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

ANTHONY MAESTAS, EUGENIO CAMARA, PAUL HILL, and WILLIAM SHOOK, Plaintiffs/Appellants v. SOFAMOR DANEK GROUP, INC. ET AL, Defendant/Appellee	)	Shelby Circuit Appeal No. 02A01-9804-CV-00099

FILED

February 16, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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

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AFFIRMED

WILLIAM H. INMAN, Senior Judge

CONCUR:

W. FRANK CRAWFORD, Judge
DAVID R. FARMER, Judge

A national television show exegeted the use of spinal fixation devices known as pedicle screws and generated the filing of class actions in federal district courts against the manufacturers of these devices. The plaintiffs were members of the class. For reasons not relevant here, class certification was denied on February 24, 1995.

On September 29, 1995 and thereafter, lawsuits were filed in the Shelby County Circuit Court by hundreds of plaintiffs, mostly non-residents, alleging that the defendants designed, manufactured, and marketed pedicle screws with rods and/or plates for posterior application by surgical implantation into the pedicles of the spine which failed of their purpose,[1] resulting in personal injury, or the exacerbation of pre-existing adverse medical problems.

The plaintiffs alleged negligence, strict liability, failure to warn, misrepresentation, implied warranty, civil conspiracy, failure to test, defect per se, etc., as causes of action allegedly resulting from the use of the pedicle screws and related hardware.

The motions of the defendant for summary judgment addressed each purported cause of action, but were granted solely on the issue of the statute of limitations. Consequently, our opinion is concerned only with that issue.

The plaintiffs appeal and present for review one issue: whether there are genuine disputes as to [sic] material facts as to when [each plaintiff] discovered their causes of action against the defendant arising out of the implantation of the

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[1]Whether the pendency of the class action tolled the Statute of Limitations was an issue in the trial court, and is, peripherally, an issue before this Court. This issue is discussed in detail later in the opinion. The cases at Bar derive from the docketed cases of *Arabie v. Sofamor Danek Group, Inc.*, and *Haffey v. Sofamor S.M.C., et al*, in the Shelby County Circuit Court.

pedicle screw device which would preclude the granting of summary judgment on the basis of the statute of limitations?

The defendant Danek addresses the question of class action tolling, and presents for review three issues:

1. Did Plaintiffs produce sufficient evidence to create a genuine issue of material fact that the devices implanted in their spines were defective or unreasonably dangerous, so as to permit liability under the Tennessee Product Liability Act?

2. Did Plaintiffs establish to a reasonable degree of medical certainty cause in fact and proximate cause between any alleged defect or unreasonably dangerous condition in Danek's medical device and each Plaintiff's alleged injury?

3. Did Plaintiffs produce sufficient evidence to create a genuine issue of material fact that Danek's medical device was unreasonably dangerous when Plaintiffs' (learned intermediary) implanting surgeons knew the risks involved?

Because the issues are so interrelated we will not address them *in seriatim*, but collectively.

Where there is no conflict in the evidence as to any material fact, the question on appeal is one of law, and the scope of review is *de novo* with no presumption of correctness accompanying a trial court's conclusions of law. *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87 (Tenn. 1993); Rule 13(d), T.R.A.P. In ruling on a motion for summary judgment the trial court and this court must consider it in the same manner as a motion for a directed verdict made at the close of the plaintiff's case, i.e., all the evidence must be viewed in a light most favorable to the motion's opponent and all legitimate conclusions of fact must be drawn in that party's favor. *Gray v. Amos*, 869 S.W.2d 925 (Tenn. App. 1993); Rule 56.03, T.R.C.P.; *See, Byrd v. Hall,* 847 S.W.2d 208 (Tenn. 1993).

Under T.C.A. § 29-28-103, 104 personal injury actions must be brought against manufacturers or sellers of defective or unreasonably dangerous conditions of products within one year after the cause of action accrued.

The date of the accrual of the cause of action in tort cases is often elusive for reasons as myriad as the number of cases expounding upon the principle.[2] The discovery principle was engrafted upon the statute in *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487 (Tenn. 1975), which held that the statute did not begin to run until an injury occurs or is discovered or until a reasonable person exercising due diligence should have discovered an injury or legal claim. The trial court's finding that the plaintiffs were put on enquiry notice more than one year before they filed suit is derived from *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W.2d 341 (Tenn. 1983), wherein the Supreme Court held that a statute of limitations is "tolled during the period when the plaintiff has no knowledge at all that the wrong has occurred and, as a reasonable person, was not put on enquiry."

Stated generally, the plaintiffs suffered severe back problems for years and underwent spinal fusion surgery in which Danek's medical device, including bone screws, were implanted to immobilize the affected area while spinal bone grafts in between the vertebrae grew together and fused. Screws to attach the instrumentation to the spine were placed in plaintiffs' pedicles.[3] Each plaintiff's history is unique; each had surgery between eighteen and sixty months before

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[2]A determination of the date of when the statute begins to run is 'a continuing saga,' *Foster v. Harris*, 633 S.W.2d 304 (Tenn. 1982), or, as the Court might have said, 'the perception to discern the difference between the facts and the way the facts are made to appear' is a challenging judicial perquisite.

[3]Pedicles are the two rearward facing bony arches on either side of the vertebral body that support the lamina. Because the pedicles extend rearward, they are accessible to surgeons for "pedicle fixation," the placement of screws passing through the pedicle and into the vertebral body.

filing suit; each of the implanted devices contained labeling that warned of the risks involved.[4]

Appellant Anthony Maestas began treatment with Dr. Ronald Racca in September of 1989 for low back pain, neck pain and headaches that he had been suffering since November 5, 1988 when he was involved in an auto accident. Dr. Racca conducted a physical examination and performed a discogram which showed positive results at L3-4 and L4-5 levels which were also shown to be abnormal on x-ray and MRI. Based upon the results of these tests, a diagnosis of herniated discs at the lower three levels in the lumbar spine was rendered and surgery was recommended. On December 17, 1990, Maestas underwent fusion surgery with implantation of a Luque internal fixation device from L3 to the sacrum. Maestas was informed by Dr. Racca that it would take up to 18 months before he could determine if the surgery was successful.

Maestas was examined by Dr. Christopher Cenac, an orthopedic surgeon, and Dr. Richard Levy, a neurosurgeon who attributed Mr. Maestas' present symptoms to the pedicle screw device. Dr. Cenac testified that Mr. Maestas had more fibrosis than he should have from the pedicle screw surgery. Further, Dr.Levy testified that the L-3 level screw may not be properly within the pedicle.

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[4]Mr. Maestas received components of Danek's Plate and Screw ("PAS") spinal system on December 17, 1990. He did not file suit until October 23, 1995. Mr. Camara received components of Danek's TSRH spinal system on December 2, 1991. That device was removed on May 21, 1993, and a second TSRH device was implanted. He did not file suit until October 12, 1995, four years after his first surgery and over two years after his second surgery. Mr. Hill had a TSRH device implanted on March 22, 1992, which was removed and replaced with another device on February 21, 1994. He did not file suit until October 12, 1995 -- 3-1/2 years after his first TSRH surgery and 1-1/2 years after the second surgery. Mr. Shook received components of Danek's PAS spinal system on June 19, 1991. He did not file suit until October 12, 1995.

Maestas testified that his symptoms worsened after the surgery and that his bladder and urinary problems began after the device was implanted. He thought that surgery was unsuccessful because "I had more pain with this back metal in my back," and that the "surgeon screwed me all to hell by giving me that operation."

Camara thought his first surgery was a failure about three months after he underwent the procedure. He testified that "what wasn't successful in general was the implant I had."

Hill believed his 1992 surgery failed shortly after it occurred. He stated: "I couldn't walk, my legs were numb and this was when he removed the screw and plate on the third operation I had two screws broke out and he replaced them with more screws and plate."[5] Hill testified that he did not know an implant was used in his 1992 surgery, notwithstanding that he signed a surgical consent to the contrary.

Shook thought his surgery was a failure by July, 1991, and knew his surgery had failed by February, 1993, because his symptoms were different and worse.[6] He considered filing suit at least two years before he did so, after seeing a December 17, 1993, television program discussing spinal fixation devices.[7]

Plaintiffs bore the burden of adducing facts to bring themselves within an exception to the statute, here, the discovery rule. *E.g., Benton v. Snyder*, 825

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[5]Apparently there was no broken screw. His physicians found no evidence that a screw had broken. This point, of course, is not relevant on the issue of the statute of limitations.

[6]Shook also claims that he did not know his 1991 surgery included an implant, although, like Hill, he signed a consent form which authorized these implants. None of the plaintiffs saw or read anything about spinal instrumentation before their surgical procedures. We think it evident that in the absence of fraud a plaintiff cannot disavow his written assurance of knowledge.

[7]These devices appear to have been labelled extensively with respect to the numerous risks their use entailed.

S.W.2d 409, 413 (Tenn. 1992); *Smith v. Southeastern Properties, Ltd.,* 776 S.W.2d 106, 109 (Tenn. App. 1989).

The discovery rule will not protect claimants who ignore readily available information and do not investigate what they know or have reason to suspect. Discovery rule tolling occurs "only during the period when the plaintiff had no knowledge at all that the wrong had occurred and, as a reasonable person, was not put on inquiry." *Potts v. Celotex Corp.,* 796 S.W.2d 678, 680-81 (Tenn. 1990). *Accord, Shadrick,* 963 S.W.2d at 734 (discovery rule requires knowledge of "wrongful" conduct, but not "that the injury constituted a breach of the appropriate legal standard.") *Shadrick* is later discussed. The elements of the discovery rule are:

> A breach of a legally cognizable duty occurs when plaintiff discovers or reasonably should have discovered, (1) the occasion, the manner and means by which a breach of duty occurred that produced . . . injury; and (2) the identity of the defendant who breached the duty. Legally cognizable damages occur when plaintiff discovers facts which would support an action for tort against the tortfeasor.

Wyatt v. A-Best Co., 910 S.W.2d 855 (Tenn. 1995).

Under this test, in cases involving surgery, sufficient notice to trigger a plaintiff's duty to inquire ordinarily exists when "the plaintiff knew or reasonably should have known that the surgery was a failure." *Hough v. Morris,* 818 S.W.2d 39, 42 (Tenn. App. 1991). At that point, a plaintiff knows enough to investigate who or what was responsible for the surgical failure. *Id. at 42-43. See, Parris v. Land,* 1996 WL 455864, (Tenn. Ct. App., Aug. 16, 1996) (obligation to investigate arose when plaintiff "began worrying" about new problem she associated with surgery); *Bennett v. Hardison,* 746 S.W.2d 713, 714 (Tenn. App. 1987) (where procedure produces a new adverse symptom, plaintiff can wait only a "brief period" and certainly not eight months before being obliged to investigate.)

This action was filed in October, 1995, some eight months after the February 22, 1995, MDL-1014 class certification denial. Unless the discovery rule tolled the statute of limitations before August, 1993, all Plaintiffs' claims are time barred. Undisputed facts establish that prior to that date, each plaintiff had adverse symptoms which they attributed to their instrumented surgery, rather than to the surgery itself. It is beyond irony that the plaintiffs once argued that "December 16, 1993, the airing of the news program 20/20 in which the pedicle screw devices were first publicly described as defective products, is the universal date in which the statute of limitation commenced for virtually all plaintiffs involved in this litigation." [On December 16, 1993 a nationwide television program publicized many of the allegations that plaintiffs are making here. *See, Shadrick v. Coker,* 963 S.W.2d 726, 729, 734 (Tenn. 1998).] We do not see how the discovery rule could continue to toll the statute of limitations after that date, since the nature of the allegedly wrongful conduct was at minimum knowable, if not actually known, to plaintiffs from that day forward.[8]

Plaintiffs Camara and Hill argue that the trial court erred in dismissing claims arising from both of their surgeries, but they allege no claim or injury unique to their second surgeries. Under the "single tort" doctrine, all claims arising from the same tortious conduct have the same limitations period, beginning with the first injury. *Potts v. Celotex*, 796 S.W.2d 678, 680 (Tenn. 1990); *National Cordova Corp. v. City of Memphis,* 214 Tenn. 371, 380-81, 380 S.W.2d 793, 797 (1964); *Beaman v. Schwartz,* 738 S.W.2d 632, 634 (Tenn. App. 1986). Neither plaintiff was "entitled to delay filing until all injurious effects or consequences of

[8]The publicity generated a veritable host of lawsuits in U. S. District Courts as to activate multi-district procedures.

the actionable wrong are actually known." *Weber v. Moses,* 938 S.W.2d 387, 393 (Tenn. 1996).

As mentioned earlier, a class action filed on December 29, 1993 in a federal district court was denied certification on February 22, 1995. *See, Orthopedic Bone Screw Products Liability Litigation,* MDL-1014, 1995 WL 273597 [E.D.Pa., Feb. 22, 1995]. The trial judge ruled that the pendency of the class action tolled the running of the statute of limitations.

The appellees argue that while the trial court correctly ruled that the appellants' claims were time-barred under the discovery rule, he erred in ruling that the class action tolled the running of the statute, because Tennessee has not recognized class action tolling. The argument that the mere filing of a state law-based class action in a federal court should nullify Tennessee's Statute of Limitations focuses our attention, especially cross-jurisdictional class action tolling whereby any unsuccessful class action filed anywhere in the federal system would toll the Statute.

It is true that in product liability cases Tennessee has not recognized class action tolling. *See, Hamilton County Board of Education v. Asbestospray Corp.*, 909 S.W.2d 783 (Tenn. 1995), wherein the Supreme Court declined to decide a certified question on this precise issue; but we assume, as did the trial court, that the rationale expressed in *American Pipe & Construction Co. v. Utah*, 414 U.S. 345, 94 S.Ct. 756 (1974), and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392 (1983) would be in some measure approved. In the latter case, the Court held that a tolling rule for class actions is not inconsistent with the purposes served by statutes of limitations, the periods of which are intended to put

defendant on notice of adverse claims and to prevent plaintiffs from sleeping on their rights.

The appellees argue with much force that the asserted tolling effect of a federal class action emasculates a salutary delimiting period, possibly for years, depending upon the length of time the federal court dockets the action before the denial of certification, or even worse, before the reversal of certification by an appellate court. However this may be, we are constrained to the view that we previously expressed in *Blakeney v. Kassell,* 1991 WL 87978, that the Tennessee statute of limitations is tolled during the pendency of the federal class action. We are not unmindful of the pointed opinion of an appellate court in Illinois, dealing with the precise issue of foreign-action tolling:

> Although our supreme court adopted the tolling doctrine . . . we decline to further extend that doctrine to the case at hand. We hold, therefore, that a class action filed in a foreign judicial system does not operate to toll the duly enacted limitations period in Illinois. We believe our decision today best serves the interests of a just and efficient legal system in Illinois . . . . This theory would establish the Illinois judiciary as a clearinghouse for stale class actions from any of the 50 states, wherein classes that died in other jurisdictions might breathe again in Illinois courts and at Illinois' expense. We cannot . . . ignore the legislature's manifest intent to set the statute of limitations . . . .

This is heady language. The plaintiffs, none of whom are from Tennessee, appear to be using Tennessee as a "clearinghouse" for claims almost literally from "any of the 50 states, since only seven (7) of the 1260 plaintiffs in *Haffey* and only one (1) of the 56 plaintiffs in *Arabie* are residents of Tennessee. Even so, we should adhere to *Blakeney* until our Supreme Court or the General Assembly clarifies the issue.

The plaintiffs argue that summary judgment is unsuited in cases involving a standard of reasonableness. The earlier cases tended to employ this rationale. But in later cases a different view was adopted:

> It is now well-settled that summary judgments are appropriate in negligence actions . . . The Supreme Court initially expressed some reluctance concerning the use of summary judgments in negligence cases. However, it has now held unequivocally that summary judgments are not disfavored procedural devices and that they may be used to conclude any case that can and should be resolved on legal issues alone. Thus, our role on appeal is not to dwell on the nature of the cause of action but to determine whether the requirements of T. R. C. P. Rule 56 have been met.

Shorter v. McManus, 1997 WL 718972 (Tenn. App. 1997).

Shadrick v. Coker, 963 S.W.2d 726 (Tenn. 1998), is a pedicle screw case involving the application of the Statute of Limitations. The defendant, an orthopedic surgeon, on March 13, 1990, inserted pedicle screws and related hardware in the plaintiff's spine to provide stability for vertebral fusion. He was not informed before surgery about the proposed implantations, but was informed immediately afterwards. The screws were removed in March 1991, but the plaintiff continued to have pain for more than three years thereafter. He continued under the treatment of the defendant, who never attributed the plaintiff's continuing pain to the installation of the screws. On December 17, 1993 the plaintiff saw the television program about pedicle screws and learned that they were experimental. On December 16, 1994, 57 months after the implantation of the screws, the plaintiff filed the complaint against Dr. Coker and the Hospital, alleging malpractice, lack of informed consent, and battery, together with fraudulent concealment about the true nature of the screws.

The case was decided solely on the plaintiff's theory of lack of informed consent. The Court opined that a jury could reasonably find that the plaintiff was

reasonably unaware of the tortious origin of his injury until December 1993 when he saw the television program. The Court stated, " . . . a jury could reasonably find there is evidence in the record that Shadrick was reasonably unaware of the tortious origin of his injury until December 1993. Dr. Coker's argument that Shadrick was aware of his claim in 1990 rings hollow given that Shadrick was never informed of the risks . . . "

That *Shadrick* is inapposite to the case at Bar is readily apparent. These plaintiffs knew that the implantations were the cause of their continuing back problems, unlike Shadrick. They signed consents to surgery which described the hardware, unlike Shadrick. There is no evidence whatever of fraudulent concealment, unlike Shadrick. If the settled principle that "a plaintiff may not delay filing suit until all the injurious effects and consequences of the alleged wrong are actually known to the plaintiff," may be found to be inapplicable here, the principle is merely wordy and has no place in malpractice or product liability law.

We agree with the trial judge that the plaintiffs knew, or, at minimum, were on enquiry notice that their claimed injuries were attributable to the implanted hardware more than one year before suit was filed. The grant of summary judgment is therefore affirmed at the costs of the appellants.

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William H. Inman, Senior Judge

CONCUR:

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W. Frank Crawford, Judge

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David R. Farmer, Judge