

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JESSICA R. MAYER, J.S.C.
JUDGE



MIDDLESEX COUNTY COURT HOUSE
P.O. Box 964
NEW BRUNSWICK, NJ 08903-0964

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JUDGE JESSICA R. MAYER

**NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS**

**Memorandum of Decision on Defendant's Motion for
Summary Judgment and Defendant's Motion to Preclude Punitive Damages**

IRBY V. NOVARTIS PHARMACEUTICALS CORP., Docket No. MID-L-1815-08 MT

(In re: Zometa®/Aredia®, Case No. 278)

For Defendant: Joe G. Hollingsworth, Esq., Hollingsworth LLP
Beth S. Rose, Esq., Sills, Cummis & Gross P.C.

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Dated: March 16, 2012

Defendant Novartis Pharmaceuticals Corporation (“NPC” or “Defendant”) moves for summary judgment alleging that the claims set forth in the complaint filed on behalf of Plaintiff Charles Irby (“Mr. Irby” or “Plaintiff”) are barred by Virginia’s statute of limitations. NPC also moves for summary judgment on specific claims alleged in Plaintiff’s complaint, including failure to warn, strict liability, consumer fraud and design defect. NPC further moves for summary judgment on Plaintiff’s claim for punitive damages.¹ Counsel advised the court that the parties waived oral argument and consented to the disposition of the pending motions on the basis of the papers submitted to the court. The court has considered the written submissions of

¹ On November 18, 2011, the court entered an order and issued a memorandum of decision holding that New Jersey’s law governs Plaintiff’s claim for punitive damages.

counsel regarding Defendant's motions. The following memorandum sets forth the court's disposition of NPC's motions.

Statement of Material Facts

In this products liability litigation, Plaintiff, a resident of Virginia, alleges that he developed osteonecrosis of the jaw ("ONJ") after receiving infusions of Zometa[®], a pharmaceutical manufactured by Defendant. Plaintiff seeks compensatory and punitive damages. The parties previously stipulated that Virginia law governs Plaintiff's claim for failure to warn.² NPC moves for summary judgment on the bases that: (1) Mr. Irby filed his complaint after expiration of Virginia's two-year statute of limitations; (2) any alleged deficiencies in the Zometa[®] label did not proximately cause Mr. Irby's alleged injury; and (3) Mr. Irby's claims for punitive damages are precluded under New Jersey law.

The facts relevant to this motion are as follows: Plaintiff went to the emergency room on February 20, 2002 with intractable back pain stemming from his myeloma bone disease. See Defendant's Statement of Undisputed Material Facts ("SUF") at ¶¶ 22, 23. Plaintiff was first prescribed Zometa[®] by Neil F. Schacht, M.D. ("Dr. Schacht") on March 2, 2002 while being treated for hypercalcemia as a hospital inpatient. Id. at ¶ 24. Plaintiff was discharged from the hospital on March, 4, 2002, and continued to receive monthly Zometa[®] infusions on an outpatient basis from Joseph Moore, M.D. ("Dr. Moore") until March 4, 2004. Id. at ¶¶ 27, 31.

Mr. Irby's reported pain level decreased significantly by the end of 2002. Id. at ¶¶ 34-35. In December of 2003, Mr. Irby saw an ear, nose and throat specialist because he was experiencing pain on both sides of his jaw. Id. at ¶ 2. The specialist observed exposed bone and subsequently referred Mr. Irby to an oral surgeon. Id. In December 2003, after being examined

² See Stipulation Regarding Choice of Law, dated September 7, 2011, attached as Exhibit 41 to the Certification of Charles Falletta ("Falletta Cert.") (hereinafter cited as "Stipulation").

by an oral surgeon, Plaintiff was diagnosed with chronically exposed mandibular bone, a defining symptom of ONJ. *Id.* at ¶ 7.³ Plaintiff underwent extensive treatment for his jaw condition, including hyperbaric oxygen sessions and surgery.⁴ In April of 2004, Dr. Moore allegedly learned of an association between Zometa[®] and osteonecrosis of the jaw and ceased Mr. Irby's Zometa[®] treatment.⁵ Defendant markets, distributes, and sells Zometa[®], an FDA-approved prescription drug, throughout the United States. *See Answer and Defenses of Defendant Novartis Pharmaceuticals Corporation to Plaintiff's Complaint* at 11. NPC is incorporated in Delaware and its principle place of business is in New Jersey. *Id.* at 2.

Summary Judgment Standard

Under New Jersey law, summary judgment is appropriate “if 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 material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” *R.* 4:46-2(c). The determination of whether genuine issues of material fact exist requires the court to “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” *Brill v. Guardian Life Insurance Co.*, 142 N.J. 520, 540 (1995). It is not the court's function “to weigh the evidence and determine the truth of the matter but [rather] to determine whether there is a genuine issue for trial.” *Id.*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

³ However, NPC cites testimony that suggests Mr. Irby's injury may have occurred as early as December 2002. *Id.* at ¶¶ 9-11.

⁴ *See* Deposition of Dr. Moore dated October 26, 2011 (“Moore Dep. II”) at 136:05-10 and 139:06-11; Deposition of Dr. Priest dated August 15, 2009 (“Priest Dep.”) at 74:07 and 96:07-13.

⁵ *See* SUF at ¶ 15; Deposition of Dr. Moore dated August 17, 2011 (“Moore Dep. I”) 106:06-10.

Legal Analysis

The court starts its analysis with NPC's argument that the applicable period of limitations in Virginia bars Plaintiff's claims in their entirety. The court need not address NPC's motions for summary judgment on other grounds if Plaintiff's claims are time barred.

In this case, the parties stipulated that Virginia law applies to Mr. Irby's substantive claims.⁶ New Jersey courts apply the statute of limitations of the jurisdiction governing the substantive claims in a case, unless a party files a motion seeking application of a different state's law. See Heavner v. Uniroyal, Inc., 63 N.J. 130 (1973). In Heavner, the New Jersey Supreme Court held:

... when the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and [if] its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence, we will "borrow" the limitations law of the foreign state.

[Heavner, *supra*, 63 N.J. at 141.]

Many state courts have adopted this approach when applying statutes of limitations to actions arising in a different state. The public policy rationale for this approach, as explained in comment (g) to the Restatement (Second) of Conflict of Laws, is the prevention of forum shopping by plaintiffs:

The forum will no longer entertain a claim with which it has otherwise no contact simply because the claim is not barred by its own statute of limitations. Entertainment of the claim under such circumstances would disserve the forum's general policy against the prosecution of stale claims and would not serve any other forum interest. Likewise, entertainment of the claim would frustrate the policy of all other states having a substantial interest in the case and under whose statute of limitations the claim would be barred.

[Restatement (Second), *supra*, at § 142, comment (g).]

⁶ See Stipulation.

NPC argues that Plaintiff's claims are barred under Virginia's statute of limitations.⁷ Rather than concede that his claims are untimely under Virginia law, Mr. Irby suggests that this court defer consideration of his case based upon cases pending in the highest courts of both Virginia and New Jersey.⁸ Mr. Irby implies that either or both cases might have bearing on the timeliness of his claims for compensatory damages.⁹

Mr. Irby argues that because Virginia's highest court (as of the filing date of Plaintiff's opposition brief) is considering applicability of equitable tolling and cross jurisdictional class action tolling, NPC's motion should be deferred until the Virginia Supreme Court issues a ruling. Pl. Opp. at 2. Second, Plaintiff suggests that if his claims fail under Virginia law as a result of an adverse ruling by the Virginia Supreme Court, then, alternatively, Plaintiff's claims could be saved under New Jersey's statute of limitations depending upon the New Jersey Supreme Court's ruling in Cornett v. Johnson & Johnson, 414 N.J. Super 365 (App. Div. 2010), certif. granted, 205 N.J. 317 (2011) (argued January 30, 2012). Pl. Opp. at 2.

Statutes of limitations are enacted to provide certainty for litigants and to prevent the litigation of stale claims.¹⁰ Judicial cherry picking whereby a litigant argues simultaneously in favor of two separate states' period of limitations, as does Mr. Irby in this case, threatens to render statutes of limitations meaningless.

⁷ See Defendant's Brief in Support of Motions for Summary Judgment dated January 20, 2012 ("Def. Br.") at 9.

⁸ See Plaintiff's Brief in Opposition to NPC's Motions for Summary Judgment dated February 6, 2012 ("Pl. Opp.") at 2.

⁹ Initially, the court was inclined to await the ruling of Virginia's Supreme Court as that ruling might be dispositive of Mr. Irby's claims. However, the court erroneously believed that the highest court in Virginia would not render a determination for several months. On March 2, 2012, less than two months after hearing oral argument, the Virginia Supreme Court issued its decision.

¹⁰ See Rivera v. Prudential Property & Casualty Ins. Co., 104 N.J. 32, 39 (1986) ("The purposes of statutes of limitations, oft-repeated by this Court, are two-fold: (1) to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims, and (2) to penalize dilatoriness and serve as a measure of repose.).

The following procedural history is important and highly relevant to the court's specific ruling in Mr. Irby's case: Pursuant to an order of this court issued on July 18, 2011, the date for the next trial in the Zometa®/Aredia® mass tort litigation was set for the Spring of 2012.¹¹ Counsel for the parties, without input from the court, selected four cases for trial work up in anticipation of the April 30 trial date. The four cases were DeSantis, Irby, Levine, and Morningstar. Of the four cases selected for the April 30 trial date, only Irby and Levine remain.

Case Management Order 23 provided ample opportunity for counsel to seek a choice of law determination on any or all issues. According to CMO 23, motions concerning "choice of law and/or statute of limitations" were to be filed no later than September 8, 2011.¹² On or about September 7, 2011, prior to the due date for choice of law motions, the parties filed a stipulation regarding choice of law in Mr. Irby's case.¹³ In the stipulation, the parties agreed that "Virginia law shall govern plaintiff's failure to warn, defective design, breach of implied warranty, negligence, and consumer fraud act claims" and that "New Jersey law shall govern all procedural or evidentiary disputes."¹⁴ The stipulation also contemplated a choice of law motion on Plaintiff's punitive damages claim, as Plaintiff favored Virginia's law and Defendant favored New Jersey's law.¹⁵ As expected, Mr. Irby filed a choice of law motion as to his punitive damages claim on September 8, 2011. On November 18, 2011, the court issued an order and memorandum of decision regarding Plaintiff's choice of law motion and ruled that Mr. Irby's claim for punitive damages was governed by New Jersey law.

¹¹ Case Management Order No. 23 dated July 8, 2011 (hereinafter, "CMO 23") at ¶1. Subsequently, the court entered Case Management Order No. 25 dated October 18, 2011 (hereinafter "CMO 25") and Case Management Order No. 26 dated October 26, 2011 (hereinafter "CMO 26") establishing April 30, 2012 as the date for the next Zometa®/Aredia® trial.

¹² See CMO 23.

¹³ See Stipulation.

¹⁴ See Stipulation at 1.

¹⁵ See Stipulation at 2.

In November 2011, NPC sent a letter to the court and Plaintiff's counsel advising that it would be filing a motion for summary judgment based on statute of limitations in this case. NPC's letter further advised that "[Plaintiff] does not object to NPC filing this motion, but does not agree that there's any basis to grant summary judgment on these grounds."¹⁶ NPC submitted another letter to the court, dated December 6, 2011, reiterating the parties' positions on a statute of limitations motion.¹⁷ Pursuant to Case Management Order 26, dispositive motions were filed on January 20, 2012, including NPC's motion to dismiss Plaintiff's claims based on Virginia's statute of limitations.¹⁸

Neither party in this case moved for a choice of law determination as to the applicable period of limitations for Mr. Irby's claims for compensatory damages. Because no choice of law motion as to the applicable statute of limitations was filed, and in accordance with Heavner, the court presumed that the parties were amenable to application of the period of limitations of the state in which the cause of action arose (Virginia). See Heavner, *supra*, 63 N.J. at 141. Similarly, it appears that NPC presumed Virginia's statute of limitations applied to Plaintiff's claims for compensatory damages because NPC relied solely on Virginia law in its summary judgment motion papers.

Mr. Irby's silence on the issue of which state's law applied to his claims for compensatory damages was broken only upon receipt of Plaintiff's brief in opposition to NPC's motion to bar his claims based upon Virginia's statute of limitations. In fact, Plaintiff raised the issue in a single sentence in his opposition brief. Pl. Opp. at 2. It is relevant to this ruling that Plaintiff was not shocked or taken aback that NPC in its motion for summary judgment assumed the Virginia statute of limitations would apply to Mr. Irby's case. Indeed, since Plaintiff failed to

¹⁶ See Letter to the court from Neil S. Bromberg, dated November 9, 2011.

¹⁷ See Letter to the court from Neil S. Bromberg, dated December 6, 2011.

¹⁸ See CMO 26 at ¶ 1.

file a timely motion requesting that this court determine which state's period of limitations governs Plaintiff's claims in this case, the belated "suggestion" in Mr. Irby's opposition brief that New Jersey's statute of limitations governed his claims was surprising to the court.

A. Virginia's Statute of Limitations

Virginia imposes a two-year statute of limitations on personal injury claims.¹⁹ Under Virginia law, the limitations period begins to run as soon as the alleged injury occurs, "not at the time of diagnosis or discovery." Wade v. Danek Med., Inc., 182 F.3d 281, 285 (4th Cir. 1999) (citing Va. Code. Ann. § 8.01-230). In other words, "an injury is deemed to occur, and the statute of limitations period begins to run, whenever any injury, however slight, is caused by the negligent act, even though additional or more severe injury or damages may be subsequently sustained." St. George v. Pariser, 253 Va. 329, 332 (1997).

Here, giving every inference in favor of the non-moving party, Mr. Irby was diagnosed with ONJ in December of 2003, after approximately twenty infusions of Zometa[®]. SUF at ¶ 7. Mr. Irby filed his complaint on March 29, 2006, two years and three months after the date of his injury, and after Virginia's statute of limitations period had expired. Thus, Mr. Irby's claims would be untimely unless Virginia's highest court created an equitable exception to the two year statute of limitations in the form of equitable tolling or cross jurisdictional class action tolling.

Significantly, the issue of whether Virginia would create an exception to Virginia's statute of limitations was recently addressed by a federal court reviewing Virginia law. The United States Court of Appeals for the Second Circuit asked the Virginia Supreme Court to certify and determine the applicability of both equitable and cross jurisdictional class action

¹⁹ See Va. Code. Ann. § 8.01-243(A).

tolling under Virginia law. See Casey v. Merck & Co., Inc., 653 F.3d 95 (2d Cir. 2011).²⁰ The Virginia Supreme Court agreed and heard oral arguments on the Casey matter in January 2012. In his opposition brief, Mr. Irby conceded that if the Virginia Supreme Court declined to recognize cross jurisdictional class action tolling in Casey, then his claims would be time barred.²¹

The Casey plaintiffs, who took the drug Fosamax[®], argued that their claims, though filed beyond Virginia's two year statute of limitations, were tolled due to a putative class action lawsuit involving Fosamax[®] that was filed in the United States District Court for the Middle District of Tennessee. Even though certification of the class of plaintiffs who ingested Fosamax[®] was denied and the class action complaint in the federal court in Tennessee was eventually dismissed, the Casey plaintiffs contended that the pendency of that case delayed the running of Virginia's two year statute of limitations because they would have been members of the proposed class had certification been granted.²²

On March 2, 2012, the Virginia Supreme Court rejected the arguments raised by plaintiffs in the Casey matter. According to the Court's ruling in Casey, Virginia does not recognize equitable tolling or cross jurisdictional class action tolling as a basis for extending Virginia's two year statute of limitations. Casey v. Merck & Co., 2012 Va. LEXIS 48 (Va. Mar. 2, 2012) ("Virginia recognizes neither equitable nor statutory tolling due to the pendency of a

²⁰ Cross jurisdictional class action tolling, also known as "American Pipe tolling," is a judicially created exception to federal statutes of limitations in federal courts. See American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). Cross jurisdictional class action tolling allows putative class members (absent and unnamed class members) to toll the statute of limitations on their federal causes of action during the pendency of the class action when the putative class members reasonably believe that their interests are protected by the class action lawsuit. See id. The majority of states that have considered the question of whether a previously filed class action in another jurisdiction can toll the statute of limitations on a state law claim have rejected cross jurisdictional class action tolling.

²¹ "With regard to the statute of limitations, [Plaintiff] concedes that his claim is barred if this court applies the Virginia statute of limitations without consideration of equitable tolling." Pl. Opp. at 2.

²² Casey v. Merck & Co., 2012 Va. LEXIS 48 at 3 (Mar. 2, 2012). Similarly, Mr. Irby argues that he is a putative member of the Zometa[®]/Aredia[®] Multi-District Litigation class action lawsuit that was pending in the federal court in the Middle District of Tennessee. Mr. Irby contends that Virginia statute's of limitations would toll his claims in this case so that the filing of this lawsuit would be timely. Pl. Opp. at 2.

putative class action in another jurisdiction.”). Therefore, the claims of the Casey plaintiffs were barred by Virginia’s two year statute of limitations.

At the March 9, 2012 case management conference, Mr. Irby’s counsel indicated that the Virginia Supreme Court’s ruling in Casey might be the subject of a motion for reconsideration. Even if a motion for reconsideration were to be filed on the issues of equitable and statutory tolling under Virginia law, this court must base its decision on the case law in effect at the time of this court’s decision. This is known as the “time of decision” rule.²³ Thus, as of the date of this court’s memorandum of decision, there are no applicable exceptions to Virginia’s two year statute of limitations and Mr. Irby’s claims are time barred under Virginia law.

B. New Jersey’s Statute of Limitations and the Cornett Case

In his opposition brief, Plaintiff raises New Jersey’s statute of limitations as an alternative to the application of Virginia’s statute of limitations. Pl. Opp. at 2. Mr. Irby notes that the New Jersey Supreme Court is expected to issue a decision this year involving New Jersey’s statute of limitations in Cornett v. Johnson & Johnson, 414 N.J. Super 365 (App. Div. 2010), certif. granted, 205 N.J. 317 (2011) that may have bearing on this case. Ibid.

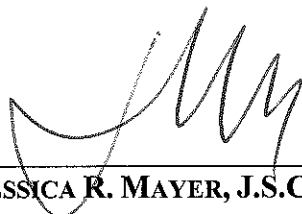
Unlike Virginia’s Casey decision, the New Jersey Supreme Court’s decision in Cornett will not be dispositive of Mr. Irby’s case because Mr. Irby did not reserve the right to argue the application of New Jersey law to his affirmative claims for compensatory damages. Mr. Irby asked this court to rule only on the issue of which state’s law applies to his punitive damages claim. Thus, it is unfair to NPC and this court for Mr. Irby to suggest at this late juncture in the litigation that a question remains as to which state’s law governed the statutory period for Mr. Irby to have filed his affirmative claims. Plaintiff cannot argue in the alternative that New

²³ See Kruvant v. Mayor and Council of Cedar Grove Tp., 82 N.J. 435, 440 (1980) (“It is a well-established principle that an appellate court on direct review will apply the statute in effect at the time of its decision By applying the presently effective statute, a court does not undercut the legislative intent.”)

Jersey's period of limitations governs his affirmative claims, having failed to raise that issue by way of a timely choice of law motion. If the substantive law of Plaintiff's home state, Virginia, governs his compensatory damage claims, then NPC has the right to assert applicable affirmative defenses under Virginia law in the absence of a judicial determination that the law of a different state applies to a particular claim or defense.

Mr. Irby had ample opportunity to raise a choice of law question on the applicable period of limitations relevant to his compensatory damage claims, but failed to do so. The New Jersey Supreme Court heard oral arguments in the Cornett matter on January 30, 2012. However, the plaintiffs' petition for certification was granted by the New Jersey Supreme Court on March 28, 2011, approximately six months before parties' motions on "choice of law and/or statute of limitations" were due to be filed in this case.²⁴

Under New Jersey law as of the date of this memorandum, in light of Heavner, and considering the relevant procedural history of Plaintiff's case, this court must apply Virginia's statute of limitations to Mr. Irby's claims for compensatory damages. Thus, Mr. Irby's claims are time barred under Virginia law. Accordingly, NPC's motion for summary judgment on the statute of limitations is **GRANTED** and Plaintiff's complaint shall be dismissed with prejudice. As a result of this ruling, this court need not rule on the issues of failure to warn, strict liability, consumer fraud, design defect or punitive damages. The court will sign an order memorializing its decision.



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²⁴ See CMO 23.