and July 9, 1975.

The State then moved for summary judgment on the remainder of Chriske's claims, arguing that the three-year tort statute of limitations barred Chriske's claims. The District Court granted Summary Judgment to the State on August 12, 2008. Chriske appealed in November of 2008.

This Court entered an order in January of 2009 recognizing that Chriske had filed for bankruptcy and that this appeal was stayed "pending further order or action by the bankruptcy court." Chriske filed her opening brief on March 29, 2010. Chriske has not filed official documents with this Court showing a further order or action by the bankruptcy court.

## STATEMENT OF THE FACTS

Chriske received periodic visits from State workers during a two-year period of State aftercare after her release from Mountain View. The aftercare period lasted from July 1, 1973 to July 9, 1975. *District Court Summary*

*Judgment Order (Order)* at 1-2. Chriske claims that the State aftercare workers allowed her to purchase cigarettes and occasionally supplied her with cigarettes. *Chriske's Brief* at 2. Chriske alleges that the actions of the aftercare workers some thirty-five years ago caused her to develop "various tobacco-related diseases." *Complaint*, ¶ 5.

The State disputes Chriske's claim that the State aftercare workers allowed Chriske to purchase cigarettes and supplied her with cigarettes, although the District Court's Order recites that this fact is "unrefuted." *Order* at 2. The allegation was undisputed at the summary judgment phase only because the actions of the aftercare workers were not relevant to the issue of whether Chriske's claim was barred by the statute of limitations. The actions of the State aftercare workers also are irrelevant for the purposes of this appeal. The issue of whether Chriske received or was allowed cigarettes by the aftercare workers would be vigorously contested should this case ever go to trial.

Chriske testified that she knew as early as the 1980s that smoking can cause lung disease. *Julie Chriske Depo*. 38:5-7 (June 25, 2007)(State's Appendix - Section II). Chriske continued to smoke one-half to four packs of cigarettes a day throughout the 1990s. *Order* at 2. Chriske worked as an

addiction counselor beginning in 1990 and continuing throughout the 1990s. *Chriske Depo* 45:5-7; *Memo in Support of Mot. For S.J.., Ex. C* (Yost letter).

Chriske continued to smoke and suffered from "various tobacco-related diseases" in the decades after she left State aftercare. Chriske's lung problems included a "smokers' cough" in the 1970s, "chronic cough" and "wheezing" throughout the 1990s, asthma during the 1990s, and a diagnosis of "small airway obstruction" beginning in 1991. *Chriske Depo.*106:23; *Order* at 2-3, 7.

Chriske received objective evidence of her tobacco-related lung disease in 1991, thirteen years before she filed her complaint, when she presented at the St. Peters emergency room. *Order* at 2; *Memo in Support of Mot. for S.J.., Ex. D* (000323) (The State's *Memo in Support of Mot. for S.J.* and attached exhibits are included separately as Appendix - Section I for ease of reference). The St. Peter's doctors ordered lung function tests, which revealed that Chriske's lung functions were 72% of the expected result. Chriske's doctors diagnosed her with "small airway disease." *Memo in Support of Mot. for S.J.., Ex. D* (000322) and Ex. B (*Rudin Affidavit*, ¶ 4).

The St. Peter's physicians doctors recommended, in 1991, that Chriske stop smoking and enroll in a smoking cessation program that included

"nicotine dependency testing." The nicotine dependency testing included a Respiratory Care Assessment that revealed that Chriske suffered from shortness of breath, that Chriske had adverse lab results including low blood oxygen saturation, and that Chriske "wants to stop smoking. *Memo in Support of Mot. For S.J.., Ex. D* (000288 and 000326).

Chriske answered a questionnaire as part of that same smoking cessation program in 1991. Chriske indicated that she "continued smoking despite knowledge of having persistent or recurrent physical problems that [were] caused or exacerbated by the use of the substance." *Id.* at 000330. Progress notes from Chriske's admission indicated that she had "a great desire to stop smoking." *Id.* at 000324. At the time, Chriske smoked three to four packs of cigarettes daily. *Id.* at 000289.

Chriske did not stop smoking, and her lung symptoms and her overall health continued to decline throughout the 1990s. Chriske's breathing became more labored. Her roommate, Sanna Yost (Yost), noticed a distinct wheeze in Chriske's breathing. Chriske's energy levels declined. *Memo in Support of Mot. For S.J.., Ex. C* (Yost letter).

Chriske's lung functions began to affect her sleep. By the late 1990s, Chriske had trouble making early morning appointments because she couldn't

get sufficient rest at night. Walking or playing golf became too strenuous for Chriske's lungs. Climbing a flight of stairs became a challenge. Chriske's reduced lung functions forced her to stop cross-country skiing by the late 1990s. *Memo in Support of Mot. For S.J.., Ex. C* (Yost letter).

Chriske and Yost discussed Chriske's wheezing during the 1990s. They both were concerned during this period that smoking might be the cause of some of Chriske's health problems. They discussed the idea that Chriske should quit smoking. *Sanna Yost Depo.* 30-31 (State's Appendix - Section III).

Dr. James Burkholder attended to Chriske beginning in October of 1993. *Burkholder Depo.* 5:9-13 and 23:12-15 (*Memo in Support of Mot. For S.J.., Ex. D*). Dr. Burkholder observed lung symptoms consistent with Chriske's 1991 diagnosis of small airway obstruction, including chronic coughing, asthma, and wheezing in Chriske's lungs. *Id.* at 10:15-14:2. Chriske regularly discussed her lung problems with Burkholder throughout the 1990s. Dr. Burkholder prescribed Chriske various smoking cessation medications and several medications intended to improve Chriske's lung functions and to help with Chriske's chronic coughing and wheezing. *Id.* at 9-11.

Nurse Practitioner Beth Sirr examined Chriske from November 1998 to July 2001. *Order* at 7; *Beth Sirr Depo.* 42:22–43:6 (State's Appendix - Section

IV). Sirr performed an examination of Chriske's lungs that revealed wheezing and reactive airway disease. *Sirr Depo.* 21:13-22:10. Sirr measured Chriske's lung volumes and determined that Chriske's peak flows were only 66% of expected. *Sirr Depo.* 25:2-8. Chriske admitted to Sirr that her coughing increased with smoking. *Id.* at 21:12–22:21. Sirr prescribed an inhaler intended to help control airway obstruction and to decrease damage from COPD. *Id.* at 24:8-15.

On August 2, 2001, Chriske visited internist Dr. Brandt. Chriske complained of fatigue. Dr. Brandt suspected that Chriske's fatigue was caused by a more advanced form of Chriske's restrictive airway disease known as Chronic Obstructive Pulmonary Disease (COPD). *Chriske Brief* - Ex. 2. Chriske claims that the three-year statute of limitations did not begin until August 2, 2001, when she received the diagnosis of the most recent stage of her progressive smoking-related lung disease – COPD.

The undisputed facts in this case are that COPD is the progression of Chriske's small airway disease, diagnosed in 1991. *See Order* at 5; *Rudin Affidavit*, ¶¶ 2-3. Chriske's COPD is not separate or distinct from the other lung problems that she suffered from for years before her COPD diagnosis. *Id*. COPD is a continuation of the same underlying smoking-caused progressive

lung disease – small airway obstruction – that doctors diagnosed Chriske with in 1991. *Id*. The diagnostic terms have changed to reflect the continued worsening of Chriske's progressive lung disease, but the underlying disease is the same. *Id*.

Chriske filed her complaint against the State on August 2, 2004, claiming that the State's actions twenty-nine years earlier had caused her to suffer from "various tobacco-related diseases." *Complaint*, ¶ 5. Chriske argues that, despite her long history of smoking-related symptoms and illnesses, the statute of limitations for her tobacco-related disease tort claims against the State did not begin to run until she received a formal diagnosis of the most recent stage of her smoking-related disease –COPD –on August 2, 2001. *Complaint*; *Chriske Brief* at 3, 12-13.

**STANDARD OF REVIEW**

This Court conducts a de novo review of a district court's decision to grant summary judgment, using the same criteria applied by the district court under M. R. Civ. P. 56. *Prosser v. Kennedy Enterprises, Inc.*, 2008 MT 87, ¶ 10, 342 Mont. 209, 179 P.3d 1178. Summary judgment is appropriate when "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. *Prosser*, ¶ 10. This Court reviews conclusions of law for correctness. *Peterson v. Eichhorn*, 2008 MT 250, ¶ 12, 344 Mont. 540, 189 P.3d 615.

The party moving for summary judgment must establish the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Peterson*, ¶ 12. Once the moving party has met its burden, the party opposing summary judgment must present substantial evidence essential to one or more elements of its case to raise a genuine issue of material fact. *Peterson*, ¶ 12. The non-moving party must set forth specific facts and cannot simply rely upon their pleadings, nor upon mere denial, speculation, or conclusory statements. *Peterson*, ¶ 12; *Thomas v. Hale*, 246 Mont. 64, 67, 802 P.2d 1255, 1257 (1990).

## SUMMARY OF THE ARGUMENT

The period of limitations on Chriske's claim began when she discovered the facts constituting her claim or, in the exercise of due diligence, should have discovered those facts. The question of whether a claimant should have discovered the facts constituting their claim is determined by whether the person knew of those facts, and if not, whether a reasonable person in that circumstance would have appreciated the cause of their damages. A formal

medical diagnosis is not necessary to begin the statute of limitations. Montana law clearly states that this issue can be determined as a matter of law.

The evidence in this case demonstrates that Chriske should have discovered, and did discover, that she suffered from tobacco-related lung disease long before August 2, 2001. This evidence comes from Chriske's medical records, her medical providers' testimony, expert affidavits, Chriske's testimony, and her roommate Yost's testimony. The evidence in fact shows that Chriske subjectively was aware that she suffered from tobacco-related diseases well before August 2, 2001. Regardless of Chriske's subjective knowledge, a reasonable person in her circumstances would have appreciated that their lung problems were caused by their smoking, long before 2001.

The undisputed evidence in this case is that COPD is not separate or distinct from small airway obstruction and disease. Small airway obstruction, chronic asthma, and COPD are different terms for the same underlying lung disease process. COPD is only the latest stage in the progression of Chriske's lung disease, which had already resulted in a diagnosis of small airway obstruction by 1991.

Chriske provides no substantial evidence sufficient to raise an issue of material fact on the question of when she reasonably should have discovered

that she suffered from smoking-related disease. In an attempt to raise an issue of material fact, Chriske's brief inaccurately minimizes her smoking-related symptoms prior to August 2, 2001. Additionally, Chriske's argument hinges on incorrect interpretations of Montana case law.

Chriske also raises a second somewhat confusing issue on appeal, although only in two cryptic paragraphs. *See Chriske Brief* at 4, 13. Chriske provides no substantive argument in support of this "close-timing" issue. The State can find no evidence that the District Court based its decision on any "close-timing" issue as suggested by Chriske's second issue.

This Court should affirm the District Court's order granting summary judgment to the State.

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE STATE BASED ON THE EXPIRATION OF THE THREE-YEAR STATUTE OF LIMITATIONS FOR TORTS.

The District Court correctly applied well-established Montana law to the undisputed facts when it granted the State's summary judgment motion. Chriske filed her complaint on August 2, 2004, and no material fact was presented disputing the State's evidence that Chriske knew or should have known that she suffered from tobacco-caused lung disease long before August

2, 2001. The evidence presented came from a wide range of sources–including Chriske's medical records, her medical providers' testimony, an expert affidavit, testimony from Chriske's roommate, and Chriske herself.

**A. Applicable Law**

A party must commence an action for personal injury within three years of the time that the claim or cause of action accrues. Section 27-2-204, MCA. Generally, lack of knowledge by the claimant of a cause of action or its accrual does not postpone the beginning of the period of limitations. Section 27-2-102(2), MCA. When the facts constituting a claim or cause of action for personal injury are by their nature concealed or self-concealing, however, the "discovery rule" applies. In these "latent" injury cases, the period of limitations does not commence until the injured party discovers the facts constituting the claim or, with due diligence, should have discovered those facts. Section 27-2-102(3), MCA; *Kaeding v. W.R. Grace & Co.*, 1998 MT 160, ¶ 17, 289 Mont. 343, 961 P.2d 1256; *Gomez v. State*, 1999 MT 67, ¶ 10, 293 Mont. 531, 975 P.2d 1258.

The claimant's subjective testimony about her actual knowledge is not determinative. *Kaeding*, ¶ 26. A formal medical diagnosis is not necessary for the period of limitations to begin in latent disease cases. *Kaeding*, ¶ 22.

The statute begins to run when the claimant discovered, or should have discovered, the facts constituting their cause of action, even without a formal medical diagnosis. *Kaeding*, ¶¶ 17, 22.

**B. Applicable Law as Applied to the Facts of Chriske's Claim**

Chriske argues that her statute of limitations did not begin to run until she received a formal medical diagnosis of the most recent stage of her restrictive airway lung disease– COPD. This Court, however, has squarely rejected Chriske's "diagnosis" premise, as the District Court correctly noted. *Order* at 9; *Kaeding* at ¶¶ 21-23. Chriske's claim also ignores the undisputed facts establishing the progressive relationship between Chriske's COPD diagnosis and the lung conditions and symptoms that she suffered from for years before the 2001 COPD diagnosis.

As the District Court noted, COPD is not a different disease from small airway obstruction, asthma, and chronic asthmatic wheezing, but a continuance of them. *Order* at 5; *Rudin Affidavit*, ¶¶ 2-3. This fact was not disputed. Despite the different diagnostic terms, "chronic wheezing," "small airway obstruction," and "COPD" are "not terms which describe a different disease with a different cause, but rather terms which identify the progression of the same medical condition – 'small airway obstruction and disease.'" *Id.* Whether

she knew the precise medical terms for the progression of small airway disease or not, Chriske admitted in her deposition that lung damage was an ongoing process. *Chriske Depo.* 18:9-20.

Chriske received a diagnosis of "small airway obstruction" in 1991, almost thirteen years before she filed her complaint in this case. *Memo in Support of Mot. for S.J.., Ex. D* (000323). Her lung conditions worsened throughout the 1990s. The evidence overwhelmingly demonstrates that Chriske had sufficient notice of her tobacco-related diseases and their link to her smoking well before August 2, 2001. Chriske raised no material fact opposing the evidence that she discovered or, in the exercise of due diligence should have discovered, that she suffered from smoking-caused lung disease before August 2, 2001. *Kaeding*, ¶ 17.

**C. Medical Evidence – 1991 Small Airway Obstruction Diagnosis**

Although a formal diagnosis is not necessary to begin the running of the statute, by 1991 Chriske's smoking had damaged her lungs to the point that doctors formally diagnosed her with small airway obstruction. Chriske presented at St. Peter's emergency room on October 31, 1991, complaining of blurred vision and facial numbness. *Memo in Support of Mot. for S.J.., Ex. D* (000283). Doctors suspected that Chriske had suffered a transient ischemic

attack (TIA). *Id.* During her emergency room examination, her medical providers noted unusual lung sounds: "a slight and intermittent high pitched expiratory wheeze was present in the lung bases bilaterally." *Id.*

Chriske was admitted to the hospital to determine the cause of her TIA and to be treated in a smoking cessation program. Emergency Room doctor Kozisek signed a "Nicotine Dependency Program Protocol Order." The order enrolled Chriske in the hospital's smoking cessation program, and ordered that Chriske undergo a battery of tests, including "spirometry" testing of her lung function, carbon monoxide testing, and nicotine dependency testing. *Id.* (000287 and 000288).

"Spirometry" is a widely recognized lung function test used to diagnose lung disorders. *Rudin Affidavit*, ¶ 4. Dr. Buswell, a local specialist, supervised Chriske's spirometry test on November 1, 1991. Chriske's lung functions were only 72% of the expected values, demonstrating that her airways had narrowed. Dr. Buswell diagnosed Chriske with "small airway obstruction, moderate." *Memo in Support of Mot. for S.J.., Ex. D* (000323 and 000322).

Chriske also received blood gas testing as part of the same 1991 evaluation. The blood gas testing revealed that Chriske had increased carbon monoxide levels and decreased oxygen levels in her blood. A respiratory

therapist advised Chriske of this test result, and noted that Chriske had "a great desire to stop smoking." *Memo in Support of Mot. for S.J.., Ex. D* (000288 and 000324).

Chriske's nicotine dependency testing during the same battery of tests included a "Respiratory Care Assessment" dated November 1, 1991. *Id.* (000326). The respiratory care assessment noted under "pulmonary indications" that Chriske suffered from shortness of breath, that she smoked 3-4 packs a day, and that she had adverse lab results. *Id.* The assessment also noted the following:

- That Chriske suffered from shortness of breath if she exerted herself.
- That Chriske "wants to stop smoking."
- That Chriske had blood oxygen saturation as low as 93%
- That the spirometry testing demonstrated lung "obstruction"

The respiratory therapist noted at the time of the assessment that it was unclear whether Chriske would go home that afternoon, but that if Chriske stayed she should:

> follow and continue an in-house nicotine dependency program – if patient does go home–she has been given ample information about the program, etc. Also recommended smoker cessation program and future St. Peter's OP [out-patient] program – patient

should continue with Nicorette and abstain from smoking

*Id.*

Chriske also filled out a "Fagerstrom Tobacco Dependence Questionnaire" as part of the respiratory care assessment. *Id.* (000329 and 000330). In the questionnaire, Chriske stated that she "continued smoking despite knowledge of having a persistent or recurrent physical problem that is caused or exacerbated by the use of the substance." *Id.* (000330). Chriske's answer to the questionnaire was an overt acknowledgment in November of 1991 that Chriske knew that her cigarette smoking was already causing her to suffer from "recurrent physical problems." The evidence from Chriske's 1991 hospital visit alone establishes that Chriske had notice that she suffered from smoking-caused lung disease at that time, but there is a great deal more.

**D. Medical Evidence – Dr. James Burkholder, M.D.**

Chriske continued to receive medical information about the effect of smoking on her lungs throughout the 1990s, consistent with her 1991 diagnosis of small airway obstruction. This evidence provided Chriske with additional notice that she was suffering from smoking-caused lung disease.

Chriske suffered from chronic coughing and wheezing throughout the 1990s. Chriske became a patient of Helena family physician Dr. James

Burkholder in 1993. *Burkholder Depo.* 5:9-13. Dr. Burkholder testified in his deposition that Chriske, like all smokers under his care, was told "to quit smoking every time [she] came in." *Id.* 9:6. Dr. Burkholder's warnings to Chriske included warnings about her increased risk of lung disease from smoking. *Id.* 8-9.

In 1994, Dr. Burkholder noted wheezes in all the fields of Chriske's lungs. *Id.* 9:17-20. He prescribed the bronchodilator Proventil to try to "open" Chriske's lungs and reduce her wheezing. *Memo in Support of Mot. for S.J.., Ex. D* (000545); *Depo. Burkholder* 9:12. Less than a year later, in 1995, Dr. Burkholder observed that Chriske had a chronic cough that was not improved by her inhaler. He noted that Chriske had "a dry cough constantly" and that she continued to smoke a half a pack daily. *Memo in Support of Mot. for S.J.., Ex. D* (000539); *Burkholder Depo.* 9-10. Dr. Burkholder changed Chriske's inhaler medication to Atrovent, a lung medication that would only benefit a patient who was a smoker. *Burkholder Depo.* 11:16-19.

In December of 1995, Chriske made an appointment with Dr. Burkholder "to talk about her asthma, her smoking, and weight gain." *Memo in Support of Mot. for S.J.., Ex. D* (000537). Dr. Burkholder testified that he prescribed an additional steroid-based inhaler and the smoking cessation aid Habitrol. Dr.

Burkholder further testified that he counseled Chriske that there was a positive relationship between her lung problems and her smoking habit. *Burkholder Depo.* 13:4–14:2.

Chriske continued to smoke. She called Burkholder in 1997 to ask about drugs that would help her quit smoking. Dr. Burkholder prescribed a number of smoking drugs during that period, including Wellbutrin and Clonidine. Dr. Burkholder also recommended that Chriske attend classes to quit smoking. *Burkholder Depo.* 16-17.

In 1998, Dr. Burkholder noted during a visit that Chriske had a dry cough. He also observed wheezing in Chriske's left lung. Dr. Burkholder again advised Chriske that she should quit smoking. Dr. Burkholder testified that he "absolutely" would have advised Chriske about the relationship between her lung disease and tobacco by that point in 1998. *Burkholder Depo.* 19-20. Chriske's interactions with Dr. Burkholder from 1991 to 1998 provided her with sufficient notice of the facts constituting her smoking-related lung disease.

**E. Medical Evidence - Beth Sirr, R.N.**

Nurse Practitioner Beth Sirr examined Chriske from November 1998 to July 2001. Sirr provided Chriske with additional notice that her smoking was correlated with her continuing lung problems. *Order* at 7. In August of 2000,

Sirr performed an examination of Chriske's lungs that revealed wheezing and reactive airway disease, also known as asthma. Chriske admitted to Sirr that her coughing increased when she smoked. *Id.*; *Sirr Depo.* 21:12-22:31.

Sirr measured Chriske's peak lung airflow in 2000 to determine her lung volumes. Chriske's peak flows were only 66% of that which was expected but improved to 91% of expected when Chriske used an inhaler. *Sirr Depo.* 22:3-10 and 25:2-8. Sirr spoke with Chriske about the test results and interpreted the results for Chriske. *Id.* 24:24–25:2. Sirr advised Chriske to quit smoking and prescribed nicotine gum. *Id.* 25:21-25.

Sirr also prescribed an inhaler that contained two medications. The medications helped control airway restriction and helped decrease the damage from COPD. *Id.* 24:8-15. Sirr testified that she would advise patients like Chriske about why the patient would be using the combination of the inhaler with other non-inhaler medications. *Id.* 24:2-7. Sirr further testified that she would have discussed with Chriske the fact that there is an increased risk of lung disease associated with smoking. *Id.* 42:22 –43:6.

Chriske's medical records and her medical providers' testimony clearly establish that Chriske knew or should have known that she suffered from smoking-related illnesses and symptoms for many years prior to the key August

1, 2001 date. The medical records and testimony indicate that Chriske's doctors linked her lung problems to her smoking habit. The records and testimony also establish that Chriske was informed of the link between the illnesses and her smoking.

This evidence alone was sufficient for the District Court to grant summary judgment to the State based on the statute of limitations. The testimony of Chriske and her long-term roommate Sanna Yost, however, provide even more evidence that Chriske knew or should have known of the facts constituting her cause of action long before August 1, 2001.

**F. Sanna Yost's Testimony and Letter**

Sanna Yost and Julie Chriske began living together as a household in 1982. Yost considers herself a parent to Chriske's children, and Yost and Chriske consider themselves to be "just like a family." *Yost. Depo.* 8-9. Yost prepared a letter on Chriske's behalf that was intended as a chronology of Chriske's smoking-related health problems from Yost's point of view. Yost's letter is Exhibit C in the State's *Memo in Support of Mot. for S.J.* Yost knew when she created the letter that Chriske would likely use the letter as part of her lawsuit. *Yost Depo.* 9-10.

Yost's letter states that Yost began to notice "a distinct wheeze" in

Chriske's breathing in the early 1990s. The wheezing gradually became worse. Chriske's physical abilities were affected, and by the mid-1990s her breathing problems began to affect her ability to sleep. She suffered from many prolonged colds. *Memo in Support of Mot. for S.J.* Ex. C (Yost letter).

Yost's letter states that by the "late 1990s," Chriske had trouble with early morning appointments because she was unable to get sufficient rest at night. Walking or playing golf became too strenuous for her lungs. Chriske's lungs were compromised to the point that walking up a flight of stairs became a challenge. Chriske no longer could cross-country ski due to her breathing problems. *Id.*

Yost and Chriske discussed Chriske's wheezing during the 1990s. *Yost Depo.* 30:12-13. They were both concerned that smoking could be causing Chriske's health problems. They talked about Chriske quitting smoking. *Id*. 31:1-12.

Yost testified that there is "no question" in her mind that Chriske has known about the potential adverse effects of smoking, including lung disease, for many years:

> Q. Now there has been warnings of some sort or another on cigarette packs for, you know, 30 years. You've been aware that there is health effects from smoking

yourself, correct?

A. Yes.

Q. Is there any question in your mind that Julie Chriske has been aware that there can be adverse health effects from smoking since the last 30 years?

A. No, I'm sure she knows that too.

Q. You've discussed it with her?

A. Yeah.

Q. And that's included things like lung disease?

A. Uh-huh.

Q. Is that yes?

A. Yes.

*Yost Depo.* 42:4-20.

Yost's testimony further reinforces the fact that Chriske knew or should have known the facts constituting her cause of action – tobacco-related lung disease – long before August 2, 2001.

**G. Julie Chriske's Deposition Testimony**

Chriske's deposition testimony demonstrates that she was aware, or should have been aware, that she was experiencing smoking-related lung disease many years ago, triggering the running of her statute of limitations.

This testimony, in addition to her admissions in her 1991 hospital visit that she knew smoking was causing her "persistent or recurring physical problems," leaves no doubt that even if Chriske's own subjective knowledge was the standard, her statute of limitations expired by the 1990s at the latest.

Chriske deposition testimony confirmed many of Yost's observations regarding the drastic impact that Chriske's lung problems had on her life. Chriske testified in deposition that:

- She had a noticeable wheeze by the mid-1990s and "I'm sure I was wheezing long before that. I mean, if you smoke, you wheeze. I am sure I was wheezing as a kid when I started smoking." *Chriske Depo.* 15:23– 16:7

- By the late 1990s she had trouble keeping early morning appointments due to insufficient rest caused by her lung problems, and that she had become "more labored in my breathing." *Id.* 17:8-23.

Chriske's deposition testimony also established that she knew, or should have known, about the negative effects of smoking on her health well before August 2, 2001. Chriske testified that:

- She had noticed the health warnings on cigarettes, as they were the topic of conversation since they first came out. *Id.* 40:3-16.

- She has known about the bad health effects from smoking since the 1980s, and she knew since the 1980s that smoking could cause cancer. *Id.* 36:18–37:12-16.

- She knew in the 1980s that people could get bad lung diseases from smoking. *Id.* 38:5-7.

- She knew that lung damage was an ongoing process. *Id.* 18:9-20.

- She became concerned about the health effects of smoking in the early 1990s – "I mean, how could anybody not be." *Id.* 36:11-17.

- She became an addiction counselor herself in the early 1990s. *Id.* 18:9-20.

**H. The State has Met its Burden**

Chriske and Yost's testimony, along with Chriske's medical records and the testimony of her doctors, establish that the State met its initial burden to prove that no genuine issue of material fact exists. The evidence showed that the three-year statute of limitations on Chriske's claim began to run well before August 2, 2001, because Chriske discovered, or should have discovered, that there was a connection between her smoking and her "tobacco-related diseases." *Kaeding*, ¶ 17; *Complaint* at 1-2.

**I. Chriske Failed to Raise a Genuine Issue of Material Fact**

Despite her long history of tobacco-caused lung problems, Chriske alleges that she first subjectively learned that she suffered from various tobacco-related diseases on August 2, 2001 when received her most recent

smoking-disease diagnosis of COPD. *Complaint* at 1-2; *Chriske Brief*. Chriske's argument that her COPD diagnosis date creates an issue of material fact suffers from fatal flaws: 1) A formal medical diagnosis is not necessary as a matter of law to begin running the statute; 2) the unrefuted evidence in this case is that Chriske's COPD constitutes only a more advanced stage of the same progressive lung disease that Chriske suffered from for many years before 2001.

**1. Chriske Incorrectly Interprets *Kaeding***

Chriske's argument regarding what constitutes notice of the facts beginning the statute of limitations is based upon an incorrect interpretation of the holding and analysis in *Kaeding*. The *Kaeding* decision does not stand for the proposition that the statute of limitations is tolled in a latent disease case until there is a formal medical diagnosis linking the harmful exposure to the disease. In fact, as the District Court correctly noted, the *Kaeding* Court squarely rejected Chriske's premise. *Kaeding*, ¶¶ 21-23; *Order* at 9.

*Kaeding* involved a diagnosis of asbestosis. Kaeding worked at a W.R. Grace vermiculite mine from 1962-1964. *Kaeding*, ¶ 5. Kaeding suffered from many lung- and heart-related ailments over the next thirty years. He visited many doctors over those years, and heard various medical opinions and diagnoses. *Kaeding*, ¶ 6. Kaeding and his wife eventually filed a complaint

against W.R. Grace in 1996. The district court granted W.R. Grace summary judgment based on the statute of limitations. *Kaeding*, ¶ 14.

Kaeding, like Chriske, argued on appeal that *Hando v. PPG Industries, Inc.*, 236 Mont. 493, 771 P.2d 956 (1989) stood for the proposition that the statute of limitations does not begin to run in a latent disease case until there is a medical diagnosis that links the harmful exposure to the disease. *Kaeding*, ¶ 21. The *Kaeding* Court disagreed, stating that "in *Hando*, this Court did not hold that a medical diagnosis must be rendered before the statute of limitations may run." *Kaeding*, ¶ 22.

The *Kaeding* Court examined Kaeding's medical history to determine when the statute of limitations began to run. *Kaeding*, ¶¶ 23-27. The Court highlighted several medical records, including a 1967 x-ray, 1983 breathing tests, and two 1992 records, all of which suggested asbestosis as a cause of Kaeding's medical problems. The Court stated that "while Kaeding may not have received a technical diagnosis of asbestosis, several doctors who examined Kaeding prior to 1994 were of the opinion that his medical problems were attributable, at least in part, to asbestosis. *Kaeding*, ¶ 23.

Chriske claims that the *Kaeding* Court did not consider the earlier medical evidence in its determination of when Kaeding should have discovered

that he suffered from asbestosis, apparently arguing that this Court should ignore Chriske's pre-COPD diagnosis medical evidence. *Chriske Brief* at 10-11. Chriske recounts a litany of older medical evidence that she claims the *Kaeding* Court did not consider. *Id*. Despite Chriske's claims to the contrary, the *Kaeding* Court clearly did consider that evidence in its determination of whether Kaeding should have discovered that he suffered from asbestosis before his formal diagnosis in 1996. *See Kaeding*, ¶ 23. The *Kaeding* Court did not ignore the earlier medical evidence, but merely stated that the statute of limitations had begun to run by 1992, <u>at the latest</u>:

> with the numerous references to asbestosis in his medical records, Kaeding's knowledge of his risk for asbestosis-related diseases from exposure to W.R. Grace, and the conclusions of Dr. Whitehouse rendered in 1992, Kaeding should have discovered that he suffered from asbestosis by September or October of 1992, at the latest.

*Kaeding*, ¶ 27.

Applying *Kaeding*, the evidence in this case demonstrates that Chriske had sufficient notice that she suffered from a tobacco-related disease to start the period of limitations well before August 2, 2001. Chriske's medical records from the 1990s contain numerous references to Chriske's progressive lung disease. Like Kaeding, Chriske had knowledge that her exposure to the

substance in question could cause her disease or disease-related medical problems. *Kaeding*, ¶¶ 24, 27. Even if a smoking-related diagnosis were needed, Chriske received one, small airway disease, in 1991.

*Kaeding's* rule, that the statute of limitations can begin to expire before a formal diagnosis of the latest stage of a progressive disease, is logical. Under Chriske's theory, each new diagnosis of the next advancing stage of the same underlying disease would begin a new statute of limitations period, despite all the earlier diagnoses or symptoms representing progressions of the same exposure-linked disease process. Chriske's theory essentially would postpone indefinitely the statutory period for progressive diseases and many other injuries. *See Blackburn v. Blue Mountain Women's Clinic*, 286 Mont. 60, 70, 951 P.2d 1, 7 (1997).

By their nature, progressive diseases have stages, often with different labels as they progress. This progression does not mean that the claimant receives a new statute of limitations every time she progresses to a worsening stage of the same underlying disease or injury. As the District Court recognized, the undisputed evidence in this case is that COPD, asthma, and small airway obstruction constitute progressions of the same underlying smoking-related disease process. *Order* at 5; *Rudin Affidavit*, ¶¶ 2-3. This is

not unfair surprise to Chriske, who acknowledged that "lung damage is an ongoing process." *Chriske Depo.* 18: 19-20.

Chriske's period of limitations began to run at least as of 1991, when she was diagnosed with small airway obstruction. The fact that she ten years later was diagnosed with a more advanced stage of the same underlying progressive disease did not toll the statute of limitations, any more than her period of limitations would be tolled if she is later diagnosed with an even more advanced stage of her underlying progressive lung disease . Under *Kaeding*, the evidence in this case demonstrates that there is no issue of material fact as to whether Chriske discovered or should have discovered that she suffered from smoking-related lung disease long before August 1, 2001. *Kaeding*, ¶¶ 17, 27.

**2. *Nelson v. Nelson* and *Hando v. PPG Industries, Inc.***

Chriske also cites to *Nelson v. Nelson*, 2002 MT 151, 310 Mont. 329, 50 P.3d 139, and *Hando*, 236 Mont. 493, 771 P.2d 956 in support of her position. Chriske states that in both of these cases, the Court determined that the statute did not begin to run until the causal relationship between the injuries and the exposure was confirmed by physicians. Chriske argues that these cases bolster her assertion that her statute did not begin to run until her formal diagnosis of COPD on August 2, 2001. *Chriske Brief* at 7-8. Chriske

apparently attempts to re-argue from these cases that her COPD diagnosis is the only way the causal connection between her lung disease and her smoking could be made.

Chriske's analysis of *Nelson* and *Hando* is faulty on several fronts. Chriske first ignores the explicit statement from this Court in *Kaeding*: "In *Hando*, this Court did not hold that a medical diagnosis must be rendered before the statute of limitations may run." *Kaeding*, ¶ 27. Chriske also ignores the fundamental and distinguishing factual differences between her case and *Nelson* and *Hando*.

Hando suspected that her medical ailments were connected to paint exposure on her job in 1981 and 1982. She saw numerous physicians between 1982 and 1984 to determine the cause of her emotional, mental, and physical problems. *Hando*, 236 Mont at 495-96, 771 P.2d at 958. Despite Hando's suspicions that the paint exposure had caused her problems, all of the physicians who examined her before 1984 "denied any causal connection between her continuing ailments and her paint exposure." *Hando*, 236 Mont at 496, 771 P.2d at 958.

Finally, in early 1984, a doctor stated his belief that the paint exposure had caused Hando's problems. *Hando*, 236 Mont at 496, 771 P.2d at 958. The

Court determined that the statute of limitations had been tolled until the doctor in 1984 contradicted the findings of the earlier doctors and, for the first time, linked her medical problems to her paint exposure. *Hando*, 236 Mont at 500-02, 771 P.2d at 961-62. The Court emphasized the fact that "no physician who examined Hando before 1984 attributed her continuing ailments to the . . . paint [exposure]." *Hando*, 236 Mont at 502, 771 P.2d at 962.

The facts in Chriske's case are easily distinguishable from those in *Hando.* The discovery rule states that the statute begins to run when the claimant discovers or should have discovered the facts constituting her cause of action. *Kaeding*, ¶ 17. Hando's physicians denied any causal link between her medical ailments and her paint exposure, despite Hando's suspicions to the contrary. *Hando*, 236 Mont at 496, 771 P.2d at 958. Chriske's physicians, on the other hand, confirmed Chriske's suspicions that her continuing ailments were linked to her exposure to tobacco time and again throughout the 1990s.

Chriske's reliance on *Nelson* is likewise misplaced. Nelson worked on a ranch from 1989 to 1994. She was exposed to numerous chemicals during that period, and was accidentally injected with a bovine vaccine in 1989. *Nelson*, ¶ 3. Nelson filed her complaint in 1998. *Nelson*, ¶ 4. The district court determined that Nelson's claim was barred by the three-year statute of

limitations. *Nelson*, ¶ 8.

From 1989 to 1998, when she filed her complaint, Nelson received extensive medical evaluations and treatments for numerous physical ailments that she attributed to her exposure to the chemicals and vaccine. *Nelson*, ¶ 3. Nelson's physicians, however, like Hando's, were "uncertain of the possible cause and effect relationship between her numerous physical ailments and her exposure to chemicals and the vaccine." One of Nelson's physicians specifically noted his uncertainty over the causal connection in a 1995 letter. *Nelson*, ¶ 5. Another of Nelson's physicians finally stated his belief in the causal connection on May 20, 1996.

The *Nelson* Court determined that the district court had erred in distinguishing Nelson's case from the holding in *Hando*. *Nelson*, ¶ 18. The Court emphasized that the plaintiffs in both cases lacked knowledge concerning the causal link between the ailments they suffered and the exposures each had experienced. *Nelson*, ¶ 18. Chriske's state of knowledge was far different – in fact, opposite, as Chriske's physicians for years affirmatively linked her continuing ailments to her exposure.

Under the facts of both *Hando* and *Nelson*, it was logical for the Court to determine that the claimants should not have discovered the causal link between

the their injuries and their exposure. Both of the claimants' physicians directly stated that they were uncertain of the causal connection. *Nelson*, ¶ 5; *Hando*, 236 Mont at 496, 771 P.2d at 958. Chriske's physicians, in contrast, corroborated her suspicions regarding the causal link between her smoking and her illnesses, rather than contradicting those suspicions.

Chriske also cites to *Nelson* for the proposition that when there is material factual dispute as to whether the statute of limitations bars the action, the issue needs to be resolved by a jury. *Chriske Brief* at 9-10. Chriske further cites to *Hill v. Squibb and Sons, ER*, 181 Mont. 199, 212, 592 P.2d 1383, 1390-91 (1979) and *McCormick v. Brevig*, 1999 MT 86, ¶¶ 102-03, 294 Mont. 144, 980 P.2d 603 for the same proposition. Chriske's argument fails to recognize that the basic summary judgment standard still applies in statute of limitations cases, as in all others. *Peterson*, ¶ 12. The claimant must produce evidence establishing a genuine issue of material fact in order to avoid summary judgment, as in any case. In each of the cases Chriske cites to, the Court simply recognized that a jury should decide the issue <u>if a question of material fact exists</u> as to when the claimant should have discovered the facts constituting their claim. *Nelson*, ¶ 26; *McCormick*, ¶¶ 102-03; *Hill*, 181 Mont. at 212, 592 P.2d at 1390-91.

### 3. Chriske Failed to Present Substantial Evidence Raising a Genuine Issue of Material Fact

To avoid summary judgment, the non-moving party must present substantial evidence essential to one or more elements of its case that raise a genuine issue of material fact. The party must present specific facts and cannot simply rely upon their pleadings, nor upon mere denial, speculation, or conclusory statements. *Peterson*, ¶ 12; *Thomas v. Hale*, 246 Mont at 67, 802 P.2d at 1257. Chriske has not presented substantial evidence raising a genuine issue of material fact.

Chriske attempts to create a genuine issue of material fact by citing to her own deposition testimony regarding her subjective appreciation of her lung disease's stages. Chriske's deposition testimony, however, merely states that even though she had experienced symptoms from progressive lung disease for years, she was "surprised" when she received the diagnosis of the most recent stage of her lung disease. *Chriske Brief* at 12. As the *Kaeding* Court noted, however, the claimant's actual knowledge is not determinative in latent diseases cases. *Kaeding*, ¶ 26. In latent disease cases, "the proper inquiry is when the claimant discovered, or in the exercise of due diligence, *should have discovered* the elements of the claim or cause of action." *Kaeding*, ¶ 26.

Chriske's subjective "surprise" at Dr. Bender's COPD diagnosis does not create a genuine issue of material fact. *Peterson*, ¶ 12; *Thomas v. Hale*, 246 Mont at 67, 802 P.2d at 1257.

Chriske also emphasizes Dr. Bender's comment in August of 2001 that Chriske's COPD was "probable recent onset." *Chriske Brief* at 5. Dr. Bender's note does not raise an issue of material fact regarding when Chriske knew or should have known of the relationship between her smoking and her lung disease. Chriske again ignores the undisputed evidence that COPD is merely the latest stage in Chriske's progressive lung disease. *Order* at 5; *Rudin Affidavit*, ¶¶ 2-3.

Whether the diagnostic criteria for Chriske's most recent progressive disease diagnosis, COPD, had existed for a long or short time by 2001 is not the issue. What matters is that Chriske should have known she was suffering from smoking-caused disease for years before August of 2001, regardless of diagnostic labels. Chriske herself acknowledged in her deposition that "lung damage is an ongoing process." *Chriske Depo.* 18:19. Chriske also stated in 1991 that smoking was causing her to suffer from recurrent physical problems. *Memo in Support of Mot. for S.J.., Ex. D* (000330). Dr. Bender's 2001 note at the most means that Chriske's latest stage of lung disease – COPD – had begun

recently. Dr. Bender's note does nothing to dispute the fact that Chriske was diagnosed with an earlier stage of the same progressive lung disease – small airway obstruction–almost ten years before Dr. Bender's COPD diagnosis. *Rudin Affidavit*, ¶¶ 2-3**.**

**4. Chriske Minimizes Her Pre-2001 Illnesses and Symptoms**

In an attempt to raise a material fact, Chriske drastically minimizes the extent of her pre-2001 smoking-related health problems. Chriske argues that "while Appellant may have had a cough, occasional chest colds, or pneumonia, she did not learn until August of 2001 that whatever she previously had to that point was not Chronic Obstructive Pulmonary Disease." *Chriske Brief at 11.* As demonstrated above, Chriske had far more than "a cough, occasional chest colds, or pneumonia." Doctors diagnosed her with smoking-caused small airway obstructive disease in 1991, and with other smoking-caused lung diseases throughout the 1990s. Chriske's progressive lung ailments had caused her to drastically alter her lifestyle by the mid-1990s.

**5. Chriske's Claim that Non-Smokers Also Can Suffer From Lung Disease is Irrelevant**

Chriske argues that:

> this Court can take judicial notice of the fact that some people can have asthma and never be a smoker. Some people can have

> bronchitis or small airway obstructions and never have been a smoker. Further, people can have a cough or asthma or bronchitis or small airway obstructions simply go away or heal and it is not a permanent condition or one which can be easily treated with medication. That is all very different from COPD.

*Chriske Brief* at 11.

Whether non-smokers suffer from coughs, asthma, bronchitis, and other lung disease has no relevance to the issue of whether Chriske should have discovered the facts constituting her cause of action. The issue in this case is when Chriske discovered or should have discovered the fact that she suffered from smoking-caused lung disease. The evidence pertinent to Chriske's claim is the only evidence that is relevant to this issue. The alleged propensity of non-smokers to experience transient lung symptoms has no bearing on whether Chriske knew or should have known that she suffered from smoking-caused lung damage.

**6. Chriske's Second Issue and Argument on Appeal**

Chriske raises a second issue on appeal: "The District Court erred in concluding that summary judgment was appropriate because Appellant filed her complaint more than three years after she acknowledges being made aware that she had been diagnosed with COPD." *Chriske's Brief* at 1-2. In her summary of the argument, Chriske claims that "The district court concluded that summary

judgment was appropriate because even if Appellant knew for the first time of her COPD on August 2, 2001, she was still late and after 3 years in filing her complaint, which was filed on August 2, 2004. However, August 1, 2004 was a Sunday." *Chriske's Brief* at 4.

The basis for Chriske's second issue is unclear. Chriske's Brief contains no substantive argument for her second issue. She does not cite to legal authority or the record. *Chriske's Brief* at 13. The State can find no evidence that the District Court based its summary judgment order on any technical argument, if that is what Chriske's brief implies, but rather on the undisputed evidence that Chriske discovered or should have discovered that she suffered from "tobacco-related diseases" long before August of 2001.

## CONCLUSION

The District Court's August 12, 2008, summary judgment order correctly determined that the three-year statute of limitations for personal injury barred Chriske's claims. This Court should affirm the District Court's order.

DATED this 28th day of April, 2010.

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**CERTIFICATE OF SERVICE**

I, Michael A. Kauffman one of the attorneys for the Defendants/Appellees, the State of Montana ex rel Department of Corrections and Institutions, hereby certify that I mailed a true and correct copy of the **APPELLEE'S BRIEF**, postage fully prepaid by U.S. Mail, on this 28th day of April, 2010, to the following:

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect X4 for Windows, is not more than 10,000 words, not averaging more than 280 words per page, excluding the Table of Contents, Table of Authorities, Certificate of Service, and this Certificate of Compliance.

DATED this 28th day of April, 2010.

_____
Michael A. Kauffman,
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