

D. N. UWY-CV14-6025333-S : SUPERIOR COURT/CLD
ROBIN SHERWOOD, ET AL : J.D. OF WATERBURY
V. : AT WATERBURY
STAMFORD HOSPITAL : NOVEMBER 1, 2016

**SUPPLEMENTAL OBJECTION TO STAMFORD HOSPITAL'S
MOTION FOR SUMMARY JUDGMENT**

The Plaintiffs hereby provide additional authority in opposition to the Defendant Stamford Hospital's Motion for Summary Judgment dated September 30, 2016. Judge Goodwin has repeatedly held that under similar statutes that it is a question of fact whether a particular plaintiff was on notice of wrongdoing despite the earlier occurrence of mesh related symptoms, including multiple surgeries

Viewing the facts in the light most favorable to the nonmovant, although Ms. Foreman first attributed her injury to the Advantage by July 28, 2010, thereby fulfilling the generic elements of causation and harm, Ms. Foreman testified that she did not know that her injury was the result of possible wrongdoing until she saw a television commercial for mesh litigation in late 2011 . . . Therefore, at the very least, whether a reasonable person would have had reason to suspect her injuries were due to wrongdoing merely because she opted to have her implant removed is a question best left to the jury.

In re Boston Scientific Corp. Pelvic Repair System Products Liability Litigation, 2:13-cv-15591 (S.D. West Virginia, March 19, 2015)

Because Dr. Wiltchik testified that she never told Ms. Sanchez her symptoms were due to a defect in the mesh, a jury could reasonably conclude that consultations with Dr. Wiltchik or a review of the medical records would not have given Ms. Sanchez a reason for suspicion of wrongdoing. . . While the evidence presented at trial may ultimately lead to a finding by the jury that Ms. Sanchez had a duty to investigate based on her multiple surgeries, there is enough of a material dispute to render summary judgment inappropriate.

Sanchez v. Boston Scientific Corporation, 011714 WVSDC, 2:12-cv-05762 (S.D. West Virginia, January 17, 2014)

“Although BSC has shown that Ms. Valenzuela experienced symptoms of her alleged injuries throughout 2009, 2010, and 2011, BSC has not shown that she had knowledge sufficient to identify that a wrong had occurred and caused injury until 2011.” In Re Boston Scientific Corp., No. 2:14-cv-03967, MDL No. 2326. (S.D. West Virginia, March 16, 2015).

[T]he discovery rule often involves “inherently debatable questions about which reasonable people may differ,” and “there is no magic moment” signifying when the plaintiff knew or should have known the facts giving rise to her cause of action. . . .As a result, the question of when the statute of limitations begins to run is “inappropriate for resolution on a summary judgment or directed verdict” and is best left for the jury to resolve.

Eghnayem, et al. v. Boston Scientific Corp., 1:14-cv-024061, Mem. Op. and Order on Def’s Renewed Mot. for J. as a Matter of Law, (S.D. West Virginia, March 17, 2016 [ECF No. 342]).

Decisions regarding California law are particularly instructive as our Supreme Court looked to California law in establishing the knowledge of defendant’s wrongful conduct standard.

“A cause of action will not accrue until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant’s *wrongful* conduct.” . . . Decisions by the appellate courts of California, . . . support this interpretation of the word ‘injury.’ ” . . . See *Graham v. Hansen*, 128 Cal.App.3d 965, 180 Cal.Rptr. 604 (1982);

Catz v. Rubenstein, 201 Conn. 39, 47, 513 A.2d 98, 102 (1986). “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 *Lambert v. Stovell*, 205 Conn. 1, 6, 529 A.2d 710 (1987).” (Emphasis added). Champagne v. Raybestos-Manhattan, Inc., 212 Conn. 509, 521, 562 A.2d 1100, 1107 (1989). Thus, the statute did not accrue until Plaintiff acquired knowledge of Stamford Hospital’s wrongful conduct, which was not until 2014.

Therefore, the Defendant's motion should be denied.

THE PLAINTIFFS,

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CERTIFICATION

This is to certify that a copy of the foregoing was Emailed this date, to all counsel of record.

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In re Boston Scientific Corp. Pelvic Repair System Products Liability Litigation, 031915 WVSDC,
2:13-cv-15591 /**/ div.c1 {text-align: center} /**/

**IN RE BOSTON SCIENTIFIC CORP., PELVIC REPAIR SYSTEM PRODUCTS LIABILITY
LITIGATION MDL No. 2326**

THIS DOCUMENT RELATES TO THE FOLLOWING

Faye M. Foreman

v.

Boston Scientific Corp.

No. 2:13-cv-15591

United States District Court, Southern District of West Virginia

March 19, 2015

**MEMORANDUM OPINION AND ORDER (DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT BASED ON STATUTE OF LIMITATIONS)**

JOSEPH R. GOODWIN UNITED STATES DISTRICT JUDGE

Pending before the court is the defendant's Motion for Summary Judgment Based on Statute of Limitations ("Motion") [Docket 36]. For the reasons set forth below, the Motion is DENIED.

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. Ms. Foreman's case was selected as a Wave 2 case by the plaintiffs.

On September 2, 2009, Ms. Foreman 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 36], at 2; Pl. Fact Sheet [Docket 36-1], at 4). She received her surgery at a hospital in Hayward, California. (Mem. in Supp. [Docket 36], at 2). The surgery was performed by Dr. Michael Fogarty. (Pl. Fact Sheet [Docket 36-1], at 4). The Advantage was later removed by Dr. Xiufen Ding. (*Id.* at 5). Ms. Foreman claims that as a result of implantation of the Advantage, she has experienced pain and injury, including urinary incontinence and dyspareunia. (Mem. in Supp. [Docket 36], at 2; Pl. Fact Sheet [Docket 36-1], at 5). 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. (Pl.'s Short Form Compl. [Docket 1] ¶ 13). In the instant motion, BSC argues that each of the plaintiff's claims is barred by California's statute of limitations, and consequently, the court should grant summary judgment in favor of BSC and dismiss Ms. Foreman's case.

II. Legal Standards

A. Summary Judgment

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'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. Foreman 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. Foreman received the Advantage implantation surgery in California. Thus, the choice-of-law principles of California guide this court’s choice-of-law analysis.

The parties agree, as does this court, that these principles compel application of California law to the plaintiff’s claims. In tort actions, California follows the “governmental interest” approach in determining choice of law questions. *Kasel v. Remington Arms Co.*, 101 Cal.Rptr. 314, 327 (Ct. App. 1972). “Under choice-of-law rules, the trial court determines whether the law of other states is materially different and whether other states have an interest in having their law applied, and if so which state’s interest would be more impaired if its policy were subordinated to the law of another state.” *Wershba v. Apple Computer, Inc.*, 110 Cal.Rptr.2d 145, 159 (Ct. App. 2001). Here, the implantation surgery that allegedly resulted in Ms. Foreman’s injuries took place in California. (Pl.’s Short Form Compl. [Docket 1] ¶ 11). Ms. Foreman is a California resident. (*Id.* ¶ 4). No other states appear to have an interest in having their laws applied. Thus, I apply California’s substantive law-including California’s statutes of limitations-to this case.

III. Discussion

“Resolution of the statute of limitations issue is normally a question of fact.” *Fox v. Ethicon Endo-Surgery, Inc.*, 110 P.3d 914, 922 (Cal. 2005). Personal injury claims are subject to a two-year statute of limitations. Cal. Civ. Proc. Code § 335.1 (West 2015). Although breach of warranty claims are typically subject to a four-year statute of limitations, Cal. Com. Code § 2725(1) (West 2015), when such a breach is related to an underlying personal injury claim, the statute of limitations governing personal injury claims applies instead. *Rivas v. Safety-Kleen Corp.*, 119 Cal.Rptr.2d 503, 513 (Ct. App. 2002). Thus, a two-year statute of limitations governs all of Ms. Foreman’s claims. The limitations period runs when the cause of action accrues. *Fox*, 110 P.3d at 920. “Generally speaking, a cause of action accrues at ‘the time when the cause of action is complete with all of its elements.’” *Id.* (quoting *Norgart v. Upjohn Co.*, 981 P.2d 79, 83 (Cal. 1999)).

However, an exception to the general rule of accrual is the “discovery rule,” which “postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.” *Id.* The term “reason to discover” is defined as having “reason at least to suspect a factual basis for” the elements of a cause of action. *Id.* In such an analysis, a court need not “take a hypertechnical approach” and analyze each individual element of a cause of action; rather, it need only examine the “generic elements” of wrongdoing, causation, and harm. *Id.* (internal quotation marks omitted). Thus, for example, instead of examining whether a plaintiff “suspect[s] facts supporting each specific legal element of a particular cause of action,” a court can look to whether a plaintiff “suspects or should suspect that her injury was caused by wrongdoing, that

someone has done something wrong to her,” thereby triggering the statute of limitations. *Id.*; *Rivas*, 119 Cal.Rptr. at 509 (quoting *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 927 (Cal. 1988)); see *Fox*, 110 P.3d at 920 n.2 (“At common law, the term ‘injury,’ as used in determining the date of accrual of a cause of action, means both a ‘person’s physical condition’ and its ‘negligent cause.’ Thus, physical injury alone is often insufficient to trigger the statute of limitations.” (emphasis in original) (citations and internal quotation marks omitted)).

Here, BSC argues that Ms. Foreman was on notice of the connection between the Advantage and her claimed injuries as of July 28, 2010, when she consulted with Dr. Ding regarding problems with her mesh implant. (Mem. in Supp. [Docket 36], at 8). On that day, Ms. Foreman decided that she “wanted the thing taken out” and opted to have Dr. Ding perform the removal procedure. (*Id.*; Foreman Dep. [Docket 67-1], at 153:4). At the very latest, BSC argues, Ms. Foreman was on notice as of August 12, 2010, when she underwent her mesh removal procedure. (Mem. in Supp. [Docket 36], at 9). Thus, BSC contends, Ms. Foreman’s claims were time barred by July 29, 2012, or, alternatively, by August 13, 2012. (*Id.*). Because Ms. Foreman did not file suit until June 25, 2013, BSC argues that her complaint fell outside the statute of limitations by nearly a year. (*Id.*).

Viewing the facts in the light most favorable to the nonmovant, although Ms. Foreman first attributed her injury to the Advantage by July 28, 2010, thereby fulfilling the generic elements of causation and harm, Ms. Foreman testified that she did not know that her injury was the result of possible wrongdoing until she saw a television commercial for mesh litigation in late 2011: “I . . . knew that I had had [the Advantage implant] removed, but I didn’t know there was anything wrong with an implant. . . . Up until I saw the ads, I thought it was just my body. . . . I thought my body rejected it.” (Foreman Dep. [Docket 36-2], at 28:14–16, 252:6–7, 255:11). Therefore, at the very least, whether a reasonable person would have had reason to suspect her injuries were due to wrongdoing merely because she opted to have her implant removed is a question best left to the jury. See *Fox v. Ethicon Endo-Surgery, Inc.*, 110 P.3d 914, 920 (Cal. 2005); see also *Id.* at 925 (“It would be contrary to public policy to require plaintiffs to file a lawsuit at a time when the evidence available to them failed to indicate a cause of action.” (internal quotation marks omitted)). Consequently, a reasonable jury could find that Ms. Foreman did not know or should not have known about BSC’s possible wrongful conduct until late 2011. Given that Ms. Foreman filed suit on June 25, 2013, a reasonable jury could find that Ms. Foreman’s claims are not time barred. On this reasoning, and bearing in mind my duty to draw all legitimate inferences in favor of the nonmovant, I DENY BSC’s Motion [Docket 36] with respect to Ms. Foreman’s claims.

IV. Conclusion

As explained above, the defendant’s Motion [Docket 36] is DENIED. The court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

Sanchez v. Boston Scientific Corporation, 011714 WVSDC, 2:12-cv-05762 /**/ div.c1 {text-align: center} /**/

ROSEANNE SANCHEZ, et al., Plaintiffs,

v.

BOSTON SCIENTIFIC CORPORATION, Defendant.

Civil Action No. 2:12-cv-05762

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

January 17, 2014

MEMORANDUM OPINION AND ORDER (Boston Scientific's Motion for Summary Judgment Based on the Statute of Limitations)

JOSEPH R. GOODWIN, District Judge.

Pending before the court is Boston Scientific Corporation's Motion for Summary Judgment Based on the Statute of Limitations [Docket 30]. Relying on California's two-year statute of limitations, Boston Scientific argues that Ms. Sanchez's claim is time-barred. In its supporting memorandum, Boston Scientific states that Ms. Sanchez underwent four revision surgeries more than two years before she filed this action. Boston Scientific claims these surgeries put Ms. Sanchez on actual or inquiry notice of her claim more than two years before filing suit. For the reasons stated below, Boston Scientific's motion for summary judgment [Docket 30] is DENIED.

I. Background

This case is one of several thousand assigned to me by the Judicial Panel on Multidistrict Litigation and one of four (now three) bellwether cases set for trial pursuant to Pretrial Order # 54 [Docket 22]. These cases involve the use of transvaginal surgical mesh to treat pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI").

On January 13, 2010, Dr. Kerri Wiltchik, M.D., implanted Ms. Sanchez with a Pinnacle Pelvic Floor Repair Kit and an Advantage Transvaginal Mid-Urethral Sling System. (See Boston Scientific Corp.'s Mem. in Supp. of its Mot. for Summ. J. based on the Statute of Limitations, Exhibit A [Docket 30-1], at 85-87; Exhibit B [Docket 30-2], at 3).^[1] The implantation surgery took place at Marian Medical Center in Santa Maria, California. (See Exhibit A [Docket 30-1], at 85). The products were implanted to treat Ms. Sanchez's SUI, POP, and cystocele. (Exhibit C [Docket 30-3], at 4).

According to Ms. Sanchez's plaintiff fact sheet, she first saw a health care provider for symptoms related to the mesh in February 2010. (Exhibit C [Docket 30-3], at 6). In addition, Ms. Sanchez's deposition testimony indicated that she was experiencing a pink-tinged discharge every day since the implantation surgery. (Exhibit E [Docket 30-5], Deposition of Roseanne Sanchez, at 21:1-15). Between her implantation surgery and her first revision surgery, Ms. Sanchez complained of vaginal discharge, itching, and abdominal cramping. (Exhibit A [Docket 30-1], at 50, 52).

On April 9, 2010, approximately four months after the implantation surgery, Ms. Sanchez told Dr. Wiltchik she was experiencing "abnormal vag[inal] bleeding scant with a pink discharge which causes her to wear a daily panty liner" and also felt "something scratchy like a stitch in her vagina." (Exhibit A [Docket 30-1], at 46). Dr. Wiltchik diagnosed Ms. Sanchez as having

"complications due to genitourinary device, graft, and implant." *Id.* Dr. Wiltchik excised a small portion of the mesh and applied silver nitrate to the area. (Exhibit D [Docket 30-4], Deposition of Dr. Kerri Wiltchik, at 50:1-3). Dr. Wiltchik prescribed Vagifem tablets, which would help grow the mucosa over the exposed mesh areas and promote healing. (*Id.* at 185-86:24-3). Ms. Sanchez's medical records for that day indicate she understood "that a few treatments may be required before the exposed mesh areas are completely covered and her symptoms resolve." (Exhibit A [Docket 30-1], at 46).

On May 3, 2010 Dr. Wiltchik performed a second revision surgery. (Exhibit A [Docket 30-1], at 44). Dr. Wiltchik again concluded that Ms. Sanchez was suffering from "complications due to genitourinary device, graft, and implant, " specifically, exposed mesh from the Pinnacle product. (*Id.*; Exhibit D [Docket 30-4], Deposition of Dr. Kerri Wiltchik, at 49:19-22).

By her May 20, 2010, visit with Dr. Wiltchik, Ms. Sanchez testified that she was experiencing pelvic cramping and discomfort, which she believed were related to vaginal infections, as well as incontinence symptoms. (Exhibit E [Docket 30-5], Deposition of Roseanne Sanchez, at 225:11-15). Dr. Wiltchik again assessed that Ms. Sanchez's symptoms stemmed from complications with the pelvic implants. (Exhibit A [Docket 30-1], at 43). Dr. Wiltchik prescribed Metrogel-Vaginal gel, which Ms. Sanchez testified did not improve her symptoms. (*Id.* at 43; Exhibit E [Docket 30-5], Deposition of Roseanne Sanchez, at 224:14-17).

On June 14, 2010, Ms. Sanchez again complained to Dr. Wiltchik that she was experiencing copious amounts of pink-tinged discharge. (Exhibit A [Docket 30-1], at 41). According to Ms. Sanchez's medical records, "her discharge was thought to be due to her exposed mesh." (*Id.*). After a lengthy discussion with Dr. Wiltchik, Ms. Sanchez agreed to undergo another revision surgery, this time under general anesthesia. (*Id.* at 42). Ms. Sanchez understood that the procedure would help stop the mesh from poking through her vaginal wall. (Exhibit E [Docket 30-5], Deposition of Roseanne Sanchez, at 230:3-6). On June 18, 2010, Dr. Wiltchik removed a large portion of exposed mesh. (Exhibit A [Docket 30-1], at 80). This was Ms. Sanchez's third revision surgery.

Despite these three revisions of the mesh and other treatments, Ms. Sanchez's symptoms did not improve. (*See id.* at 39, 35). On September 1, 2010, Ms. Sanchez reported to Dr. Wiltchik that she was experiencing abnormal vaginal bleeding, pink-tinged discharge, and discomfort with intercourse. (*Id.* at 35). The medical record for this date indicates Ms. Sanchez understood that "her symptoms are due to a small amount of exposed mesh." (*Id.*). For the fourth time, Dr. Wiltchik completed an in-office excision of the exposed mesh. (*Id.*). Later, on September 17, 2010, Ms. Sanchez agreed to undergo another revision surgery under anesthesia because her symptoms had not resolved. (*Id.* at 33).

According to the plaintiffs, during these medical visits, Dr. Wiltchik never told Ms. Sanchez that her symptoms were related to a defect in the mesh. (*See Pls.' Resp. in Opp'n to Boston Scientific Corp.'s Mot. for Summ. J. based on the Statute of Limitations [Docket 32], at 4*). Ms. Sanchez testified that during one of her medical appointments, Dr. Wiltchik said, "[f]or one reason or another... the skin was not healing over the mesh." (Exhibit E [Docket 30-5], Deposition of Roseanne Sanchez, at 221:11-13). According to Dr. Wiltchik's progress notes on May 11, 2011,

she "discussed at length patient's reaction to mesh and propensity for body to expel mesh." (See Pls.' Resp. in Opp'n to Boston Scientific Corp.'s Mot. for Summ. J. based on the Statute of Limitations, Exhibit 3 [Docket 32-3], Deposition of Dr. Kerri Wiltchik, at 191:9-14).^[2] Dr. Wiltchik told Ms. Sanchez she had "no idea why this was happening and for some reason [Ms. Sanchez's] body did not like" the mesh products. (*Id.* at 191:19-21). In addition, Dr. Wiltchik testified that she has never attributed the cause of Ms. Sanchez's symptoms to a defect in the mesh. (*See id.* at 223:17-21; 224:14-16, 23-25; 225:1-11).

Ms. Sanchez's plaintiff fact sheet indicates she became aware that her injuries were related to a defect in the mesh implants in August 2011. (Exhibit C [Docket 30-3], at 6). According to the plaintiffs, Ms. Sanchez saw an advertisement for transvaginal mesh litigation on television, which caused her to seek representation. (*See* Exhibit 7 [Docket 32-7], at 28:5-16). However, Ms. Sanchez's deposition testimony reveals that she did not know the month or the year she saw the advertisement. (Exhibit A [Docket 34-1], at 36:10-16). On September 21, 2012, Ms. Sanchez directly filed suit in MDL 2326 pursuant to Pretrial Order # 12 [Docket 176].^[3]

II. Choice of Law

In multidistrict litigation cases, the choice-of-law determination for pre-trial motions hinges upon whether federal or state law governs. "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); *see Toll Bros., Inc. v. Dryvit Sys., Inc.*, 432 F.3d 564, 568 n. 4 (4th Cir. 2005) (applying Connecticut state law in transferred multidistrict litigation case based on diversity jurisdiction and citing to *In re Temporomandibular (TMJ) Joint Implants Prods. Liab. Litig.*, 97 F.3d at 1055); *Bradley v. United States*, 161 F.3d 777, 782 n. 4 (4th Cir. 1998); *see also* 15 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3866 (3d ed. 2009).

This case is based on diversity jurisdiction. Federal law thus controls procedural issues and state law controls substantive issues. *Dixon v. Edwards*, 290 F.3d 690, 710 (4th Cir. 2002). The standard for summary judgment is procedural; therefore, the federal standard applies. *Gen. Accident Fire & Life Assurance Co. v. Akzona, Inc.*, 622 F.2d 90, 93 n. 5 (4th Cir. 1980). In determining which state substantive law governs this dispute, I must first identify which choice-of-law rules to follow.

A majority of cases in an MDL are transferred from other forums pursuant to 28 U.S.C. § 1407. *See* William B. Rubenstein, *Newberg on Class Actions* § 10:29 (5th ed. 2013). With respect to these transferred cases, courts routinely apply the choice-of-law of the originating forum. *See, e.g., In re Temporomandibular (TMJ) Joint Implants Prods. Liab. Litig.*, 97 F.3d at 1055; *see also Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 732 (7th Cir. 2010) ("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...").

However, plaintiffs may bypass the transfer process by directly filing into the MDL. *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*,

88 Notre Dame L. Rev. 759, 794 (2012). Some cases are directly filed into the MDL and originate in the MDL court's judicial district. Others cases originate elsewhere and are directly filed into the MDL. See *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, 2011 WL 1375011, at *4 (S.D. Ill. Apr. 12, 2011).

The difficulty with the latter category of cases is there technically is no prior proper forum whose choice-of-law rules should apply. In addition, many direct filing orders indicate direct filing does not make the MDL court a "transferor court," and thus has no effect on choice-of-law. *Bradt, supra*, at 764; see, e.g., Pretrial Order # 14 [Docket 196], at 3 ("This court shall not be deemed to be the transferor court' simply by virtue of the action having been directly filed into MDL No. 2326."). Without a prior proper forum and a disclaimer that direct filing does not affect choice-of-law, it may be difficult to determine which forum's choice-of-law should apply.

For cases that originate outside the MDL court's judicial district and are filed directly into the MDL, many courts apply the choice-of-law rules of the "originating jurisdiction." *In re Watson Fentanyl Patch Prods. Liab. Litig.*, MDL No. 2732, 2013 WL 4564927, at *2 (N.D. Ill. Aug. 27, 2013) ("Indeed, the prevailing rule in this situation is that in a case that was directly filed in the MDL transferee court but that originated elsewhere, the law (including the choice of law rules) that applies is the law of the state where the case originated."); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, 2011 WL 1375011, at *6 ("[T]he Court concludes that the 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."). See generally *Wahl v. Gen. Elec. Co.*, No. 3:13-CV-0329, 2013 WL 604818, at *4 (M.D. Tenn. Nov. 14, 2013) ("Most of the courts that have considered this peculiar procedural posture have stated that it is appropriate to apply the choice of law rules of the originating' jurisdiction (i.e., where the case would have [been] brought but for the CMO permitting direct filing), rather than the choice of law rules of the MDL Court.").

In prescription drug MDLs, the originating jurisdiction is the place where the drug was purchased and prescribed. *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, 2011 WL 1375011, at *6 ("[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.*, MDL No. 1871, 2012 WL 3205620, at *2 (E.D. Pa. Aug. 7, 2010) ("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. This ruling will promote uniform treatment between those Plaintiffs whose cases were transferred into the MDL from their home states and those Plaintiffs who filed directly in the MDL.").

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. Here, the plaintiff was implanted with the product in Santa Maria, California. Therefore, California choice-of-law rules will govern the selection of the statute of limitations.

California uses the governmental interest approach to analyze choice-of-law questions.

Wash. Mut. Bank v. Superior Court, 15 P.3d 1071, 1080-81 (Cal. 2001). Under this approach, the parties agree that the California statute of limitations would apply. Because the parties agree on this point, I will assume that it is not an issue. Therefore, I will apply the California statute of limitations to determine whether Ms. Sanchez's claim is time-barred.

III. 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).

IV. Discussion

In California, there is a two-year statute of limitations for personal injury actions. Cal. Civ. Proc. Code § 335.1. This statute applies to injuries involving defective products regardless of the legal theory asserted. See, e.g., *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 971 (9th Cir. 2002). The general rule is that a cause of action accrues when all of its elements are complete. *Fox v. Ethicon Endo-Surgery, Inc.*, 110 P.3d 914, 920 (Cal. 2005). However, the discovery rule tolls accrual until the plaintiff "is aware of her injury and its negligent cause." *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1109 (1988). In other words, the statute begins to run "when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." *Id.* at 1110. "Wrong" is not used "in any technical sense, but rather in accordance with a lay understanding." *Id.* "The question when a plaintiff actually discovered or reasonably should have discovered the facts for purposes of the delayed discovery rule is a question of fact unless the evidence can support only one reasonable conclusion." *Ovando v. County of Los Angeles*, 159 Cal.App.4th 42, 61 (2008).

In a case involving both medical malpractice and products liability claims, the California Supreme Court has stated that "a plaintiff's ignorance of wrongdoing involving a product's defect will usually delay accrual because such wrongdoing is essential to that cause of action." *Fox*, 110

P.3d at 924. Simply put, "[t]he discovery rule does not trigger accrual of a cause of action unless the plaintiff has some reason to suspect wrongdoing; that is, when a plaintiff, through reasonably diligent investigation, discovers only that he has been injured but not that the injury may have a wrongful cause, then the clock has not yet begun to run." *Hendrix v. Novartis Pharm. Corp.*, No. CV-13-2402-MWF PLAX, 2013 WL 5491846, at *5 (C.D. Cal. Oct. 2, 2013).

However, in order to use the discovery rule to delay accrual, the plaintiff must "plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Fox*, 110 P.3d at 921. In other words, "to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light." *Id.*

Boston Scientific argues that Ms. Sanchez had discovered the wrongful cause of her injuries more than two years before she filed suit. First, Ms. Sanchez had at least four revision surgeries, which should have put her on actual or inquiry notice that her symptoms were related to a problem with the mesh implants. In support of this contention, Boston Scientific cites *Coleman v. Boston Scientific*, No. 1:10-CV-01968-0WW, 2011 WL 3813173 (E.D. Cal. Aug. 29, 2011). In *Coleman*, the plaintiff was implanted with a Boston Scientific mesh product on December 5, 2006. *Id.* at *1. "From July 2007 to March 2009, the plaintiff had surgery, vaginal reconstruction, and mesh removal in order to treat her recurrent symptoms of pelvic pain, erosion and recurrent infection of the tissue surrounding the mesh." *Id.* The plaintiff filed suit more than two years after her July 2007 surgery. *See id.* The plaintiff argued she was not on notice until she had seen a 2008 FDA Notice regarding the possible defectiveness of the product. *Id.* at *3. The United States District Court for the Eastern Division of California stated that

A reasonable person who is implanted with a medical device, which requires a second corrective surgery to remove the device and correct injuries resulting there from within a year of implantation [,] should suspect the defectiveness of the device and conduct a reasonable inquiry and examination into the suitability of the device.

Id. Second, Boston Scientific claims that if Ms. Sanchez had consulted Dr. Wiltchik, her medical records, or the publicly available 2008 FDA Notice, she would have discovered that her injuries were related to a problem with the mesh.

The plaintiff counters that *Coleman* does not apply to this case because the court never found as a matter of law that the plaintiff had discovered the wrongful cause of her injury. In a footnote, the court noted that "[d]ue to the lack of detail concerning the nature of Plaintiff's 2007 surgery, it cannot be said as a matter of law that Plaintiff was on inquiry notice of her claims in 2007." *Id.* at *3 n. 1. Instead, the plaintiffs claim Ms. Sanchez had notice of the wrongful cause of her symptoms, i.e. product defect, when she observed a television advertisement about mesh litigation in August 2011. The plaintiffs argue that Ms. Sanchez did not initially suspect a defect caused her injuries because Dr. Wiltchik stated that her symptoms were related to her body's rejection of the mesh, not the mesh itself. In addition, the plaintiffs contend that Ms. Sanchez's

nineteen visits with her physician, or an investigation of her medical records, would not have revealed this wrongful cause because Dr. Wiltchik did not suspect that Ms. Sanchez's injuries were caused by a defect in the mesh.

In other words, the plaintiffs claim that summary judgment is not appropriate because the record supports two inferences: First, Ms. Sanchez initially suspected that her symptoms was related to her body's rejection of the mesh and only in August 2011 did she discover her symptoms had a wrongful cause. Conversely, she knew after four surgeries, including a surgery under anesthesia, that something was wrong with the product, not her body, and thus was on inquiry notice.

For instruction on this point, the plaintiffs cite *Clark v. Baxter Healthcare Corp.*, 83 Cal.App.4th 1048 (2000). In *Clark*, the plaintiff began experiencing allergic reactions to latex gloves starting in 1992. *Id.* at 1053. The plaintiff consulted with an allergist who suggested that the plaintiff was allergic to the gloves. *Id.* In May 1995, the plaintiff had a serious allergic response to the latex gloves. *Id.* at 1053. By the end of 1995, the plaintiff joined a support group. *Id.* The group gave her a flyer regarding latex allergies litigation, which indicated that there might be a defect in the latex gloves. *Id.* The plaintiff filed suit against the glove manufacturers on January 23, 1996. *Id.* The flyer was entered into the record, and the plaintiff submitted a declaration stating when she had received the flyer. *Id.* The defendants moved for summary judgment based on the statute of limitations. *Id.*

The California Court of Appeals found that there was a triable issue of fact because the record supported two reasonable inferences-(1) the plaintiff "could reasonably have inferred from the advice given her by various doctors and from the severity of the May 1995 acute reaction, caused by gloves she was not wearing, that more than a natural allergy to a natural substance was involved, and that a product defect or a contaminated product could have been a causative factor" or (2) "that she did not become aware of a potential wrongfulness component of her cause of action until more information than the existence of her allergies placed her on inquiry notice and then was actually gained." *Id.* at 1059-60. If the plaintiff identified the negligent cause of her injuries by May 1995, her action would be time-barred. However, if she was unaware of this negligent cause until the end of 1995, her claim was timely filed. Accordingly, the court denied the defendants' motion for summary judgment.

If I were permitted to weigh evidence at the summary judgment stage, it is unlikely that Ms. Sanchez would prevail. However, I am not a fact finder. Therefore, based on the record before me, I must reluctantly conclude that there is a genuine issue of material fact regarding when Ms. Sanchez suspected that wrongdoing caused her injuries.

On one hand, a jury might believe that Ms. Sanchez initially suspected the cause of her symptoms was related to her body's rejection of the mesh. Dr. Wiltchik never told Ms. Sanchez that her symptoms were caused by a defect in the mesh. In addition, Dr. Wiltchik never suspected that a defect could be causing Ms. Sanchez's symptoms. One could reasonably conclude that Ms. Sanchez's body simply "didn't like" the mesh. Ms. Sanchez may have continued to believe this to be the cause of her symptoms until August 2011, when she allegedly viewed the television advertisement. The jury might reach this conclusion even though Ms. Sanchez's deposition

testimony reveals she could not remember the exact date when she saw the advertisement. Thus, a jury could reasonably infer that Ms. Sanchez discovered the wrongful cause of injuries in August 2011 and thus timely filed her action.

On the other hand, a jury might conclude that after four revision surgeries, several medical treatments, and nineteen medical appointments, her body's rejection of the mesh was not a reasonable explanation of her symptoms. A reasonable person could conclude that the cause of Ms. Sanchez's injuries was a defect in the product, not her body's natural reaction to the mesh. Thus, a jury could infer that Ms. Sanchez discovered the wrongful cause of her injuries more than two years before filing suit. Therefore, her claim could be time-barred.

Assuming that Ms. Sanchez did suspect or should have suspected wrongdoing more than two years before filing, and thus had a duty to investigate, whether that investigation was reasonable is a more difficult issue. See *Fox*, 110 P.3d at 921 ("[A] potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury."); *Jolly*, 44 Cal.3d at 1111 ("Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her."); *Nelson v. Indevus Pharm., Inc.*, 142 Cal.App.4th 1202, 1206 (2006) ("When the cases are read in whole, rather than in isolated quotes, it is clear that a plaintiff's duty to investigate does not begin until the plaintiff actually has a reason to investigate. A plaintiff has reason to discover a cause of action when he or she has reason at least to suspect a factual basis for its elements. We look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." (internal citations, quotations, and alterations omitted)).

Because Dr. Wiltchik testified that she never told Ms. Sanchez her symptoms were due to a defect in the mesh, a jury could reasonably conclude that consultations with Dr. Wiltchik or a review of the medical records would not have given Ms. Sanchez a reason for suspicion of wrongdoing. (Exhibit 3 [Docket 32-3], Deposition of Dr. Kerri Wiltchik, at 223:17-21; 224:14-16; 224-225:23-11). While the evidence presented at trial may ultimately lead to a finding by the jury that Ms. Sanchez had a duty to investigate based on her multiple surgeries, there is enough of a material dispute to render summary judgment inappropriate.

For these reasons, I cannot determine as a matter of law that Ms. Sanchez discovered her cause of action more than two years before filing suit. Accordingly, I DENY Boston Scientific's motion for summary judgment. See *Ward v. Westinghouse Canada, Inc.*, 32 F.3d 1405, 1408 (9th Cir. 1994) (applying California law) (factual issue regarding when plaintiff suspected wrongdoing not suitable for summary judgment). See generally *Sylve v. Riley*, 15 Cal.App.4th 23, 26 (1993) ("Whether reasonable diligence was exercised is generally a question of fact precluding summary judgment.").

V. Conclusion

For the reasons discussed above, Boston Scientific's Motion for Summary Judgment [Docket 30] is DENIED. The court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

Notes:

[1] Exhibits relating to Boston Scientific's memorandum in support of its motion for summary judgment shall be identified alphabetically.

[2] Exhibits relating to the plaintiffs' response to Boston Scientific's motion for summary judgment will be referred to numerically.

[3] Pretrial Order # 12 was amended by Pretrial Order # 14 [Docket 196] on September 26, 2012. Pretrial Order # 14 did not modify sections regarding direct filing into the MDL.

In re Boston Scientific Corp., Pelvic Repair System Products Liability Litigation, 031615 WVSDC,
2:14-cv-03967 /**/ div.c1 {text-align: center} /**/

**IN RE: BOSTON SCIENTIFIC CORP., PELVIC REPAIR SYSTEM PRODUCTS LIABILITY
LITIGATION MDL No. 2326.**

THIS DOCUMENT RELATES TO THE FOLLOWING CASE:

Maria A. Valenzuela & Carlos Valenzuela,

v.

Boston Scientific Corp.

No. 2:14-cv-03967

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

March 16, 2015.

JOSEPH R. GOODWIN, District Judge.

Pending before the court is the defendant's Motion for Summary Judgment Based on Statute of Limitations ("Motion") [Docket 29]. For the reasons set forth below, the Motion is DENIED.

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 Valenzuelas's case was selected as a Wave 2 case by BSC.

On August 21, 2009, Ms. Valenzuela was surgically implanted with the Pinnacle Pelvic Floor Repair Kit (the "Pinnacle"), a product manufactured by BSC to treat POP. (BSC's Mot. for Summ. J. & Mem. of Law in Supp. Based on Statute of Limitations ("Mem. in Supp.") [Docket 29], at 3; Pl. Fact Sheet [Docket 29-1], at 5). She received her surgery at a hospital in Gilbert, Arizona. (Pl.'s Short Form Compl. [Docket 1] ¶ 11). Her surgery was performed by Dr. Eric Huish. (*Id.* ¶ 12).

Ms. Valenzuela claims that as a result of implantation of the Pinnacle, she has experienced injuries including dysuria and dyspareunia. (Mem. in Supp. [Docket 29], at 3; Pl. Fact Sheet [Docket 29-1], at 6). She testified that she began feeling pain and discomfort as early as a week after the surgery. (Maria Valenzuela Dep. [Docket 29-2], at 68:1-17). She also testified that in response to her symptoms, she visited her physician, Dr. Huish, who told her that what she was feeling was normal. (*Id.* at 68:7-69:4). In addition, Ms. Valenzuela stated that she did not suspect

that the Pinnacle could be defective and BSC to blame until she saw a television commercial in 2011. (Pl. Fact Sheet [Docket 29-1], at 6). 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. (Pl.'s Short Form Compl. [Docket 1] ¶ 13). Mr. Valenzuela 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 Arizona's statute of limitations, and consequently, the court should grant summary judgment in favor of BSC and dismiss the Valenzuelas's 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).

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 Valenzuelas 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. Valenzuela received the Pinnacle implantation surgery in Arizona. Thus, the choice-of-law principles of Arizona guide this court's choice-of-law analysis.

The parties agree, as does this court, that these principles compel application of Arizona law to the plaintiff's claims. Arizona follows the "most significant relationship" test, as outlined in the Restatement (Second) of Conflict of Laws ("Restatement"), in determining choice of law questions. *Bates v. Superior Court*, 749 P.2d 1367, 1369 (Ariz. 1988). For torts claims, the Restatement takes several factors into account, including (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. *Id.* at 1370; Restatement § 145(2) (1971). This inquiry is qualitative, not quantitative, and a court should evaluate the contacts "according to their relative importance with respect to the particular issue." *Bates*, 749 P.2d at 1370 (quoting Restatement § 145(2)). In addition, in an action for a personal injury, the law of the state where the injury occurred should be applied unless some other state has a more significant relationship. *Id.* (citing Restatement § 146).

Here, the implantation surgery that allegedly resulted in Ms. Valenzuela's injuries took place in Arizona. Ms. Valenzuela is an Arizona resident, and she received medical care for her alleged injuries in Arizona. No other state has a more significant relationship. Thus, I apply Arizona's substantive law-including Arizona's statutes of limitations-to this case.

III. Discussion

Resolution of the statute of limitations issue is normally a question of fact. *Landgraff v. Wagner*, 546 P.2d 26, 34 (Ariz.Ct.App. 1976). Personal injury claims are subject to a two-year statute of limitations. Ariz. Rev. Stat. § 12-542 (West 2015), held unconstitutional on other grounds by *Anson v. Am. Motors Corp.*, 747 P.2d 581 (Ariz.Ct.App. 1987). Although breach of warranty claims are typically subject to a four-year statute of limitations, *Id.* § 47-2725(A), when such a breach is related to an underlying personal injury claim, the statute of limitations governing personal injury claims applies instead. *Wetzel v. Commercial Chair Co.*, 500 P.2d 314, 317 (Ariz.Ct.App. 1972). Thus, a two-year statute of limitations governs all of Ms. Valenzuela's claims. Furthermore, because a claim for loss of consortium is a derivative claim, *Barnes v. Outlaw*, 964 P.2d 484, 487 (Ariz. 1998), a two-year statute of limitations also governs Mr. Valenzuela's claim. See *id.*

The limitations period runs when the cause of action accrues, *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 898 P.2d 964, 966 (Ariz. 1995), subject to the "discovery rule." The discovery rule provides that "a cause of action... accrues when the plaintiff knew or by the exercise of reasonable diligence should have known of the defendants' conduct." *Lawhon v. L.B.J. Institutional Supply, Inc.*, 765 P.2d 1003, 1005 (Ariz.Ct.App. 1988) (quoting *Mayer v. Good Samaritan Hosp.*, 482 P.2d 497, 501 (Ariz.Ct.App. 1971)); see also *Anson v. Am. Motors Corp.*, 747 P.2d 581, 584 (Ariz.Ct.App. 1987) ("[A] cause of action does not accrue' until a plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by the defendant's negligent conduct."). It is not enough that a plaintiff knows he or she has suffered some kind of injury; the plaintiff must have "knowledge sufficient to identify that a wrong occurred and caused injury." *Walk v. Ring*, 44 P.3d 990, 996 (Ariz. 2002) (quoting *Doe v. Roe*, 955 P.2d 951, 961 (Ariz. 1998)). In other words, a cause of action does not accrue until the plaintiff discovers his or her injury is attributable to a particular person's conduct. *Doe*, 955 P.2d at 961.

Here, BSC argues that the statute of limitations began to run in October 2009, pointing out that Ms. Valenzuela first began experiencing symptoms of her alleged injuries "[a]pproximately 2 months after [her] initial surgery in 8/2009." (Mem. in Supp., at 8 [Docket 29]; Pl. Fact Sheet [Docket 29-1], at 6). Ms. Valenzuela testified that she experienced dyspareunia after resuming sexual activities 40 days after her surgery. (Maria Valenzuela Dep. [Docket 29-2], at 67:21-68:6). Mr. Valenzuela testified that he could "feel the mesh" during intercourse, which felt abrasive to him. (Carlos Valenzuela Dep. [Docket 29-3], at 40:6-15, 42:5-43:2). Ms. Valenzuela also stated that she experienced pain, including dyspareunia, between August 2009 and August 2010. (Maria Valenzuela Dep. [Docket 29-2], at 68:1-69:14). Furthermore, she explained that she continued to feel pain in 2010 and 2011. (*Id.* at 69:15-23). Although BSC has shown that Ms. Valenzuela experienced symptoms of her alleged injuries throughout 2009, 2010, and 2011, BSC has not shown that she had knowledge sufficient to identify that a wrong had occurred and caused injury until 2011. (See Mem. in Supp. [Docket 29], at 8). Ms. Valenzuela testified that after she began experiencing pain and discomfort, she spoke with Dr. Huish, who told her that what she was feeling was "normal." (Maria Valenzuela Dep. [Docket 29-2], at 68:1-69:4.) She also explained that she did not see another medical care provider in the six months following the surgery, and she never went to an emergency room. (*Id.* at 69:5-9). It was not until 2011 that she saw a mesh litigation television commercial and "suspect[ed] that the product in me could be defective" and that BSC could be to blame. (Pl.'s Fact Sheet [Docket 29-1], at 6). Thus, until that time, a reasonable jury could find that Ms. Valenzuela did not have knowledge sufficient to identify that a wrong had occurred. See *Walk*, 44 P.3d at 996.

BSC asserts that pursuant to *Mack v. A.H. Robins Co.*, 573 F.Supp. 149 (D. Ariz. 1983), a plaintiff in Arizona does not need "to know of the defendant's improper conduct or defect in the product" for the statute of limitations to run. (BSC's Reply in Supp. of Its Mot. for Summ. J. Based on Statute of Limitations ("Reply") [Docket 63], at 3 (quoting *Mack*, 573 F.Supp. at 154)). However, *Anson v. American Motors Corp.*, as stated earlier, provides that "a cause of action does not accrue' until a plaintiff discovers or by the exercise of reasonable diligence should have

discovered that he or she has been injured by the *defendant's negligent conduct.* " 747 P.2d 581, 584 (Ariz.Ct.App. 1987) (emphasis added). *Mack* was decided before *Anson* changed the standard and therefore is no longer good law. BSC also cites to *Cooper v. Ross Stores, Inc.*, No. 1 CA-CV 13-0223, 2014 WL 800940 (Ariz.Ct.App. Feb. 27, 2014), in support of its position. In *Cooper*, a case decided on a motion to dismiss, the plaintiff was not reasonably diligent in discovering who had injured her. *Id.* at *1. Here, however, a reasonable jury could find that Ms. Straub was reasonably diligent in discovering BSC's possibly wrongful conduct.

The Valenzuelas filed suit on May 17, 2013. Ms. Valenzuela viewed the television commercial in 2011. The record does not go into further detail on when exactly in 2011 Ms. Valenzuela saw the television commercial and was put on notice. Thus, a reasonable jury could infer that Ms. Valenzuela viewed the television commercial before the two-year statute of limitations had run. On this reasoning, and bearing in mind my duty to draw all legitimate inferences in favor of the nonmovant, I DENY BSC's Motion [Docket 29] with respect to the Valenzuelas's claims.

IV. Conclusion

As explained above, the defendant's Motion [Docket 29] is DENIED. The court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

AMAL EGHNAYEM, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 1:14-cv-024061

BOSTON SCIENTIFIC CORPORATION,

Defendant.

MEMORANDUM OPINION & ORDER

(Defendant's Renewed Motion for Judgment as a Matter of Law & Motion for New Trials)

Pending before the court are the plaintiffs' Motion to Approve Form of Final Judgment [Docket 319] and three motions filed by the defendant: (1) Motion for a Judgment as a Matter of Law [Docket 291], (2) Renewed Motion for Judgment as a Matter of Law [Docket 322], and (3) Motion for New Trial [Docket 323]. For the reasons discussed below, the plaintiffs' motion is **DENIED as moot**, and the defendant's motions are **DENIED**.

I. Background

This case consolidated four plaintiffs within the Boston Scientific Corporation ("BSC") MDL, MDL 2326. (Pretrial Order # 91 [Docket 10]). At present, the BSC MDL contains approximately 18,000 individual cases. The Judicial Panel on Multidistrict Litigation assigned the BSC MDL to this court, along with six other MDLs that concern the use of transvaginal surgical mesh to treat pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI"). More than 75,000 cases are currently pending in the MDLs.¹ In this particular case, the plaintiffs allege

¹ Notably, the U.S. Court of Appeals for the Eleventh Circuit is among the circuits with the highest number of MDL plaintiffs.

injuries associated with implantation of the Pinnacle Pelvic Floor Repair Kit (“Pinnacle”), a polypropylene mesh product manufactured by BSC to treat POP.²

A. Amal Eghnayem

Plaintiff Amal Eghnayem’s Pinnacle implant surgery was performed by Dr. William Porter on February 28, 2008, to treat her Stage 3 rectocele and bladder prolapse. (Trial Tr. (Nov. 7, 2014) [Docket 315], at 228:2–230:23). In the months following her surgery, Ms. Eghnayem began to experience bleeding and pain during intercourse, incontinence, and pelvic pain and pressure. (Trial Tr. (Nov. 6, 2014) [Docket 314], at 13:8–14:2). She visited Dr. David Choi about these vaginal problems in October 2008. (*Id.* at 14:10–15; 29:6). Dr. Choi completed a pelvic exam and told Ms. Eghnayem she had exposed mesh in her vagina. (*Id.* at 14:19–20). He then performed in-office surgery to trim the mesh. (*Id.* at 15:1–2). This treatment did not resolve Ms. Eghnayem’s symptoms, and in May 2012, she visited Dr. Linda Kiley, complaining of pelvic pain, pressure, pain with intercourse, and bowel problems. (*Id.* at 17:13–17). Dr. Kiley examined Ms. Eghnayem, found another mesh exposure, and performed mesh-removal surgery in August 2012. (*Id.* at 18:2–24). Since then, Ms. Eghnayem’s pain has largely subsided, but she has lost vaginal sensitivity. (*Id.* at 19:14–17).

B. Mania Nunez

Plaintiff Mania Nunez’s Pinnacle implant surgery was performed by Dr. Emery Salom on August 27, 2008, to treat her rectocele. (Trial Tr. (Nov. 7, 2014) [Docket 315], at 140:2–12). Ms. Nunez returned to Dr. Salom in October 2008, complaining of vaginal bleeding after intercourse, and upon examination, Dr. Salom observed a left-sided exposure of the mesh at the vaginal cuff.

² The facts relayed in this section, though primarily pulled from the trial testimony, are not intended to be exhaustive lists of the evidence presented at trial and instead provide a brief background on each plaintiff’s medical history as it relates to the Pinnacle.

The plaintiffs have established sufficient evidence on the inadequacy of the DFU and on specific causation such that a reasonable and impartial jury could have resolved the plaintiffs' failure to warn claims in the same way as the jury did here. Accordingly, BSC's Renewed Motion on this point is **DENIED**.⁹

3. Statute of Limitations

The Verdict Form for Ms. Eghnayem asked the jury, “[b]y a preponderance of the evidence, did Ms. Eghnayem discover, or with the exercise of due diligence should she have discovered, the facts giving rise to her claims on or before April 11, 2009?” to which the jury responded “[n]o,” indicating Ms. Eghnayem’s Complaint was filed within the statute of limitations. Verdict Form-Amal Eghnayem [Docket 303]. Nevertheless, BSC argues that it is entitled to judgment as a matter of law as to Ms. Eghnayem’s claims under Florida’s statute of limitations.

In a product liability action, the statute of limitations is four years, beginning “from the time the cause of action accrues.” Fla. Stat. §§ 95.11(3)(e), 95.031. The accrual of a product liability action is subject to the discovery rule, which tolls the limitations period until “the date 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 Supreme Court of Florida has explained that the knowledge required to commence the limitation period under the discovery rule “does not rise to that of legal certainty.” *Univ. of Miami v. Bogorff*, 583 So. 2d 1000, 1004 (Fla. 1991), *holding modified on other grounds by Tanner v. Hartog*, 618 So. 2d 177 (Fla. 1993). Rather, the plaintiffs “need only have notice, through the exercise of reasonable diligence, of the possible invasion of their legal rights.” *Id.*

⁹ Because the plaintiffs established their failure to warn claims on the theory that the DFU did not describe the permanency, irreversibility, and reoccurrence of injury, I need not address BSC’s arguments for a directed verdict focused on the MSDS.

In other words, the limitations period is triggered when a plaintiff has actual or constructive knowledge of a possible causal connection between her injury and the product in question. *See Babush v. Am. Home Prods. Corp.*, 589 So. 2d 1379, 1381 (Fla. Dist. Ct. App. 1991) (explaining that the statute of limitations is triggered under the discovery rule when the products liability plaintiff has knowledge that the connection between her condition and use of the product in question is “to some extent causal”). This causal connection means that an injury must be “distinct in some way from conditions naturally to be expected from the plaintiff’s condition.” *Id.* Importantly, however, Florida does not require that a plaintiff know of a defect in the product to trigger the limitations period. *Bogorff*, 583 So. 2d at 1002 (“In *Barron* we expressly rejected the argument that knowledge of a physical injury, without knowledge that it resulted from a negligent act, failed to trigger the statute of limitation.”).

BSC argues that by October 29, 2008, when Ms. Eghnayem underwent a procedure to trim exposed mesh, she knew or should have known of a possible invasion of her legal rights. Consequently, according to BSC, the limitations period began to run at this point, thereby expiring on October 29, 2012. Because Ms. Eghnayem did not file suit until April 12, 2013, BSC asserts that her claims are time barred. BSC argues that Ms. Eghnayem was on notice of a causal connection between her condition and the Pinnacle after meeting with Dr. Choi, the surgeon who removed part of her mesh, on October 29, 2008. (*See* Def.’s Ex. 8, Eghnayem Medical Rs.: Annual Exam (Oct. 29, 2008) [Docket 322-8], at 2). At trial, Ms. Eghnayem testified as follows:

- Q. . . . After your visit with Dr. Choi in October, 2008, you believe[d] your problems were related to the mesh repair?
- A. That’s what he said. Yes.

(Trial Tr. (Nov. 6, 2014) [Docket 314], at 29:6–9). BSC interprets this testimony as confirmation that Ms. Eghnayem knew that her problems were related to the Pinnacle, which would be sufficient

to put her on notice of the possible invasion of her legal rights. (BSC's Renewed Mot. for J. as a Matter of Law [Docket 322], at 18). But BSC's construction of this exchange goes too far. The attorney asked Ms. Eghnayem about the "mesh repair," not the Pinnacle itself, and the meaning of "mesh repair" is open to a number of reasonable interpretations. For example, Ms. Eghnayem might have believed her problems were related to Dr. Choi's mesh excision procedure, during which he repaired the mesh exposure, or to her February 12, 2008 mesh implantation procedure, during which Dr. Porter repaired her POP using the Pinnacle. Neither of these understandings require Ms. Eghnayem to believe that her injuries resulted from the product itself, which is necessary to trigger the statute of limitations.

Ms. Eghnayem's testimony does not establish that she became aware of a possible invasion of her legal rights in 2008. Rather, Ms. Eghnayem testified that she concluded her problems were mesh-related when she researched pelvic mesh online in 2009:

- Q. Ms. Eghnayem, based on the research that you did after your office visit in October 2008 . . . that is when you concluded that your problems were related to the mesh. Is that correct?
- A. It was similar to what I was experiencing. Yes.
- Q. Okay. In October of 2008. Correct?
- A. Somewhere in 2009, yes.
- Q. In 2008 or 2009?
- A. Nine.
- Q. In early 2009?
- A. I don't recall the exact dates.
- Q. But it's your testimony it was either around the time of Dr. Choi, October 2008, or in early 2009. Is that right?
- A. Somewhere like that. Yes.

(Trial Tr. (Nov. 6, 2014) [Docket 314], at 33:13–34:2). From Ms. Eghnayem's testimony, a reasonable juror could find that Ms. Eghnayem's online research took place at some point after April 11, 2009, and, as a result, she discovered her case within the four-year statute of limitations.

The Supreme Court of Florida has emphasized that the discovery rule often involves “inherently debatable questions about which reasonable people may differ,” and “there is no magic moment” signifying when the plaintiff knew or should have known the facts giving rise to her cause of action. *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 937 (Fla. 2000) (quoting *Copeland v. Armstrong Cork Co.*, 447 So. 2d 922, 926 (Fla. Dist. Ct. App. 1984), *decision approved in part, quashed in part sub nom., Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985)). As a result, the question of when the statute of limitations begins to run is “inappropriate for resolution on a summary judgment or directed verdict” and is best left for the jury to resolve. *Id.* Here, the evidence presented by BSC on the statute-of-limitations issue is not “so overwhelmingly in [its] favor [] that a reasonable jury could not arrive at a contrary verdict.” *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1246 (11th Cir. 2001). Accordingly, BSC’s Renewed Motion on this matter is **DENIED**.

III. Motion for New Trials

Having denied BSC’s Renewed Motion for Judgment as a Matter of Law in its entirety, I now turn to BSC’s Motion for New Trials.

A. Legal Standard

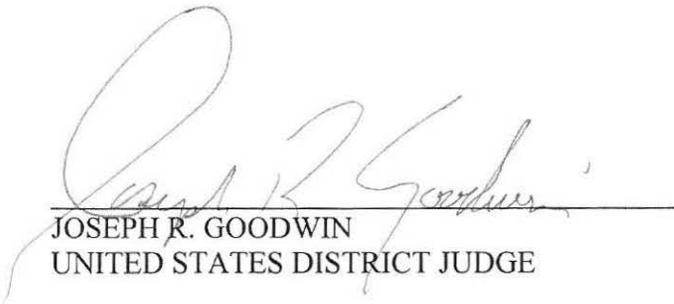
Rule 59 of the Federal Rules of Civil Procedure allows a court to grant a new trial “for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a)(1)(A). Primarily, ruling on a motion for a new trial requires the court to determine whether, “in [its] opinion, the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.” *Hewitt v. B.F. Goodrich Co.* 732 F.2d 1554, 1556 (11th Cir. 1984) (quoting *Untied States v. Bucon Constr. Co.*, 430 F.2d 420, 423 (5th Cir. 1970)). The court must

V. Conclusion

BSC has asked this court to discard the jury's unanimous decision and direct a verdict in its favor pursuant to Rule 50(b), which allows for a directed verdict only if no reasonable jury could find in the plaintiffs' favor. Alternatively, BSC has asked for a new trial pursuant to Rule 59, which allows for a do-over only if a grievous error occurred that rendered the trial unfair. Both courses of action require the court to desert the jury's verdict, and consequently, neither should be taken lightly. Indeed, the remedies of a directed verdict or a new trial should be applied only in exceptional circumstances. BSC has failed to show that such circumstances exist here. Thus, applying the hesitancy and caution that a district court must employ in these circumstances, I **DENY** BSC's Renewed Motion for Judgment as a Matter of Law [Docket 322], **DENY** BSC's Motion for New Trials [Docket 323], and **DENY as moot** BSC's Motion for Judgment as a Matter of Law [Docket 291]. The plaintiffs' Motion to Approve Form of Final Judgment [Docket 319] is **DENIED as moot**.

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

ENTER: March 17, 2016



JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE