

HONORABLE RACHELLE L. HARZ, J.S.C.
Superior Court of New Jersey, Law Division
Bergen County Justice Center
10 Main Street, Chambers 359
Hackensack, New Jersey 07601
(201) 527-2685

FILED

JAN 24 2019

RACHELLE L. HARZ
J.S.C.

Prepared by the court

KATHY MCFALL,

Plaintiff,

v.

ETHICON, INC., ETHICON WOMEN'S
HEALTH AND UROLOGY, a Division of
Ethicon, Inc., GYNECARE, JOHNSON &
JOHNSON, AND JOHN DOES 1-20,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

MASTER CASE NO. BER-L-011575-14
L-11513-14 MCL

In Re Pelvic Mesh/Gynecare Litigation

Case No. 291

ORDER AND DECISION

INTRODUCTION

Before this court is defendants', Ethicon, Inc., Ethicon's Women's Health and Urology, Gynecare, Johnson & Johnson, and Joe Does 1-20 (hereafter "Ethicon"), Motion for Summary Judgment based on the contention that plaintiff's claims are time-barred pursuant to the two-year statute of limitations. Oral arguments were heard on January 14, 2019.

FACTS

On April 3, 2006 plaintiff Kathy McFall ("McFall") underwent surgery to treat her abnormal menses, vaginal prolapse, and dysmenorrhea, mild dysplasia, and chronic pelvic pain in Abilene, Texas. Dr. Charles Thompson ("Dr. Thompson") performed a laparoscopically-assisted vaginal hysterectomy, bilateral salpingo-oophorectomy, and anterior and posterior colporrhaphy concomitantly with placement of the TVT Obturator ("TVT-O"). Shortly after her

surgery, McFall began to experience severe pain to her groin and vaginal area, urinary retention, and incontinence, which she reported to Dr. Thompson. On May 3, 2006, McFall had her post-operative examination with Dr. Thompson. Dr. Thompson reported in his post-operative exam notes that he observed nothing unusual. He also observed that McFall had "a very small piece of mesh coming from the right groin incision, which I was easily able to remove even without cutting." McFall continued to experience urinary retention.

On May 22, 2006, Dr. Thompson recommended and performed a urethral release for McFall by cutting the TVT-O tape. Through the summer of 2006, McFall continued to complain to Dr. Thompson about her urinary retention and pain in her groin area. On September 8, 2006, Dr. Thompson's medical chart reflects that he spoke with the medical director of Gynecare Worldwide, a division of Ethicon, to discuss McFall's pain in the groin area. The medical director informed Mr. Thompson that with this type of problem after implantation of the TVT-O, there are typically three things that help the pain: injection of an anesthetic with a steroid, physical therapy, or removal of the tape. McFall made the decision to receive the steroid injections, which Dr. Thompson performed.

On September 13, 2006 McFall called Ethicon's customer support hotline with complaints. This court has reviewed the 16 page document generated by Ethicon in response to this call. The event description, which is information provided by the patient McFall states:

The patient has reported that since she had the TVT procedure she has had to be catheterized 2 times a day. She is also receiving 2 steroid shots a week in her thigh and vagina for a number of weeks. They ended up clipping the device in May.

In response to McFall's complaint, on September 14, 2006, Ethicon sent McFall a letter that provides in part:

I am sending this letter as a follow-up to the conversation that we had recently. As we discussed, Ethicon understands the importance of having an opportunity to learn

more about the difficulty you reported. This includes an evaluation of any device involved. Therefore we make every attempt to evaluate the product, or conduct a lot history review, if the product is not available for investigation. When the investigation is complete, the results will be forwarded directly to your attention. Additionally, we are required to provide the data to the FDA. In order to fully evaluate your complaint, we need information regarding the product involved and your post-operative status and follow up office care.

On August 8, 2007, McFall had an office visit with Dr. Thompson and at that time reported that she tried to cut herself in the groin area. At McFall's deposition, when asked about this incident, she testified that, "I wanted that stuff out of me." Further questioning revealed that "that stuff" was the mesh, and she wanted it out of her because it hurt and she had dealt with the situation for over a year. She testified that the area she cut herself was in the groin area. McFall Dep. Tr. at 143:15-144:10. Dr. Thompson wrote in his medical chat that he, "chastised the patient for cutting herself... I told her that I would be more than willing to try to remove this tape that could be causing her pain, but we will do it under the right circumstances."

On April 15, 2009, McFall went to see a new physician, Dr. Bob Schull ("Dr. Schull"). Dr. Schull performed a revision procedure on November 25, 2009 wherein he removed portions of the implant. On January 25, 2010, McFall told Dr. Schull that her pain was improving, and she was able to have sexual intercourse. McFall Dep. Tr. at 157:6-157:11. Dr. Schull informed McFall that the TVT-O was causing her irritation, so removing it helped. McFall Dep. Tr. at 154:25-155:15. McFall filed this lawsuit on October 15, 2010.

LEGAL STANDARD

Under New Jersey law, a plaintiff has a two year statute of limitations, generally from the date of his or her injury, to file a product liability claim. *See, Cornett v. Johnson & Johnson*, 211 N.J. 362, 277 (2012). The discovery rule is a rule of equity. *See, Brecke v. Hoffman-LaRoche.*,

No. A-1359-14T4. 2018 WL 619729, at *4 (N.J. Super. Ct. App. Div. Jan. 30, 2018). The statute of limitations will toll “until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered a basis for an actionable claim.” *Id.* (citing *Lopez*, 62 N.J. at 272; *McCarrell*, 227 N.J. at 578). The standard is one of a reasonable person, “whether the facts presented would alert a reasonable person exercising ordinary diligence that the alleged injury was due to the fault of another.” *Id.* at *4.

ANALYSIS

This court finds there are two events that alerted McFall, if exercising ordinary diligence, to the fact that her pain in her groin and pelvic area was due to the TVT-O and consequently, the manufacturer(s) of the TVT-O. The first event is September 13, 2006 when McFall called Ethicon’s customer support hotline. The second event is August 8, 2007 when McFall informed Dr. Thompson that she tried to cut the mesh out of her groin area. Therefore, McFall’s causes of action accrued on September 13, 2006, or at latest, August 8, 2007. McFall had until September 14, 2008 or August 9, 2009 to file this lawsuit within the statute of limitations. McFall filed this lawsuit on October 15, 2010, and therefore, her complaint is time barred.

September 13, 2006

On September 13, 2006, McFall called Ethicon’s customer support hotline. The fact that McFall chose to call Ethicon, after Dr. Thompson already spoke with Ethicon’s medical director and told her Ethicon’s suggested options for treatment is evidence to this court that McFall believed her claimed injuries arose from the TVT-O and was not a surgical side effect or error of some kind. Plaintiff’s counsel argues that this evidence is hearsay, and this court does not know the contents of the conversation between McFall and Ethicon. First, this evidence is not hearsay

because the content of the conversation is not being offered for the truth of the matter asserted. The call itself is being offered for the fact that McFall made a telephone call to Ethicon's customer support hotline. Second, although this court does not know exactly what was said during the call, McFall called Ethicon because she believed her pain and problems were due to the TVT-O. The report generated from her call specifically provides, "Issue Type: Complaint" and "Event Date: April 2006" (which is the timeframe when she received the TVT-O). Given these facts, there is no other rational explanation a reasonable factfinder could deduce as to why McFall would have called Ethicon's customer support hotline other than to report her complaints that she associated with the TVT-O.

The letter from Ethicon dated September 14, 2006 was a follow-up letter to her September 13, 2006 call. Ethicon writes in this letter that it "understands the importance of having an opportunity to learn more about the difficulty you reported." The letter continues to explain that Ethicon will look into the issue the individual reported, investigate the product itself, and update the individual when it receives the results of the investigation. In its letter, Ethicon is giving a summary about its conversation with McFall and what it will do to address McFall's complaint. This is further evidence supporting this court's conclusion that McFall reported her concerns about the TVT-O during her September 13, 2006 call with Ethicon's customer support hotline.¹

¹ The issue before this court is on point with a decision authored by Nelson Johnson, J.S.C. (ret.) in the Atlantic County case *Tabor v. Johnson & Johnson*. This court recognizes that Judge Johnson's decision is not a reported decision; however, given the fact that this is a New Jersey MCL case and directly on point, this court finds the decision instructive. In *Tabor*, the plaintiff complained of pain at the site of the prolene mesh implant. *See, Tabor v. Johnson & Johnson*, No. ATL-L-830-14 (N.J. Super. Ct. Law Div. May 15, 2018). The plaintiff called Ethicon's customer support hotline and reported that he was experiencing pain. *Id.* Ethicon then wrote plaintiff follow-up letters to learn more about his problem. *Id.* The court granted summary judgment stating that the claim was time barred and said, "If he (plaintiff) didn't think the mesh was, or could have been, the problem, then why else was he calling Ethicon? It strains credulity to say that after calling Ethicon to report his pain, he had no reason to suspect that the mesh was possibly the cause of his problems." The same can be said for McFall in this case as well. If McFall did not think the TVT-O mesh was causing her pain, then why else was she calling Ethicon?

August 8, 2007

On August 8, 2007, Dr. Thompson reported in his medical notes that “she tried to cut herself in the area that was hurting... because she was hurting.” In McFall’s deposition, she said that she “wanted that stuff (the mesh) out of me... because it hurt. I had dealt with this for over a year at this point.” When asked why she resorted to cutting herself, McFall responded:

I wanted the stuff out of me. I don’t really have another explanation for that, but, you know, if you live with something stabbing you like that and hurting all the time, you would want it out too. I mean, it’s just, you know, the physical therapy, the injections, the -- you know, it’s like where you get to you’re not a person anymore. They dehumanize you, and I wanted it out.

McFall Dep. Tr. at 143:25-145:17.

McFall admits to trying to cut the TVT-O mesh out of herself because it was causing her pain. She explains that she was generally frustrated with the pain and problems she was experiencing after implantation. Based on her own statements, this court concludes McFall believed the mesh of the TVT-O was a reason for her pain and problems.

Plaintiff’s counsel argues that Dr. Thompson did not reasonably believe that McFall’s issues were related to the TVT-O, and therefore, McFall could not have reasonably believed her pain was associated with the TVT-O. This argument does not abide by the reasonable person exercising ordinary diligence standard. While a doctor’s opinion or recommendation can affect an individual’s belief of whether a product is causing his or her injury, the standard is focused on the individual bringing the lawsuit, not the beliefs of the individual’s doctors. The standard looks to the surrounding circumstances and whether those circumstances would alert a reasonable person to believe that his or her injury is due to the fault of another. Under New Jersey Law, for the statute of limitations to run, the injured party need not know the “state of law positing a right of recovery upon the facts.” *See, Baird v. American Medical Optics*, 155 N.J. 54, 68 (1988)

(quoting *Burd v. New Jersey Tel. Co.*, 76 N.J. 284, 291-92 (1978)). The Supreme Court of New Jersey in *Baird* held that the statute of limitations begins to run when the plaintiff was aware, or reasonably should have been aware, of facts indicating that she was injured through the fault of another, “not when a lawyer advises her that the facts give rise to a legal cause of action.” *Id.* at 68. Just as a lawyer’s legal advice as to facts giving rise to a legal cause of action does not begin the running of the statute of limitations for a plaintiff, a doctor’s opinion as to the cause of symptoms conveyed to a patient (the plaintiff) does not begin the running of the statute of limitations. The statute of limitations did not begin to run when Dr. Thompson or Dr. Schull told McFall that her pelvic problems were due to the TVT-O. This court finds the statute of limitations began to run when McFall herself, given the surrounding circumstances, reasonably believed her injury and pain was due to the TVT-O.

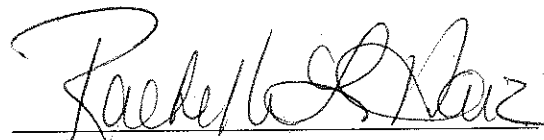
CONCLUSION

This court finds the evidence substantiates that McFall believed her injury and pain were due to the TVT-O and the mesh on September 13, 2006 because that is when she called Ethicon’s customer support hotline with complaints, and on August 8, 2007 because that is when she reported to Dr. Thompson she attempted to cut the TVT-O mesh out of her.

The statute of limitations accrued in this case September 13, 2006 or the latest August 8, 2007. McFall had until September 14, 2008 or the latest August 9, 2009 to file this lawsuit; however, she filed this lawsuit on October 15, 2010. Plaintiff failed to file within the two-year statute of limitations, and therefore, all causes of action are time barred.

Based upon the foregoing reasons, defendants' Motion for Summary Judgment based on the statute of limitations as to plaintiff Kathy McFall is granted. This case is dismissed with prejudice.

Dated: January 24, 2019

A handwritten signature in cursive script, reading "Rachelle L. Harz", written over a horizontal line.

Rachelle L. Harz, J.S.C.