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RACHELLE L. HARZ
J.S.C.

This Order is prepared and filed by the Court:

IN RE: PELVIC MESH/GYNECARE LITIGATION

This document relates to:

Trinidad Alvarado v. Ethicon, Inc., et al.
(BER-L-000282-15 MCL)

Kelly Beechie et al. v. Ethicon, Inc., et al.
(BER-L-017211-14 MCL)

Susan Cardwell v. Ethicon, Inc., et al.,
(BER-L-011577-14 MCL)

Anita Carne v. Ethicon, Inc., et al.
(BER-L-005708-15 MCL)

Pauline Curtin v. Ethicon, Inc., et al.
(BER-L-017252-14 MCL)

Melisha Mason v. Ethicon, Inc., et al.
(BER-L-001499-15 MCL)

Geralyn Monson v. Ethicon, Inc., et al.
(BER-L-001856-15 MCL)

Lissette Renta et als v. Ethicon, Inc., et al.
(BER-L-000922-15 MCL)

Julie Torchetti v. Ethicon, Inc., et al.
(BER-L-010422-15 MCL)

Sandra Wolgast v. Ethicon, Inc, et al.
(BER-L-000555-15 MCL)

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION – BERGEN COUNTY

MASTER CASE NO. L-11575-14
Gynecare Litigation, Case No. 291

DECISION REGARDING PROSPECTIVE APPLICATION OF MCCARRELL V. HOFFMAN-LAROCHE, INC.

PROCEDURAL BACKGROUND

Before this court are ten motions filed by defendants seeking dismissal of plaintiffs' claims pursuant to the New Jersey statute of limitations. Oral argument was conducted on September 27, 2019.

This court must first decide the threshold legal question of the applicability of McCarrell v. Hoffmann-LaRoche, Inc., 227 N.J. 569 (2017) to these motions. Specifically, the question to be decided is whether McCarrell has retroactive application. the New Jersey Supreme Court's decision was silent on this issue.

THE MCCARREL DECISION

On January 24, 2017, our New Jersey Supreme Court issued a unanimous decision in McCarrell holding that the substantial-interest test set forth in section 142 of the Restatement (Second) of Conflicts of Law (1971) (Am. Law Inst., amended 1988) was the operative choice-of law rule for resolving statute of limitations conflicts in New Jersey. Under section 142, New Jersey's statute of limitations controls if (1) New Jersey has a substantial interest in the maintenance of the claim; and (2) there are no "exceptional circumstances" that "make such a result unreasonable." McCarrell, 227 N.J. at 574.

The Supreme Court held that section 142 is the provision intended by the drafters of the Restatement (Second) of Conflicts of Law to govern statute of limitations conflicts, and that New Jersey will now follow its substantial-interest test in choice-of-law determinations involving statutes of limitations. Id. at 574-75, 591. The Court reasoned that the substantial-interest test "will channel judicial discretion and lead to more predictable and uniform results that are consistent with the just expectations of the parties." Id. at 574. The Court further held that New Jersey has a

substantial interest in "deterring its manufacturers from placing dangerous products into the stream of commerce" and that there were no exceptional circumstances in McCarrell to make the application of New Jersey's statute of limitations unreasonable. Id. at 575.

Defense counsel argues that McCarrell did not articulate a new principal of law and therefore the threshold requirement for prospective-only application has not been met. Defense counsel also argues even if McCarrell did articulate a new rule of law, retroactive application is still appropriate because plaintiffs cannot overcome the common law presumption of retroactivity. Finally, defense counsel argues that this court's previous interpretation of In re Accutane Litig., 235 N.J. 229 (2018) requires application of New Jersey statute of limitations law to all cases in this MCL. This court finds these arguments are not supported by the McCarrell decision itself as set forth below.

The language utilized in the McCarrell decision confirms the Supreme Court's recognition that the statute of limitations is not to be controlled by the substantive law of the state that is being applied to the case. The Court wrote:

> The essential purpose of substantive tort law is to provide a remedy to a party who has been wronged, whereas the essential purpose of a statute of limitations is to encourage litigants to file timely claims and to bar the litigation of stale claims. Those differences were recognized in the common law and are recognized by the presumptions in Second Restatement sections 146 and 142.

McCarrell, 227 N.J. at 592 (internal citations omitted). While the McCarrell Court does indicate that the outcome of its decision would be the same under the governmental-interest test, the decision provides language to specifically explain that section 142 is the basis for its analysis, and analysis under section 142 supersedes an analysis pursuant to the governmental-interest test.

The Supreme Court provided:

> [T]here are meaningful distinctions between section 142 and the governmental-interest test. Section 142's presumption in favor of a forum state with a substantial interest in the litigation can be overcome only by exceptional circumstances that would render that result unreasonable. Under the governmental-interest test, a forum state's substantial interest in the litigation is a significant factor—but not a conclusive one—to be weighed against the interests of another state connected with the parties or the occurrence. Section 142 is a less malleable standard than the governmental-interest test. For all practical purposes, under section 142, once a court finds that the forum state has a substantial interest in the litigation, the inquiry is at an end.
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> McCarrell, 227 N.J. at 596.

Finally, if there was any doubt that the McCarrell decision provides a new choice-of-law analysis for determining the appropriate state statute of limitations, one need look no further than this phrase: "[W]e are adopting a different choice-of-law framework for determining whether the forum state's or another state's statute of limitations will apply . . . ." Id. at 599.

Therefore, contrary to the arguments of defense counsel, the McCarrell decision changed the statute of limitations choice-of-law analysis in tort actions. The Supreme Court found that section 142 of the Restatement (Second) of Conflicts of Law governed statute of limitations choice of law conflicts. "This ruling was a significant and outcome-determinative departure from the most significant relationship test adopted by the Court in P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132 (2008) and Cornett v. Johnson & Johnson, 414 N.J. Super. 365 (App. Div. 2010), judgment aff'd as modified, 211 N.J. 362 (2012)." N.J Practice, Civil Practice Forms § 5:6.50 (6th Ed.). Prior to McCarrell, New Jersey courts applied the presumption that the statute of limitations of the place of injury applied in personal injury actions. See, e.g., P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 136 (2008); Erny v. Estate of Merola, 171 N.J. 86, 96 (2002).

ANALYSIS

Since the McCarrell Court was silent as to the prospective or retroactive effect of its decision, this court undertook an analysis of what our Supreme Court has ruled in previous decisions with regard to retroactivity when its decisions changed a prevailing statute of limitations.

Instructive to this court's analysis was the reasoning set forth by our Supreme Court in Montells v. Haynes 133 N.J. 282 (1993), concerning prospective application of its decision that changed the statute of limitations for sexual harassment claims from a six-year period to a two-year period. "Prospective application is appropriate when a decision establishes a new principle of law by overruling past precedent or by deciding an issue of first impression." Id. at 295 (citing Coons v. American Honde Motor Co., 96 N.J. 419, 427 (1984). "[The Court] must also weigh whether retroactivity furthers the underlying purpose of the rule and whether retroactive applications could produce substantial inequitable results." Montells, 133 N.J. at 295. In applying those standards to the facts of that case, the Court stated that "[t]he tradition [of confining retroactive application when fairness and justice require] is particularly appropriate when a court renders a first-instance or clarifying decision in a murky or uncertain area of law or when a member of the public could reasonably have relied on a different conception of the state of the law." Id. at 297-98 (internal quotations and citations omitted).

Also informative is the language and rational provided in Velez v. City of Jersey City, 180 N.J. 284 (2004), a case dealing with whether or not a plaintiff's claim was barred for failing to give a timely notice under the New Jersey Tort Claims Act. Once again, our Supreme Court focused on what would be the reasonable reliance of other plaintiffs and potential inequitable

results. "[P]rospective application is appropriate when (1) the decision establishes a new rule of law, by either overruling past precedent or deciding an issue of first impression, and (2) when retroactive application could produce substantial inequitable results." Id. at 297 (citing Alderiso v. The Medical Center of Ocean County, Inc., 167 N.J. 191, 203 (2001)).

In Alderiso v. Med. Ctr. Of Ocean County, 167 N.J. 191, 201 (2001), the Supreme Court once again applied their decision prospectively as it concerned a change, or perceived change, regarding a statute of limitations issue. The Court held that for computation purposes, the first date to be included in the one-year limitations for an employee's cause of action under the Conscientious Employee Protection Act would be the day after the date of discharge. Id. at 195. Because the case was one of first impression, the Court applied its holding prospectively. Id. at 204. The Court reasoned that prospective application of a rule was warranted when an issue is one of first impression and a plaintiff reasonably relies on a plausible, although incorrect, interpretation of the law. Id.

This court is similarly guided by language found in Selective Ins. Co. of America v. Rothman, 208 N.J. 580 (2012) which underscores the Supreme Court's approach to the issue this court is tasked to decide. "Decisions arising in the context of civil litigation are ordinarily given retroactive application but we depart from that general principle and turn to prospective application when considerations of fairness and justice, related to reasonable surprise and prejudice to those affected counsel us to do so." Rothman, 208 N.J at 587 (internal quotations and citations omitted).

CONCLUSION

Based on the foregoing, this court finds that McCarrell did in fact articulate a new principle of law. At the very least, there was lack of clarity such that no plaintiff or plaintiff's attorney could

reasonably expect that the New Jersey statute of limitations applied at the time these ten cases were filed. Accordingly, this court will be applying a prospective application of McCarrell, as that is the fairest and most equitable disposition of the issue. This determination is in keeping with the manner in which our Supreme Court has previously dealt with the prospective application of decisions that change a statute of limitations analysis. It is undisputed that the essential purpose of a statute of limitations is to encourage litigants to file timely claims. Litigants cannot follow a statute of limitations rule that they cannot reasonably foresee will apply to their cases. A retrospective application of the McCarrell case would not further the purpose of the statute of limitations.

PROCEDURAL STATUS OF MOTIONS BEFORE THIS COURT

Pertaining to the present motions, this court agrees with the position of defense counsel that plaintiffs have presented inconsistent choice-of-law arguments. Defense counsel recognized they would need to file new briefs if this court disagreed with their interpretation of the retroactive effect of McCarrell. Therefore, new submissions are required from all parties. Defense counsel has also requested that this court conduct Lopez hearings.

A Gynecare Case Management Conference is presently scheduled for Thursday, October 10, 2019 at 10 o'clock am. Counsel shall appear at 9:30 am in order to discuss with this court a reasonable time frame within which the depositions of the plaintiffs and fact witnesses in connection with these ten motions shall be completed. Thereafter, a briefing schedule consistent with this court's opinion finding no retroactive application of McCarrell to these tens motions (as well as all cases in this MCL) shall be discussed and scheduled.

This court will also entertain a scheduling order (depositions and briefs) regarding the second wave of motions filed by defense counsel pertaining to twelve other plaintiffs.

October 8, 2019

RACHELLE L. HARZ, J.S.C.