IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON FEBRUARY 1999 SESSION

ROBERT JASTREBSKI,	)	
	)	SHELBY CIRCUIT
Plaintiff/Appellant	)	
	)	Appeal No. 02A01-9803-CV-00068
v.	)	
	)	
SMITH & NEPHEW RICHARDS, INC., ET AL.,	)	
	)	
	)	
Defendants/Appellees	)	

FILED

March 18, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS
THE HONORABLE JOHN R. McCARROLL, JUDGE

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AFFIRMED

WILLIAM H. INMAN, Senior Judge

CONCUR:

W. FRANK CRAWFORD, JUDGE

DAVID R. FARMER, JUDGE (Not Participating)

This is another pedicle screw implantation case. On October 6, 1995, a complaint[1] was amended to add the plaintiff in the case at Bar, who alleged that the appellee unlawfully and without pre-market governmental approval marketed a pedicle screw fixation device which was unsafe for spinal fusion, the implantation of which on June 25, 1992 resulted in permanent injury. Among other causes of action he alleged fraud and deceit, fraudulent concealment, and gross negligence.

Pursuant to a case management order, Mr. Jastrebski's [plaintiff's] medical records were obtained and he executed a sworn questionnaire. His and his causation expert's discovery depositions were taken; thereafter the appellee moved for summary judgment based on two grounds: (1) the bar of the statute of limitations of one year, and (2) the lack of evidence to establish a causal connection between the medical device manufactured and/or marketed by the appellee and the disability claimed by the plaintiff. The motion was granted and the plaintiff appeals, presenting for review the issues of (1) whether there are genuine issues of fact as to when the plaintiff discovered his cause of action arising out of his June 25, 1992 surgery, and (2) whether there are genuine issues of fact as to causation.

We measure the propriety of the trial court's grant of summary judgment against the standard of Rule 56.04, Tenn. R. Civ. P., which provides that summary judgment is appropriate where

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

[1]On September 29, 1995, an action was filed in the Circuit Court at Memphis on behalf of numerous plaintiffs against numerous defendants, each of whom alleged injuries as a result of the implantation of spinal fixation devices. One of the defendants is the appellee. This complaint was amended on October 6, 1995 to add 230 additional plaintiffs, one of whom is Mr. Jastrebski, who was selected, for the purpose of case management, as a designated plaintiff.

> material fact and that the moving party is entitled to a judgment as a matter of law.

We also note that the nonmoving party is entitled to the benefit of any doubt. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). The court must "take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Id.* At 210-11. All facts supporting the position of the nonmovant must be accepted as true by the trial court. *Id.* At 212. It is only when the material facts are undisputed and conclusively demonstrate that the movant is entitled to a judgment that a trial court is justified in depriving a claimant of its right to a plenary trial; in all other instances, a trial on the merits is required. Summary judgment "is clearly not designed to serve as a substitute for the trial of genuine and material factual matters." *Id.* At 210.

When reviewing a grant of summary judgment, an appellate court must decide anew if judgment in a summary fashion is appropriate. *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991); *Gonzales v. Alman Constr. Co.*, 857 S.W.2d 42, 44-45 (Tenn. App. 1993). Since this determination involves a question of law, there is no presumption of correctness as to the trial court's judgment. *Id.; Hembree v. State,* 925 S.W.2d 513, 515 (Tenn. 1996).

The plaintiff is 41 years old. He was born with a congenital anomaly medically known as spondylolisthesis, a condition involving a misaligned vertebra. He suffered from sporadic low back discomfort after increased physical activity, but otherwise was apparently in good condition. He has a degree, is a CPA, and is a talented operatic performer. His testimony is somewhat unusual and is reproduced verbatim:

Q: And is it your testimony that immediately prior to the implantation surgery you were not having any back pain, were not having any problems with your back, you simply wanted to have a stronger back?

A: That's correct.

Q: And you believed, based on what your doctor told you, that having this implantation surgery would cause you to have a stronger back?

A: Yes, I did.

. . . . .

Q: When did you first realize or think that you had a problem after the surgery that was caused by the device?

A: Immediately when I woke up from this operation.

Q: What was your problem when you first woke up?

A: I had severe pain, like I had a -- like my leg was electrocuted.

Q: And you believed that that was being caused by the device?

A: Yes, I do.

Q: Did you talk to your doctor about it?

A: Yes, I did.

Q: What did he tell you?

A: He sent me down to have tomograms [sic] to see if one of the pedicle screws was pressing on a nerve.

Q: What were the results of the tomograms?

A: I don't know.

Q: But you continued to have pain every day?

A: I had extreme pain. I couldn't straighten my leg.

Q: And you believed that was being caused by the device that was in your back?

A: Yes, I did.

The plaintiff was somewhat vague when asked when he consulted an attorney about the problems he was having which he believed were caused by the

implanted device, but admitted that he contacted a lawyer approximately one year after his implantation surgery, who told him that the statute of limitations had expired:

> Q: Who is the first lawyer you contacted?
>
> A: I don't remember.
>
> Q: Where were you living?
>
> A: Same place I'm currently residing in. I'm at home with my mother.
>
> Q: Was the lawyer in Illinois?
>
> A: Probably.
>
> Q: Probably? What city was he in?
>
> A: I don't know.
>
> . . . . .
>
> Q: Did you employ that lawyer?
>
> A: I don't know what you are asking me. Are you asking me if I called any attorney and asked to be represented in my case?
>
> Q: Yes, sir.
>
> A: Against who?
>
> Q: Against anybody that you thought had done anything to cause you any harm or injury. You believed from June of 1992 that you had a problem that was being caused by a device in your back. Is that right?
>
> A: Yeah. I think actually I called the lawyer, I believe it was a woman, and she said it was too late to file, the statute of limitations was expiring in Illinois or something. Because I was advised by my doctor to wait at least a year.

Jastrebski conceded that he did not do anything to attempt to determine the name of the manufacturer of the medical device that he believed was causing him a problem:

> Q: My question, again, is after the implantation surgery in June of 1992, and while you believed that you were being caused problems or pain

from a device in your back, did you ever ask your doctor the name of the manufacturer?

A: No, I didn't.

Personal injury actions against the manufacturers or sellers of defective or unreasonably dangerous products must be commenced within one year after the cause of action has accrued. T.C.A. § 29-28-103, 104. On this statutory scheme has been engrafted the rule that the delimiting period does not commence until a reasonable person exercising due diligence should have discovered an injury or legal claim. *Foster v. Harris,* 633 S.W.2d 304 (Tenn. 1982).

No proof superior to the testimony of the plaintiff comes to mind as to when he discovered or in the exercise of diligence should have discovered his cause of action. The plaintiff candidly testified that he knew he had a problem caused by the device when he awakened from surgery. This ends the matter, but further discussion is warranted.

We reiterate that the plaintiff believed from June of 1992 that he had a problem that was being caused by the device in his back. He admits that he went to see an attorney about a year later. Although he could not recall any of the details - - where the attorney's office was located, or even the city or town - - he claims that the attorney told him it was "too late to file . . . ." Subsequently, on August 31, 1993, Plaintiff had explantation surgery to have the device removed. Although he claims his pain continued, he did nothing from August 31, 1993 until October 17, 1994. At that time, or sometime after that date, he read an article that he claims was his first notice that there might be something wrong with the device. Finally, suit was filed on October 6, 1995.

The only injury about which plaintiff complains is pain. He claims no other injury caused by a defect in the product. He admits that from that date he

"believed" the pain was caused by the product. He was, therefore, obligated to investigate his cause of action and avail himself of the discovery rule. But he did nothing, and cannot now claim that although he was diligent, he was unable to discover his cause of action. To obtain the benefit of the tolling period provided by the discovery rule, a plaintiff must exercise reasonable diligence as soon as he knows or believes he has an injury caused by a product. He may not sit back, wait, and do nothing, and then claim he is an "innocent" plaintiff entitled to the benefits of the discovery rule:

> As stated in the principal opinion, the [discovery] rule applies only in cases where the plaintiff does not discover and reasonably could not be expected to discover that he has a right of action. It does not, in my opinion, permit a plaintiff to wait until he knows all of the injurious effects or consequences of a tortious act. [Citations omitted.] The statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person, is not put on inquiry.

See, Teeters v. Currey, 518 S.W.2d 512 (Harbison, concurring opinion) (Tenn. 1974).

. . . . .

In *Craig v. R. R. Street & Co., Inc.*, 794 S.W.2d 351 (Tenn. App. 1990), plaintiff's decedent argued against a motion for summary judgment on the grounds that the cause of action did not accrue until plaintiff knew the identity of the manufacturer or the supplier of chemicals that were causing the medical problems. This Court rejected those arguments and affirmed the trial court's summary judgment. The Court noted that plaintiff knew that his decedent was suffering from an illness which was caused by exposure to the chemicals. There was no evidence that plaintiff made any effort to ascertain the identity of the chemicals, the manufacturers of the chemicals, or the full extent of the injury being caused by exposure to the chemicals. Thus, the court concluded:

> We do not believe that there is any dispute as to a genuine issue of material fact that plaintiff and plaintiff's decedent did not use due

> diligence in ascertaining the causal connection between decedent's illness and the acts of the defendants herein. Accordingly, the order of the trial court granting summary judgment to defendants is affirmed. 794 S.W.2d at 357.

Like plaintiff's decedent in *Craig*, the plaintiff, by his own admission, was clearly on notice, even though he may not have known all of the particulars of his cause of action. He had knowledge and admitted that he himself believed there was a causal connection between his pain and the device. Consequently, the statute of limitations began to run because "the statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry." *Roe v. Jefferson*, 875 S.W.2d 653, 656-657 (Tenn. 1994), quoting *Hoffman v. Hospital Affiliates*, 652 S.W.2d 341, 344 (Tenn. 1983).

Plaintiff argues that he did not know the device was "defective" or "unreasonably dangerous" until he read an article "around 1994 . . . that indicated there were thousands of people having problems who had these devices put in their back . . . ." However, the statute of limitations is not tolled simply because a plaintiff may not know that the injury he has sustained has resulted in the breach of a specific legal standard:

> It is not required that the plaintiff actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a "right of action"; the plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct. *Roe, supra*, 875 S.W.2d at 657.

Plaintiff's reliance on *Shadrick v. Coker*, 963 S.W.2d 726 (Tenn. 1998) is unavailing. The similarity between the plaintiff and Shadrick is that they both had back surgery and both subsequently saw media reports about pedicle instrumentation surgery. *Shadrick* was a medical malpractice case based on lack

of informed consent. Shadrick claimed that his doctor fraudulently concealed the cause of action when he "offered a number of explanations for Shadrick's continuing back problems." Under the circumstances, the Court held that there was sufficient evidence in the record to raise a jury question on the issue of fraudulent concealment with regard to informed consent. There is no such issue in this case. While, on that record, there may have been an issue about whether Shadrick had "reason to suspect that he had sustained an injury," on this record there is no doubt that Jastrebski not only suspected but "believed" the device was causing his injury and pain.

We hold that the motion for summary judgment was properly sustained on the ground of the bar of the statute of limitations.

Turning now to the issue of causation, the appellee argues with much vigor that there is no evidence to support the claim that a defect or dangerous condition in the hardware was the cause of the injury claimed by the plaintiff.

We agree with the appellee that since the plaintiff claims an injury from a product, his claims are governed by the Tennessee Products Liability Act, T.C.A. § 29-28-202, *et seq.* The Act requires a plaintiff to prove as a threshold element that the product was either defective or unreasonably dangerous. T.C.A. § 29-28-105(a)(1980) sets forth this threshold requirement in a products liability case. "A manufacturer or seller of a product shall not be liable for any injury to person or property caused by the product *unless a product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller." Id. Fulton v. Pfizer Hosp. Products Group, Inc.*, 872 S.W.2d 908, 911 (Tenn. App. 1993) (Emphasis in original.)

In a case involving a prescription medical product, it is not enough to simply show that the product had risks or was dangerous. A plaintiff must show that the danger was unreasonable which was unknown to the medical practitioner who elected to use the product. The reasonableness of the rule and the scope of the warning required for a manufacturer to discharge its duty and avoid liability for any harm caused by use of the product are controlled by the knowledge of the physician who is expected to select the product for use. *Pittman v. Upjohn Co.*, 890 S.W.2d 425 (Tenn. 1994). The prescription medical product cannot be unreasonably dangerous where the medical practitioner is aware of the risks associated with using the product. T.C.A. § 29-28-105(d).

Once a plaintiff has established that a product is "defective" or "unreasonably dangerous," the plaintiff must then offer proof to establish that the defect or unreasonably dangerous condition was the cause of plaintiff's claimed injury. In other words, the plaintiff must "trace the injury to some specific error in construction or design of the [product]. . . ." *Fulton v. Pfizer Hosp. Products Group, Inc., supra,* 872 S.W.2d 912, quoting from *Browder v. Pettigrew,* 541 S.W.2d 402, 404 (Tenn. 1976). *See also, Caldwell v. Ford Motor Co.,* 619 S.W.2d 534, 538-39 (Tenn. App. 1981).

The plaintiff offered no proof that the injury about which he complains was caused by a defect or unreasonably dangerous condition in the product. The injury about which he complains is pain. However, his causation expert rejected the notion that the plaintiff's pain was being caused by the product, much less some defect or condition associated with the use of the product. Dr. Cenac testified that he could find "no specific residual which could be causally related to the use of the

instrument device," and that the plaintiff had a successful fusion and "the pedicle instrumentation was successful and accomplished its goal."

Plaintiff argues that he has created a factual dispute through his own testimony that his pain significantly increased after his implantation surgery, and relies on *Peete v. Shelby County Health Care Corp.*, 938 S.W.2d 693 (Tenn. App. 1996). However, *Peete* was not a case involving a prescription medical device; rather, it involved an orthopedic suspension bar above plaintiff's hospital bed, that unexpectedly fell and injured plaintiff's head. Under that circumstance, this Court held that expert testimony was not required to defeat a motion for summary judgment. But in the case at Bar, expert testimony is required. Plaintiff's testimony cannot substitute for the expert testimony required to establish a causal connection between an alleged defect in the product and a specific injury. The product in dispute is a technically complex prescription medical device, and expert testimony is required to establish the causal connection between the alleged defect in the device and Plaintiff's claimed injuries. *Fulton v. Pfizer Hosp. Products Group, Inc., supra,* 872 S.W.2d at 912.

Dr. Cenac confirmed his findings and opinions in his discovery deposition.[2] He testified that the plaintiff's alleged post-operative problems with his lower back were attributable to his spondylolisthesis and not to the spinal implant surgery, and that the chronic problems plaintiff claimed to be suffering were caused, more likely than not, by the instability in his spinal column at the location where the spondylolisthesis was present. In response to questions from plaintiff's counsel, Dr. Cenac testified:

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[2]Dr. Cenac was used as the causation expert for all of the designated plaintiffs. The volume filed in support of the motion for summary judgment in this case is volume 2 of his deposition, taken on July 25, 1997. The portion of his deposition dealing with his examination and opinions concerning the plaintiff begins at page 153 and continues through page 174.

Q: [To] what do you attribute the chronic changes in the L-4 that were shown on EMG post surgery?

A: probably due to the - - I'm not trying to be funny. The guy's got a spondylolisthesis. He's got a birth defect. More probably than not the chronic part of the findings on the tests were longstanding due to the instability at L5/S1 from the spondylolisthesis. (Cenac Dep., p. 157.)

In summary, the plaintiff's causation expert testified that there was no causation. In response to questions from the appellee's attorney, Dr. Cenac testified:

> My general opinion with this particular patient was that the patient had a successful fusion, the pedicle instrumentation was successful and accomplished its goal. It assisted in achieving the fusion procedure. I found no specific residual which could be causally related to the use of the instrumentation device. I felt that the patient overall had a very acceptable result. I felt that the patient -- in this particular patient I felt that his expectations exceeded the expected goal.

Then, in response to follow-up questions from plaintiff's counsel, Dr. Cenac testified that:

Q: And you say that because he has a solid fusion based on what you saw?

A: Solid fusion, normal neurological examination, and everything that was set out to be accomplished was accomplished orthopedically.

The plaintiff did not offer any other medical causation proof in response to the motion for summary judgment.

According to the appellee, these are the undisputed facts:

1. Jastrebski was an intelligent, educated individual.

2. Jastrebski was born with a birth defect that caused him to have pain after increased physical activity.

3. Jastrebski wanted his back to be perfect and wanted to cure the birth defect.

4. In June of 1992, Jastrebski had implantation surgery to attempt to cure his birth defect.

5. Immediately after the surgery, and continuously thereafter, Jastrebski claims that he had extreme pain that he had never experienced prior to the implantation surgery.

6. Immediately after the surgery, and continuously thereafter, Jastrebski "believed" the pain was being caused by the device that had been implanted in his back.

7. Jastrebski never took any reasonable action to attempt to learn why the device was causing him pain or the identity of the manufacturer of the device or to investigate any claims he might have as a result of the pain he believed was being caused by the device.

8. Jastrebski's complaint in this case was not filed until October 6, 1995.

9. Jastrebski's own medical causation witness failed to provide any testimony to a reasonable degree of medical certainty to establish that the implantation of the device was causing or contributing to any of the injuries allegedly suffered by Jastrebski.

We have carefully examined the record and agree that the foregoing summation is correct. We therefore conclude that the motion for summary judgment was properly sustained on the ground of causation.

The judgment is affirmed at the costs of the appellant.

_____
William H. Inman, Senior Judge

CONCUR:

_____
W. Frank Crawford, Judge

_____
David R. Farmer, Judge