

DOCKET # X06-UWY-CV-14-6025333-S : SUPERIOR COURT
:
ROBIN SHERWOOD, ET AL : J.D. OF WATERBURY
:
v. : COMPLEX LITIGATION DOCKET
:
STAMFORD HEALTH SYSTEM, ET AL : OCTOBER 17, 2016

**MEMORANDUM OF LAW IN SUPPORT OF THIRD PARTY DEFENDANTS
JOHNSON & JOHNSON’S AND ETHICON, INC.’S
MOTION FOR SUMMARY JUDGMENT**

Preliminary Statement

Third-party defendants Johnson & Johnson and Ethicon, Inc. (collectively “Ethicon”) submit this memorandum of law in support of summary judgment to dismiss the third-party complaint of defendant Stamford Health System, Inc. d/b/a Stamford Hospital (the “Hospital”) against Ethicon (the “Third Party Complaint”).

Ethicon briefly highlights below the critical undisputed facts and legal principles which require dismissal of the Third Party Complaint, and also incorporates herein by reference that section of the Motion for Summary Judgment filed by the Hospital which requests dismissal of the plaintiffs’ claims against the Hospital under the Connecticut Product Liability Act (“CPLA”), C.G.S. § 52-577a(b), on the grounds that they are barred by the applicable three year statute of limitations.

The sole ground for the third-party claims against Ethicon is that in the event plaintiffs are found at trial to be injured as alleged in their Complaint against the Hospital, then Ethicon is liable to plaintiffs under the CPLA. *See* Third Party Complaint at ¶¶ 22-23. The Hospital alleges that “if anyone is responsible for plaintiff’s injuries, to the extent she is injured, it is the third party defendants.” *Id.* at ¶ 23. As argued in Point I of the Hospital’s memorandum of law in support of its motion (“Hospital Mem.”) and below, the CPLA claim against the Hospital is

time barred. Accordingly, the Hospital cannot maintain the third-party claims against Ethicon for indemnification and/or contribution and therefore, the third-party complaint should also be dismissed.

Pertinent Legal Standards

1. On a motion for summary judgment “[t]he courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.” *Ziolkovski v. Town of Waterford*, No. KNLCV125014374, 2015 WL 7709327, at *4 (Conn. Super. Ct. Oct. 20, 2015) (unreported decisions are attached as Exhibit A). “Summary judgment is appropriate on statute of limitation grounds when the ‘material facts concerning the statute of limitations [are] not in dispute’” *Id.* at *4.

2. The Connecticut Supreme Court recognizes the important public policy of statutes of limitations, including their “finality, repose and avoidance of stale claims and stale evidence. . . [T]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Flannery v. Singer Asset Finance Co., LLC*, 312 Conn. 286, 322-23 (2014).

3. The statute of limitations under the CPLA is three years from “when the injury . . . is first sustained or discovered or in the exercise of reasonable care should have been discovered” Conn. Gen. Stat. § 52-577a(a). “[A] cause of action accrues when a plaintiff suffers actionable harm.” *Champagne v. Raybestos-Manhattan*, 212 Conn. 509, 562 (1989). “Actionable harm occurs when the plaintiff discovers or should discover, through the exercise of reasonable care, that he or she has been injured and that the defendant’s conduct caused such injury.” *Id.*; *see also Peerless Ins. Co. v. Tucciarone*, 48 Conn. App. 160, 167-168 (1988)

(affirming third-party defendant manufacturer's motion for summary judgment dismissing property owners' cross-claims for indemnification because they were untimely under § 52-577(a), where the owners suffered "actionable harm" on the date when the cause of the fire was discovered).

4. As demonstrated below, applying these standards to the undisputed facts, plaintiffs' product liability claim against the Hospital is time barred and therefore, the Hospital's third-party claims against Ethicon should be dismissed in their entirety.

Pertinent Facts and Arguments

5. Robin Sherwood was implanted with an Ethicon Anterior Prolift device ("Prolift") as well as an AMS Monarc Sling at Stamford Hospital on April 12, 2006.¹ Transcript of deposition of Robin Sherwood, dated 9/20/16 ("Tr.") at 174 (attached as Exhibit B).

6. As early as December 2007, Ms. Sherwood testified that she was told by her physician, Dr. Hines, that "the mesh was causing me the problems:"

Q. Did you go see Dr. Hines again?

A. Yes.

Q. Why did you go back to see him?

A. To talk to him and tell him that I was pretty sure, not just as the person who received the mesh, that the mesh was causing me the problems. And that I needed to do something about it.

...

Q. And that was the last time you saw Dr. Hines; is that right?

A. Yes.

Q. That was in December of 2007 approximately?

A. That sounds right.

¹ Ms. Sherwood settled her case with AMS. Tr. at 174.

Tr. at 132:3-14; 134:8-13.

7. Ms. Sherwood further testified that she was aware of her specific alleged injuries from the Prolift -- including, without limitation, mesh contraction² -- by no later than January 2008:

A. The arms of the mesh on both sides had gotten -- I guess they shrunk. They became hard.

Q. And that's what you told Dr. Staskin when you met with him in January or so of 2008; is that right?

A. Yes.

Q. You told him that the mesh shrunk and become hard and felt out of place; is that right?

A. Yes.

...

A. It was not supposed to be like that.

Tr. at 137:18-138:2; 138:8. She later confirmed again that she knew in 2008 that her alleged injuries were caused by the Prolift:

Q. . . . So other than the symptoms you just described, the yeast infections, the spot on your side of your vagina and top that was textured and painful, the tightness, the shortened vagina, the bone pain, the pain in your groin, the pain down your right leg and the activities making it worse, were there any other symptoms that you were experiencing because of the [Prolift] in 2008?

A. I think I covered them.

Tr. at 163:19-164:3.

8. Moreover, Ms. Sherwood testified that she was told by her treating physicians in 2008 that the Prolift should be removed:

² Ms. Sherwood alleges that mesh contraction was one of the injuries, conditions and complications she suffered due to the Prolift. Complaint ¶ 46.

Q. . . . So you saw Dr. Porges. You told him about your symptoms; is that right?

A. Uh-huh.

Q. And that was also in 2008; correct?

A. Yes.

Q. . . . tell me about what you -- what Dr. Porges told you.

. . .

A. I believe he's the first doctor I recall saying, I think your mesh needs to come out.

Tr. at 142:18-22; 143:19-23.

. . .

Q. When you were talking with Dr. Staskin and he recommended that you have surgery to cut the arms of the mesh, was he talking about the Prolift?

A. I assume he was.

. . .

Q. And Dr. Porges, when he was -- he was telling you that you should have the mesh removed, was he also talking about the Prolift?

A. Yes.

Tr. at 145:5-9, 19-22.

9. Regarding her consults with all of the foregoing physicians in 2008, Ms. Sherwood testified that "all of the doctors were telling" her that she "needed to take the Prolift out." *Id.* at 156:8-16.

10. Ms. Sherwood later testified that in November 2010, Dr. Shlomo Raz also told her that the arms of the mesh had shrunk: "He knew I was there for mesh and he said this is what I see is wrong. Your vagina is too short. It's rigid. The arms of your mesh have shrunk." Tr. at

179: 23-180:1. Finally, Ms. Sherwood testified that Dr. Raz scheduled surgery to “complete[ly] remove the Ethicon Prolift in November 2010:”

Q. . . . [J]ust so I understand, this November 2010 you met with Dr. Raz, he diagnosed your problems, recommended some tests and you scheduled the surgery; is that right?

A. Yeah

Q. And the surgery we’re talking about is the complete removal of the Prolift, the Ethicon Prolift; is that right?

A. Yes.

Tr. at 181:12-21.

11. Given her clear admissions, Ms. Sherwood cannot dispute that she knew of her alleged injuries from the Prolift in 2008 and by no later than November 2010. Yet she waited until August 2014 to sue the Hospital. Her claim against the Hospital is time barred under the CPLA’s three -year statute of limitation. Therefore, the Hospital’s third party claims against Ethicon must also be dismissed.

12. No tolling doctrines apply because Ms. Sherwood’s deposition testimony demonstrates that there can be no genuine issue of material fact that she knew by 2008 that she had actionable harm. *See* Hospital Mem. at 11, n.3 and cases cited therein. And Plaintiffs’ argument that her claim did not accrue until she allegedly knew the Hospital was potentially liable is without basis in Connecticut law. *See id.* at 16-17.

13. Notably, in applying statute of limitation accrual standards similar to Connecticut’s § 52-577a(a), Judge Goodwin has granted summary judgment in the MDL pelvic mesh litigations, where, as here, plaintiffs knew or should have known they were injured by defendant’s conduct. *See Hospital* Mem. at 14-15 and cases cited therein, *e.g.*, *Brawley v. Boston Sci. Corp. (In re Boston Sci. Corp., Pelvic Repair Sys. Prod. Liab. Litig.)*, No. 2:13-cv-

23832, 2015 WL 1481837, at *4 (S.D.W. Va. Mar. 31, 2015) (granting summary judgment under Arkansas’s statute of limitations, which begins to run when the “plaintiff knew or, in the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered” -- there, upon plaintiff’s mesh removal surgery); *Smothers v. Boston Sci. Corp.* (*In re Boston Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig.*), No. 2:12-CV-4078, 2014 WL 3495977, at *3 (S.D.W. Va. Jul. 11, 2014) (granting summary judgment under Massachusetts’s statute of limitations, which begins to accrue “when a plaintiff discovers, or any earlier date when she should reasonably have discovered, that she has been harmed or may have been harmed by the defendant’s conduct,” and where plaintiff testified at her deposition “that she was aware that the [mesh] sling was causing her injuries as early as three weeks after implantation”).³

14. These opinions by Judge Goodwin dismissing pelvic mesh cases as time barred are consistent with other courts’ rulings on the issue. *See e.g., In re Mentor Corp.*, No. 4:13-cv-341, 2015 WL 6159477, at *3 (M.D. Ga. Oct. 20, 2015) (claims accrued under Minnesota law when physicians told plaintiff that her symptoms were caused by vaginal sling and that she would require further surgery); *In re Mentor Corp.*, Nos. 4:08-MD-2004, 4:13-cv-14, 2015 WL 5838483, at *3 (M.D. Ga. Oct. 5, 2015) (claims accrued under Alaska law when plaintiff knew that the sling had eroded, that “something was definitely wrong,” and that she would have to have the device removed); *In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.*, No. 4:12-cv-181, 2015 WL 4644661, at *2 (M.D. Ga. Aug. 4, 2015) (claims accrued under

³ *See also, e.g., Oliver v. BSC*, No. 2:13-cv-01736, 2015 WL 5838506 (S.D.W. Va. Oct. 5, 2015); *Brawley v. BSC*, No. 2:13-cv-23832, 2015 WL 1481837 (S.D.W. Va. Mar. 31, 2015); *Robinson v. BSC*, No. 2:12-cv-03700, 2015 WL 1466746 (S.D.W. Va. Mar. 30, 2015) (aff’d, *Robinson v. BSC*, 647 Fed. Appx. 184 (2016)); *Timothy v. BSC*, No. 2:12-cv-05950, 2015 WL 1405498 (S.D.W. Va. Mar. 26, 2015); *Fleming v. BSC*, No. 2:12-cv-5131, 2015 WL 1405493 (S.D.W. Va. Mar. 26, 2015); *Hay-Rewalt v. BSC*, No. 2:12-cv-9912, 2015 WL 1405504 (S.D.W. Va. Mar. 26, 2015) (aff’d *Hay-Rewalt v. BSC*, 623 Fed. Appx 92 (2015)); *Smothers v. BSC*, Nos. 2:12-cv-4078, 2:12-cv-8016, 2014 WL3495977 (S.D.W. Va. Jul. 11, 2014).

Texas law when physician told plaintiff that sling “was hurting her and needed to be removed as soon as possible”); *see also Gagnon v. G.D. Searle & Co.*, 899 F.2d 340, 343 (1st Cir. 1989) (claims accrued under New Hampshire law when plaintiff’s IUD was removed and plaintiff knew that injuries may have been caused by the device, even though she “did not know with certainty the cause of her injuries or the full extent thereof”).

CONCLUSION

For the foregoing reasons, and for the reasons described in Point I in the Hospital’s Memorandum of Law in Support of its Motion for Summary Judgment, Ethicon respectfully requests that the Court grant its Motion for Summary Judgment dismissing the Third Party Complaint in its entirety.

Respectfully submitted,

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CERTIFICATION OF SERVICE

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Exhibit A

2015 WL 1481837

Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia.

In re BOSTON SCIENTIFIC
CORP., PELVIC REPAIR SYSTEM
PRODUCTS LIABILITY LITIGATION.

This Document Relates to the Following Case:

Cindy Brawley & Travis Brawley

v.

Boston Scientific Corp.

MDL No. 2326.

|
No. 2:13-cv-23832.

|
Signed March 31, 2015.

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MEMORANDUM OPINION AND ORDER

(Defendant's Motion for Summary Judgment)

JOSEPH R. GOODWIN, District Judge.

*1 Pending before the court is the defendant's Motion for Summary Judgment Based on Statute of Limitations ("Motion") [Docket 30]. For the reasons set forth below, the Motion is **GRANTED**, and this case is **DISMISSED with prejudice**.

I. Background

This case resides in one of seven MDLs assigned to me by the Judicial Panel on Multidistrict Litigation concerning the use of transvaginal surgical mesh to treat pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI"). In the seven MDLs, there are more than 70,000 cases currently pending, approximately 15,000 of which are in the Boston Scientific Corp. ("BSC") MDL, MDL 2326. In an effort to efficiently and effectively manage this massive MDL, I decided to conduct pretrial discovery and motions practice on an individualized basis so that once a case is trial-ready (that is, after the court has ruled on all *Daubert* motions, summary judgment motions, and motions *in limine*, among other things), it can then be promptly transferred or remanded to the appropriate district for trial. To this end, I ordered the plaintiffs and defendant to each select 50 cases, which would then become part of a "wave" of cases to be prepared for trial and, if necessary, remanded. (See Pretrial Order # 65, *In re: Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-md-002326, entered Dec. 19, 2013, available at <http://www.wvsc.uscourts.gov/MDL/boston/orders.html>). This selection process was completed twice, creating two waves of 100 cases, Wave 1 and Wave 2. The Brawleys' case was selected as a Wave 2 case by the plaintiffs.

On March 2, 2005, Ms. Brawley was surgically implanted with the Advantage Transvaginal Mid-Urethral Sling System (the "Advantage"), a product manufactured by BSC to treat SUI. (See BSC's Mot. for Summ. J. & Mem. of Law in Supp. ("Mem. in Supp.") [Docket 30], at 3; Pl. Fact Sheet [Docket 30-1], at 5). She received her surgery at a hospital in Jonesboro, Arkansas. (Mem. in Supp. [Docket 30], at 3). Ms. Brawley claims that as a result of implantation of the Advantage, she has experienced multiple complications, including back pain, urinary problems, recurrent urinary tract infections, dyspareunia, mesh erosion, mesh extrusion, bleeding, vaginal discharge, cystocele, rectocele, and urinary incontinence. (*Id.*) She brings the following claims against BSC: strict liability for design defect, manufacturing defect, and failure to warn; negligence; breaches of express and implied warranties; and punitive damages. (*Id.* at 2 (citing to Pl.'s Short Form Compl.)). In the instant motion, BSC argues that each of Ms. Brawley's claims is barred by Arkansas's statute of limitations, and consequently, the court should grant summary judgment in favor of BSC and dismiss Ms. Brawley's case. BSC also argues that if Ms. Brawley's

claims are barred as untimely, Mr. Brawley's claim for loss of consortium is also time-barred and should be dismissed.

II. Legal Standards

A. Summary Judgment

*2 To obtain summary judgment, the moving party must show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In considering a motion for summary judgment, the court will not “weigh the evidence and determine the truth of the matter.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some “concrete evidence from which a reasonable juror could return a verdict in his [or her] favor.” *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere “scintilla of evidence” in support of his or her position. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or unsupported speculation, without more, are insufficient to preclude the granting of a summary judgment motion. *See Felty v. Graves–Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987); *Ross v. Comm'n Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985), *abrogated on other grounds*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

B. Choice of Law

Under 28 U.S.C. § 1407, this court has authority to rule on pretrial motions in MDL cases. The choice of law for these pretrial motions depends on whether they concern federal or state law:

When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located. When considering questions of state law, however, the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.

In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir.1996) (internal citations omitted). To determine the applicable state law for a dispositive motion based on the statute of limitations, I generally refer to the choice-of-law rules of the jurisdiction where the plaintiff first filed her claim. *See In re Air Disaster at Ramstein Air Base, Ger.*, 81 F.3d 570, 576 (5th Cir.1996) (“Where a transferee court presides over several diversity actions consolidated under the multidistrict rules, the choice of law rules of each jurisdiction in which the transferred actions were originally filed must be applied.”); *In re Air Crash Disaster Near Chi., Ill.*, 644 F.2d 594, 610 (7th Cir.1981); *In re Digitek Prods. Liab. Litig.*, MDL No. 2:08–md–01968, 2010 WL 2102330, at *7 (S.D.W.Va. May 25, 2010). However, if a plaintiff files her claim directly into the MDL in the Southern District of West Virginia, as the Brawleys did in this case, I consult the choice-of-law rules of the state in which the plaintiff was implanted with the product. *See Sanchez v. Boston Scientific Corp.*, 2:12–cv–05762, 2014 WL 202787, at *4 (S.D. W. Va. Jan 17, 2014) (“For cases that originate elsewhere and are directly filed into the MDL, I will follow the better-reasoned authority that applies the choice-of-law rules of the originating jurisdiction, which in our case is the state in which the plaintiff was implanted with the product.”). Ms. Brawley received the Advantage implantation surgery in Arkansas. (Pl. Fact Sheet [Docket 30–1], at 5). Thus, the choice-of-law principles of Arkansas guide this court's choice-of-law analysis.

*3 The parties agree, as does this court, that these principles compel application of Arkansas law to the plaintiffs' claims. Arkansas courts consider the *lex loci delicti* doctrine and Dr. Robert A. Leflar's¹ five choice-influencing factors in conjunction when analyzing choice of law problems. *Ganey v. Kawasaki Motors Corp., U.S.A.*, 366 Ark. 238, 234 S.W.3d 838, 847 (Ark.2006); *Schubert v. Target Stores, Inc.*, 360 Ark. 404, 201 S.W.3d 917, 922–

23 (Ark.2005). “Under the doctrine of *lex loci delicti*, the law of the place where the wrong took place is the proper choice of law.” *Ganey*, 234 S.W.3d at 846. The five choice-influencing factors, promulgated by Dr. Leflar, include (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law. *Id.* The Leflar factors, however, are used only to soften “a rigid formulaic application” of the *lex loci delicti* doctrine. See *Gomez v. ITT Educ. Servs., Inc.*, 348 Ark. 69, 71 S.W.3d 542, 546 (Ark.2002). In the case at bar, those factors are inapposite. The implantation surgery that allegedly resulted in Ms. Brawley's injuries took place in Arkansas, where Ms. Brawley is a resident. (Pl. Fact Sheet [Docket 30–1], at 2, 5). Moreover, both parties agree that Arkansas is the proper choice of law. Thus, I apply Arkansas's substantive law—including Arkansas's statute of limitations—to this case.

III. Discussion

I begin by reviewing the relevant undisputed facts. Ms. Brawley underwent implantation of the Advantage on March 2, 2005. (Pl. Fact Sheet [Docket 30–1], at 5). She began to experience symptoms of bodily injury around July 2005. (*Id.* at 7). At an appointment with Dr. Ladd Scriber, on July 1, 2005, Ms. Brawley was informed that the mesh had eroded into her bladder. (*Id.*) Ms. Brawley attributed her bodily injuries to the Advantage at that time. (*Id.*). On July 5, 2005, Ms. Brawley underwent a procedure to excise and remove part of the mesh. (See Cindy Brawley Dep. [Docket 30–2], at 227:1–19). At that time, Dr. Scriber informed Ms. Brawley that her symptoms were a result of the implantation of the Advantage sling. (*Id.* at 309:3–18). In fact, the purpose of the procedure, in Ms. Brawley's own words, was to “resolve her ongoing mesh related injuries.” (Pl. Fact Sheet [Docket 30–1], at 6).

Due to her persistent stress urinary incontinence, Ms. Brawley underwent a vaginal exploration procedure for additional tension-free vaginal tape (the “TVT tape”) on September 19, 2006. (Brawley Med. Rs. Sept. 19, 2006 [Docket 30–4], at 1). The day after the procedure, Dr. Scriber informed her that he did not place the TVT tape because “the mesh had eroded [her] urethra until it was paper thin, and ... when he went in to try to do another one, it busted and he had to take ... tissue from [her] vaginal area and fix [her] urethra.” (Cindy Brawley Dep.

[Docket 65–2], at 263:14–264:8). Ms. Brawley knew that the erosion had been caused by the mesh at that time. (See *id.* at 264:9–13 (“From my understanding, he told me that it was because the mesh had eroded or rubbed against [the urethra] and-it was the mesh is what I understood.”)). On October 20, 2006, Ms. Brawley did some online research to get more “information about the mesh that was inside of [her].” (*Id.* at 180:15–21). Subsequently, she contacted a lawyer about a possible medical malpractice claim. (*Id.* at 175:5–11). Ms. Brawley did not learn that the mesh could be defective until she saw an advertisement about mesh litigation on television in 2011. (*Id.* at 322:9–17). The Brawleys filed suit on May 31, 2013.

*4 Arkansas's Product Liability Act provides that “[a]ll product liability actions shall be commenced within three (3) years after the date on which the death, injury, or damage complained of occurs.” Ark.Code Ann. § 16–116–103 (2014).² In *Martin v. Arthur*, the Supreme Court of Arkansas adopted the discovery rule for medical product liability claims, holding that the statute of limitations for such claims “does not commence running until the plaintiff knew or, by the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered.” 339 Ark. 149, 3 S.W.3d 684, 690 (Ark.1999). In other words, a cause of action will accrue “when the plaintiff first becomes aware of his or her condition, including both the fact of the injury and the probable causal connection between the injury and the product's use, or when the plaintiff by the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered.” *IC Corp. v. Hoover Treated Wood Prods., Inc.*, 2011 Ark. App. 589, 385 S.W.3d 880, 883 (Ark.Ct.App.2011).

The plaintiffs argue that the discovery provision of section 16–116–103 is triggered upon discovery that a defective product caused the injury. (Pls.' Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. Based on Statute of Limitations (“Resp.”) [Docket 65], at 3–5). Therefore, the plaintiffs contend that the statute of limitations did not start until 2011, when Ms. Brawley saw television commercials and learned that the mesh was defective. (*Id.* at 5–7). The plaintiffs point to three cases to support this argument: (1) *Martin*, (2) *Mulligan v. Lederle Laboratories., a Division of American Cyanamid Co.*, 786 F.2d 859 (8th Cir.1986), and (3) *Scroggin v. Wyeth*, 586 F.3d 547 (8th Cir.2009). None of these cases stands for this proposition. Specifically, none of the holdings in these cases interpretively import

a “defect” requirement into the statute. *See Martin*, 3 S.W.3d at 690 (“By using the date of the implantation of the [product] in 1991 as opposed to [plaintiff’s] awareness of the nature of the harm, the trial court’s order of dismissal runs counter to this analysis.”); *Mulligan*, 786 F.2d at 864 (“Here, the jury had sufficient evidence to conclude either that the true nature of [plaintiff’s] illness did not manifest itself until 1976 or that it took until 1976 for [plaintiff] to obtain a diagnosis that informed her of the nature and cause of her condition.”); *Scroggin*, 586 F.3d at 564–65 (“The assertion that [plaintiff] would have been aware of the risk ... ascribes to [her] the duty of being aware of not simply the possibility that her hormone replacement therapy caused her [injury], but that a causal connection was probable. The jury could reasonably conclude that if medical doctors were unsure of the risk, it is highly unlikely that a layperson would be more aware of that risk.”). Moreover, *Martin* is the only case from the Arkansas Supreme Court, and the *Martin* court held that “where there is a genuine issue of material fact regarding discovery, the trier of fact must determine when [the plaintiff] was first made aware of the nature of the harm caused by [the product] or, alternatively, when she should have discovered the causal connection, for the statute of limitations to begin to run.” 3 S.W.3d at 690.

*5 The undisputed facts taken in conjunction with the Arkansas state courts’ interpretation of section 16–116–103 lead this court to agree with BSC. The statute of limitations began to run on July 5, 2005, upon Ms. Brawley’s mesh removal surgery, when Dr. Scriber explained to Ms. Brawley that the mesh had eroded into her bladder. Consequently, Ms. Brawley’s lawsuit, filed on May 31, 2013, is barred by Arkansas’s statute of limitations. The record before the court establishes that Ms. Brawley knew or, in the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered on July 5, 2005, when she underwent a repair procedure. At that time, Dr. Scriber informed Ms. Brawley that her symptoms were a result of the implantation of the Advantage sling. Moreover, Ms. Brawley recognizes that the purpose of the procedure was to “resolve her ongoing mesh related injuries.” (Pl. Fact Sheet [Docket 30–1], at 6). The record thus indicates that on July 5, 2005, almost eight years before she filed her complaint, Ms. Brawley was aware of both her injury and the probable causal connection between her injury and the Advantage.

The plaintiffs’ arguments are unpersuasive. First, in a misstatement of the law, plaintiffs admit that Ms. Brawley recognized that she was having injuries that resulted from the Advantage being inside of her bladder on July 5, 2005, but argue that she was not aware that a defect in the Advantage sling itself was the cause of her problems. (Resp. [Docket 65], at 5). However, as explained above, when the plaintiff attributed her injury to a defective product is not the relevant question in Arkansas. Rather, the court must ask “when the plaintiff first [became] aware of his or her condition, including both the fact of the injury and the probable causal connection between the injury and the product’s use, or when the plaintiff by the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered.” *IC Corp.*, 385 S.W.3d at 883. And the undisputed facts demonstrate that Ms. Brawley should have discovered the causal connection between the product and the injuries suffered on July 5, 2005, when Dr. Scriber informed Ms. Brawley that her symptoms were a result of the implantation of the Advantage sling and that he would need to remove the portion of the sling that was inside the bladder. The plaintiffs next point to Ms. Brawley’s vaginal exploration procedure for more TVT tape as evidence that she was unaware of the defective nature of BSC’s mesh slings. Again, this is not the standard under Arkansas law. Lastly, plaintiffs argue that when Ms. Brawley conducted her own research into the product, nothing told her that the Advantage was defective. Instead, she was led to believe that her implanting physician negligently inserted the mesh. The quality of Ms. Brawley’s research does not change the fact that she had previously discovered all that section 16–116–103 requires to trigger the statute of limitations. In fact, her Internet search into the product, and subsequent visit to an attorney, further evidence her knowledge of causation.

*6 “[I]f there is any reasonable doubt as to the application of the statute of limitations, [the Arkansas Supreme Court] will resolve the question in favor of the complaint standing and against the challenge.” *State v. Diamond Lakes*, 347 Ark. 618, 66 S.W.3d 613, 616 (Ark.2002). The evidence in this case, however, is clear: Ms. Brawley discovered her injuries and a possible causal connection between the product and her injury on July 5, 2005. No reasonable jury could find otherwise. Therefore, I **FIND** that the statute of limitations for her products liability claims ran until July 5, 2008, almost five years

before she filed suit, and as a result, her claims are barred by Arkansas' statute of limitations.

Mr. Brawley's claim for loss of consortium is dependent on the success of Ms. Brawley's claims. *See Sisemore v. Neal*, 236 Ark. 574, 367 S.W.2d 417, 418 (Ark.1963) (quoting *Tollett v. Mashburn*, 291 F.2d 89 (8th Cir.1961) (finding that a loss-of-consortium claim is "derivative and depends upon the wife's successful suit for damages")). A judgment against a personal-injury plaintiff bars a claim by her husband for loss of consortium arising out of the same facts. *Id.* Therefore, I **FIND** that Mr. Brawley's claim is time-barred as well.

IV. Conclusion

For the reasons stated above, BSC's Motion [Docket 30] is **GRANTED**, and this case is **DISMISSED with prejudice**. The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1481837

Footnotes

- 1 Dr. Leflar was a Distinguished Professor at the University of Arkansas, a noted scholar, and a recognized authority on conflicts law. *See Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453, 456 n. 2 (Ark.1977).
- 2 All of the plaintiffs' claims are governed by the limitations period of the Arkansas Products Liability Act. *See IC Corp. v. Hoover Treated Wood Prods., Inc.*, 2011 Ark. App. 589, 385 S.W.3d 880, 885 (Ark.Ct.App.2011) (explaining that the Act defines "product liability actions" as "including *all* actions brought for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product") (emphasis added).

2015 WL 1405493

Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia.

In re BOSTON SCIENTIFIC
CORP., PELVIC REPAIR SYSTEM
PRODUCTS LIABILITY LITIGATION.
This Document Relates to the Following
Case Nancy B. Fleming & Gary Fleming

v.
Boston Scientific Corp.

MDL No. 2326.
|
No. 2:12-cv-5131.
|
Signed March 26, 2015.

MEMORANDUM OPINION AND ORDER

*(Defendant's Motion for Summary
Judgment Based on Statute of Limitations)*

JOSEPH R. GOODWIN, District Judge.

*1 Pending before the court is the defendant's Motion for Summary Judgment Based on Statute of Limitations ("Motion") [Docket 41]. For the reasons set forth below, the Motion is **GRANTED**.

I. Background

This case resides in one of seven MDLs assigned to me by the Judicial Panel on Multidistrict Litigation concerning the use of transvaginal surgical mesh to treat pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI"). In the seven MDLs, there are more than 70,000 cases currently pending, approximately 15,000 of which are in the Boston Scientific Corp. ("BSC") MDL, MDL 2326. In an effort to efficiently and effectively manage this massive MDL, I decided to conduct pretrial discovery and motions practice on an individualized basis so that once a case is trial-ready (that is, after the court has ruled on all *Daubert* motions, summary judgment motions, and motions *in limine*, among other things), it can then be promptly transferred or remanded to the appropriate district for trial. To this end, I ordered the plaintiffs

and defendant to each select 50 cases, which would then become part of a "wave" of cases to be prepared for trial and, if necessary, remanded. (See Pretrial Order # 65, *In re: Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-md-002326, entered Dec. 19, 2013, available at <http://www.wvwd.uscourts.gov/MDL/boston/orders.html>). This selection process was completed twice, creating two waves of 100 cases, Wave 1 and Wave 2. The Flemings's case was selected as a Wave 2 case by the plaintiffs.

On February 15, 2008, Ms. Fleming was surgically implanted with Boston Scientific's Pinnacle Pelvic Floor Repair Kit ("Pinnacle"), a product manufactured by BSC to treat POP. (See BSC's Mot. for Summ. J. & Mem. of Law in Supp. ("Mem. in Supp.") [Docket 41], at 2). Thereafter, on April 17, 2008, Ms. Fleming underwent a procedure to remove exposed mesh. (*Id.*). Then, on September 17, 2008, Ms. Fleming was surgically implanted with the Obtryx Transobturator Mid-Urethral Sling System (the "Obtryx"). (*Id.*). She received both surgeries at a hospital in Tallahassee, Florida. (*Id.*). Ms. Fleming claims that as a result of implantation of the Pinnacle mesh product, she has experienced multiple complications. (*Id.*). In her Short Form Complaint, she brings the following claims against BSC as to both the Pinnacle and the Obtryx: strict liability for design defect, manufacturing defect, and failure to warn; negligence; breaches of express and implied warranties; and punitive damages. (Short Form Comp. [Docket 1], at 2). Mr. Fleming brings a claim for loss of consortium. (*Id.*). In the instant motion, BSC argues that all of the plaintiffs' claims are barred by Florida's statute of limitations, and consequently, the court should grant summary judgment in favor of BSC and dismiss the entire case.

II. Legal Standards

A. Summary Judgment

*2 To obtain summary judgment, the moving party must show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the

nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some “concrete evidence from which a reasonable juror could return a verdict in his [or her] favor.” *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere “scintilla of evidence” in support of his or her position. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or unsupported speculation, without more, are insufficient to preclude the granting of a summary judgment motion. See *Felty v. Graves–Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987); *Ross v. Comm'n Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985), *abrogated on other grounds*, 490 U.S. 228 (1989).

B. Choice of Law

Under 28 U.S.C. § 1407, this court has authority to rule on pretrial motions in MDL cases. The choice of law for these pretrial motions depends on whether they concern federal or state law:

When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located. When considering questions of state law, however, the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.

In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir.1996) (internal citations omitted). To determine the applicable state law for a dispositive motion based on the statute of limitations, I generally refer to the choice-of-law rules of the jurisdiction where the plaintiff first filed her claim. See *In re Air Disaster at Ramstein Air Base, Ger.*, 81 F.3d 570, 576 (5th Cir.1996) (“Where a transferee court presides over several diversity actions consolidated

under the multidistrict rules, the choice of law rules of each jurisdiction in which the transferred actions were originally filed must be applied.”); *In re Air Crash Disaster Near Chi., Ill.*, 644 F.2d 594, 610 (7th Cir.1981); *In re Digitek Prods. Liab. Litig.*, MDL No. 2:08-md-01968, 2010 WL 2102330, at *7 (S.D.W.Va. May 25, 2010). If a plaintiff files her claim directly into the MDL in the Southern District of West Virginia, however, as the plaintiffs did in this case, I consult the choice-of-law rules of the state in which the implantation surgery took place. See *Sanchez v. Boston Scientific Corp.*, 2:12-cv-05762, 2014 WL 202787, at *4 (S.D.W.Va. Jan. 17, 2014) (“For cases that originate elsewhere and are directly filed into the MDL, I will follow the better-reasoned authority that applies the choice-of-law rules of the originating jurisdiction, which in our case is the state in which the plaintiff was implanted with the product.”). Ms. Fleming received the implantation surgeries in Florida. Thus, the choice-of-law principles of Florida guide this court's choice-of-law analysis.

*3 The parties agree, as does this court, that these principles compel application of Florida law to the plaintiffs' claims. In tort actions, Florida adheres to the Restatement (Second) of Conflict of Laws (“Restatement”). *Bishop v. Fla. Specialty Paint Co.*, 389 So.2d 999 (Fla.1980). Under section 145 of the Restatement, the court must apply the law of the state with the most “significant relationship to the occurrence and the parties.” Here, Ms. Fleming resides in Florida, the product at issue was purchased in Florida, and the product was implanted in Florida. Thus, I apply Florida's substantive law—including Florida's statutes of limitations—to this case.

III. Discussion

Because this case involves injuries allegedly sustained as a result of the implantation of two different products in separate procedures, I split my analysis into two categories: (1) Ms. Fleming's alleged injuries sustained as a result of implantation of the Pinnacle mesh product; and (2) Ms. Fleming's alleged injuries sustained as a result of implantation of the Obtryx.

A. The Pinnacle Mesh Product

Under Florida law, the statute of limitations for personal injury actions, including claims “founded on the design, manufacture, distribution, or sale of personal property,”

is four years from the date of injury or damage. Fla. Stat. § 95.11(3)(a), (e). Accordingly, a four-year statute of limitations governs all of Ms. Fleming's claims. Furthermore, a claim for loss of consortium is a derivative claim. *Gates v. Foley*, 247 So.2d 40, 45 (Fla.1971). Thus, Mr. Fleming's claim is likewise governed by a four-year statute of limitations.

Florida law provides that the statute of limitations runs “from the time the cause of action accrues.” Fla. Stat. § 95.031. Importantly, a cause of action accrues on “the date that the facts giving rise to the cause of action were discovered, or should have been discovered with the exercise of due diligence.” *Id.* § 95.031(2)(b). “The knowledge required to commence the limitation period ... does not rise to that of legal certainty.” *Univ. of Miami v. Bogorff*, 583 So.2d 1000, 1004 (Fla.1991). Rather, a “[p]laintiff need only have notice of the possible invasion of his legal rights' discoverable 'upon the exercise of due diligence.’” *Hamrac v. Dorel Juvenile Grp., Inc.*, No. 3:09CV390/RV/MD, 2010 WL 1879278, at *4 (N.D.Fla. May 11, 2010) (quoting *Doe v. Cutter Biological*, 813 F.Supp. 1547, 1555 (M.D.Fla.1993) (emphasis added)). Therefore, the limitation period generally “commences when the plaintiff should have known of either (1) the injury or (2) the negligent act.” *Bogorff*, 583 So.2d at 1002 (emphasis added). In product liability cases, however, in addition to having constructive knowledge of an injury, the plaintiff must have had “exposure to the product in question.” *Babush v. Am. Home Prods. Corp.*, 589 So.2d 1379, 1381 (Fla. Dist. Ct.App.1991); see also *Walls v. Armour Pharm. Co.*, 832 F.Supp. 1467, 1478 (M.D.Fla.1993) (“Florida courts ha[ve] required that products liability plaintiffs have knowledge that the connection between the injury and use of the product in question was ‘to some extent causal.’”) (quoting *Babush*, 589 So.2d at 1381).

*4 Ms. Fleming filed this action on September 5, 2012. (Short Form Compl. [Docket 1]). BSC argues that Ms. Fleming's causes of action were barred on April 17, 2012, because, by at least April 17, 2008, Ms. Fleming was aware of her injuries, and thus, the facts that gave rise to her claims. (Mem. in Supp. [Docket 41], at 7). The plaintiffs, on the other hand, argue that the limitation period did not commence until Ms. Fleming was equipped with knowledge that permitted her to attribute her health complications to the defective product.¹ (See Pls. Resp. to BSC's Mot. for Summ. J. & Mem. of Law in Supp.

(“Resp. Mem. in Supp.”) [Docket 65], at 9–10). Because it undermines the purpose of Florida's discovery rule, the plaintiffs' argument is without merit.

As discussed above, to trigger the limitation period in product liability actions, Florida law only requires that a plaintiff be aware of her injuries following exposure to the alleged defective product. *Babush*, 589 So.2d at 1381. Critically, Florida law does not require a plaintiff to have awareness of the alleged negligent act. *Cutter Biological*, 813 F.Supp. at 1554 n. 3 (“The court in *Babush* did not require an awareness of a negligent act by a plaintiff before the statute of limitations was triggered in a product liability case. The plaintiff need only be aware of exposure to the product so as to suggest causation.”). Here, the record is clear that by April 17, 2008, when Ms. Fleming underwent a procedure to remove exposed mesh, she was aware that the Pinnacle mesh product had been implanted inside of her *and* that she was experiencing adverse health effects. (See Ms. Fleming. Dep. [Docket 41–2], at 13:18–14:1; Dr. Douso Rs. [Docket 65–2], at 9). Accordingly, Ms. Fleming had notice of “the possible invasion of [her] legal rights.” *Hamrac*, 2010 WL 1879278, at *4. No reasonable juror could infer otherwise.

Any argument by Ms. Fleming that she was not aware that she suffered an injury because the injuries were not distinct from complications naturally to be expected from her condition likewise fails. Indeed, Ms. Fleming testified that she never had pelvic pain nor pain due to sexual intercourse prior to the February 2008 procedure. (Ms. Fleming Dep. [Docket 41–2], at 13:18–14:1; 59:15–59:20). I therefore **FIND** that the four-year limitation period began to run against the plaintiffs on April 17, 2008. On this reasoning, to the extent the plaintiffs' claims arise out of the implantation of the Pinnacle mesh product, I **GRANT** BSC's Motion and **DISMISS** such claims.

B. The Obtryx

In a footnote, BSC argues that the plaintiffs do not claim that the Obtryx caused Ms. Fleming's injuries. (Mem. in Supp. [Docket 41], at 2 n. 2). As a result, to the extent the plaintiffs' claims arise out of the implantation of the Obtryx, BSC argues that they should be dismissed. (*Id.*). In support, BSC points to deposition testimony in which Ms. Fleming testified that only the Pinnacle mesh product—“the first one that was planted”—caused her injuries. (*Id.* (citing Ms. Fleming Dep. [Docket 41–2], at 12:21–13:17)). Furthermore, BSC references Ms.

Fleming's deposition, during which the plaintiffs' counsel failed to ask questions about the Obtryx, (Ms. Fleming Dep. [Docket 41-2], at 105:20-105:25), as well as the deposition of Dr. Douso, the implanting surgeon for both products, during which the plaintiff's counsel discussed only the Pinnacle mesh product specifically. (Dr. Douso Dep. [Docket 41-4], at 19:16-19).

*5 In rebuttal, the plaintiffs take issue with BSC's contention that only the Pinnacle mesh product was discussed during Dr. Douso's deposition. (Resp. Mem. in Supp. [Docket 65], at 3 n. 15 (explaining that the deposition testimony makes clear that the Pinnacle mesh product was to be discussed "more than the sling"—but not necessarily exclusively)). Moreover, the plaintiffs cite to their Short Form Complaint as proof that Ms. Fleming alleges that her claims are related to the Obtryx. (*Id.*).

The plaintiffs, however, utterly fail to contradict Ms. Fleming's sworn testimony that only the Pinnacle mesh product contributed to her injuries. (Ms. Fleming Dep. [Docket 41-2], at 12:21-13:17(asserting that only the Pinnacle mesh product—"the first one that was planted"—caused her injuries)). As a result, the plaintiffs

have failed to present *any* evidence regarding causation with regard to claims arising out of the implantation of the Obtryx. *See Celotex Corp.*, 477 U.S. at 322-23 ("[S]ummary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element."). On this reasoning, to the extent the plaintiffs' claims arise out of the implantation of the Obtryx, I **GRANT** BSC's Motion and **DISMISS** such claims.

IV. Conclusion

As explained above, the defendant's Motion [Docket 41] is **GRANTED**, and the plaintiffs' case is **DISMISSED WITH PREJUDICE**. The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1405493

Footnotes

1 The plaintiffs also argue that the statute of limitations was tolled by application of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). In *American Pipe*, the Supreme Court of the United States held that "[t]he commencement of a class action suspends the statute of limitations to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. Whether the *American Pipe* rule should apply to toll state law claims is not clear. *Compare Senger Bros. Nursery v. E.I. DuPont de Nemours & Co.*, 184 F.R.D. 674, 682 (M.D.Fla.1999) ("Plaintiff's reliance on *American Pipe* and *Crown* is misplaced. *American Pipe* and *Crown* did not involve a claim brought in federal court on diversity of citizenship."), with *Raie v. Cheminova, Inc.*, 336 F.3d 1278, 1282 (11th Cir.2003) ("There is no dispute that *American Pipe* has been followed in Florida state courts."). But I need not make this determination here. The Tennessee class action suit relied on by plaintiffs was not filed until July 12, 2012, by which time, as discussed *infra*, the four-year limitation period had already expired.

2015 WL 1405504

United States District Court, S.D. West Virginia.

In re BOSTON SCIENTIFIC
CORP., PELVIC REPAIR SYSTEM
PRODUCTS LIABILITY LITIGATION.

This Document Relates to the Following Case:

Nancy Hay–Rewalt & Ronald Rewalt

v.

Boston Scientific Corp.

MDL No. 2326.

No. 2:12–cv–9912.

Signed March 26, 2015.

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MEMORANDUM OPINION AND ORDER

**(Defendant's Motion for Summary
Judgment Based on Statute of Limitations)**

JOSEPH R. GOODWIN, District Judge.

*1 Pending before the court is the defendant's Motion for Summary Judgment Based on Statute of Limitations (“Motion”) [Docket 28]. For the reasons set forth below, the Motion is **GRANTED**.

I. Background

This case resides in one of seven MDLs assigned to me by the Judicial Panel on Multidistrict Litigation concerning

the use of transvaginal surgical mesh to treat pelvic organ prolapse (“POP”) and stress urinary incontinence (“SUI”). In the seven MDLs, there are more than 70,000 cases currently pending, approximately 15,000 of which are in the Boston Scientific Corp. (“BSC”) MDL, MDL 2326. In an effort to efficiently and effectively manage this massive MDL, I decided to conduct pretrial discovery and motions practice on an individualized basis so that once a case is trial-ready (that is, after the court has ruled on all *Daubert* motions, summary judgment motions, and motions *in limine*, among other things), it can then be promptly transferred or remanded to the appropriate district for trial. To this end, I ordered the plaintiffs and defendant to each select 50 cases, which would then become part of a “wave” of cases to be prepared for trial and, if necessary, remanded. (*See* Pretrial Order # 65, *In re: Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12–md–002326, entered Dec. 19, 2013, available at <http://www.wvwsd.uscourts.gov/MDL/boston/orders.html>). This selection process was completed twice, creating two waves of 100 cases, Wave 1 and Wave 2. Ms. Hay–Rewalt and Mr. Rewalt's (collectively “the plaintiffs”) case was selected as a Wave 2 case by the plaintiffs.

On June 5, 2007, Ms. Hay–Rewalt was surgically implanted with the Advantage Pelvic Floor Repair Kit (the “Advantage”), a product manufactured by BSC, to treat her POP and SUI. (BSC's Mot. for Summ. J. & Mem. of Law in Supp. Based on Statute of Limitations (“Mem. in Supp.”) [Docket 28], at 3; Pl. Fact Sheet [Docket 28–2], at 5). She received her surgery at a hospital in Grosse Pointe, Michigan. (Pls.' Short Form Compl. [Docket 1] ¶ 11). Her surgery was performed by Dr. John Knapp. (*Id.* ¶ 12).

Ms. Hay–Rewalt claims that as a result of implantation of the Advantage, she has experienced injuries including pelvic pain, dysuria, and dyspareunia. (Mem. in Supp. [Docket 28], at 3; Pl. Fact Sheet [Docket 28–2], at 6). She claims that she began feeling pain about one month after the surgery. (Pl. Fact Sheet [Docket 28–2], at 7). She had dyspareunia before the surgery, but the pain increased after it. (Hay–Rewalt Dep. [Docket 60–3], at 230:20–232:2).

On July 2, 2007, she saw Dr. John Knapp, her implanting surgeon, and Dr. Knapp noted a hematoma on her bladder. (Dr. Knapp Office Visit Notes [Docket 60–2]).

Dr. Knapp testified that one would anticipate having pain after surgery. (Knapp Dep. [Docket 60-1], at 74:10-16). He also testified that the hematoma, which he measured to be 10 centimeters during Ms. Hay-Rewalt's visit on July 30, 2007, could possibly be the cause of her continued pain in June, July, and August 2007. (*Id.* at 74:19-75:6; Dr. Knapp Office Visit Notes [Docket 60-2]). Dr. Knapp decided to let the hematoma resolve itself spontaneously. (Dr. Knapp Office Visit Notes [Docket 60-2]). Ms. Hay-Rewalt testified that at her visit with Dr. Knapp on July 30, 2007, she complained of vaginal pain. (Hay-Rewalt Dep. [Docket 60-3], at 219:19-220:1). She testified that Dr. Knapp told her that the pain would go away by October. (*Id.* at 220:2-5). However, Ms. Hay-Rewalt stated that she continued to experience dysuria after her visit with Dr. Knapp on July 30, 2007, and that the pain has continued "to this day." (*Id.* at 220:18-22). However, the intensity of the pain subsided within the first two months of her surgery. (*Id.* at 222:4-6). She recalled returning to Dr. Knapp in October because she continued to feel pain, and she was told that she should "give it more time and it will be better." (*Id.* at 222:19-223:16).

*2 Ms. Hay-Rewalt claims that she continued to have pain even "[a]fter enough time had passed where I should have recovered from my mesh implant surgery." (Pl. Fact Sheet [Docket 28-2], at 7). She did not know what was causing her pain, but she "suspected the mesh was the problem." *Id.* Ms. Hay-Rewalt felt that she was not "getting the necessary direction from Dr. Knapp" and that she "needed a second opinion." (Hay-Rewalt Dep. [Docket 60-3], at 226:9-13). She was then referred to Dr. Shiva Maralani, a urologist, to whom she reported urethral pain and pressure in late 2007 or early 2008. (Hay-Rewalt Dep. [Docket 60-3], at 226:4-229:13). Ms. Hay-Rewalt also testified that Dr. Maralani discussed removing the Advantage, which would alleviate Ms. Hay-Rewalt's symptoms. (*Id.* at 234:9-17). Ms. Hay-Rewalt could not recall whether Dr. Maralani told her that the Advantage was causing the problems Ms. Hay-Rewalt was reporting. (*Id.* at 234:12-14).

Dr. Maralani referred Ms. Hay-Rewalt to Dr. Edward McGuire, another urologist. (*Id.* at 235:8-15). Ms. Hay-Rewalt testified that she reported to Dr. McGuire that she immediately had problems with urethral pain after the Advantage implantation surgery. (*Id.* at 238:1-8). Dr. McGuire recommended a transvaginal urethrolisis and excision of the Advantage. (Letter from Edward

J. McGuire, M.D., to Shiva J. Maralani, M.D. (Mar. 14, 2008) [Docket 60-4], at 3). On April 14, 2008, Ms. Hay-Rewalt underwent urethrolisis surgery to cut and release the Advantage sling. (April 14, 2008, Urethrolisis Operative Report [Docket 60-5], at 1-2). She recalled that she underwent a second procedure with Dr. McGuire in early January 2009 to remove the mesh that was embedded in her urethra. (Hay-Rewalt Dep. [Docket 60-3], at 257:13-258:9). Dr. McGuire told her that he would attempt to remove as much of the mesh as he could during the second surgery. (January 12, 2009, Operative Report [Docket 60-6], at 1).

After seeing a mesh litigation television commercial, Mr. Rewalt discussed with Ms. Hay-Rewalt about contacting an attorney.¹ (Hay-Rewalt Dep. [Docket 60-3], at 45:3-24; Rewalt Dep. [Docket 60-7], at 23:10-20).

The plaintiffs filed suit on December 30, 2012. Ms. Hay-Rewalt brings the following claims against BSC: strict liability for design defect, manufacturing defect, and failure to warn; negligence; breaches of express and implied warranties; and punitive damages. (Pls.' Short Form Compl. [Docket 1] ¶ 13). Additionally, Mr. Rewalt brings a claim of loss of consortium against BSC. (*Id.*). In the instant motion, BSC argues that each of the plaintiffs' claims is barred by Michigan's statute of limitations, and consequently, the court should grant summary judgment in favor of BSC and dismiss the plaintiffs' case.

II. Legal Standards

A. Summary Judgment

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

*3 Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable juror could

return a verdict in his [or her] favor.” *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere “scintilla of evidence” in support of his or her position. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or unsupported speculation, without more, are insufficient to preclude the granting of a summary judgment motion. See *Felty v. Graves–Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987); *Ross v. Comm’ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985), *abrogated on other grounds*, 490 U.S. 228 (1989).

B. Choice of Law

Under 28 U.S.C. § 1407, this court has authority to rule on pretrial motions in MDL cases. The choice of law for these pretrial motions depends on whether they concern federal or state law:

When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located. When considering questions of state law, however, the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.

In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir.1996) (internal citations omitted). To determine the applicable state law for a dispositive motion based on the statute of limitations, I generally refer to the choice-of-law rules of the jurisdiction where the plaintiff first filed her claim. See *In re Air Disaster at Ramstein Air Base, Ger.*, 81 F.3d 570, 576 (5th Cir.1996) (“Where a transferee court presides over several diversity actions consolidated under the multidistrict rules, the choice of law rules of each jurisdiction in which the transferred actions were originally filed must be applied.”); *In re Air Crash Disaster Near Chi., Ill.*, 644 F.2d 594, 610 (7th Cir.1981); *In re Digitek Prods. Liab. Litig.*, MDL No. 2:08–md–01968, 2010 WL 2102330, at *7 (S.D.W.Va. May 25, 2010). However, if a plaintiff files her claim directly into the

MDL in the Southern District of West Virginia, as the plaintiffs did in this case, I consult the choice-of-law rules of the state in which the implantation surgery took place. See *Sanchez v. Boston Scientific Corp.*, 2:12–cv–05762, 2014 WL 202787, at *4 (S.D. W. Va. Jan 17, 2014) (“For cases that originate elsewhere and are directly filed into the MDL, I will follow the better-reasoned authority that applies the choice-of-law rules of the originating jurisdiction, which in our case is the state in which the plaintiff was implanted with the product.”). Ms. Hay–Rewalt received the Advantage implantation surgery in Michigan. Thus, the choice-of-law principles of Michigan guide this court’s choice-of-law analysis.

*4 The parties agree, as does this court, that these principles compel application of Michigan law to the plaintiffs’ claims. Michigan courts follow what is essentially a rebuttable *lex fori* approach: Michigan law applies “unless a ‘rational reason’ to do otherwise exists.” *Sutherland v. Kennington Truck Serv., Ltd.*, 562 N.W.2d 466, 471 (Mich.1997) (quoting *Olmstead v. Anderson*, 400 N.W.2d 292 (Mich.1987)). In determining whether a rational reason exists, a court undertakes a two-step analysis. First, a court “must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome.” *Id.* However, if a foreign state does have an interest in having its law applied, a court “must then determine if Michigan’s interests mandate that Michigan law be applied, despite the foreign interests.” *Id.*; see also *Standard Fire Ins. Co. v. Ford Motor Co.*, 723 F.3d 690, 693 (6th Cir.2013) (discussing Michigan’s choice of law framework).

Here, the implantation surgery that allegedly resulted in Ms. Hay–Rewalt’s injuries took place in Michigan. (Pls.’ Short Form Compl. [Docket 1] ¶ 13). Ms. Hay–Rewalt is a Michigan resident, (*Id.* ¶ 4), and she received medical care for her alleged injuries in Michigan, (Pl. Fact Sheet [Docket 28–2], at 6). No other state has an interest in having its law applied. Thus, I apply Michigan’s substantive law—including Michigan’s statutes of limitations—to this case.

III. Discussion

The statute of limitations for a products liability action is three years. Mich. Comp. Laws § 600.5805(13) (2015). Although breach of warranty claims are typically subject to a four-year statute of limitations, *id.* § 440.2725(1),

when such a breach is related to an underlying personal injury claim, the statute of limitations governing personal injury claims applies instead. See *Hertzler v. Manshum*, 200 N.W. 155, 157 (Mich.1924) (“The implied warranty, so called, reaching from the manufacturer of foodstuffs to the ultimate purchaser for immediate consumption is in the nature of a representation that the highest degree of care has been exercised, and a breach of such duty inflicting personal injury is a wrong in the nature of a tort.... Except in name ..., it is the same thing as negligence. Plaintiff’s case, in its last analysis, is bottomed on negligence.”); see also *Roseville Plaza Ltd. P’ship v. U.S. Gypsum Co.*, 31 F.3d 397, 398 (6th Cir.1994) (applying Michigan law and upholding dismissal of products liability action alleging, inter alia, breach of warranty under three-year statute of limitations); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 519 (Mich.Ct.App.1992) (same). Thus, a three-year statute of limitations governs all of Ms. Hay–Rewalt’s claims. Furthermore, a claim for loss of consortium is a derivative claim. *Moss v. Pacquing*, 455 N.W.2d 339, 343 (Mich.Ct.App.1990) (“[The plaintiff-husband’s] claim for loss of consortium is clearly derivative of his injured spouse’s claim. His recovery for loss of consortium stands or falls upon her recovery of damages.”). Thus, the three-year products-liability statute of limitations also governs Mr. Rewalt’s claim. See *id.*

*5 The limitations period runs when the claim accrues. Mich. Comp. Laws § 600.5827. For a products liability claim, “the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.” *Id.* Most states have a limitation on when the claim accrues through operation of the “discovery rule,” which postpones accrual until a plaintiff discovers, or through the reasonable diligence should have discovered, his or her injury and the causal connection between the plaintiff’s injury and the defendant’s breach of duty. See *Jones v. Trs. of Bethany Coll.*, 351 S.E.2d 183, 185 (W.Va.1986) (collecting cases); 3 J.D. Lee & Barry A. Lindahl, *Modern Tort Law: Liability and Litigation* § 27.112 (2d ed.2014) (same); see also, e.g., *Fox v. Ethicon Endo–Surgery, Inc.*, 110 P.3d 914, 920 (Cal.2005); *Lawhon v. L.B.J. Institutional Supply, Inc.*, 765 P.2d 1003, 1005 (Ariz.Ct.App.1988); *Pennwalt Corp. v. Nasios*, 550 A.2d 1155, 1165 (Md.1988). However, in *Trentadue v. Buckler Automatic Lawn Sprinkler Co.*, the Michigan Supreme Court held that section 600.5827 of the Michigan Compiled Laws precluded any common-law discovery

rule to delay accrual. 738 N.W.2d 664, 680 (Mich.2007). Thus, unless the discovery rule is provided by statute, claims in Michigan are not subject to postponement under the discovery rule.

A. Breach of Warranty Claims

A statutory discovery rule exists in Michigan for breach of warranty claims. Section 600.5833 of the Michigan Compiled Laws provides that for a breach of warranty claim, “the claim accrues at the time the breach of the warranty is discovered or reasonably should be discovered.” Mich. Comp. Laws § 600.5833 (2015). This is an objective standard: “[A] plaintiff’s cause of action accrues ... even if a subjective belief regarding the injury occurs at a later date.” *Mott v. Abbott Labs.*, 506 N.W.2d 816, 825 (Mich.1993). *Mott* also emphasizes that accrual begins when a plaintiff “discovers or, through the exercise of reasonable diligence, should have discovered that he has a possible cause of action,” not when the plaintiff discovers or should have discovered the likely cause of his or her injuries. *Id.* at 826 (emphasis in original) (quoting *Bonney v. Upjohn Co.*, 342 N.W.2d 551, 554 (Mich.Ct.App.1983)). In rejecting the “likely cause” standard in favor of “possible,” which is a “lesser standard of information needed to provide knowledge of causation,”² *id.* at 827, the *Mott* court explained that once a plaintiff is “aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action. We see no need to further protect the rights of the plaintiff to pursue a claim, because the plaintiff at this point is equipped with sufficient information to protect the claim.” *Id.* at 828.

Although section 600.5833, part of the Revised Judicature Act, provides a discovery rule for breach of warranty claims, it appears to conflict with section 440.2725 of the Michigan Compiled Laws. Section 440.2725, part of Michigan’s version of the Uniform Commercial Code, provides that “[a] cause of action accrues when the breach [of warranty] occurs, regardless of the aggrieved party’s lack of knowledge of the breach.” Mich. Comp. Laws § 440.2725(2) (2015). However, “[t]he manufacturer’s duty to the consumer with regard to products which it puts into the stream of commerce does not generally arise out of a contract for sale, and is therefore not limited by the UCC [.]” *Southgate Cmty. Sch. Dist. v. W. Side Constr. Co.*, 247 N.W.2d 884, 886 (Mich.1976). Indeed, “the consumer’s right of action against a remote manufacturer is not dependent on the existence of contract or contract

principles; product warranties adhere by implication of the law.” *Id.* at 888; *see also Parish v. B.F. Goodrich Co.*, 235 N.W.2d 570, 573 (Mich.1975) (“The provisions of UCC § 2-725 (a warranty is breached upon tender of delivery), while entirely satisfactory in a commercial setting, are inconsistent with principles developed by the courts in consumer actions against manufacturers for personal injury.... Adopting time of delivery, without regard to time of discovery, as the point of departure for statute of limitations purposes frequently will produce unsatisfactory results in personal injury cases.”). Thus, because this is a products liability case grounded in tort law and not contract law, section 440.2725 is inapplicable, and instead section 600.5833 governs Ms. Hay–Rewalt’s breach of warranty claims.

*6 As noted earlier, Ms. Hay–Rewalt testified that Dr. Maralani discussed removing the Advantage, which would alleviate Ms. Hay–Rewalt’s symptoms. (Hay–Rewalt Dep. [Docket 60–3], at 234:9–17). Even though Ms. Hay–Rewalt could not recall whether Dr. Maralani told her that the Advantage was causing the problems Ms. Hay–Rewalt was reporting, (*id.* at 234:12–14), I **FIND** that a reasonable person, upon being told that the removal of the Advantage could alleviate that person’s symptoms, would discover through the exercise of reasonable diligence that she has a *possible* cause of action against BSC. *See Mott v. Abbott Labs.*, 506 N.W.2d 816, 826 (Mich.1993) (holding that accrual begins when a plaintiff “discovers or, through the exercise of reasonable diligence, should have discovered that he has a *possible* cause of action” (emphasis in original)); *see also id.* at 825 (“[A] plaintiff’s cause of action accrues ... even if a subjective belief regarding the injury occurs at a later date.”). Although the record does not appear to provide an exact date regarding when Ms. Hay–Rewalt consulted with Dr. Maralani, Ms. Hay–Rewalt stated that she thought she saw Dr. Maralani in 2008.³ (Hay–Rewalt Dep. [Docket 60–3], at 227:22). Thus, the statute of limitations began to run at that time in 2008. *See Mott*, 506 N.W.2d at 826. Ms. Hay–Rewalt had until 2011 to file suit. *See Mich. Comp. Laws* § 600.5803; *Hertzler v. Mamshum*, 200 N.W. 155, 157 (Mich.1924). Ms. Hay–Rewalt did not file suit until December 30, 2012, nearly two years after the statute of limitations had run. (*See Pls.’ Short Form Compl.* [Docket 1]). Consequently, her breach of warranty claims are time barred.

Even assuming a reasonable person would not have discovered she had a possible cause of action at the time her doctor discussed removing the Advantage with her, the record provides ample evidence that a reasonable person would have discovered she had a possible cause of action shortly afterwards. For example, a reasonable person would have discovered she had a possible cause of action against BSC after undergoing surgery to release the Advantage sling on April 14, 2008. (*See* April 14, 2008, Urethrolisis Operative Report [Docket 60–5], at 1–2). Likewise, a reasonable person would have discovered she had a possible cause of action against BSC after undergoing surgery to remove mesh embedded in her urethra on January 12, 2009. (*See* Hay–Rewalt Dep. [Docket 60–3], at 257:13–258:9). All of these dates are well outside of the statute of limitations.

The plaintiffs argue that they did not realize the Advantage could be the cause of Ms. Hay–Rewalt’s problems until Mr. Rewalt saw a mesh litigation television commercial and discussed with Ms. Hay–Rewalt about contacting an attorney. (Pls.’ Resp. in Opp’n to Def.’s Mot. for Summ. J. (“Resp. in Opp’n”) [Docket 60], at 4–5; *see* Hay–Rewalt Dep. [Docket 60–3], at 45:3–24; Rewalt Dep. [Docket 60–7], at 23:10–20). This argument is unavailing. The relevant issue is not when Ms. Hay–Rewalt subjectively believed that she had a possible cause of action—it is when a reasonable person in her position would have discovered that she had a possible cause of action. *See Mott*, 506 N.W.2d at 825 (“[A] plaintiff’s cause of action accrues ... even if a subjective belief regarding the injury occurs at a later date.”). A reasonable person would have discovered she had a possible cause of action well before the plaintiffs saw the television commercial.

*7 The plaintiffs also argue that my decision in *Sanchez v. Boston Scientific Corp.*, No. 2:12-cv-05762, 2014 WL 202787 (S.D.W.Va. Jan. 17, 2014), is controlling. (*See* Resp. in Opp’n [Docket 60], at 6). That argument is equally unavailing. *Sanchez* was concerned with California law. California, unlike Michigan, requires that a plaintiff discover wrongdoing by the defendant before a claim will accrue. *See Fox v. Ethicon Endo–Surgery, Inc.*, 110 P.3d 914, 920 (Cal.2005). Michigan has no such requirement.

Accordingly, BSC’s Motion concerning Ms. Hay–Rewalt’s claims for breaches of express and implied warranties is **GRANTED**, and these claims are **DISMISSED with prejudice**.

B. Nonwarranty Claims

Ms. Hay–Rewalt's non-breach of warranty claims began to accrue when “the wrong upon which the claim is based was done,” Mich. Comp. Laws § 600.5827—that is, when Ms. Hay–Rewalt had her implantation surgery on June 5, 2007. (Pl. Fact Sheet [Docket 28–2], at 5). Because there is no postponement of her nonwarranty claims, the limitations period ran until June 5, 2010. *See* Mich. Comp. Laws § 600.5805(13) (2015) (providing three-year statute of limitations for products liability action); *Trentadue v. Buckler Automatic Lawn Sprinkler Co.*, 738 N.W.2d 664, 680 (Mich.2007) (abolishing common-law discovery rule). Ms. Hay–Rewalt filed suit on December 30, 2012. (Pls.' Short Form Compl. [Docket 1]). As a result, her nonwarranty claims are time barred. Furthermore, because Mr. Rewalt's claim of loss of consortium is derivative to Ms. Hay–Rewalt's claims, and none of Ms. Hay–Rewalt's claims survive, Mr. Rewalt's claim is also

time barred. Accordingly, BSC's Motion concerning Ms. Hay–Rewalt's claims for strict liability for design defect, manufacturing defect, and failure to warn; negligence; and punitive damages; and Mr. Rewalt's claim for loss of consortium is **GRANTED**, and these claims are **DISMISSED with prejudice**.

IV. Conclusion

As explained above, the defendant's Motion [Docket 28] is **GRANTED** and the plaintiffs' case is **DISMISSED with prejudice**. The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1405504, 86 UCC Rep.Serv.2d 198

Footnotes

- 1 It is unclear when the plaintiffs saw the television commercial. Ms. Hay–Rewalt stated in her deposition, taken on May 22, 2014, that after seeing the commercial, they first contacted an attorney sometime “within the last two years.” (Hay–Rewalt Dep. [Docket 60–3], at 45:3–46:1). Mr. Rewalt stated that he noticed the television commercial in “early 2013 to the best of my recollection .” (Rewalt Dep. [Docket 60–7], at 23:12–16). However, that clearly cannot be correct, as the plaintiffs filed suit on December 30, 2012—in other words, before 2013. (See Pls.' Short Form Compl. [Docket 1]).
- 2 The *Mott* court quoted *Black's Law Dictionary*'s definition of “possible”: “Capable of existing, happening, being, becoming or coming to pass; feasible, not contrary to nature of things; neither necessitated nor precluded; free to happen or not; contrasted with impossible.” *Id.* (quoting *Black's Law Dictionary* 1166 (6th ed.1990)).
- 3 However, Dr. Maralani wrote a letter dated December 17, 2007, to Dr. Kyung Soo Kim, Ms. Hay–Rewalt's cardiologist, stating that Ms. Hay–Rewalt “would benefit from the sling removal.” (Letter from Shiva Maralani, M.D., to Kyong Soo Kim, M.D. (Dec. 17, 2007) [Docket 28–5]).

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Only the Westlaw citation is currently available.

United States District Court,
M.D. Georgia,
Columbus Division.

In re MENTOR CORP. OBTAPE
TRANSOBTURATOR SLING
PRODUCTS LIABILITY LITIGATION.

MDL Docket No. 2004 4:08-MD-2004 (CDL).

|
No. 4:12-cv-181 (B.ROMAN).

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Signed Aug. 4, 2015.

ORDER

CLAY D. LAND, District Judge.

*1 Defendant Mentor Worldwide LLC developed a suburethral sling product called ObTape Transobturator Tape, which was used to treat women with stress urinary incontinence. Plaintiff Blanca Roman was implanted with ObTape, and she asserts that she suffered injuries caused by ObTape. Roman brought this product liability action against Mentor, contending that ObTape had design and/or manufacturing defects that proximately caused her injuries. Roman also asserts that Mentor did not adequately warn her physicians about the risks associated with ObTape. Mentor contends that Roman's claims are barred by the applicable statutes of limitation. For the reasons set forth below, the Court agrees, and Mentor's Motion for Summary Judgment (ECF No. 46 in 4:12-cv-181) is granted. Roman's request for oral argument is denied.

SUMMARY JUDGMENT STANDARD

Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). In determining whether a *genuine* dispute of *material* fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment,

drawing all justifiable inferences in the opposing party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is *material* if it is relevant or necessary to the outcome of the suit. *Id.* at 248. A factual dispute is *genuine* if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Id.*

FACTUAL BACKGROUND

Viewed in the light most favorable to Roman, the record reveals the following.

Roman lives in Texas, and all of her medical treatment relevant to this action occurred in Texas. Roman experienced incontinence, and she consulted with Dr. Charles L. Fougousse. Dr. Fougousse recommended mesh implant surgery, and he implanted Roman with ObTape on November 16, 2004.

After the implant surgery, Roman experienced pain and pressure in her vagina. She returned to Dr. Fougousse twice but then did not go back to see him again. She instead saw another doctor, who referred her to Dr. Peter Lotze. Dr. Lotze examined Roman in April 2005 and told her that the ObTape "had done damage" and hurt her. Roman Dep. 102:2-19, ECF No. 46-4. He also told Roman that he needed to take out the ObTape and do reconstructive surgery as soon as possible. *Id.* Dr. Lotze performed the revision surgery on May 4, 2005 and removed as much of the ObTape as he could. After the revision surgery, Roman's abdominal pain and pressure was resolved. *Id.* at 106:5108:10.

Roman filed her Complaint on July 13, 2012. *See generally* Compl., ECF No. 1 in 4:12-cv-181. Roman brought claims for personal injury under a variety of theories, including strict liability/design defect, strict liability/failure to warn, strict liability/defective manufacturing, and negligence.

DISCUSSION

Roman filed her action in this Court under the Court's direct filing order. The parties agreed that for direct-filed cases, the "Court will apply the choice of law rules of the state where the plaintiff resides at the time of the filing

of the complaint.” Order Regarding Direct Filing § II(E), ECF No. 446 in 4:08–md–2004. The parties agree that Texas law, including its statutes of limitations, apply to Roman's claims because Roman is a Texas resident and all of her medical treatment relevant to this action occurred in Texas.

*2 The parties agree that Roman's claims are subject to a two–year statute of limitations. Tex. Civ. Prac. & Rem.Code § 16.003(a) (requiring that actions for personal injury be brought within two years after the claim accrues). Texas's discovery rule applies if “the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable.” *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex.1998) (quoting *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex.1994)). Under the discovery rule, “a cause of action does not accrue until a plaintiff knows or, through the exercise of reasonable care and diligence, ‘should have known of the wrongful act and resulting injury.’” *Id.* at 37 (quoting *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex.1996)). Mentor argues that Roman's claims accrued in 2005, when Roman's doctors linked her symptoms to ObTape. Roman, however, contends that her claims did not accrue until she saw an advertisement suggesting that ObTape was defective.

Roman cited several cases that are instructive. In *Pavich v. Zimmer, Inc.*, 157 F.3d 903 (5th Cir.1998) (per curiam), the Fifth Circuit noted that the Texas discovery rule applied to a plaintiff's claims based on injuries due to breaks in surgical rods implanted in his spine. *Pavich*, 1998 WL 612290, at *2. According to the Fifth Circuit, the plaintiff “acquired knowledge of facts which, in the exercise of reasonable diligence, would lead to the discovery of his injury” when his doctor told the plaintiff that his pain was likely due to breaks in the rods, and that is when his claims accrued. *Id.* at *2 to *3. But the plaintiff did not file his suit until more than two years after his cause of action accrued, so his action was time-barred. *Id.*

In *Brandau v. Howmedica Osteonics Corp.*, 439 F. App'x 317, 322 (5th Cir.2011) (per curiam), the Fifth Circuit

found that the plaintiff's cause of action accrued under Texas law when her doctor reviewed an x-ray of the plaintiff's knee prosthesis and noticed possible problems with the prosthesis. The plaintiff's action in *Brandau* was timely because the plaintiff filed her action within two years of receiving that provisional diagnosis. *Id.*

And in *Porterfield v. Ethicon, Inc.*, 183 F.3d 464, 467 (5th Cir.1999) (per curiam), the Fifth Circuit concluded that the plaintiff's cause of action accrued under Texas law when she began to conclude that her symptoms were related to problems with her hernia mesh. The Fifth Circuit rejected the plaintiff's argument that her claims did not accrue until a revision surgery revealed that the mesh had attached itself to her liver. *Id.* Because the plaintiff did not file her action within two years after she began to conclude that her symptoms were related to problems with her hernia mesh, her claims were time-barred. *Id.*

Based on *Pavich*, *Brandau*, and *Porterfield*, Roman's claims accrued in 2005, when her doctor told her that ObTape was hurting her and needed to be removed as soon as possible and when Roman's abdominal pain and pressure were resolved after her doctor removed as much of the ObTape as he could. Roman did not file her Complaint until more than seven years later, so her claims are time-barred.

CONCLUSION

*3 As discussed above, Roman's claims are time-barred, so Mentor's Motion for Summary Judgment (ECF No. 46 in 4:12–cv–181) is granted. Roman's request for oral argument is denied.

IT IS SO ORDERED.

All Citations

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2015 WL 5838483

Only the Westlaw citation is currently available.

United States District Court,
M.D. Georgia, Columbus Division.

In re Mentor Corp. Obtape Transobturator
Sling Products Liability Litigation

MDL Docket Nos. 2004 4:08-MD-2004
(CDL), 4:13-cv-14 (J. ECHEVERRIA)

|
Signed 10/05/2015

ORDER

CLAY D. LAND, Chief Judge

*1 Defendant Mentor Worldwide LLC developed a suburethral sling product called ObTape Transobturator Tape, which was used to treat women with stress urinary incontinence. Plaintiff Julia Echeverria was implanted with ObTape and asserts that she suffered injuries caused by ObTape. Echeverria brought this product liability action against Mentor, contending that ObTape had design and/or manufacturing defects that proximately caused her injuries. Echeverria also asserts that Mentor did not adequately warn her physicians about the risks associated with ObTape. Mentor contends that Echeverria's claims are barred by the applicable statute of limitations. For the reasons set forth below, the Court agrees, and Mentor's Motion for Summary Judgment (ECF No. 32 in 4:13-cv-14) is granted.

SUMMARY JUDGMENT STANDARD

Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a *genuine* dispute of *material* fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment, drawing all justifiable inferences in the opposing party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A fact is *material* if it is relevant or necessary to the outcome of the suit. *Id.* at 248. A factual dispute is *genuine*

if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Id.*

FACTUAL BACKGROUND

Viewed in the light most favorable to Echeverria, the record reveals the following. Echeverria is a resident of Alaska. In 2004, Echeverria sought treatment for stress urinary incontinence and decided to undergo a mesh sling operation. Dr. Kathleen Kobashi implanted ObTape in Echeverria on July 19, 2004 in Seattle, Washington.

In May 2006, Echeverria went to Dr. Richard Welling, her doctor in Alaska, complaining of pelvic discomfort, difficulty urinating, and blood in her urine. Dr. Welling told Echeverria that her ObTape had eroded and referred Echeverria to a urologist. The urologist confirmed the erosion. Echeverria called Dr. Kobashi and "told her there was something wrong with me vaginally, I knew something was definitely wrong." Echeverria Dep. 72:6-10, ECF No. 32-5.

Echeverria visited Dr. Welling again in early June 2006, and he noted that Echeverria had called "her specialist down south who suggested she come down as soon as she could conveniently arrange it and at that time, they would replace the urethral sling which apparently has been investigated as being potentially defective according to the Pt." Welling Dep. Ex. 6, Patient Note, June 2, 2006, ECF No. 32-7. Dr. Welling did not remember whether Echeverria used the exact words that ObTape was being "investigated as potentially defective." Dr. Welling did recommend that Echeverria have the ObTape removed. Echeverria Dep. 81:22-82:5.

Echeverria visited Dr. Kobashi, who confirmed the erosion and removed Echeverria's ObTape on June 30, 2006. Echeverria knew that Dr. Kobashi removed the sling to resolve the problems she was having with it. By June 2006, Dr. Kobashi was telling her patients who had problems with ObTape that she had stopped using it due to a higher rate of extrusions compared to other slings. Dr. Kobashi did not recall whether she spoke with Echeverria about this issue. Echeverria did not investigate the possible causes of her symptoms in 2006. She did not consider bringing an action against Mentor until late 2011, when she saw a television commercial regarding complications with mesh sling products.

*2 Echeverria filed her Complaint on January 16, 2013. *See generally* Compl., ECF No. 1 in 4:13-cv-14. Echeverria brought claims for personal injury under the following theories: negligence, strict liability design defect, strict liability manufacturing defect, and strict liability failure to warn.

DISCUSSION

Echeverria filed her action in this Court under the Court's direct filing order. The parties agreed that for direct-filed cases, the "Court will apply the choice of law rules of the state where the plaintiff resides at the time of the filing of the complaint." Order Regarding Direct Filing § II(E), ECF No. 446 in 4:08-md-2004. Alaska's choice of law rules thus apply. The parties agree that Alaska law, including its statutes of limitation, apply to Echeverria's claims because she is an Alaska resident and sought medical treatment related to her alleged ObTape injuries in Alaska.

The parties agree that Echeverria's claims are subject to a two-year statute of limitations. Alaska Stat. § 09.10.070(a) (requiring that actions for personal injury be "commenced within two years of the accrual of the cause of action"). The parties only dispute when Echeverria's claims arose. Alaska's statute of limitations begins to run when "a person discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action" or when a person "has sufficient information to prompt an inquiry into the cause of action." *Cameron v. State*, 822 P.2d 1362, 1366 (Alaska 1991). That is, the statute begins to run on the date when the claimant "reasonably should have known of the facts supporting her cause of action" or "the date when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights." *Id.* at 1365 (quoting *Mine Safety Appliances Co. v. Stiles*, 756 P.2d 288, 291 (Alaska 1988)).¹ "A plaintiff does not have to understand the technical or scientific explanation for a defect before having knowledge sufficient to start the statute of limitations running." *Mine Safety*, 756 P.2d at 291. "Nor does the plaintiff need to be able to technically prove the case the day the complaint is filed." *Id.*

Mine Safety and *Cameron* are instructive on when a plaintiff should begin an inquiry regarding potential

claims. In *Mine Safety*, the plaintiff was hit on the back of his head with a large metal object. His safety helmet cracked upon impact, and the plaintiff suffered a skull fracture. The plaintiff argued that the limitations period did not begin to run until he discovered evidence "that his safety helmet was defectively designed and that those inadequacies exacerbated his injuries." *Mine Safety*, 756 P.2d at 291. But the plaintiff "knew he was hit in the head while wearing a safety helmet designed to protect against such blows." *Id.* at 292. His employer investigated the accident, and the result of that investigation was available to the plaintiff shortly after the accident. The Alaska Supreme Court concluded "that under these circumstances a reasonable person would have notice of facts" "sufficient to prompt a person of average prudence to inquire, and thus [the person] should be deemed to have notice of all facts which reasonable inquiry would disclose." *Id.* (alteration in original) (quoting *Russell v. Municipality of Anchorage*, 743 P.2d 372, 376 (Alaska 1987)). Because the plaintiff in *Mine Safety* "did nothing to investigate his claim" within the limitations period, his claim was barred. *Id.*

*3 Similarly, in *Cameron*, the Alaska Supreme Court found that the plaintiff's claims were time-barred because he did not begin an inquiry into the cause of his breathing problems—which he believed were caused by his workplace conditions—until well after he was diagnosed with asthma. 822 P.2d at 1367. In *Cameron*, the Alaska Supreme Court found that the plaintiff had enough information to prompt an inquiry into his cause of action when he learned that he had a medically documented condition which he attributed to his workplace conditions. *Id.*; accord *Sopko v. Dowell Schlumberger, Inc.*, 21 P.3d 1265, 1271 (Alaska 2001) (finding that plaintiff's cause of action was time-barred because he made no inquiry after he was diagnosed with toxic fume exposure).

Echeverria argues that because she is not a doctor, she had no duty to begin an inquiry in 2006. In support of this argument, Echeverria cites *Gudenau & Co. v. Sweeney Insurance, Inc.*, 736 P.2d 763 (Alaska 1987). In that case, an insurance broker procured an insurance policy that excluded certain coverage the insured needed, although the broker assured the insured that it contained the needed coverage. After the insured suffered a loss that was excluded from coverage, the insured sued the broker for malpractice, and the broker argued that the insured should have read the policy and discovered the

exclusion clause. *Id.* at 767. The Alaska Supreme Court disagreed, finding that the insured was entitled to rely on the broker's representations when interpreting the scope of his coverage.² *Id.* If Echeverria's doctors had told her that there was no problem with the ObTape and that her symptoms were just normal risks associated with the product, this argument might have some merit. But there is no such evidence in the present record, so *Gudenau* does not excuse Echeverria's failure to begin an inquiry in 2006.

Echeverria also contends that she did not have enough information to suspect that ObTape may be defective because she had been informed that erosion and infections were potential side risks associated with ObTape and because her doctors did not tell her that her injuries might be caused by a defect in ObTape. But based on *Mine Safety* and *Cameron*, the Court finds that Echeverria's claims accrued in June 2006. At that time, she had enough information to prompt an inquiry into her problems with ObTape. She knew that her ObTape had eroded and that "something was definitely wrong." Echeverria Dep. 72:6-10. She also knew that the ObTape had to be removed. Those facts should have prompted Echeverria to ask her doctors whether her symptoms were caused by a problem with ObTape or by some other problem. Furthermore, Dr. Kobashi believed in 2006 that ObTape had a higher erosion rate than other

slings products, and Dr. Welling's patient notes stated that ObTape was being investigated as potentially defective. Had Echeverria asked, Dr. Kobashi presumably would have told Echeverria what she had told her other patients: that Dr. Kobashi believed ObTape had a higher rate of erosions than other slings.

For these reasons, the Court finds that no genuine fact dispute exists on when Echeverria's claims accrued. Her claims accrued by June of 2006. She did not file her Complaint until January 16, 2013—more than six years after her claims accrued. Therefore, Echeverria's claims are barred by the applicable statute of limitations, and Mentor is entitled to summary judgment on her claims.

CONCLUSION

*4 As discussed above, Mentor's Motion for Summary Judgment (ECF No. 32 in 4:13-cv-14) is granted.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 5838483

Footnotes

- 1 Alaska recognizes a third accrual date: "where a person makes a reasonable inquiry which does not reveal the elements of the cause of action within the statutory period at a point where there remains a reasonable time within which to file suit, the limitations period is tolled until a reasonable person discovers actual knowledge of, or would again be prompted to inquire into, the cause of action." *Cameron*, 822 P.2d at 1367. There is no evidence that Echeverria made any inquiry during the statutory period, so this accrual date does not apply here.
- 2 The Alaska Supreme Court did find that a diligent party would have discovered the limited nature of its insurance coverage when the insurer rejected its claim; the insured should have commenced an inquiry when its claim was denied. *Gudenau*, 736 P.2d at 767.

2015 WL 6159477

Only the Westlaw citation is currently available.
United States District Court,
M.D. Georgia, Columbus Division.

In re Mentor Corp. ObTape Transobturator
Sling Products Liability Litigation.

MDL Docket No. 2004 4:08-MD-2004 (CDL)

|
Case No. 4:13-cv-341 (D. BENSON)

|
Signed 10/20/2015

ORDER

CLAY D. LAND CHIEF U.S. DISTRICT COURT
JUDGE MIDDLE DISTRICT OF GEORGIA

*1 Defendant Mentor Worldwide LLC developed a suburethral sling product called ObTape Transobturator Tape, which was used to treat women with stress urinary incontinence. Plaintiff Darlene Benson was implanted with ObTape and asserts that she suffered injuries caused by ObTape. Benson brought this product liability action against Mentor, contending that ObTape had design and/or manufacturing defects that proximately caused her injuries. Benson also asserts that Mentor did not adequately warn her physicians about the risks associated with ObTape. Mentor contends that all of Benson's claims are barred by the applicable statutes of limitation. For the reasons set forth below, the Court agrees, and Mentor's Motion for Summary Judgment (ECF No. 24 in 4:13-cv-341) is granted.

SUMMARY JUDGMENT STANDARD

Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a *genuine* dispute of *material* fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment, drawing all justifiable inferences in the opposing party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255

(1986). A fact is *material* if it is relevant or necessary to the outcome of the suit. *Id.* at 248. A factual dispute is *genuine* if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Id.*

FACTUAL BACKGROUND

Viewed in the light most favorable to Benson, the record reveals the following. Benson is a Florida resident, and all medical treatment relevant to this action occurred in Florida. Benson sought treatment from Dr. Ekiong Chu Tan for stress urinary incontinence. Dr. Tan implanted Benson with ObTape on April 25, 2005. In August 2005, Benson visited Dr. Scott Rhamy complaining that she felt a foreign body in her vaginal wall. Dr. Rhamy examined Benson and discovered an erosion of the ObTape. He explained to Benson that the ObTape was coming through her vaginal wall and was causing her symptoms. Benson Dep. 93:12-20, ECF No. 24-4. Dr. Rhamy performed a revision procedure in August 2005, but Benson continued to have problems with exposed ObTape. Dr. Rhamy recommended another revision surgery. Benson understood that Dr. Rhamy planned to remove the exposed part of her ObTape and cover the area of her vaginal wall where the ObTape had eroded. *Id.* at 96:12-97:2. Dr. Rhamy again told Benson that the eroded ObTape was causing her symptoms. *Id.* at 97:7-13. Dr. Rhamy excised portions of Benson's ObTape on December 8, 2005. Benson continued to have problems with the ObTape, so another doctor removed the rest of Benson's ObTape in May 2006. *Id.* at 101:16-102:10.

Benson filed her Complaint on July 11, 2013. *See generally* Compl., ECF No. 1 in 4:13-cv-341. Benson brought claims for personal injury under the following theories: strict liability design defect, negligence, breach of warranty, and strict liability failure to warn.

DISCUSSION

*2 Benson filed this action in the United States District Court for the District of Minnesota. *See generally* Compl., ECF No. 1 in 4:13-cv-341. The action was later transferred to this Court as part of a multidistrict litigation proceeding regarding ObTape. The parties agree for purposes of summary judgment that Minnesota law applies to Benson's claims. *See In*

re *Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-md-2004, 2013 WL 286276, at *7 (concluding that Minnesota law applied to claims of non-Minnesota ObTape plaintiffs who brought their actions in Minnesota). Mentor argues that all of Benson's claims are time-barred under Minnesota law.

I. Breach of Warranty Claim

The statute of limitations for Benson's breach of warranty claim is four years. Minn. Stat. § 336.2-725(1). "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Minn. Stat. § 336.2-725(2). "A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." Minn. Stat. § 336.2-725(1). Benson did not respond to Mentor's summary judgment on this point, and she did not point to any evidence that any warranty made by Mentor explicitly extended to future performance, so her breach of warranty claim accrued in 2005, when her ObTape was implanted. Benson did not bring her claim within four years, so her breach of warranty claim is time-barred.

II. Negligence, Design Defect and Failure to Warn Claims

Benson brought design defect and failure to warn claims under a strict liability theory. She also brought a negligence claim based on her problems with ObTape. The statute of limitations for her strict liability claims is four years, and the statute of limitations for her negligence claim is six years. Minn. Stat. § 541.05 subd. 2 ("[A]ny action based on the strict liability of the defendant and arising from the manufacture, sale, use or consumption of a product shall be commenced within four years."); Minn. Stat. § 541.05 subd. 1(5) (establishing six-year limitation period for personal injury claims not arising in contract or strict liability). Under Minnesota law, "a claim involving personal injuries allegedly caused by a defective product accrues when two elements are present: '(1) a cognizable physical manifestation of the disease or injury, and (2) evidence of a causal connection between the injury or disease and the defendant's product, act, or omission.'" *Klempka v. G.D. Searle & Co.*, 963 F.2d 168, 170 (8th Cir. 1992) (quoting *Hildebrandt v. Allied Corp.*, 839 F.2d 396, 398 (8th Cir. 1987)) (applying Minnesota law). "A plaintiff who is aware of both her injury and the likely cause of

her injury is not permitted to circumvent the statute of limitations by waiting for a more serious injury to develop from the same cause." *Id.*

For example, in *Klempka*, the plaintiff suffered injuries and was diagnosed with chronic pelvic inflammatory disease, which her doctor said was caused by the plaintiff's intrauterine device. *Id.* at 169. Several years later, the plaintiff was told that she was infertile and that the intrauterine device caused her infertility. *Id.* Applying Minnesota law, the Eighth Circuit concluded that the plaintiff's cause of action accrued when she first learned that she had an injury (chronic pelvic inflammatory disease) that was caused by the intrauterine device. *Id.* at 170. Here, Benson does not deny that she knew that her injuries were caused by ObTape in 2005 when her doctors told her that her symptoms were caused by ObTape and that she would require further surgery. She also does not deny that she knew in 2006 that her ObTape had to be removed completely because of the problems she had with it. Benson argues, however, that her claims did not accrue until she saw a television commercial regarding injuries caused by defects in mesh products. Benson did not point to any Minnesota authority holding that a plaintiff must be on notice that her injuries were caused by a defect. Rather, the precedent states that the plaintiff must be aware of an injury and a causal connection between the injury and the defendant's product. *Id.*

*3 Benson nonetheless contends that two Eighth Circuit cases support denial of summary judgment in this case. The Court disagrees. First, Benson points to *Hildebrandt v. Allied Corp.*, 839 F.2d 396 (8th Cir. 1987), where the plaintiffs alleged that they suffered lung damage due to their exposure to a toxic chemical at their workplace. But there, unlike here, the plaintiffs' doctors initially told the plaintiffs that there was no correlation between their symptoms and the chemical. *Id.* at 399. The Eighth Circuit thus concluded that the plaintiffs' claims did not accrue until the cause of the plaintiffs' injuries was rationally identified. Second, Benson points to *Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917 (8th Cir. 2004). In *Tuttle*, the district court found that the decedent's smokeless tobacco product liability action accrued when the decedent discovered a lump in his cheek. 377 F.3d at 922. The Eighth Circuit reversed because the decedent's doctor initially told the decedent that the lump was caused by an oral infection and was treatable with antibiotics—not that it was oral cancer caused by the tobacco.

Id. Hildebrandt and *Tuttle* are both distinguishable from Benson's case. Here, unlike *Hildebrandt* and *Tuttle*, there is no dispute that Benson and her doctors connected her injuries to ObTape in 2005.

Benson argues that even if Minnesota's discovery rule does not save her strict liability and negligence claims, the statute of limitations should be tolled by fraudulent concealment. "Fraudulent concealment, if it occurs, will toll the running of the statute of limitations until discovery or reasonable opportunity for discovery of the cause of action by the exercise of due diligence." *Holstad v. Sw. Porcelain, Inc.*, 421 N.W.2d 371, 374 (Minn. Ct. App. 1988); accord *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 918 (Minn. 1990). "The party claiming fraudulent concealment has the burden of showing that the concealment could not have been discovered sooner by reasonable diligence on his part and was not the result of his own negligence." *Wild v. Rarig*, 234 N.W.2d 775, 795 (Minn. 1975). As discussed above, Benson's doctors told her in 2005 that she had injuries caused by ObTape. And she knew by 2006 that her entire ObTape had to be removed because of her problems with erosion. A

reasonable person in those circumstances would take some action to follow up on the cause of her injuries and try to find out whether the injuries were caused by a problem with ObTape, a problem with the implant surgery, or some other problem. But Benson pointed to no evidence that she took any action to investigate her potential claims even though she knew there was a connection between her injuries and the ObTape. Under these circumstances, the Court concludes that fraudulent concealment does not toll the statute of limitations. Benson's strict liability and negligence claims are therefore barred.

CONCLUSION

As discussed above, Mentor's Motion for Summary Judgment (ECF No. 24 in 4:13-cv-341) is granted.

IT IS SO ORDERED.

All Citations

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2015 WL 5838506

Only the Westlaw citation is currently available.

United States District Court,
S.D. West Virginia,
Charleston Division.

Joyce Oliver, Plaintiff,

v.

Boston Scientific Corp., Defendant.

Civil Action No. 2:13-cv-01736

|
Signed October 5, 2015

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MEMORANDUM OPINION AND ORDER

(Defendant's Motion for Summary Judgment)

JOSEPH R. GOODWIN, UNITED STATES DISTRICT JUDGE

*1 Pending before the court is Defendant Boston Scientific Corp.'s ("BSC") Motion for Summary Judgment and Memorandum in Support Against Plaintiff Joyce Oliver ("Motion") [Docket 33]. As set forth below, BSC's Motion is **GRANTED IN PART** with respect to BSC's defense of the statute of limitations regarding any claims based on the Obtryx Transobturator Mid-Urethral Sling System, and with respect to the plaintiff's claims of strict liability for manufacturing defect, strict liability for failure to warn, negligent manufacturing,

negligent failure to warn, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and fraudulent concealment. BSC's Motion is **DENIED IN PART** with respect to the plaintiff's claims of strict liability for design defect and negligent design.

I. Background

This case resides in one of seven MDLs assigned to me by the Judicial Panel on Multidistrict Litigation concerning the use of transvaginal surgical mesh to treat pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI"). In the seven MDLs, there are more than 72,000 cases currently pending, approximately 19,000 of which are in the Boston Scientific Corp. MDL, MDL 2326. In an effort to efficiently and effectively manage this massive MDL, I decided to conduct pretrial discovery and motions practice on an individualized basis so that once a case is trial-ready, it can then be promptly transferred or remanded to the appropriate district for trial. To this end, I ordered the plaintiffs and defendant to each select 50 cases, which would then become part of a "wave" of cases to be prepared for trial and, if necessary, remanded. (See Pretrial Order # 65, *In re Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-md-002326, entered Dec. 19, 2013, available at <http://www.wvsd.uscourts.gov/MDL/boston/orders.html>). This selection process was completed twice, creating two waves of 100 cases, Wave 1 and Wave 2. Ms. Oliver's case was selected as a Wave 1 case by the plaintiffs.

Plaintiff Joyce Oliver was surgically implanted with the Obtryx Transobturator Mid-Urethral Sling System (the "Obtryx") on September 8, 2008, and the Advantage Fit System (the "Advantage Fit") on July 18, 2011.¹ (Pl. Fact Sheet [Docket 33-4], at 5). She received the surgery at a hospital in St. Petersburg, Florida, and Clearwater, Florida, respectively. (*Id.*). Her surgeries were performed by Dr. Meena Jain and Dr. Craig Barkley, respectively. (*Id.*). The plaintiff claims that as a result of implantation of the Obtryx and Advantage Fit, she has experienced multiple complications. She brings the following claims against BSC: strict liability for manufacturing defect, design defect, and failure to warn; negligence; breaches of express and implied warranties; fraudulent concealment; and punitive damages. (Short Form Compl. [Docket 1] ¶ 13).

II. Legal Standards

A. Summary Judgment

*2 To obtain summary judgment, the moving party must show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, the court will not “weigh the evidence and determine the truth of the matter.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some “concrete evidence from which a reasonable juror could return a verdict” in his or her favor. *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere “scintilla of evidence” in support of his or her position. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or unsupported speculation, without more, are insufficient to preclude the granting of a summary judgment motion. *See Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013); *Stone v. Liberty Mut. Ins. Co.*, 105 F.3d 188, 191 (4th Cir. 1997).

B. Choice of Law

Under 28 U.S.C. § 1407, this court has authority to rule on pretrial motions in MDL cases such as this. The choice of law for these pretrial motions depends on whether they involve federal or state law. “When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located. When considering questions of state law, however, the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.” *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996) (internal citations omitted). In cases based on

diversity jurisdiction, the choice-of-law rules to be used are those of the states where the actions were originally filed. *See In re Air Disaster at Ramstein Air Base, Ger.*, 81 F.3d 570, 576 (5th Cir. 1996) (“Where a transferee court presides over several diversity actions consolidated under the multidistrict rules, the choice of law rules of each jurisdiction in which the transferred actions were originally filed must be applied.”); *In re Air Crash Disaster Near Chi., Ill.*, 644 F.2d 594, 610 (7th Cir. 1981); *In re Digitek Prods. Liab. Litig.*, MDL No. 2:08-md-01968, 2010 WL 2102330, at *7 (S.D. W. Va. May 25, 2010).

If a plaintiff files her claim directly into the MDL in the Southern District of West Virginia, however, as Ms. Oliver did in this case, I consult the choice-of-law rules of the state in which the implantation surgery took place. *See Sanchez v. Boston Scientific Corp.*, 2:12-cv-05762, 2014 WL 202787, at *4 (S.D. W. Va. Jan. 17, 2014) (“For cases that originate elsewhere and are directly filed into the MDL, I will follow the better-reasoned authority that applies the choice-of-law rules of the originating jurisdiction, which in our case is the state in which the plaintiff was implanted with the product.”). Ms. Oliver received her implantation surgery in Florida. (Short Form Compl. [Docket 1] ¶ 11). Thus, the choice-of-law principles of Florida guide this court's choice-of-law analysis.

*3 These principles compel application of Florida law. “In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship” *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980) (quoting Restatement (Second) of Conflict of Laws (“Restatement”) § 146); *see also id.* (quoting Restatement § 145) (listing factors to consider when determining which state has the most significant relationship to a dispute).

Here, the plaintiff is a Florida resident. (Short Form Compl. [Docket 1] ¶ 4). In addition, she was implanted with the device and allegedly suffered injury in Florida. (*Id.* ¶¶ 11, 13). Accordingly, Florida has the most significant relationship of any state to the occurrence alleged in this lawsuit and to the parties. Thus, I apply Florida's substantive law to this case.

III. Analysis

The plaintiff has conceded the following claims: strict liability for manufacturing defect, negligent manufacturing, breach of express warranty, breach of implied warranties, and fraudulent concealment. (Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. ("Resp.") [Docket 67], at 17–18). Therefore, BSC's Motion on these claims is **GRANTED**. I analyze the remaining claims below.

A. Statute of Limitations

In a products-liability action, the statute of limitations is four years. Fla. Stat. 95.11(3)(c). The statute of limitations "runs from the time the cause of action accrues," *id.* § 95.031, but is subject to the discovery rule: "[T]he period run[s] from the date that the facts giving rise to the cause of action were discovered, or should have been discovered with the exercise of due diligence." *Id.* § 95.031(2)(b). The limitations period is triggered when a plaintiff has knowledge of a possible causal connection between her injury and the product in question. *Walls v. Armour Pharm. Co.*, 832 F. Supp. 1467, 1478 (M.D. Fla. 1993) (citing *Babush v. Am. Home Prods. Corp.*, 589 So. 2d 1379, 1381 (Fla. Dist. Ct. App. 1991)), *aff'd sub nom. Christopher v. Cutter Labs.*, 53 F.3d 1184 (11th Cir. 1995); *see Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 938 (Fla. 2000) (citing with approval *Tanner v. Hartog*, 618 So. 2d 177 (Fla. 1993)).

The plaintiff was implanted with the Obtryx on September 8, 2008. (Pl. Fact Sheet [Docket 33-4], at 5). In her deposition, she admitted that within a few weeks of her Obtryx implantation surgery, she told Dr. Jain, her implanting physician, that "I think it's the sling that's causing these problems." (Oliver Dep. [Docket 67-3], at 204:9–22). Therefore, I **FIND** that the limitations period was triggered at that time, a few weeks after September 8, 2008, and ran until a few weeks after September 8, 2012. *See Walls*, 832 F. Supp. at 1478. The plaintiff filed suit on January 31, 2013, several months outside of the limitations period. (*See Short Form Compl.* [Docket 1]). Thus, to the extent the plaintiff's claims arise out of the implantation of the Obtryx, BSC's Motion regarding the statute of limitations is **GRANTED**.

B. Strict Liability

In *West v. Caterpillar Tractor Co.*, the Supreme Court of Florida adopted section 402A of the Restatement

(Second) of Torts as the standard for strict liability. 336 So. 2d 80, 87 (Fla. 1976). Accordingly, in Florida,

[i]n order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user's injuries or damages.

*4 *Id.* at 86–87. Additionally, "a product may be defective by virtue of a design defect, a manufacturing defect, or an inadequate warning." *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167, 1170 (Fla. Dist. Ct. App. 1998).

1. Design Defect

Under the "government rules defense,"

there is a rebuttable presumption that the product is not defective or unreasonably dangerous and the manufacturer or seller is not liable if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm: (a) Complied with federal or state codes, statutes, rules, regulations, or standards relevant to the event causing the death or injury; (b) The codes, statutes, rules, regulations, or standards are designed to prevent the type of harm that allegedly occurred; and (c) Compliance with the codes, statutes, rules, regulations, or standards is required as a condition for selling or distributing the product.

Fla. Stat. § 768.1256(1).

BSC argues that the government rules defense applies in this case because the Federal Food, Drug, and Cosmetic

Act (“FDCA”) is designed to prevent the type of harm that allegedly occurred, and BSC complied with FDA regulations under the FDCA in clearing the Advantage Fit for sale to the public. (Def.’s Mot. for Summ. J. & Mem. of Law in Supp. (“Mem. in Supp.”) [Docket 33], at 8–10).

In *Lewis v. Johnson & Johnson*, I held that

[t]he 510(k) process is not a safety statute or administrative regulation. The Supreme Court has determined that “the 510(k) process is focused on equivalence, not safety.” [*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 493 (1996)] (internal quotation omitted); see also [*Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323 (2008)] (“While § 510(k) is focused on equivalence, not safety, premarket approval is focused on safety, not equivalence.”) (internal quotation omitted).

991 F. Supp. 2d 748, 755 (S.D. W. Va. 2014) (footnote omitted); see also *Cisson v. C. R. Bard, Inc. (In re C. R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.)*, No. 2:11-cv-00195, 2013 WL 3821280, at *7 (S.D. W. Va. July 23, 2013) (“The FDA 510(k) process does not go to safety and effectiveness and does not provide any requirements on its own.”). I also found in *Lewis* that section 82.008(a) of the Texas Civil Practice and Remedies Code did not apply because the product’s “510(k) clearance [did] not relate to its safety or efficacy.” *Lewis*, 991 F. Supp. 2d at 761; see also *Tex. Civ. Prac. & Rem. Code § 80.008(a)* (“[T]here is a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a claimant caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes that the product’s formula, labeling, or design *complied with mandatory safety standards or regulations* adopted and promulgated by the federal government, or an agency of the federal government, that were applicable to the product at the time of manufacture and that governed the product risk that allegedly caused harm.”) (emphasis added).

Section 768.1256 of the Florida Statutes is nearly identical to the Texas statute at issue in *Lewis*. Both statutes provide a rebuttable presumption only when the product complies with government *safety* standards. Like I held in *Lewis*, because the 510(k) process is not “designed to prevent the type of harm that allegedly occurred,” see Fla. Stat. § 768.1256(1)(b), I **FIND** that the government rules defense is inapplicable.

*5 BSC has presented no other argument on design defect. Thus, BSC has failed to meet its burden of showing the absence of a genuine dispute as to any material fact. See Fed. R. Civ. P. 56(a); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), *superseded on other grounds by Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Furthermore, the plaintiff has offered concrete evidence from which a reasonable juror could return a verdict in her favor. Therefore, BSC’s Motion on the plaintiff’s claim of strict liability for design defect is **DENIED**.

2. Failure to Warn

To prevail on a claim of failure to warn, a plaintiff must show that the warnings accompanying the product are inadequate, and that the inadequacy of the warnings proximately caused the plaintiff’s injury. *Hoffmann-La Roche Inc. v. Mason*, 27 So. 3d 75, 77 (Fla. Dist. Ct. App. 2009).

Florida follows the learned intermediary doctrine, under which the drug or medical device manufacturer’s duty to warn is directed to the physician rather than the patient. *Felix v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102, 104 (Fla. 1989); see *Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1368 (S.D. Fla. 2007) (holding learned intermediary doctrine applies to prescription medical devices as well as prescription drugs); *Savage v. Danek Med. Inc.*, 31 F. Supp. 2d 980, 984 (M.D. Fla.), *aff’d mem.*, 202 F.3d 288 (11th Cir. 1999) (same).² Under the learned intermediary doctrine, any warning read by the physician “means only that the learned intermediary would have incorporated the additional risk into his decisional calculus.” *Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806, 814 (5th Cir. 1992) (internal quotation marks omitted) (distinguishing preventable-risk warnings and unavoidable-risk warnings); accord *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1021 (10th Cir. 2001); *Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992). A plaintiff must still show that her treating physician would not have implanted the product had the physician been given an adequate warning. See *Hoffmann-La Roche Inc. v. Mason*, 27 So. 3d 75, 76 (Fla. Dist. Ct. App. 2009) (“[The plaintiff] failed to establish that the allegedly deficient warning was the proximate cause of his injury; therefore, we reverse.”); *Boles v. Merck & Co. (In re Fosamax Prods. Liab. Litig.)*, 647 F. Supp. 2d 265, 279–82 (S.D.N.Y.

2009); *Baker v. Danek Med.*, 35 F. Supp. 2d 875, 881 (N.D. Fla. 1998); see also *Maley v. Merek & Co. (In re Fosamax Prods. Liab. Litig.)*, 688 F. Supp. 2d 259, 265 (S.D.N.Y. 2010) (listing Florida as among the states where the plaintiff “has the burden of production on this aspect of causation”).

*6 Here, there is no evidence that Dr. Barkley, the implanting physician of the Advantage Fit, would have taken a different course of action even if he had been given an adequate warning. Dr. Barkley stated that if any information about the risks of a product changed, he would have incorporated those changes in how he advised his patients. (Barkley Dep. [Docket 67-2], at 16:14–17:23). However, without any indication that he would not have implanted the product had he been given such a warning, the plaintiff cannot establish proximate causation. See *Hoffmann-La Roche Inc. v. Mason*, 27 So. 3d at 76 (“[The plaintiff] failed to establish that the allegedly deficient warning was the proximate cause of his injury; therefore, we reverse.”). Therefore, BSC’s Motion on the plaintiff’s claim of strict liability for failure to warn is **GRANTED**.

C. Negligence

In a negligence suit, the plaintiff must establish (1) duty; (2) breach of duty; (3) causation; and (4) damages. *Kayfetz v. A.M. Best Roofing, Inc.*, 832 So. 2d 784, 786 (Fla. Dist. Ct. App. 2002); see *Clay Elec. Co-op, Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003) (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 164–65 (W. Page Keeton ed., 5th ed. 1984)).

1. Negligent Design

Footnotes

- 1 The plaintiff underwent another Advantage Fit implantation surgery on May 20, 2013. (Pl. Fact Sheet [Docket 33-4], at 5).
- 2 The plaintiff argues that the learned intermediary doctrine is an affirmative defense. (Resp. [Docket 67], at 13–14). Thus, according to the plaintiff, BSC bears the burden of proof on this issue. (*Id.* at 10). Although a few Florida courts have indeed referred to the learned intermediary as an affirmative defense, upon review, I distinguish those cases and reject such a characterization. See *Walls v. Armour Pharmaceutical Co.*, 832 F. Supp. 1467, 1482 (M.D. Fla. 1993) (holding that the defendant bore the burden of proof with regard to the learned intermediary doctrine when moving for judgment as a matter of law under Federal Rule of Civil Procedure 50), *aff’d in part, rev’d in part on other grounds sub nom. Christopher v. Cutter Labs.*, 53 F.3d 1184 (11th Cir. 1995); *MacMorris v. Wyeth, Inc.*, No. 2:04CV596FTM-29DNF, 2005 WL 1528626, at *2 (M.D. Fla. June 27, 2005) (declining to resolve the issue of whether the learned intermediary doctrine applies at the motion to dismiss stage); *Horillo v. Cook, Inc.*, No. 10-15327, 2012 WL 6553611, at *3 (11th Cir. Nov. 7, 2012) (referring

As explained earlier, the government rules defense does not apply to the plaintiff’s design defect claim, whether based on strict liability or negligence, and BSC has failed to meet its summary judgment burden. See *supra* Part III.B.1. Therefore, BSC’s Motion on the plaintiff’s claim of negligent design is **DENIED**.

2. Negligent Failure to Warn

As explained earlier, there is no evidence that Dr. Barkley would have taken a different course of action even if he had been given an adequate warning, and thus, the plaintiff cannot establish proximate causation. See *supra* Part III.B.2. Therefore, BSC’s Motion on the plaintiff’s claim of negligent failure to warn is **GRANTED**.

IV. Conclusion

For the reasons discussed above, it is **ORDERED** that BSC’s Motion [Docket 33] be **GRANTED IN PART** with respect to the plaintiff’s claims of strict liability for manufacturing defect, strict liability for failure to warn, negligent manufacturing, negligent failure to warn, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and fraudulent concealment, and **DENIED IN PART** with respect to the plaintiff’s claims of strict liability for design defect and negligent design.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

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to the learned intermediary doctrine as an affirmative defense in the context of a defendant's ability to "avoid liability by demonstrating the treating physician was otherwise aware of the particular risk associated with the medical device").

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Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia.

In re BOSTON SCIENTIFIC CORP., Pelvic
Repair System Products Liability Litigation.
This Document Relates to the Following Case:

Brenda L. Robinson & Rex Robinson

v.

Boston Scientific Corp.

MDL No. 2326.

|

No. 2:12-cv-03700.

|

Signed March 30, 2015.

**MEMORANDUM OPINION AND ORDER
(Defendants' Motion for Summary Judgment)**

JOSEPH R. GOODWIN, District Judge.

*1 Pending before the court is the defendant's Motion for Summary Judgment Based on Statute of Limitations ("Motion") [Docket 54]. For the reasons set forth below, the Motion is **GRANTED**, and this case is **DISMISSED with prejudice**.

I. Background

This case resides in one of seven MDLs assigned to me by the Judicial Panel on Multidistrict Litigation concerning the use of transvaginal surgical mesh to treat pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI"). In the seven MDLs, there are more than 70,000 cases currently pending, approximately 15,000 of which are in the Boston Scientific Corp. ("BSC") MDL, MDL 2326. In an effort to efficiently and effectively manage this massive MDL, I decided to conduct pretrial discovery and motions practice on an individualized basis so that once a case is trial-ready (that is, after the court has ruled on all *Daubert* motions, summary judgment motions, and motions *in limine*, among other things), it can then be promptly transferred or remanded to the appropriate district for trial. To this end, I ordered the plaintiffs and defendant to each select 50 cases, which would then become part of a "wave" of cases to be prepared for trial and, if necessary, remanded. (*See* Pretrial Order # 65,

In re: Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig., No. 2:12-md-002326, entered Dec. 19, 2013, available at <http://www.wvsc.uscourts.gov/MDL/boston/orders.html>). This selection process was completed twice, creating two waves of 100 cases, Wave 1 and Wave 2. The Robinsons' case was selected as a Wave 2 case by the plaintiffs.

On June 27, 2006, Ms. Robinson was surgically implanted with the Obtryx Transobturator Mid-Urethral Sling System (the "Obtryx"), a product manufactured by BSC to treat SUI. (*See* BSC's Mot. for Summ. J. & Mem. of Law in Supp. ("Mem. in Supp.") [Docket 54], at 3). She received her surgery at a hospital in Salt Lake City, Utah. (*Id.*) Ms. Robinson claims that as a result of implantation of the Obtryx, she has experienced multiple complications, including pain, pain with intercourse, SUI, mesh erosion/exposure, urinary problems, and emotional effects. (*Id.* at 4). She brings the following claims against BSC: negligence; strict liability for design defect, manufacturing defect, and failure to warn; breaches of express and implied warranties; and punitive damages. (Pl.'s First Am. Short Form Compl. ("Short Form Compl.") [Docket 11], at 4-5). In the instant motion, BSC argues that each of Ms. Robinson's claims are barred by Utah's statute of limitations, and consequently, the court should grant summary judgment in favor of BSC and dismiss Ms. Robinson's case. BSC further contends that if Ms. Robinson's claims are barred as untimely, Mr. Robinson's claim for loss of consortium is also time barred and should be dismissed.

II. Legal Standards

A. Summary Judgment

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 249 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

*2 Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some “concrete evidence from which a reasonable juror could return a verdict in his [or her] favor.” *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere “scintilla of evidence” in support of his or her position. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or unsupported speculation, without more, are insufficient to preclude the granting of a summary judgment motion. See *Felty v. Graves–Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987); *Ross v. Comm'n Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985), *abrogated on other grounds*, 490 U.S. 228 (1989).

B. Choice of Law

Under 28 U.S.C. § 1407, this court has authority to rule on pretrial motions in MDL cases. The choice of law for these pretrial motions depends on whether they concern federal or state law:

When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located. When considering questions of state law, however, the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.

In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir.1996) (internal citations omitted). To determine the applicable state law for a dispositive motion based on the statute of limitations, I generally refer to the choice-of-law rules of the jurisdiction where the plaintiff first filed her claim. See *In re Air Disaster at Ramstein Air Base, Ger.*, 81 F.3d 570, 576 (5th Cir.1996) (“Where a transferee court presides over several diversity actions consolidated under the multidistrict rules, the choice of law rules of each jurisdiction in which the transferred actions were

originally filed must be applied.”); *In re Air Crash Disaster Near Chi., Ill.*, 644 F.2d 594, 610 (7th Cir.1981); *In re Digitek Prods. Liab. Litig.*, MDL No. 2:08–md–01968, 2010 WL 2102330, at *7 (S.D.W.Va. May 25, 2010). The Robinsons initially filed their products liability action in the District of Utah on July 3, 2012. (See Compl. [Docket 2]). Subsequently, they filed a First Amended Short Form Complaint into MDL No. 2326 on September 10, 2012. (See Short Form Compl. [Docket 11]). As such, the choice-of-law principles of Utah guide this court's choice-of-law analysis.

The parties agree, as does this court, that these principles compel application of Utah law to the plaintiffs' claims. In tort actions, Utah employs the “most significant relationship” test as articulated by the Restatement (Second) of Conflict of Laws (“Restatement”) to determine which state's laws should apply to a given circumstance. See *Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054, 1059 (Utah 2002). Section 145 of the Restatement lists the following factors to consider when determining which state has the most significant relationship to a dispute: “(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.” Restatement § 145(2). The Restatement directs that “[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue.” *Id.* Here, the implantation surgery that allegedly resulted in Ms. Robinson's injuries took place in Utah. (Pl. Fact Sheet [Docket 54–1], at 4). The Robinsons are Utah residents. (Short Form Compl. [Docket 11], at 1). And Ms. Robinson's subsequent medical treatment for the claimed injuries occurred in Utah. (Pl. Fact Sheet [Docket 54–1], at 6). Accordingly, Utah has the most significant relationship to the occurrence alleged in this lawsuit and to the parties. Thus, I apply Utah's substantive law—including Utah's statutes of limitations—to this case.

III. Discussion

*3 I begin by reviewing the relevant disputed facts.¹ On June 26, 2006, Ms. Robinson had a preoperative meeting with Dr. Clayton Wilde to discuss the placement of a transobturator suburethral sling. (Robinson Medical Rs. June 26, 2006 [Docket 54–4], at 8). Dr. Wilde reviewed

the risks, complications, indications, and nature of the procedure with Ms. Robinson at that time. (*Id.*) Dr. Wilde's notes indicate that he discussed voiding disorders and tape erosion with her. (*Id.*) Ms. Robinson then signed a Consent for Operation or Procedure form authorizing Dr. Wilde to place a "sling" under her urethra in order to relieve her urinary incontinence. (Robinson Medical Rs. June 26, 2006 [Docket 54-3], at 2). The form describes the device as a "Transobturator Suburethral Sling." (*Id.*) Ms. Robinson underwent implantation of the Obtryx on June 27, 2006. (Pl. Fact Sheet [Docket 54-1], at 4). At least two of Ms. Robinson's medical records include the name of the implanted product, including (1) Dr. Wilde's Operative Report, (*see* Robinson Medical Rs. June 27, 2006 [Docket 54-4], at 3 (describing the procedure performed as "Obtryx transobturator suburethral sling")), and (2) Dr. Wilde's Implant Record, (*see id.* at 9 (including a product sticker which identifies the product name—"Obtryx"—and product number)). Following the implantation procedure, Ms. Robinson signed a Discharge Information Sheet form that described the procedure as "Transobturator Sub Urethral Sling." (*Id.* at 10).

In "late 2006 or early 2007," Ms. Robinson began to experience "problems." (Pl. Fact Sheet [Docket 54-1], at 5). She presented to Dr. Wilde with complaints about possible sling erosion and her husband's dyspareunia on January 24, 2007. (Robinson Medical Rs. [Docket 544], at 7). Upon examination, Dr. Wilde did note some erosion of the tape. (*Id.*; *see also* Clayton Wilde Dep. [Docket 54-6], at 66:2-5). Ms. Robinson had an interval exam with Dr. Wilde on April 25, 2007. (*Id.* at 2). At that point, she was still having dyspareunia, and Dr. Wilde again noted "a little bit of vaginal erosion of her suburethral tape." (*Id.*) Ms. Robinson remembers Dr. Wilde telling her that the mesh was "hanging down a little" and that he thought it was causing the pain that Mr. Robinson felt during intercourse. (Brenda Robinson Dep. [Docket 54-2], at 77:21-78:19). He explained that trimming the mesh would improve Ms. Robinson's symptoms. (Pl. Fact Sheet [Docket 54-1], at 5). On May 4, 2007, Dr. Wilde performed an excision/removal procedure on Ms. Robinson. (*Id.*).

Between 2007 and 2012, Ms. Robinson continued to experience symptoms, including infections, pain with intercourse, incontinence, and bleeding. (*See* Brenda Robinson Dep. [Docket 54-2], at 193:10-194:10).

In February 2012, Ms. Robinson saw a television commercial concerning mesh. (*See* Pl. Resp. in Opp'n to BSC's Mots. for Summ. J. ("Resp.") [Docket 88], at 18). She then visited Dr. Lisa Stout with complaints of pain, heavy leaking, urinary tract infections, and Mr. Robinson's continued ability to feel the mesh. (Brenda Robinson Dep. [Docket 88-2], at 87:8-16). On June 8, 2012, Dr. Stout performed an "excision of vaginal mesh." (Robinson Med. Rs. June 8, 2012 [Docket 88-11], at 14). The Robinsons filed their original suit on July 3, 2012. (*See* Compl. [Docket 2]).

*4 Utah's Product Liability Act ("UPLA") provides a two-year statute of limitations for the plaintiffs' claims. Utah Code Ann. § 78B-6-706 (West 2014).² Section 78B-6-706 explicitly incorporates the discovery rule by providing that the action "shall be brought within two years from the time the individual who would be the claimant in the action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause." *Id.* The Supreme Court of Utah has yet to elaborate on the precise contours of Utah's discovery rule, in particular, whether "cause" as mentioned in section 78B-6-706 means only "identity of the manufacturer," "cause in fact," or "possible legal responsibility." However, lower Utah courts have interpreted the phrase—"and its cause"—to mean both the identity of the allegedly defective product's manufacturer and the causal relationship between the product and the harm. *See Aragon v. Clover Club Foods Co.*, 857 P.2d 250, 252-54 (Utah Ct.App.1993). *Aragon* holds that discovery of "cause" requires discovery of "the identity of the manufacturer" and that "due diligence" is "that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so." *Id.* at 252-53. Following *Aragon*, courts considering Utah law have applied a three-part analysis to statute-of-limitations issues under the UPLA:

[T]he UPLA statute of limitations begins to run when the plaintiff discovers, or should have discovered: (1) that she has been injured; (2) the identity of the maker of the allegedly defective product; and (3) that the product had a possible causal relation to her injury.

Hansen v. Novartis Pharms. Corp., No. 2:08-cv-985, 2011 WL 6100848, at *3 (D.Utah Dec. 7, 2011) (citing *Aragon*); *see also Pratt v. Cavagna N. Am., Inc.*, No. 2:13-cv-107, 2013 WL 6146075, at *3 (D.Utah

Nov. 21, 2013) (same); *McDougal v. Weed*, 945 P.2d 175, 177 n. 1 (Utah Ct.App.1997) (reasserting *Aragon's* holding that the statute of limitations is tolled until the plaintiff discovers “both the injury and the identity of the manufacturer” and distinguishing the UPLA from the statute of limitations for medical malpractice). With no direction from the Supreme Court of Utah to the contrary, I now apply this analysis to the present facts. See *Castillo v. Holder*, 776 F.3d 262, 268 n. 3 (4th Cir.2015) (“[W]hen the state's highest court has not engaged in such statutory interpretation, a state's intermediate appellate court decisions constitute the next best indicia of what state law is” (internal quotations omitted)).

The plaintiffs point to *Bridgewater v. Toro Co.* for the premise that the discovery provision of the UPLA statute of limitations would be triggered upon discovery that a “defective product” caused the injury. 819 F.Supp. 1002, 1009 (D.Utah 1993) (holding that the “cause” that must be discovered for purposes of section 78B-6-706 is “the legal cause, and not merely the ‘but for’ cause”). The court is aware of only one other case adopting this strict interpretation of the UPLA's discovery rule. See *Strickland v. Gen. Motors Corp.*, 852 F.Supp. 956, 959 (D.Utah 1994). I find these applications of section 78-B-6-706 unpersuasive for several reasons. First, *Bridgewater* was a federal district court case decided several months prior to the *Aragon* decision. Thus, I must defer to *Aragon* over *Bridgewater*. See *United States v. King*, 673 F.3d 274, 279 (4th Cir.2012) (stating that the federal courts should “generally defer to the state's intermediate appellate courts” on an issue undecided by the highest court of the state). Second, although later in time, the *Strickland* decision arises from an overly broad understanding of *Aragon* and the *Aragon* court's reliance on the Washington Supreme Court case of *North Coast Air Services v. Grunman Corp.*, 759 P.2d 405 (Wash.1988)—while acknowledging North Coast's reading of Washington's statute of limitations as requiring discovery of the “legal cause,” *Aragon's* holding was much narrower, finding that the UPLA “tolls the statute of limitations until the plaintiff discovers, or in the exercise of due diligence should have discovered, the identity of the manufacturer.” 857 P.2d at 252-53 (emphasis added). Finally, as explained above, the majority of Utah cases addressing this matter rely on *Aragon's* three-part analysis (or something less stringent, see, e.g., *Cannon v. Minn. Min. & Mfg. Co.*, 2009 WL 350561, at *6 (D.Utah Feb. 11, 2009) (considering whether the plaintiff knew that

the product “was the possible cause” of his symptoms) (emphasis added), and do not require discovery of a specific product defect. For these reasons, I follow *Aragon* rather than *Bridgewater*.

*5 In BSC's view, the statute of limitations began to run as early as “late 2006 or early 2007,” when Ms. Robinson first experienced symptoms of bodily injury, but, no later than mid-2007, when despite Ms. Robinson's excision/removal procedure, the problems continued. Consequently, BSC argues that Ms. Robinson's lawsuit, filed on July 3, 2012, is barred by the UPLA statute of limitations. The plaintiffs, on the other hand, contend that the statute of limitations did not start until 2012, when Ms. Robinson saw television commercials and discovered the cause of her injuries. (Resp. [Docket 88], at 17-19). The undisputed facts, considered under the *Aragon* test, lead this court to agree with BSC.

First, Ms. Robinson testified that she discovered her injuries in late 2006 or early 2007, about six months after her surgery. (See Pl. Fact Sheet [Docket 54-1], at 5). Second, both Ms. Robinson's Operative Report and Implant Record name the Obtryx. (See Robinson Medical Rs. June 27, 2006 [Docket 54-4], at 3, 9). Assuming that this information was not directly conveyed to Ms. Robinson by her physician, the court must then ask whether Ms. Robinson “presented evidence that would allow a reasonable jury to find that even if she had used ‘diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so,’ she should not have ascertained the identity of the manufacturer.” *Griffiths-Rast v. Sulzer Spine Tech*, 216 F. App'x 790, 796-97 (10th Cir.2007) (quoting *Aragon*, 357 P.2d at 253). Ms. Robinson has provided no evidence indicating that she could not have obtained her medical records containing the identity of the product manufacturer had she sought them. Therefore, a reasonable jury could not find that this information was unavailable to Ms. Robinson through due diligence beginning on the day of her implantation surgery, June 27, 2006. See *id.* at 796 (“It seems clear that in a normal case a reasonable jury could not find that it would take over two years to determine the manufacturer of a trademarked medical device when the party knows the correct name of that device.”); see also *Pratt*, 2013 WL 6146075, at *3 (“It is well established that plaintiffs cannot simply wait for information regarding a potential defendant to come to them. Rather, a plaintiff has a duty

to act with reasonable diligence to ascertain the identity of a defendant.” (internal citations and quotation marks omitted)).

Finally, Ms. Robinson discovered that the product had a possible causal relation to her injury by April 25, 2007, when she saw Dr. Wilde about the dyspareunia. During this visit, Dr. Wilde told her that the mesh was “hanging down a little” and that he thought it was causing the pain that Mr. Robinson felt during intercourse. (Brenda Robinson Dep. [Docket 54–2], at 77:21–78:19). He told Ms. Robinson that trimming the mesh would improve her symptoms. (Pl. Fact Sheet [Docket 54–1], at 5). At this point, Ms. Robinson knew that the mesh had a “possible causal relation” to her symptoms of pain and dyspareunia, at the very least, *see Hansen*, 2011 WL 6100848, at *3, and the final prong of *Aragon* was satisfied, thereby triggering the UPLA's statute of limitations. Accordingly, the statute of limitations, having expired on April 25, 2009, bars her claim which was not filed until July 3, 2012.

*6 The plaintiffs' arguments do not change this definitive outcome. First, in an attempt to create an issue of material fact, the plaintiffs claim that Ms. Robinson did not suspect that the BSC Obtryx was the cause of her injury until she saw a television commercial in early 2012. (Resp. [Docket 88], at 18). However, when the plaintiff conclusively attributed her injury to the product is not the relevant question. *See Hansen*, 2011 WL 6100848, at *3 (“[A] plaintiff need not have a ‘confirmed diagnosis’ about the causal relation to trigger the running of the statute of limitation.”). Rather, the court must ask when the plaintiff had “inquiry notice” of a possible causal relation between the product and her injury. *Id.*; *see also Macris v. Sculptured Software, Inc.*, 24 P.3d 984, 990 (Utah 2001) (considering the statute of limitations for conversion and concluding that “all that is required to trigger [it] is sufficient information to put plaintiffs on notice to make further inquiry if they harbor doubts or questions”). And the undisputed facts demonstrate that Ms. Robinson had inquiry notice on April 25, 2007, when Dr. Wilde told her that the mesh was causing her problems and needed to be surgically repaired. (*See Brenda Robinson Dep.* [Docket 54–2], at 77:21–78:19; *see also, e.g., McCollin v. Synthes Inc.*, 50 F.Supp.2d 1119, 1123 (D.Utah 1999) (finding that

the statute of limitations began to run when the plaintiff learned that a second surgery was needed to “replace implants”)).

“It is well settled that the issue of when a plaintiff knew or with reasonable diligence should have known of a cause of action is a question for the [factfinder].” *In re Adoption of Baby B.*, 308 P.3d 382, 418 (Utah 2012) (citing *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir.1985) (internal quotation marks omitted)). Where the evidence is “so clear that there is no genuine factual issue,” however, the determination can be made as a matter of law. *Maughan*, 758 F.2d at 1388. The evidence in this case is clear: Ms. Robinson discovered her injuries, the identity of the product manufacturer, and a possible causal connection between the product and her injury on April 25, 2007. No reasonable jury could find otherwise. Therefore, I **FIND** that the statute of limitations for her products liability claims ran until April 25, 2009, almost three years before she filed suit, and as a result, her claims are barred by the UPLA's statute of limitations.

Mr. Robinson's claim for loss of consortium is dependent on the success of Ms. Robinson's claims. A loss-of-consortium claim is “derivative from the cause of action existing in behalf of the injured person[,] and may not exist in cases where the injured person would not have a cause of action.” Utah Code Ann. § 30–2–11(5)(a), (b). Furthermore, “[t]he statute of limitations applicable to the injured person shall also apply to the spouse's claim of loss of consortium.” *Id.* § 30–2–11(3). Therefore, I **FIND** that Mr. Robinson's claim is time barred as well.

IV. Conclusion

*7 For the reasons stated above, BSC's Motion [Docket 54] is **GRANTED**, and this case is **DISMISSED with prejudice**. The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1466746

Footnotes

- 1 The plaintiffs state that BSC's recitation of the facts is incomplete. Therefore, I provide the relevant facts as noted in BSC's Motion and include the additional facts described in the plaintiffs' responsive briefing.
- 2 Both Ms. Timothy's non-warranty and warranty claims fall under this general statute. See *Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 16 (Utah 1990) (holding that the UCC four-year statute of limitations for contracts (Utah Code Ann. § 70A-2-725) does not apply to warranty claims based on personal injury).

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2014 WL 3495977

Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia.

In re BOSTON SCIENTIFIC
CORPORATION PELVIC REPAIR SYSTEM
PRODUCTS LIABILITY LITIGATION

This Document Relates to the Following Cases:

Carolyn Frances Smothers

v.

Boston Scientific Corporation

Carolyn Francis Smothers

v.

Boston Scientific Corporation.

MDL No. 2326.

|

Nos. 2:12-cv-4078, 2:12-cv-8016.

|

Signed July 11, 2014.

MEMORANDUM OPINION AND ORDER

JOSEPH R. GOODWIN, District Judge.

*1 Pending in 2:12-cv-8016 is Boston Scientific Corporation's Motion for Summary Judgment Based on Statute of Limitations [Docket 49]¹. For the reasons stated below, the motion is **GRANTED** and these cases are **DISMISSED**.

I. Background

The plaintiff in these cases alleges she was injured after she was implanted with Boston Scientific Corporation's ("BSC") Obtryx Transobturator Mid-Urethral Sling. (See Short Form Compl. [Docket 1], at 3). She filed two lawsuits against BSC. First, she sued BSC in the District of Massachusetts on July 10, 2012. This action was later transferred by the Judicial Panel on Multidistrict Litigation to MDL 2326 and assigned its current case number, 2:12-cv-4078. A second suit was filed on the plaintiff's behalf on November 20, 2010. This suit was filed directly into the Boston Scientific MDL and was given

case number 2:12-cv-8016. Unaware of the first filing that originated in the District of Massachusetts, I selected the later-filed case as a bellwether case to be prepared for trial. (See Pretrial Order # 54).

On January 6, 2014, I entered an Order indicating that the plaintiff had filed duplicate actions and that the plaintiff must either (1) show cause within ten days why both actions should not be dismissed, or (2) file the appropriate pleadings to dismiss the duplicate action. (See Order [Docket 31]). The plaintiff then moved to dismiss 2:12-cv-8016 as a duplicate action and asked that I replace it with the earlier-filed case, 2:12-cv-4078. (See Motion to Dismiss [Docket 41], at 2). That motion remains pending.

In the instant motion for summary judgment, BSC contends that the plaintiff's action is barred by Tennessee's one-year statute of limitations. The plaintiff responds that I should apply Massachusetts's three-year statute of limitations and find that her claims are not time-barred. As I explain below, the plaintiff's claims are time-barred under Massachusetts's three-year limitations period.

II. Legal Standard

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable juror could return a verdict in his [or her] favor[.]" *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere "scintilla of evidence" in support of his or her position. *Anderson*,

477 U.S. at 252. Likewise, conclusory allegations or unsupported speculation, without more, are insufficient to preclude the granting of a summary judgment motion. See *Felty v. Graves Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987); *Ross v. Comm'ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985), *abrogated on other grounds*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

III. Analysis

*2 The parties disagree on which state's choice-of-law rules to apply. The plaintiff maintains that Massachusetts's choice-of-law provisions should apply because her earlier-filed case, 2:12-cv-4078, was transferred from the District of Massachusetts. "When a diversity case is transferred by the multidistrict litigation panel, the law applied is that of the jurisdiction from which the case was transferred." *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 732 (7th Cir.2010); see also *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir.1996) ("[T]he transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation."). In that case, Massachusetts's choice-of-law rules would apply because the case was transferred from Massachusetts and it would have remained in Massachusetts but for MDL consolidation.

On the other hand, BSC argues that Tennessee's choice of law provisions should apply. BSC contends that the later-filed case, 2:12-cv-8016, which was slotted as a bellwether,² should determine what state's choice-of-law provisions apply. This case was filed directly into the MDL and does not formally have an "originating" district. Therefore, BSC argues, I should apply the law of the state where the plaintiff was implanted with the product, which is Tennessee. See *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-2100, 2011 WL 1375011, at *6 (S.D.Ill. Apr. 12, 2011) ("[T]he better approach is to treat foreign direct filed cases as if they were transferred from a judicial district sitting in the state where the case originated," which is "the state where the plaintiff purchased and was prescribed the subject drug."); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-md-1871, 2012 WL 3205620, at *2 (E.D.Pa. Aug. 7, 2012) ("The Court has concluded, as have other MDL courts, that such cases should be governed by the

law of the states where Plaintiffs received treatment and prescriptions for Avandia.").

After deciding what state's choice-of-law provisions apply, I would then use those provisions to determine which state's substantive law to apply. For instance, BSC argues that even if I apply Massachusetts's choice-of-law rules, Massachusetts utilizes the "most significant relationship" test to determine which state's substantive laws to apply. See *New England Tel. & Tel. Co. v. Gourdeau Const. Co.*, 647 N.E.2d 42, 44 (Mass.1995) (In deciding choice-of-law issues, the "focus should be on which State has the more significant relationship to the occurrence and to the parties with respect to the issue of limitations.") (citing Restatement (Second) Conflict of Laws § 142 cmt. e (Supp.1989)). BSC contends that Tennessee has the most significant relationship to this case because the plaintiff is a citizen of Tennessee and the product was implanted in Tennessee. (See BSC's Reply in Supp. of Its Mot. for Summ. J. Based on Statute of Limitations [Docket 78], at 7–8). The plaintiff disagrees. She contends that Massachusetts has the most significant relationship to this case because BSC is headquartered there and the product was designed and manufactured there. (See Pls.' Resp. in Opp. to BSC's Mot. for Summ. J. Based on Statute of Limitations [Docket 71], at 9). Therefore, the plaintiff urges the court to apply Massachusetts's substantive law to this case, which includes a three-year statute of limitations on her claims.

*3 I need not settle this dispute. I will assume for the sake of argument that the plaintiff is correct: that Massachusetts law applies here and that Massachusetts has the most significant relationship to this case. Even so, the plaintiff's claims are time-barred. Massachusetts uses a three-year statute of limitations for personal injury actions. See Mass. Gen. Laws Ann. ch. 260, § 2A. Massachusetts, like many other states, follows the discovery rule. Under the discovery rule, the limitations period for bringing an action begins to run "when a plaintiff discovers, or any earlier date when she should reasonably have discovered, that she has been harmed or may have been harmed by the defendant's conduct." *Bowen v. Eli Lilly & Co.*, 557 N.E.2d 739, 741 (Mass.1990). A plaintiff must have "(1) knowledge or sufficient notice that she was harmed and (2) knowledge or sufficient notice of what the cause of harm was." *Id.* at 742; see also *Koe v. Mercer*, 876 N.E.2d 831, 836 (Mass.2007) ("[T]he three-year statute of limitations period of § 2A does not start to

run 'until a plaintiff has first, an awareness of [the] injuries and, second, an awareness that the defendant caused [the] injuries.' ") (quoting *Doe v. Creighton*, 786 N.E.2d 1211, 1213 (Mass.2003)).

When a plaintiff relies on the discovery rule to argue that the limitations period was tolled, the plaintiff bears the burden to prove "both an actual lack of causal knowledge and the objective reasonableness of that lack of knowledge." *Doe*, 786 N.E.2d at 1213. Although issues relating to what the plaintiff knew are usually fact questions for the jury, the plaintiff will not survive summary judgment if she cannot "demonstrate a reasonable expectation of proving that the claim was timely filed." *Koe v. Mercer*, 876 N.E.2d 831, 836 (Mass.2007).

The plaintiff was implanted with BSC's Obtryx sling on May 11, 2009, more than three years before she filed any lawsuit. (See Pls.' Resp. in Opp. to BSC's Mot. for Summ. J. Based on Statute of Limitations [Docket 71], at 4). But the plaintiff argues that the limitations period did not begin to run until a later time. The plaintiff contends that she did not have actual knowledge of her injury until July 30, 2009, when she visited her implanting physician for a follow-up. (See *id.* at 4, 15). She further argues that she did not make a causal connection between the device and her injuries until she visited a different physician on September 22, 2009, who told her that her sling was causing problems. (See *id.* at 5; Smothers Dep. [Docket 71-1], at 138:21-139:8).

These contentions are without merit because the plaintiff herself admitted that she was aware that the sling was causing her injuries as early as three weeks after implantation. She testified to this fact at her deposition:

Q. When did you first attribute the symptoms that you're having now to your sling?

A. *Probably, I guess, about two or three weeks after I had it put in. It's been so long. It's hard to remember.*

*4 Q. You didn't think that it could have been one of the other parts of the surgery that were causing your problem?

A. *I didn't think it would be.*

Q. You just thought it must have been the sling?

A. *Yeah.*

(Smothers Dep. [Docket 49-2], at 147:14-148:2 (emphasis added)). The plaintiff does not address this testimony in her response brief.

It is clear from her testimony that the plaintiff was on notice that she had been harmed, and that her harm was attributable to the Obtryx sling as early as three weeks after implantation, which is June 1, 2009. No reasonable jury could infer otherwise. The plaintiff's notice that the Obtryx caused her harm "creates a duty of inquiry and starts the running of the statute of limitations." *Bowen v. Eli Lilly & Co.*, 557 N.E.2d 739, 743 (Mass.1990). I therefore **FIND** that the limitations period began to run against the plaintiff's claims on June 1, 2009. Having found that the limitations period began to run on June 1, 2009, the following timeline demonstrates that the plaintiff's claims are time-barred:

- May 11, 2009 Plaintiff implanted with Obtryx sling
- June 1, 2009 Plaintiff attributes symptoms to Obtryx sling three weeks after implantation
- June 1, 2012 Plaintiff's claims become time-barred in Massachusetts
- July 10, 2012 Plaintiff files suit in District of Massachusetts, No. 2:12-cv-4078
- November 20, 2012 Plaintiff files suit directly into MDL, No. 2:12-cv-8016

The plaintiff failed to file her lawsuits within Massachusetts's three-year limitations period. Therefore, I **FIND** that the plaintiff's claims are time-barred.

IV. Conclusion

For the reasons stated above, BSC's Motion for Summary Judgment Based on Statute of Limitations [Docket 49] is **GRANTED** and these cases are **DISMISSED with prejudice**. The Clerk is **DIRECTED** to terminate all pending motions in these cases.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

All Citations

Not Reported in F.Supp.3d, 2014 WL 3495977

Footnotes

- 1 Hereinafter, all docket entries will refer to 2:12-cv-8016.
- 2 BSC declined to waive its rights under *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), and, as a result, I am now unable to try this case as a bellwether case in this district.

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KeyCite Blue Flag – Appeal Notification
Appeal Filed by SHARRENE TIMOTHY v. BOSTON SCIENTIFIC CORPORATION, 4th Cir., April 27, 2015

2015 WL 1405498

Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia.

In re BOSTON SCIENTIFIC
CORP., PELVIC REPAIR SYSTEM
PRODUCTS LIABILITY LITIGATION.
This Document Relates to the Following Case.
Sharrene Timothy & Thomas Timothy

v.
Boston Scientific Corp.

MDL No. 2326.
|
No. 2:12-CV-05950.
|
Signed March 26, 2015.

MEMORANDUM OPINION AND ORDER

(Defendant's Motion for Summary Judgment)

JOSEPH R. GOODWIN, District Judge.

*1 Pending before the court is the defendant's Motion for Summary Judgment Based on Statute of Limitations (“Motion”) [Docket 39]. For the reasons set forth below, the Motion is **GRANTED**, and this case is **DISMISSED with prejudice**.

I. Background

This case resides in one of seven MDLs assigned to me by the Judicial Panel on Multidistrict Litigation concerning the use of transvaginal surgical mesh to treat pelvic organ prolapse (“POP”) and stress urinary incontinence (“SUI”). In the seven MDLs, there are more than 70,000 cases currently pending, approximately 15,000 of which are in the Boston Scientific Corp. (“BSC”) MDL, MDL 2326. In an effort to efficiently and effectively manage this massive MDL, I decided to conduct pretrial discovery and motions practice on an individualized basis so that once a case is trial-ready (that is, after the court has ruled on all *Daubert* motions, summary judgment motions, and

motions *in limine*, among other things), it can then be promptly transferred or remanded to the appropriate district for trial. To this end, I ordered the plaintiffs and defendant to each select 50 cases, which would then become part of a “wave” of cases to be prepared for trial and, if necessary, remanded. (See Pretrial Order # 65, *In re: Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-md-002326, entered Dec. 19, 2013, available at <http://www.wvsc.uscourts.gov/MDL/boston/orders.html>). This selection process was completed twice, creating two waves of 100 cases, Wave 1 and Wave 2. The Timothys' case was selected as a Wave 2 case by the plaintiffs.

On June 30, 2009, Ms. Timothy was surgically implanted with the Pinnacle Pelvic Floor Repair Kit (the “Pinnacle”) and the Lynx Suprapubic Mid-Urethral Sling System (the “Lynx”). (See BSC's Mot. for Summ. J. & Mem. of Law in Supp. (“Mem. in Supp.”) [Docket 39], at 3). The Pinnacle was manufactured by BSC to treat POP, and the Lynx was manufactured by BSC to treat SUI. (See Pl. Fact Sheet [Docket 39-1], at 5). Ms. Timothy received her surgery at a hospital in Layton, Utah. (Mem. in Supp. [Docket 39], at 3). She claims that as a result of implantation of the Pinnacle and the Lynx, she has experienced multiple complications, including pain, infections, urinary and bowel problems, bleeding, dyspareunia, and mesh erosion. (*Id.*). She brings the following claims against BSC: negligence; strict liability for design defect, manufacturing defect, and failure to warn; breaches of express and implied warranties; and punitive damages. (*Id.* at 2 (citing to the plaintiff's Short Form Compl.)). In the instant motion, BSC argues that each of Ms. Timothy's claims are barred by Utah's statute of limitations, and consequently, the court should grant summary judgment in favor of BSC and dismiss Ms. Timothy's case. BSC further contends that if Ms. Timothy's claims are barred as untimely, Mr. Timothy's claim for loss of consortium is also time barred and should be dismissed.

II. Legal Standards

A. Summary Judgment

*2 To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In considering a motion for summary judgment, the court will not “weigh the

evidence and determine the truth of the matter.” *Anderson v. Liberty Lobby, Inc.*, 249 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some “concrete evidence from which a reasonable juror could return a verdict in his [or her] favor.” *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere “scintilla of evidence” in support of his or her position. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or unsupported speculation, without more, are insufficient to preclude the granting of a summary judgment motion. See *Felty v. Graves–Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987); *Ross v. Comm’ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985), *abrogated on other grounds*, 490 U.S. 228 (1989).

B. Choice of Law

Under 28 U.S.C. § 1407, this court has authority to rule on pretrial motions in MDL cases. The choice of law for these pretrial motions depends on whether they concern federal or state law:

When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located. When considering questions of state law, however, the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.

In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir.1996) (internal citations omitted). To determine the applicable state law for a dispositive motion based on the statute of limitations, I generally refer to the choice-of-law rules of

the jurisdiction where the plaintiff first filed her claim. See *In re Air Disaster at Ramstein Air Base, Ger.*, 81 F.3d 570, 576 (5th Cir.1996) (“Where a transferee court presides over several diversity actions consolidated under the multidistrict rules, the choice of law rules of each jurisdiction in which the transferred actions were originally filed must be applied.”); *In re Air Crash Disaster Near Chi., Ill.*, 644 F.2d 594, 610 (7th Cir.1981); *In re Digitek Prods. Liab. Litig.*, MDL No. 2:08-md-01968, 2010 WL 2102330, at *7 (S.D.W.Va. May 25, 2010). However, if a plaintiff files her claim directly into the MDL in the Southern District of West Virginia, as Ms. Timothy did in this case, I consult the choice-of-law rules of the state in which the plaintiff was implanted with the product. See *Sanchez v. Boston Scientific Corp.*, 2:12-cv-05762, 2014 WL 202787, at *4 (S.D.W.Va. Jan. 17, 2014) (“For cases that originate elsewhere and are directly filed into the MDL, I will follow the better-reasoned authority that applies the choice-of-law rules of the originating jurisdiction, which in our case is the state in which the plaintiff was implanted with the product.”). Ms. Timothy received the Pinnacle and the Lynx implantation surgery in Utah. Thus, the choice-of-law principles of Utah guide this court's choice-of-law analysis.

*3 The parties agree, as does this court, that these principles compel application of Utah law to the plaintiffs' claims. In tort actions, Utah employs the “most significant relationship” test as articulated by the Restatement (Second) of Conflict of Laws (“Restatement”) to determine which state's laws should apply to a given circumstance. See *Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054, 1059 (Utah 2002). Section 145 of the Restatement lists the following factors to consider when determining which state has the most significant relationship to a dispute: “(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.” Restatement § 145(2). The Restatement directs that “[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue.” *Id.* Here, the implantation surgery that allegedly resulted in Ms. Timothy's injuries took place in Utah. (Pl. Short Form Compl. [Docket 1], at 4). The Timothys are Utah residents. (*Id.* at 1). And Ms. Timothy's subsequent medical treatment for the claimed injuries occurred in Utah. (Pl. Fact Sheet [Docket

39–1], at 7). Accordingly, Utah has the most significant relationship to the occurrence alleged in this lawsuit and to the parties. Thus, I apply Utah's substantive law—including Utah's statute of limitations—to this case.

III. Discussion

I begin by reviewing the relevant undisputed facts.¹ Ms. Timothy underwent implantation of the Pinnacle and the Lynx on June 30, 2009. (Pl. Fact Sheet [Docket 39–1], at 5). At least three of Ms. Timothy's medical records include the names of the implanted products, including (1) the informed consent discussion recorded by Dr. Johnson and placed in Ms. Timothy's medical records, (*see* Timothy Medical Rs. July 1, 2009 [Docket 39–3], at 16 (explaining to Ms. Timothy that in her implantation surgery, he would “probably [use] Pinnacle mesh posteriorly and possibly anterior[ly] along with a Lynx”)); (2) Ms. Timothy's perioperative medical records, (*see* Timothy Medical Rs. June 30, 2009 [Docket 39–3], at 5 (listing the “procedure implants” as the Pinnacle Pelvic Floor Repair Kit and the Lynx Sling, both manufactured by “Boston Scientific Products”)); and (3) Dr. Johnson's operative notes, (*see id.* at 3 (detailing the implant of the Pinnacle posterior graft and the Lynx)). Importantly, the perioperative medical records identify BSC as the manufacturer of the implants Ms. Timothy received. (*See id.* at 5).

Six months after the implantation surgery, Ms. Timothy began to experience “problems.” (Pl. Fact Sheet [Docket 39–1], at 6). These problems included a “scratchy” and “poking” feeling in her vagina, blood in her urine, and continued incontinence. (Sharrene Timothy Dep. [Docket 39–2], at 54:13–35). The bleeding progressed, and in February or March of 2010, Ms. Timothy began to bleed from either her vagina or her rectum. (*Id.* at 159:18–161:1). Ms. Timothy went to see Dr. Johnson about these symptoms on April 19, 2010. (*Id.* at 161:4–15). Dr. Johnson noted that Ms. Timothy complained of “abnormal bleeding” with “increasing symptoms,” and of “dyspareunia” with “very severe” pain that “seems to be getting worse with time.” (Timothy Medical Rs. Apr. 19, 2010 [Docket 39–3], at 9). Upon examination, Dr. Johnson found that Ms. Timothy had “some erosion of her mesh” and that “she's having a[*sic*] significant pelvic pain.” (*Id.* at 11; *see also id.* at 13 (“[Patient] has erosion of the mesh involving the left lateral aspect of the distal end of the vagina.”)). He recommended that Ms. Timothy remove the eroded portion of the mesh. (*Id.*) Ms.

Timothy remembers Dr. Johnson telling her that he could feel the mesh, that he believed the mesh was causing the bleeding, and that he would “repair” the mesh in his office. (Sharrene Timothy Dep. [Docket 39–2], at 162:3–25).

*4 On May 28, 2010, Ms. Timothy saw Dr. Johnson for a preoperative visit for the “surgical repair” of her mesh due to “pelvic pain,” “dyspareunia,” and “[a]bnormal vaginal bleeding.” (Timothy Medical Rs. May 28, 2010 [Docket 39–3], at 6). He noted that her mesh had “eroded through on the left side.” (*Id.*) On June 1, 2010, Dr. Johnson performed the excision/removal procedure on Ms. Timothy. (Pl. Fact Sheet [Docket 39–1], at 5). Dr. Johnson was “very pleased” with the repair surgery. (Timothy Medical Rs. Operative Report June 1, 2010 [Docket 73–4], at 1).

Ms. Timothy's pelvic pain eventually returned, and she again visited Dr. Johnson on November 15, 2010. (Timothy Medical Rs. Nov. 15, 2010 [Docket 73–1], at 199). Dr. Johnson thought that Ms. Timothy might have vaginitis. (*Id.*) On December 8, 2010, at Dr. Johnson's recommendation, Ms. Timothy presented to Dr. Glen Morrell for pain in her hip and groin region. (Timothy Medical Rs. Dec. 8, 2010 [Docket 73–1], at 196). Dr. Morrell stated that he was “uncertain as to the etiology” of her pain and questioned whether it “related to her back problems.” (*Id.*)

Ms. Timothy hired an attorney after she “saw a commercial on TV about the mesh product that had been [in her] surgery.” (Sharrene Timothy Dep. [Docket 39–2], at 22:15–17). According to her, she “attributed” her problems to the mesh at this time. (Pl. Fact Sheet [Docket 39–1], at 5). After seeing the commercial, Ms. Timothy followed up with Dr. Johnson about a possible “mesh infection.” (Timothy Medical Rs. Sept. 30, 2011 [Docket 73–1], at 129). She explained to Dr. Johnson that she saw TV advertisements about the dangers of mesh and that “she did have erosion and we did have to remove part of the mesh.” (*Id.*) Throughout the months of October and November 2011, Ms. Timothy continued to visit various doctors about pain with intercourse, urinary incontinence, and irritation. (*See generally* Timothy Medical Rs. [Docket 731], at 93–112). On July 20, 2012, Ms. Timothy visited her regular clinic with a possible bladder infection. (Timothy Medical Rs. July 20, 2012 [Docket 73–1], at 32). The record states “She's worried her mesh is causing some kind of problem.

Seen lots of commercials about the problems with mesh and she's wondering if she doesn't have a problem." (*Id.*). Ms. Timothy filed suit on September 26, 2012. (Pl.'s Short Form Compl. [Docket 1]).

Utah's Product Liability Act ("UPLA") provides a two-year statute of limitations for the plaintiffs' claims. Utah Code Ann. § 78B-6-706 (West 2014).² Section 78B-6-706 explicitly incorporates the discovery rule by providing that the action "shall be brought within two years from the time the individual who would be the claimant in the action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause." *Id.* The Supreme Court of Utah has yet to elaborate on the precise contours of Utah's discovery rule, in particular, whether "cause" as mentioned in section 78B-6-706 means only "identity of the manufacturer," "cause in fact," or "possible legal responsibility." However, lower Utah courts have interpreted the phrase—"and its cause"—to mean both the identity of the allegedly defective product's manufacturer and the causal relationship between the product and the harm. See *Aragon v. Clover Club Foods Co.*, 857 P.2d 250, 252-54 (Utah Ct.App.1993). *Aragon* holds that discovery of "cause" requires discovery of "the identity of the manufacturer" and that "due diligence" is "that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so." *Id.* at 252-53. Following *Aragon*, courts considering Utah law have applied a three-part analysis to statute-of-limitations issues under the UPLA:

*5 [T]he UPLA statute of limitations begins to run when the plaintiff discovers, or should have discovered: (1) that she has been injured; (2) the identity of the maker of the allegedly defective product; and (3) that the product had a possible causal relation to her injury. *Hansen v. Novartis Pharms. Corp.*, No. 2:08-cv-985, 2011 WL 6100848, at *3 (D.Utah Dec. 7, 2011) (citing *Aragon*); see also *Pratt v. Cavagna N. Am., Inc.*, No. 2:13-cv-107, 2013 WL 6146075, at *3 (D.Utah Nov. 21, 2013) (same); *McDougal v. Weed*, 945 P.2d 175, 177 n. 1 (Utah Ct.App.1997) (reasserting *Aragon's* holding that the statute of limitations is tolled until the plaintiff discovers "both the injury and the identity of the manufacturer" and distinguishing the UPLA from the statute of limitations for medical malpractice). With no direction from the Supreme Court of Utah to

the contrary, I now apply this analysis to the present facts. See *Castillo v. Holder*, 776 F.3d 262, 268 n. 3 (4th Cir.2015) ("[W]hen the state's highest court has not engaged in such statutory interpretation, a state's intermediate appellate court decisions constitute the next best indicia of what state law is " (internal quotations omitted)).

The plaintiff points to *Bridgewaters v. Toro Co.* for the premise that the discovery provision of the UPLA statute of limitations would be triggered upon discovery that a "defective product" caused the injury. 819 F.Supp. 1002, 1009 (D.Utah 1993) (holding that the "cause" that must be discovered for purposes of section 78B-6-706 is "the legal cause, and not merely the 'but for' cause"). The court is aware of only one other case adopting this strict interpretation of the UPLA's discovery rule. See *Strickland v. Gen. Motors Corp.*, 852 F.Supp. 956, 959 (D.Utah 1994). I find these applications of section 78B-6-706 unpersuasive for several reasons. First, *Bridgewaters* was a federal district court case decided several months prior to the *Aragon* decision. Thus, I must defer to *Aragon* over *Bridgewaters*. See *United States v. King*, 673 F.3d 274, 279 (4th Cir.2012) (stating that the federal courts should "generally defer to the state's intermediate appellate courts" on an issue undecided by the highest court of the state). Second, although later in time, the *Strickland* decision arises from an overly broad understanding of *Aragon* and the *Aragon* court's reliance on the Washington Supreme Court case of *North Coast Air Services v. Grumman Corp.*, 759 P.2d 405 (Wash.1988)—while acknowledging *North Coast's* reading of Washington's statute of limitations as requiring discovery of the "legal cause," *Aragon's* holding was much narrower, finding that the UPLA "tolls the statute of limitations until the plaintiff discovers, or in the exercise of due diligence should have discovered, *the identity of the manufacturer.*" 857 P.2d at 252-53 (emphasis added). Finally, as explained above, the majority of Utah cases addressing this matter rely on *Aragon's* three-part analysis (or something less stringent, see, e.g., *Cannon v. Minn. Min. & Mfg. Co.*, 2009 WL 350561, at *6 (D.Utah Feb. 11, 2009) (considering whether the plaintiff knew that the product "was the *possible* cause" of his symptoms) (emphasis added)), and do not require discovery of a specific product defect. For these reasons, I follow *Aragon* rather than *Bridgewaters*.

*6 In BSC's view, the statute of limitations began to run on May 28, 2010, at Ms. Timothy's preoperative visit for

the mesh removal surgery, when Dr. Johnson explained that the mesh had eroded and needed to be removed. Consequently, BSC argues that Ms. Timothy's lawsuit, filed on September 26, 2012, is barred by the UPLA statute of limitations. The plaintiff, on the other hand, contends that the statute of limitations did not start until 2011, when Ms. Timothy saw television commercials and "attributed" her "legal injuries" to the mesh. (Pl.'s Resp. & Supp. Mem. in Opp'n to BSC's Mot. for Summ. J. Based on Statute of Limitations ("Resp.") [Docket 73], at 9–10). The undisputed facts, considered under the *Aragon* test, lead this court to agree with BSC.

First, Ms. Timothy testified that she discovered her injuries in late 2009, about six months after her surgery. (See Pl. Fact Sheet [Docket 39–1], at 5). Second, Ms. Timothy's pre- and post-surgery medical records identify BSC as the manufacturer of the implanted products, the Pinnacle and the Lynx. (See Timothy Medical Rs. July 1, 2009 [Docket 39–3], at 16; Timothy Medical Rs. June 30, 2009 [Docket 39–3], at 3, 5). Assuming that this information was not directly conveyed to Ms. Timothy by her physician, the court must then ask whether Ms. Timothy "presented evidence that would allow a reasonable jury to find that even if she had used 'diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so,' she should not have ascertained the identity of the manufacturer." *Griffiths–Rast v. Sulzer Spine Tech*, 216 F. App'x 790, 796–97 (10th Cir.2007) (quoting *Aragon*, 357 P.2d at 253). Ms. Timothy has provided no evidence indicating that she could not have obtained her medical records containing the identity of the product manufacturer had she sought them. Therefore, a reasonable jury could not find that this information was unavailable to Ms. Timothy through due diligence beginning on the day of her implantation surgery, June 30, 2009. See *id.* at 796 ("It seems clear that in a normal case a reasonable jury could not find that it would take over two years to determine the manufacturer of a trademarked medical device when the party knows the correct name of that device."); see also *Pratt*, 2013 WL 6146075, at *3 ("It is well established that plaintiffs cannot simply wait for information regarding a potential defendant to come to them. Rather, a plaintiff has a duty to act with reasonable diligence to ascertain the identity of a defendant." (internal citations and quotation marks omitted)).

Finally, Ms. Timothy discovered that the product had a possible causal relation to her injury by April 19, 2010, when she saw Dr. Johnson about her pelvic pain and vaginal bleeding. During this visit, Dr. Johnson told her that he could "feel the mesh" and that the mesh "was causing the bleeding." (Sharrene Timothy Dep. [Docket 39–2], at 165:18–21). He told Ms. Timothy that he could "fix" the mesh with an outpatient surgery. (*Id.* at 165:25). At this point, Ms. Timothy knew that the mesh had a "possible causal relation" to her symptoms of pain and bleeding, see *Hansen*, 2011 WL 6100848, at *3, and the final prong of *Aragon* was satisfied, thereby triggering the UPLA's statute of limitations. Accordingly, the statute of limitations, having expired on April 19, 2012, bars her claim which was not filed until September 26, 2012.

*7 The plaintiffs' arguments do not change this definitive outcome. First, in an attempt to create an issue of material fact, the plaintiffs point to Ms. Timothy's Plaintiff Fact Sheet, wherein she explains that she did not "attribute" her pain to the mesh until seeing a television commercial in 2011. (Resp. [Docket 73], at 6). However, when the plaintiff conclusively attributed her injury to the product is not the relevant question. See *Hansen*, 2011 WL 6100848, at *3 ("[A] plaintiff need not have a 'confirmed diagnosis' about the causal relation to trigger the running of the statute of limitation."). Rather, the court must ask when the plaintiff had "inquiry notice" of a possible causal relation between the product and her injury. *Id.*; see also *Macris v. Sculptured Software, Inc.*, 24 P.3d 984, 990 (Utah 2001) (considering the statute of limitations for conversion and concluding that "all that is required to trigger [it] is sufficient information to put plaintiffs on notice to make further inquiry if they harbor doubts or questions"). And the undisputed facts demonstrate that Ms. Timothy had inquiry notice on April 19, 2010, when Dr. Johnson told her that the mesh was causing her problems and needed to be "fixed" with another surgery. (See Sharrene Timothy Dep. [Docket 39–2], at 165:2–25; see also, e.g., *McCollin v. Synthes Inc.*, 50 F.Supp.2d 1119, 1123 (D.Utah 1999) (finding that the statute of limitations began to run when the plaintiff learned that a second surgery was needed to "replace implants").

The plaintiffs next contend that the statute of limitations could not have begun at this time because Dr. Johnson told Ms. Timothy that the removal surgery was successful. The success of the removal surgery, however, does not change the fact that Ms. Timothy had previously

discovered all that the UPLA requires to trigger the statute of limitations. *See, e.g., Cannon v. Minn. Min. & Mfg. Co.*, No. 2:08-cv-532 CW, 2009 350561, at *6 (D.Utah Feb. 11, 2009) (“Under Utah law, plaintiffs are not required to receive definitive confirmation of the cause of their harms to be on reasonable notice.”). *McCullin v. Synthes* is illustrative of this point. In *McCullin*, the plaintiff had bone grafts, plates, and screws implanted into his spine on April 24, 1991. 50 F.Supp.2d at 1121. The surgery did not result in proper fusion of the bones, and six months later, the plaintiff had a second operation, which was successful. *Id.* Two years after the second operation, the plaintiff saw a television program about the improper use of spinal implants, and he filed suit against the manufacturers in 1995. *Id.* The manufacturers moved for summary judgment under UPLA’s statute of limitations. *Id.* at 1222. In dismissing the case, the court relied on the plaintiff’s testimony that his surgeon explained to him that “the need for the second surgery was caused by the fact that the hardware was not holding the bone where it needed to be ... for the graft to grow.” *Id.* at 1223 (internal quotation marks omitted). From this, the court held that the plaintiff “‘discovered, or in the exercise of due diligence should have discovered, both the harm and its cause’ by the time he underwent the second surgery.” *Id.* (quoting § 78B-6-706). The success of the second surgery had no bearing on the court’s analysis. *Id.* at 1223-24. Similarly, in this case, the temporary success of Ms. Timothy’s revision surgery does not nullify what she had already discovered from Dr. Johnson on April 19, 2010, that is, that the mesh had caused her symptoms of vaginal bleeding and pain and needed to be surgically repaired.

*8 “It is well settled that the issue of when a plaintiff knew or with reasonable diligence should have known of a cause of action is a question for the [factfinder].” *In*

re Adoption of Baby B., 308 P.3d 382, 418 (Utah 2012) (citing *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir.1985) (internal quotation marks omitted)). Where the evidence is “so clear that there is no genuine factual issue,” however, the determination can be made as a matter of law. *Maughan*, 758 F.2d at 1388. The evidence in this case is clear: Ms. Timothy discovered her injuries, the identity of the product manufacturer, and a possible causal connection between the product and her injury on April 19, 2010. No reasonable jury could find otherwise. Therefore, I **FIND** that the statute of limitations for her products liability claims ran until April 19, 2012, five months before she filed suit, and as a result, her claims are barred by the UPLA’s statute of limitations.

Mr. Timothy’s claim for loss of consortium is dependent on the success of Ms. Timothy’s claims. A loss-of-consortium claim is “derivative from the cause of action existing in behalf of the injured person[,] and may not exist in cases where the injured person would not have a cause of action.” Utah Code Ann. § 30-2-11(5)(a), (b). Furthermore, “[t]he statute of limitations applicable to the injured person shall also apply to the spouse’s claim of loss of consortium.” *Id.* § 30-2-11(3). Therefore, I **FIND** that Mr. Timothy’s claim is time barred as well.

IV. Conclusion

For the reasons stated above, BSC’s Motion [Docket 39] is **GRANTED**, and this case is **DISMISSED with prejudice**. The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1405498

Footnotes

- 1 The plaintiffs state that BSC’s recitation of the facts is accurate but incomplete. Therefore, I provide the relevant facts as noted in BSC’s Motion and include the additional facts described in the plaintiffs’ responsive briefing.
- 2 Both Ms. Timothy’s non-warranty and warranty claims fall under this general statute. *See Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 16 (Utah 1990) (holding that the UCC four-year statute of limitations for contracts (Utah Code Ann. § 70A-2-725) does not apply to warranty claims based on personal injury).

2015 WL 7709327

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New London.

Kevin ZIOLKOVSKI

v.

TOWN OF WATERFORD.

No. KNLCV125014374.

|
Oct. 20, 2015.

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Opinion

ZEMETIS, J.

*1 Should grant the defendant's motion for summary judgment because: (1) the plaintiff failed to disclose expert testimony to establish the standard of care, breach of such standard of care, and proximate cause of harm to the plaintiff; (2) the plaintiff's claims are barred by governmental immunity; and/or (3) the plaintiff's claims are barred by the statute of limitations? The court grants the motion on all three grounds.

FACTS

On February 29, 2012, the plaintiff, Kevin Ziolkovski,¹ commenced this negligence action against the defendant, the town of Waterford, seeking damages and injunctive relief, for alleged negligent management of the Bloomingdale Road crossing of Hunt's Brook. The December 3, 2013 second amended complaint, entry # 115, alleges: that on March 30, 2010 the defendant "has been negligent in its management of the Bloomingdale Road crossing of Hunt's Brook by failing to make

adjustments to the culvert system after previously causing flooding conditions in 1982, 2007, 2008, and 2009 ." Complaint, paragraph 3. The plaintiff alleges that the defendant "failed to meet the drainage requirements of State of Connecticut Department of Energy and Environmental Regulations (Connecticut General Statutes Sec. 25-68h-3e) and the State of Connecticut Department of Transportation Drainage Manual Chapter 8 (Section 8.3) resulting in flooding of the watershed upstream from the road crossing." Complaint, paragraph 1.

The defendant denied the allegations of negligence and left the plaintiff to his proof regarding the balance. The defendant asserted four Special Defenses: governmental immunity, comparative negligence, laches regarding equitable relief sought, and the statute of limitations under either C.G.S. 52-577 or C.G.S. 52-584 bars recovery.

The plaintiff has not replied to the Special Defenses.

The defendant moved for summary judgment, entry # 124, attached a memorandum of law in support thereof with plaintiff's answers to interrogatories, affidavits of Waterford's Zoning Enforcement Officer, Tom Lane, and Waterford's Director of Public Works Kristin Zawacki and incorporated by reference its expert witness disclosure.

The plaintiff objected to the instant motion filing a memorandum of law, entry 126, and appended exhibits, court docket entries 127 & 128. In Docket entry # 127, labeled Ex. C: eleven (11) undated color photos of water passing through a culvert beneath a road and photos showing water passing over a culvert; labeled Ex. D: a title page from a document purporting to be a 1980 U.S. Army Corps of Engineers "Phase One Inspection Report" regarding Miller Pond Dam in Waterford CT; labeled Ex. E pages 1 and 2: two pages of handwritten notes and mathematical calculations prepared by Diversified Technologies dated April 1980 and July of 1980 and indicating pages 15 and 16 of 19, respectively, containing yellow highlighting of text by an unidentified person for unexplained reasons; an unmarked or unlabeled Exhibit: five (5) color photos of grassy land with a fenced garden and one photo with a pink ribbon-topped engineering stake with an elevation marked on the stake; labeled Ex E, pages 1, 2 and 3: two (2) close color photos of water cresting a roadway, and, labeled Ex. E3: two

(2) undated black and white photos on a single page with a caption reading “Quaker Hill store was a sudden island in a sea” and “bridge cave-in on Bloomingdale Road in Quaker Hill.” Docket entry # 128 contains exhibits A: three (3) pages of colored maps and a map key—all three with a date/time stamp of 4/30/15, 5:04–5:10; exhibit B—plaintiff’s affidavit attesting, *inter alia*, to the photos appended to the opposition to the summary judgment, other than the photos clipped from the *New London Day* (local newspaper)—the court concludes these are the black and white photos labeled Ex. E3, “fairly and accurately reflect the matters appearing therein.” (Affidavit paragraph 6.)

LEGAL STANDARDS

*2 A motion for summary judgment may be granted when there is no genuine issue of material fact in dispute and the movant is entitled to judgment as a matter of law.

Sec. 17–49.—Judgment

The judgment sought shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (P.B.1978–97, Sec.384.)

A moving party may seek summary judgment by assuming the truth of certain facts solely for the motion and on this basis argue that it is entitled to judgment as a matter of law. A movant may concede that certain facts are in dispute, but maintain these facts are immaterial. “A material fact is a fact that will make a difference in the outcome of the case.” (Citation omitted.) *Reynolds v. Chrysler First Commercial Corp.*, 40 Conn.App. 725, 729, 673 A.2d 573, cert. denied, 237 Conn. 913, 675 A.2d 885 (1996). A “genuine” issue has been described as a “triable, substantial or real” issue of fact or one that “can be maintained by substantial evidence.” *United Oil Co. v. Urban Redevelopment Commission*, 158 Conn. 364, 378, 260 A.2d 596 (1969). An issue of fact “encompasses not only evidentiary facts in issue but also questions as to how the trier would characterize such evidentiary facts and what inferences and conclusions it would draw from them.” (Citations omitted.) *Id.*, at 379. The burden of showing the non-existence of a material fact cannot be met by mere assertion, but must be shown

by “[e]videntiary facts or substantial evidence outside the pleadings.” (Citations omitted; emphasis deleted.) *Barasso v. Rear Still Hill Road, LLC*, 81 Conn.App. 798, 803, 842 A.2d 1134 (2004). “Because litigants ordinarily have a constitutional right to have issues of fact decided by the finder of fact, the party moving for summary judgment is held to a strict standard. He must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.” (Citation omitted; internal quotation marks omitted.) *Id.*, at 802. The burden of proving the non-existence (or existence) of a genuine issue of material fact cannot be satisfied by relying on: arguments or assertions by counsel, either orally or in memoranda; *Martinez v. Southington Metal Fabricating Co.*, 101 Conn.App. 796, 799, 924 A.2d 150, cert. denied, 284 Conn. 930, 934 A.2d 246 (2007); unadmitted allegations of the pleadings; *Dinnis v. Roberts*, 35 Conn.App. 253, 260, 644 A.2d 971, cert. denied, 231 Conn. 924, 648 A.2d 162 (1994); or on unauthenticated documents, speculative or conjectural claims, or other information that would be inadmissible evidence. See *Nolan v. Borkowski*, 206 Conn. 495, 507, 553 A.2d 1031 (1988) (speculative evidence “cannot serve as a basis for opposition to a motion for summary judgment”); *New Haven v. Pantami, supra*, 89 Conn.App. at 678 (summary judgment procedure “could be circumvented by filing unauthenticated documents in support of summary judgment”). A motion for summary judgment that does not squarely address or refute all the material facts or legal claims raised by the pleadings or the opposing documents should be denied. See *Fogarty v. Rashaw*, 193 Conn. 442, 444, 476 A.2d 582 (1984).

*3 “In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of material facts, which under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law.” *Socha v. Bordeau*, 277 Conn. 579, 585 (2006).

“The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.” *Id.* at 585–86.

Especially important in the consideration is the evidence produced to support it. “As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent ... When documents submitted in support of the motion fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such issue.” *Socha*, 586.

“Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue.” *Id.* However, the evidence presented fails to raise a genuine issue of material fact. In response to a properly supported motion for summary judgment indicating the absence of any material disputed facts, the burden shifts to the non-movant to present a “factual predicate” demonstrating the existence of a genuine issue of material fact. *Wadia Enterprises, Inc. v. Hirschfeld*, 224 Conn. 240, 250, 618 A.2d 506 (1992). Again, this factual predicate must be premised on “evidentiary facts” or “substantial evidence”; *Martinez v. Southington Metal Fabricating Co.*, *supra*, 101 Conn.App. at 799; and cannot be premised solely on mere assertions, unadmitted allegations of the pleadings, or speculative or inadmissible evidence. *Id.* at 799–780. “To oppose a motion for summary judgment successfully, the non-movant must recite specific facts ... which contradict those stated in the movant’s affidavits and documents.” (Citations omitted; internal quotation marks omitted.) *Reynolds v. Chrysler First Commercial Corp.*, *supra*, 40 Conn.App. at 729.

“It must always be borne in mind that litigants have a constitutional right to have issues of fact decided by the jury and not by the court.” *Ardoline v. Keegan*, 140 Conn. 552, 555, 102 A.2d 352 (1954); see also *Mather v. Griffin Hospital*, *supra*, 207 Conn. at 138; *Robinson v. Buckes*, 91 Conn. 457, 460, 99 A. 1057 (1917). “[T]he issue of causation in a negligence action is a question of fact for them ...” *D’Arcy v. Shugrue*, 5 Conn.App. 12, 15, 496 A.2d 967, cert. denied, 197 Conn. 817, 500 A.2d 1336 (1985); see also *Stewart v. Federated Dept. Stores, Inc.*, 234 Conn. 597, 611, 662 A.2d 753 (1995) (“causation is essentially a factual issue”); *Fox v. Mason*, 189 Conn. 484, 489, 456 A.2d 1196 (1983) (“[c]onclusions of proximate cause are to be drawn by the jury and not by the court”); *Marley v. New England Transportation Co.*, 133 Conn. 586, 591, 53 A.2d 296 (1947) (“if there is room for a reasonable disagreement the question [of negligence] is one to be determined by the

trier as matter of fact”); 2 Restatement (Second), Torts § 434(2) (1965) (“[i]t is the function of the jury to determine, in any case in which it may reasonably differ on the issue, (a) whether the defendant’s conduct has been a substantial factor in causing the harm to the plaintiff”). *Burton v. City Of Stamford*, 115 Conn.App. 47, 88 (2009).

*4 “Summary judgment may be granted where the claim is barred by the statute of limitations.” *Doty v. Mucci*, 238 Conn. 800, 806, 679 A.2d 945 (1996). Summary judgment is appropriate on statute of limitation grounds when the “material facts concerning the statute of limitations [are] not in dispute ...” *Burns v. Hartford Hospital*, 192 Conn. 451, 452, 472 A.2d 1257 (1984). “[S]ummary judgment is proper where the affidavits do not set forth circumstances which would serve to avoid or impede the normal application of the particular limitations period.” (Internal quotation marks omitted.) *LaBow v. Rubin*, 95 Conn.App. 454, 471, 897 A.2d 136, cert. denied, 280 Conn. 933, 909 A.2d 960 (2006). “[B]efore a document may be considered by the court in support of a motion for summary judgment, ‘there must be a preliminary showing of [the document’s] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be. The requirement of authentication applies to all types of evidence, including writings ...’ Conn.Code Evid. § 9–1(a), commentary. Documents in support of or in opposition to a motion for summary judgment may be authenticated in a variety of ways, including, but not limited to, a certified copy of a document or the addition of an affidavit by a person with personal knowledge that the offered evidence is a true and accurate representation of what its proponent claims it to be.” *New Haven v. Pantani*, 89 Conn.App. 675, 679, 874 A.2d 849 (2005).

“Practice Book § [17–45], although containing the phrase ‘including but not limited to,’ contemplates that supporting documents to a motion for summary judgment be made under oath or be otherwise reliable ... [The] rules would be meaningless if they could be circumvented by filing [unauthenticated documents] in support of or in opposition to summary judgment.” (Internal quotation marks omitted.) *New Haven v. Pantani*, *supra*, 89 Conn.App. at 678.

“[O]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment, and the applicable provisions of our rules of practice contemplate that supporting [or opposing]

documents ... be made under oath or be otherwise reliable.” (Internal quotation marks omitted.) *Rockwell v. Quinter*, 96 Conn.App. 221, 233 n. 10, 899 A.2d 738, cert. denied 280 Conn. 917, 908 A.2d 538 (2006).

DISCUSSION

In paragraph 3 of the December 3, 2013 complaint the plaintiff alleges that the defendant “has been negligent in its management of the Bloomingdale Road crossing of Hunt’s Brook by failing to make adjustments to the culvert system after previously causing flooding conditions in 1982, 2007, 2008 and 2009.”

The defendant moves for summary judgment because: (1) the plaintiff has failed to disclose an expert who will establish the standard of care, describe a breach of the standard of care and proximately resulting harm to the plaintiff, (2) the plaintiff’s claims are barred by the doctrine of governmental immunity, and/or (3) the plaintiff’s claims are barred by the operation of the statute of limitations.

*5 The plaintiff opposes the motion arguing that: (1) the plaintiff needs no expert witness to establish a standard of care, breach thereof, and/or proximate causation of plaintiff’s harm,² (2) governmental immunity is inapplicable because either the defendant has violated a ministerial duty, the defendant violated a discretionary duty but the plaintiff is within the ‘identifiable person-imminent harm’ exception, or that C.G.S. 52–557n(b) (2) rescinds governmental immunity and, (3) that the ‘continuing course of conduct’ doctrine tolls the applicable statute of limitations.

The court agrees with the defendant.

EXPERT WITNESS: PRIMA FACIE CASE

The plaintiff has admittedly failed to disclose an expert witness to establish the standard of care applicable to the defendant. The plaintiff alleges the defendant negligently managed a road crossing by failing to make adjustments to the culvert system. The plaintiff asserts that the “Plaintiff is not required to supply expert testimony in this case. The negligence of the Defendant is self-evident and requires no special training or experience to identify it ... The

Plaintiff’s claims, however, do not rely on the expertise of any of the persons he disclosed as “experts” in response to Defendant’s discovery requests.” Plaintiff’s April 30, 2015 Memorandum of Law, page 7.

“It is an elementary precept of tort law that in order to prove a case founded on negligence, a plaintiff must demonstrate that the defendant had a duty of care to the plaintiff and that the defendant breached that duty, causing injury to the plaintiff. See *Utica Mutual Ins. Co. v. Precision Mechanical Services, Inc.*, 122 Conn.App. 448, 454, 998 A.2d 1228, cert. denied, 298 Conn. 926, 5 A.3d 487 (2010). The scope of a party’s duty is generally referred to as the standard of care. *Id.* When a case involves resolution of an issue of ordinary negligence, normally, expert testimony is not required to establish the applicable standard of care. Rather, the jury is to apply the standard of the reasonably prudent person in the same circumstances. See *Canmarota v. Guerrero*, 148 Conn.App. 743, 750, 87 A.3d 1134, cert. denied, 311 Conn. 944, 90 A.3d 975 (2014). On the other hand, expert testimony to inform a jury of the standard of care is required when the question involved goes beyond the field of knowledge and experience of ordinary fact finders. See *Ciarelli v. Romeo*, 46 Conn.App. 277, 283, 699 A.2d 217, cert. denied, 243 Conn. 929, 701 A.2d 657 (1997), and cases cited therein. *Mazier v. Signature Pools, Inc.*, 159 Conn.App. 12, 32–33 (2015). “While expert testimony is permitted in a great many instances, it is required only when the question involved goes beyond the field of ordinary knowledge and experience of judges and jurors.” (Emphasis added.) C. Tait & J. LaPlante, *Connecticut Evidence*, (2d. Ed.1988) § 7.16.5, *Ciarelli v. Romeo*, 46 Conn.App. 277, 283 (1997).

The plaintiff’s claim that the defendant was “negligent in its management of the Bloomingdale Road crossing Hunt’s Brook by failing to make adjustments to the culvert system ...” necessitates expert testimony. Flood management plans and designs applicable to a road crossing over a brook contained in a culvert system are beyond the field of ordinary knowledge and experience of jurors. Whether state agency regulations created and imposed standards applicable to the defendant’s “management” of Bloomingdale Road crossing Hunt’s Brook is beyond the ken of the ordinary juror. Whether the conduct of the defendant met or breached such applicable regulations or standards requires expert testimony. Whether the breach of those standards

proximately caused plaintiff's harm requires expert testimony. The nature and extent of some of the plaintiff's claimed harm does not require expert testimony.

*6 Absent expert testimony to establish a standard of care applicable to the defendant, and a breach of that standard of care with proximately resulting harm to plaintiff, the plaintiff fails to establish a prima facie case. Plaintiff has disclosed no expert, has not requested time or permission to disclose an expert, and, asserts that no expert witness testimony is necessary.

The court disagrees. The court concludes that expert witness is necessary to establish the standard of care applicable to the defendant, whether the defendant breached the standard of care, and whether the breach was a proximate cause of plaintiff's claimed damage or harm.

GOVERNMENTAL IMMUNITY

The plaintiff's claims are also barred by operation of the doctrine of governmental immunity. Plaintiff's allegation that "Waterford has been *negligent* in its management of the Bloomingdale Road crossing of Hunt's Brook by failing to make adjustments to the culvert system ..." Complaint, paragraph 3, implicates the governmental function of public road management and, therefore, municipal tort liability.

"The tort liability of a municipality has been codified in § 52-557n. Section 52-557n(a)(1) provides that '[e]xcept as otherwise provided by law, a political sub-division of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties ...' Section 52-557n(a)(2)(B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by 'negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.'" *Violano v. Fernandez*, 280 Conn. 310, 320, 907 A.2d 1188 (2006).

"The [common-law] doctrines that determine the tort liability of municipal employees are well established ... Generally, a municipal employee is liable for the mis-

performance of ministerial acts, but has a qualified immunity in the performance of governmental acts ... Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature ... The hallmark of a discretionary act is that it requires the exercise of judgment ... In contrast, [ministerial refers to a duty [that] is to be performed in a prescribed manner without the exercise of judgment or discretion ...

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society ... Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury ... In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion ... This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts." (Internal quotation marks omitted.) *Bailey v. West Hartford*, 100 Conn.App. 805, 810-11, 921 A.2d 611 (2007). *Swanson v. City of Groton*, 116 Conn.App. 849, 854-56 (2009).

*7 "Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder ... there are cases where it is apparent from the complaint ... [that] [t]he determination of whether an act or omission is discretionary in nature and, thus, whether governmental immunity may be successfully invoked pursuant to [General Statutes] § 52-557n(a)(2)(B), turns on the character of the act or omission complained of in the complaint ... Accordingly, where it is apparent from the complaint that the defendants' allegedly negligent acts or omissions necessarily involved the exercise of judgment, and thus, necessarily were discretionary in nature, summary judgment is proper." (Citation omitted; internal quotation marks omitted.) *Soderlund v. Merrigan*, 110 Conn.App. 389, 393-94, 955 A.2d 107 (2008); see

Mattel v. Metropolitan District Commission, 275 Conn. 38, 48–49, 881 A.2d 194 (2005). *Swanson v. City of Groton, id.*, at 854 (2009).

The plaintiff alleges that the Bloomingdale Road crossing of Hunt's Brook “failed to meet the drainage requirements of the State DEEP and/or DOT as prescribed in identified regulations and a DOT “Drainage Manual,” Complaint, paragraph one. Whether the regulation or drainage manual is applicable to the defendant and to the road/culvert at the time in issue, whether the road or culvert complied with the regulation or drainage manual at the time in issue, and whether any failure to comply proximately caused plaintiff harm is disputed by defendant's expert witness, entry # 122. Plaintiff offers no evidence to support his claim that either the regulation or drainage manual applies to the defendant, to the road/culvert, at the time in issue, or, whether failing to adhere to such standards was a proximate cause of plaintiff's claimed harm. Defendant's expert disclosure disputes the existence of a ministerial duty based on either the DEEP regulation or DOT manual, and plaintiff offers no evidence to support the proposition, but instead contends that the “culvert meets the definition of a “dam” as set forth Connecticut regulations for Dam Safety(,)” thereafter quoting regulations and a statute regarding dams, Plaintiff's April 30, 2015 Memorandum, page 12. The plaintiff has failed to offer an expert opinion to substantiate this theory or an adequate factual basis for the court to so conclude.

Even if the court concluded that the DEEP, or DOT, or ‘dam statute/regulation’ applied to the defendant, the culvert/road, at the time of the claimed loss, “(T)he fact that a claim is based upon a defendant's alleged failure to enforce a statute, however, does not, in and of itself, make enforcement of that statute a ministerial duty. See *Shore v. Stonington*, 187 Conn. 147, 444 A.2d 1379 (1982). Rather, a police officer's decision whether and how to enforce a statute necessarily requires an examination of the surrounding circumstances and a determination as to what enforcement action, if any, is necessary and appropriate in those circumstances. Such a decision thus invariably involves the exercise of judgment and discretion. Indeed, even if the command of a statute is mandatory, it is well settled that a police officer's decision whether or not to enforce the statute in particular circumstances is a matter that requires the exercise of judgment and discretion. See *id. Faulkner v. Dadonna*,

142 Conn.App. 113, 122–23 (2013). Similarly, even if the claimed DEEP regulation and/or DOT manual was applicable to the defendant, to the culvert/roadway, at the time in issue, then the municipal official's decision, an exercise of judgment, as to whether, when, and how to comply with the statute, regulation and/or manual would be discretionary. “It is axiomatic that “ministerial acts [are those that] are performed in a prescribed manner without the exercise of judgment ...” (Emphasis added.) *Gauvin v. New Haven*, 187 Conn. 180, 184, 445 A.2d 1 (1982).” *Evon v. Andrews*, 211 Conn. 501, 507–08 (1989).

*8 Plaintiff claims that the recognized exception to the discretionary liability of municipal employees under the concept of the ‘identifiable person, imminent harm’ doctrine, *Grady v. Somers*, 294 Conn. 324, 352–53, 984 A.2d 684 (2009), applies, Plaintiff's Memorandum, page 13. However, plaintiff has not raised this exception to government immunity in his Reply to the Special Defense, as required in Practice Book 10–57, perhaps because no Reply has yet been filed. The court will consider the ‘identifiable person—imminent harm exception to discretionary act immunity’ anticipating that, having raised this argument, plaintiff would have also pled this exception in his Reply.

“There are three exceptions to discretionary act immunity. Each of these exceptions represents a situation in which the public official's duty to act is [so] clear and unequivocal that the policy rationale underlying discretionary act immunity—to encourage municipal officers to exercise judgment—has no force ... First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure ... Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws. [fn2] ... Third, liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm ...” (Internal quotation marks omitted.) *Bailey v. West Hartford, supra*, 100 Conn.App. at 811. The plaintiff claims that the third exception applies in the present case. *Swanson v. City of Groton, Id.* at 859–60 (2009).

Connecticut General Statutes “[Section] 52–557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in

which a municipality may be liable for damages ... One such circumstance is a negligent act or omission of a municipal officer acting within his or her employment or official duties ... [Section] 52–557n(a)(2)(B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.” (Citation omitted; footnote omitted; internal quotation marks omitted.) *Edgerton v. Clinton*, 311 Conn. 217, 229, 86 A.3d 437 (2014).

“This court has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm ... This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm ... All three must be proven in order for the exception to apply.” (Citations omitted; footnote omitted; internal quotation marks omitted.) *Id.*, at 230–31. “[T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court ... [unless] there are unresolved factual issues material to the applicability of the defense ... [where] resolution of those factual issues is properly left to the jury.” (Internal quotation marks omitted.) *Purzycki v. Fairfield*, 244 Conn. 101, 107–08, 708 A.2d 937 (1998). *Haynes v. City of Middletown*, 314 Conn. 303, 312–13 (2014).

*9 Examining each element of the ‘identifiable person—imminent harm’ exception the undersigned concludes that the plaintiff does not meet this standard.

First, “the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm.” *Haynes v. City of Middletown, Id.* at 323.

The harm claimed by Ziolkovski does not meet the court’s definition of imminent harm: “if a harm is not so likely to happen that it gives rise to a clear duty to correct the dangerous condition creating the risk of

harm immediately upon discovering it, the harm is not imminent. See *Tryon v. North Branford*, 58 Conn.App. 702, 712, 755 A.2d 317 (2000) (under *Evon*, imminent harm is “harm ready to take place within the immediate future”). This reading of *Evon* is consistent both with the meaning of the word “imminent” [fn10] and with our case law holding that the imminent harm to identifiable persons exception “represents a situation in which the public official’s duty to act is [so] clear and unequivocal that the policy rationale underlying discretionary act immunity to encourage municipal officers to exercise judgment—has no force.” (Internal quotation marks omitted.) *Violano v. Fernandez*, 280 Conn. 310, 319, 907 A.2d 1188 (2006); *Durrant v. Board of Education*, 284 Conn. 91, 106, 931 A.2d 859 (2007) (same); *Doe v. Petersen*, 279 Conn. 607, 615, 903 A.2d 191 (2006) (same); *Shore v. Stonington, supra*, 187 Conn. at 153 (“[W]here the duty of the public official to act is not ministerial but instead involves the exercise of discretion, the negligent failure to act will not subject the public official to liability unless the duty to act is clear and unequivocal ... We have recognized the existence of such duty in situations where it would be apparent to the public officer that his failure to act would be likely to subject an identifiable person to imminent harm.” [Citation omitted.]); see also *Bonington v. Westport*, 297 Conn. 297, 314, 999 A.2d 700 (2010) (“Imminent does not simply mean a foreseeable event at some unspecified point in the not too distant future. Rather, we have required plaintiffs to identify a discrete place and time period at which the harm will occur.”). This interpretation of *Evon* is also consistent with our cases recognizing that “[t]he discrete person/imminent harm exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state.” (Internal quotation marks omitted.) *Evon v. Andrews, supra*, 211 Conn. at 507; see also *Durrant v. Board of Education, supra*, at 106 (same). This is because “[t]he adoption of a rule of liability where some kind of harm may happen to someone would cramp the exercise of official discretion beyond the limits desirable in our society.” (Internal quotation marks omitted.) *Evon v. Andrews, supra*, at 508.” *Haynes v. Middletown, Id.* at p. 317–19.

*10 Plaintiff urges, “(B)ecause the defendant’s course of conduct was continuing, the imminence prong of the test is satisfied as the harm to be caused would always be coextensive with the time of the defendant’s acts.”

Plaintiff's Memorandum, p. 14–15. Our Supreme Court rejected this argument in *Evon v. Andrews*, *supra*.

Similarly to the plaintiffs in *Evon v. Andrews*, *supra*, the potential for harm to Ziolkovski, is too uncertain to qualify him as an identifiable person. In *Evon*, the plaintiffs' decedent died in an apartment house fire. The plaintiffs sought to impose tort liability on the municipality for failing to reasonably inspect the involved apartment building and determine safety code violations. The court held, “(T)he class of possible victims of an unspecified fire that may occur at some unspecified time in the future is by no means a group of “identifiable persons ...” Ziolkovski is similarly positioned: he claims to be a member of a class of possible victims of an unspecified flood that may occur at some unspecified time in the future. He is not an identifiable victim within the meaning of the exception to discretionary act immunity.

The plaintiff offers no evidence on the third prong of the exception: a public official to whom his or her conduct is likely to subject that victim to that harm. Though the court noted “(T)he question of whether the imminent harm to identifiable persons standard should be subjective or objective has not been raised, however, in the present case.” *Haynes v. Middletown*, *Id.* n. 15, the plaintiff offers insufficient *evidence* to raise the issue either of objective or subjective notice. Plaintiff has offered little admissible evidence in opposition to the instant motion, P.B. 17–46, e.g. the many photographs are inadmissible for though the plaintiff asserts the same fairly and accurately reflect the matters, he does not identify *what* is depicted or *explain the relevance or materiality* of the matters depicted. The court declines to guess the identity of the objects in the photos or whether the same are relevant or material to the matters. Ex. C, a photocopy of what is apparently a title page of a U.S. Army Corp of Engineers report from 1980 and two handwritten pages of notes and figures are unauthenticated and unexplained on relevance or materiality and hence, inadmissible.

Nor has the plaintiff offered any evidentiary support for his claims of flooding in 1982, 2007, 2008 or 2009 though the same is claimed, paragraph 3, and the plaintiff's memorandum, p. 2. The court cannot conclude notice absent a presentation of facts from which a reasonable inference is permissible.

The plaintiff's claims are barred by the doctrine of governmental immunity.

STATUTE OF LIMITATIONS

The plaintiff alleges a negligence claim, paragraph 3. Connecticut General Statute 52–584³ defines the limitations of action, or statute of limitations, on negligence claims.

*11 “The purposes of statutes of limitation include finality, repose and avoidance of stale claims and stale evidence ... These statutes represent a legislative judgment about the balance of equities in a situation involving a tardy assertion of otherwise valid rights: [t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” (Citation omitted; internal quotation marks omitted.) *Flannery v. Singer Asset Finance Co., LLC.*, 312 Conn. 286, 322–23, 94 A.3d 553 (2014). *Iacuri v. Larry Sax*, 313 Conn. 786 (2014).

The instant lawsuit was commenced via service of process on the defendant on February 23, 2012. C.G.S. 52–584 bars claims unless brought “but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of.” Acts or omissions complained of that occurred before February 23, 2009, absent a tolling of the limitations period, are barred by operation of statute.

“[T]he three year provision in § 52–584 is the repose section of the statute of limitations.” (Emphasis omitted; internal quotation marks omitted.) *Barrett v. Montesano*, 269 Conn. 787, 794, 849 A.2d 839 (2004). “While statutes of limitation are sometimes called ‘statutes of repose,’ the former bars [a] right of action unless it is filed within a specified period of time after injury occurs, while statute[s] of repose [terminate] any right of action after a specific time has elapsed, regardless of whether there has as yet been an injury.” (Internal quotation marks omitted.) *Baxter v. Sturm, Ruger & Co.*, 230 Conn. 335, 341, 644 A.2d 1297 (1994). “Unlike a statute of limitations, the [s]tatute of [r]epose does not bar a cause of action; its

effect, rather, is to prevent what might otherwise be a cause of [action] from ever arising ... For that reason, injury occurring [after the expiration of the applicable repose period] forms no basis for recovery ... The starkness of its application is intended: The injured party literally has no cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress. The function of the statute [of repose] is thus rather to define substantive rights than to alter or modify a remedy.” (Internal quotation marks omitted.) *State v. Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 442, 54 A.3d 1005 (2012), quoting *Davidone v. Buterick Bulkheading*, 191 N.J. 557, 564–65, 924 A.2d 1193 (2007).

Plaintiff claims the act or omission complained of is the defendant “has been negligent in its management of the Bloomingdale Road crossing of Hunt’s Brook by failing to make adjustments to the culvert system after previously causing flooding conditions in 1982, 2007, 2008 and 2009.” Complaint, paragraph 3.

*12 Consequently the acts of omissions complained of begin in 1982. Claims based on such acts or omissions are barred by C.G.S. 52–584—absent a tolling.

Plaintiff claims a tolling of the limitations period by operation of the ‘continuing course of conduct’ theory. Again the plaintiff has failed, P.B. 10–57, to file a Reply raising ‘continuing course of conduct’ as a response to the Special Defense, because the plaintiff has failed to Reply, but, again, having raised the issue, and both sides briefed the issue, the court will address the same.

“In certain circumstances, this statute of limitations may be tolled under the continuing course of conduct doctrine. *Watts v. Chittenden*, 301 Conn. 575, 583, 22 A.3d 1214 (2011). The test for determining whether the continuing course of conduct doctrine should apply has developed primarily in negligence cases. “For instance, we have recognized the continuing course of conduct doctrine in claims of medical malpractice ... In doing so, we noted that [t]he continuing course of conduct doctrine reflects the policy that, during an ongoing relationship, lawsuits are premature because specific tortious acts or omissions may be difficult to identify and may yet be remedied ... The continuing course of conduct doctrine has also been applied to other claims of professional negligence in this state ...” In these negligence actions, this court has held

that in order [t]o support a finding of a continuing course of conduct that may toll the statute of limitations there must be evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto. That duty must not have terminated prior to commencement of the period allowed for bringing an action for such a wrong ... Where we have upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act ...

“Therefore, a precondition for the operation of the continuing course of conduct doctrine is that the defendant must have committed an initial wrong upon the plaintiff ...

“A second requirement for the operation of the continuing course of conduct doctrine is that there must be evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto ... This court has held this requirement to be satisfied when there was wrongful conduct of a defendant related to the prior act.” (Citations omitted; internal quotation marks omitted.) *Watts v. Chittenden*, *supra*, 301 Conn. at 583–85. Such later “wrongful conduct may include acts of omission as well as affirmative acts of misconduct ...” *Blanchette v. Barrett*, 229 Conn. 256, 264, 640 A.2d 74 (1994).” *Flannery v. Singer Asset Finance Company, LLC*, 312 Conn. 286, 311–12 (2014).

*13 Plaintiff fails to meet either prong of the continuing course of conduct test for tolling the limitation of action. First, there is no evidence, or even a claim, that the defendant committed an initial wrong *upon the plaintiff* in 1982—though that is the date of the act or omission complained of, see complaint, paragraph 3. Plaintiff’s claim is that the defendant’s wrongful act or omission began in 1982, and continuing thereafter, and the plaintiff suffered harm on March 30, 2012.

The plaintiff does not claim that he had any interest in the real property adjoining the Bloomingdale Road crossing of Hunt’s Brook, but only that he stored personal property on land adjoining that road/brook. He does not claim that the personal property was stored on the property in 1982. Consequently, if “the act or omission complained of,” C.G.S. 52–584, occurred in 1982, and the plaintiff

does not claim defendant committed an initial harm upon plaintiff then, plaintiff fails to satisfy the first prong of the continuing course of conduct theory.

Second, the plaintiff must show “evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto,” *Flannery, id.* at 312. The claimed act or omission occurred in 1982. There is no evidence to support the claim that the defendant owed plaintiff any duty in 1982, or that the same was breached, or that the breach of the duty remained in existence after commission of the original wrong.

The statute of limitations bars this claim as the continuing course of conduct theory does not apply to this case.

HOLDING

The court finds that the defendant has established there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. The plaintiff has raised no genuine issue of material fact by competent evidence on the application or validity of the defenses.

Summary judgment enters for the defendant because the plaintiff's claim is barred: for failure to establish a prima facie case through competent evidence, by the doctrine of governmental immunity, and/or by the statute of limitations.

All Citations

Not Reported in A.3d, 2015 WL 7709327

Footnotes

- 1 According to the plaintiff's counsel at short calendar, this case was errantly captioned as Ziolkouski upon the filing of the initial handwritten, pro se complaint. The plaintiff's name, however, is Ziolkovski. Therefore, he will be referred to by his proper name in this memorandum.
- 2 The court, during this motion's oral argument, noted that counsel of record recently appeared for the formerly self-represented plaintiff. Plaintiff did not request time to disclose an expert witness. The court noted that the former self-represented plaintiff claimed to have understood his disclosure obligations. Nonetheless, plaintiff's counsel argues that plaintiff needs no expert testimony. As explained the court disagrees. Were this the only basis for the granting of the motion, the court would be inclined to permit the plaintiff to seek time to disclose an expert, however, as explained in this memorandum, the court perceives other insurmountable impediments to viability of this claim.
- 3 Sec. 52–584. Limitation of action for injury to person or property caused by negligence, misconduct or malpractice. No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed.
(1949 Rev., S. 8324; 1957, P.A. 467; 1969, P.A. 401, S. 2.)

Exhibit B

SUPERIOR COURT
COMPLEX DOCKET
AT WATERBURY

- - - - - /

ROBIN SHERWOOD and GREG
HOELSCHER,

DOCKET NUMBER:
UWY-CV-14-6025333-S

v

STAMFORD HEALTH SYSTEM,
INC. D/B/A STAMFORD HOSPITAL

- - - - - /

DEPOSITION OF ROBIN SHERWOOD, taken in
accordance with the Connecticut Practice Book at the
law offices of Toohr Woel & Leydon, 80 Fourth
Street, Stamford, Connecticut 06905, before Mercedes
Marney-Sheldon, RPR, a Registered Professional
Reporter and Notary Public, in and for the State of
Connecticut on Tuesday, September 20, 2016, at 10:15
a.m.

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Hartford

New Haven

Stamford

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A P P E A R A N C E S (Continued)

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Attorney Representing J&J ETHICON - THIRD PARTY

1 to help you?

2 A Yes.

3 Q Did you go see Dr. Hines again?

4 A Yes.

5 Q What -- go ahead. I'm sorry. I
6 didn't mean to cut you off.

7 A No. You ask the next question yes.
8 I went back to see him.

9 Q Why did you go back to see him?

10 A To talk to him and tell him that I
11 was pretty sure, not just as the person who
12 received the mesh, that the mesh was causing me
13 the problems. And that I needed to do something
14 about it. And he emphasized that it is
15 permanent. And I said, well, then I need to -- I
16 need to see someone else. So he gave me some
17 names of people to go see. And he said I'm sorry
18 that you're having problems.

19 Q Did he recommend that you go see
20 Dr. Bercik in that meeting?

21 A Uh-huh.

22 Q Did he recommend that you go see
23 Dr. Bercik to remove the mesh?

24 A I don't think that he -- I don't
25 think -- I don't know I can't answer that

1 BY MR. ALLENTUCH:

2 Q When you said you needed somewhere to
3 go, do you mean you just needed someone to treat
4 the pain you were suffering from?

5 A Yes.

6 Q And did you understand at that point
7 that you needed to -- withdraw the question.

8 And that was the last time you saw
9 Dr. Hines; is that right?

10 A Yes.

11 Q That was in December of 2007
12 approximately?

13 A That sounds right.

14 Q All right. So what did you do to
15 find someone to help you?

16 A I did call Dr. Bercik. I couldn't
17 make an appointment with him until I think March,
18 which was a long way away. He had to be off work
19 for some -- his own personal surgery or
20 something. So I made the appointment.

21 And then I asked a friend of mine for
22 a recommendation of a urologist in New York.
23 She's a dentist and her husband is a doctor. And
24 she knew David Staskin, so I called and made an
25 appointment with him. I didn't know anything

1 and I saw you nod. Thank you for catching that.

2 So when you went to Dr. Staskin,
3 right, you weren't having sex with your husband
4 and the pain had gotten better. What were you
5 telling him was your problem?

6 A That -- okay. So the pain I had
7 after the surgery, suddenly got better right
8 around the time I went to see him. I saw him
9 once with the pain and by the time I went back,
10 it was better. But that's a different pain. I
11 still had tension, pulling, just feeling that,
12 like, everything was twisting inside of me. I
13 had a 24-hour awareness that -- I think I knew
14 just where the mesh was in terms of I can trace
15 the pain.

16 Q And it was in the wrong place and
17 that was causing pain; is that what you felt?

18 A The arms of the mesh on both sides
19 had gotten -- I guess they shrunk. They became
20 hard.

21 Q And that's what you told Dr. Staskin
22 when you met with him in January or so of 2008;
23 is that right?

24 A Yes.

25 Q You told him that the mesh shrunk and

1 become hard and felt out of place; is that right?

2 A Yes.

3 Q And I take it that's not -- Dr. Hines
4 had told you what you were -- when you were
5 considering the surgery, what it would be like
6 post surgery and it wasn't supposed to be like
7 that; is that right?

8 A It was not supposed to be like that.

9 Q Okay. At this point, again, we're in
10 January 2008, had you talked to other women who
11 had had problems with pelvic mesh surgeries?

12 A I don't think so.

13 Q All right. Were you doing any
14 research on the Internet?

15 A I was looking for doctors that had
16 experience with, you know, mesh. And, you know,
17 checking out the doctors that I was given the
18 names of. I don't think I found anything at that
19 point about mesh causing problems.

20 For a very long time I did think that
21 I was the only person that had a problem.

22 Q Were you undergoing menopause at this
23 time as well?

24 A Well, I'm sure I was because after
25 the mesh was put in I never had another period.

1 hospital was down on First Avenue. He was
2 recommended by Dr. Hines.

3 Q Did you ever go see him?

4 A I did.

5 Q And when was that, do you remember?

6 A Not exactly.

7 Q Was that in -- did you see him in
8 2008?

9 A Yes, I think so. I don't know if I
10 saw him before or after Dr. Gee.

11 Q All right. Tell me -- withdrawn.
12 Were your symptoms changing during
13 2008 as you were seeing these different
14 physicians or were they constant or similar?

15 A I don't recall exactly. It didn't go
16 away. I had resumed having intercourse and it
17 was painful.

18 Q All right. So you saw Dr. Porges.
19 You told him about your symptoms; is that right?

20 A Uh-huh.

21 Q And that was also in 2008; correct?

22 A Yes.

23 Q Did you bring him your medical
24 records?

25 A I don't remember.

1 Q What about Dr. Staskin? Did you get
2 your medical records and bring them to him?

3 A I don't remember. When I left
4 Dr. Hines' practice he wrote the procedures. I
5 asked him to write down what had been done so I
6 could communicate that. And so I don't know the
7 answer about when the medical records --

8 Q I'm sorry. Go ahead. I didn't mean
9 to cut you off.

10 A I think I took the little sheet of
11 paper to one or two doctors before I --

12 Q So when Dr. Staskin, for example, met
13 with you, he did an exam, he looked at the piece
14 of paper from Dr. Hines listing the surgeries
15 that he performed and he listened to your oral
16 history; is that what he was relying on?

17 A I don't remember exactly.

18 Q Okay. All right. Let's go back to
19 Dr. Porges. What -- tell me about what you --
20 what Dr. Porges told you.

21 A I believe he's the first doctor that
22 I recall saying, I think your mesh needs to come
23 out. And he said he could do it but it would be
24 a series of surgeries and they would all be
25 abdominal.

1 minutes. I understand you want to finish,
2 but just two minutes.

3 (Off the record.)

4 BY MR. ALLENTUCH:

5 Q When you were talking with
6 Dr. Staskin and he recommended that you have
7 surgery to cut the arms of the mesh, was he
8 talking about the Prolift?

9 A I assume he was.

10 Q Okay. And Dr. --

11 A That's the only thing that was
12 written on the prescription sheet of paper
13 besides the sacrospinous ligament fixation.

14 Q I was going to try to pronounce that
15 correctly but I failed a number of times. I'm
16 glad you took the lead there.

17 A I talked over you. I'm sorry.

18 Q No. I would have butchered it.

19 And Dr. Porges, when he was -- he was
20 telling you that you should have the mesh
21 removed, was he also talking about the Prolift?

22 A Yes.

23 Q You told me a few moments ago that
24 Dr. Staskin recommended that you see Dr. Gee in
25 Hartford?

1 having any trouble getting doctors to say that I
2 had an issue with mesh shrinking inside or
3 changing my architecture.

4 Q Right. They all -- everybody you saw
5 told you the Prolift was a problem.

6 A Yeah. Nobody told me they wanted --
7 I didn't get two answers that were the same.

8 Q And so is it fair to say that by June
9 of 2008, you had definitively concluded that you
10 needed to do -- you needed to take the Prolift
11 out?

12 A At some point I came to the knowledge
13 that that's where I needed to go.

14 Q But that's what all the doctors were
15 telling you?

16 A Yes.

17 Q Did you see a Dr. Siegel during the
18 May June 2008 time period?

19 A I don't know. I don't think so. Is
20 it for the same --

21 Q So I have some notes here. I will
22 just tell you what I have.

23 A Okay.

24 Q "Evaluation of RUQ pain following
25 cholecystectomy patient to consider ERCP."

1 whether your condition did change.

2 A It didn't. But my state of mind
3 changed.

4 Q And these symptoms you just
5 described, did they -- did you have any other
6 symptoms as a result of the Prolift other than
7 the ones you just described?

8 I could repeat them to you if you
9 would like.

10 A No, I know them.

11 I probably, during that time,
12 developed a spot on the right side of the
13 introitus of my vagina that was -- you know, it
14 was textured like the top where it felt like
15 there was screen door wire in it. It was
16 sensitive. It was painful. I had yeast
17 infections. I had a lot of urinary tract
18 infections.

19 Q All right. So other than the
20 symptoms you just described, the yeast
21 infections, the spot on your side of your vagina
22 and top that was textured and painful, the
23 tightness, the shortened vagina, the bone pain,
24 the pain in your groin, the pain down your right
25 leg and the activities making it worse, were

1 there any other symptoms that you were
2 experiencing because of the profit in 2008?

3 A I think I covered them.

4 Q I'm sorry. And that would be true in
5 2009 as well?

6 A Yes.

7 Q And what about 2010 you would have
8 the same symptoms in 2010?

9 A Yeah. I -- I would say that the
10 tightening essentially in my right side had
11 gotten tighter. I felt like it was pulling. My
12 hip hurt a lot. I don't think I mentioned that
13 my hip hurt at the beginning after the surgery
14 and pretty much since then. They're sort of all
15 interconnected to me, but sometimes my hip does
16 get flared out and, you know, causes problems.

17 Q All right. I just want to go back to
18 the April 2006 surgery for a moment with
19 Dr. Hines.

20 A Okay.

21 Can I just stand up? Go ahead. I
22 just need to stand up for a second.

23 Q Sure. Sure.

24 Tell me, did you go to the hospital
25 that morning when you had the surgery? Was it in

1 A Yes.

2 Q Did you settle your case with AMS?

3 A Yes.

4 Q What was the amount of the
5 settlement?

6 MS. FUSCO: Objection.

7 Attorney/client privilege. Do not answer
8 that question.

9 INST

10 BY MR. ALLENTUCH:

11 Q Were you paid the settlement amount
12 by AMS?

13 MS. FUSCO: Objection. Same
14 objection. Attorney/client privilege.
15 You're not to answer that question.

16 INST

17 BY MR. ALLENTUCH:

18 Q Did you provide AMS a release as a
19 result of the settlement in this case?

20 MS. FUSCO: That's okay.

21 THE WITNESS: I did.

22 BY MR. ALLENTUCH:

23 Q If Dr. Hines had privileges at
24 Westchester Hospital instead of Stamford
25 Hospital, would you have gone there for the

1 because his office was very thorough.

2 Q What medical records did you bring
3 with you?

4 A I believe at this time I had asked
5 for the surgical records from the medical records
6 office from Stamford Hospital and that's it. I
7 might have gotten Dr. Hines' notes, but I don't
8 think I had done that by that time. I think I
9 asked for them and they never sent them. All
10 they wanted were the operative reports, and I
11 think I took those.

12 Q All right. And so you told Dr. Raz
13 you didn't want to give him a description of the
14 problems you were suffering from; is that right?

15 A Yes.

16 Q So did the appointment primarily
17 consist of him examining you? Is that what
18 happened? Tell me what happened.

19 A Yes. He came in the room and he and
20 his resident -- or I don't know if she was a
21 resident -- Lisa Rogo Gupta I believe is her
22 name.

23 He knew I was there for mesh and he
24 said this is what I see is wrong. Your vagina is
25 too short. It's rigid. The arms of your mesh

1 have shrunk. I can feel the mesh in the top of
2 your vagina and on the side.

3 He asked me if I could have
4 intercourse and I said, yeah, modified
5 intercourse, which is not face-to-face anymore at
6 this point. And he just seemed to me exactly --
7 he seemed to have my answers.

8 Q All right. You said you couldn't
9 have face-to-face intercourse. What did you
10 mean?

11 A By this time I had to just have rear
12 entry so there wasn't full penetration.

13 Q Was that still enjoyable for you?

14 A Hell no.

15 Sorry.

16 Q It took me a moment to be able to
17 come up with the right question there because,
18 like you, I don't entirely want to ask you about
19 your sex life.

20 A Yes.

21 Q So it was uncomfortable?

22 A Yes. Painful.

23 Q Painful?

24 A Yes.

25 Q Did he recommend a course of

1 treatment for you?

2 A He recommended that I come back as
3 quickly as possible to have a couple of
4 diagnostic tests to see if they could visualize
5 the mesh with translabial ultrasound and do some
6 Euro dynamic test.

7 So I did go back in December. I
8 mean, at that point I knew I was home. I knew I
9 was going to do this. I scheduled the surgery,
10 and I got back there in December for the
11 diagnostic tests.

12 Q All right. So in November -- just so
13 I understand this, November 2010 you met with
14 him, he diagnosed your problems, recommended some
15 tests and you scheduled the surgery; is that
16 right?

17 A Yeah. He gave me great confidence.

18 Q And the surgery we're talking about
19 is the complete removal of the Prolift, the
20 Ethicon Prolift; is that right?

21 A Yes.

22 Q Around the same time there's a bunch
23 of references to hip pain. Is that something
24 that was also related to the problems you were
25 having with the Prolift?

