

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4871-11T3

CHARLES IRBY,

Plaintiff-Appellant,

v.

NOVARTIS PHARMACEUTICALS  
CORPORATION,

Defendant-Respondent.

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Submitted April 10, 2013 – Decided June 14, 2013

Before Judges Simonelli, Koblitz and  
Accurso.

On appeal from Superior Court of New Jersey,  
Law Division, Middlesex County, Docket No.  
L-1815-08.

Parker Waichman, L.L.P., attorneys for  
appellant (Gary P. Falkowitz, on the  
briefs).

Sills Cummis & Gross, P.C., and Rebecca A.  
Womeldorf (Hollingsworth, L.L.P.) of the  
District of Columbia, Georgia and  
Mississippi bars, admitted pro hac vice,  
attorneys for respondent (Beth S. Rose,  
Charles J. Falletta and Ms. Womeldorf, on  
the brief).

PER CURIAM

Plaintiff Charles Irby appeals from a March 16, 2012 order  
dismissing his case with prejudice and a May 11, 2012 order

denying plaintiff's motion for reconsideration. While the complaint was brought in New Jersey, the judge determined that Virginia's statute of limitations governed. We affirm.

Plaintiff is a resident of Virginia. Defendant Novartis Pharmaceuticals Corporation is incorporated in Delaware, with its principal offices in East Hanover, New Jersey. Plaintiff received Zometa<sup>1</sup> injections manufactured by defendant as treatment for multiple myeloma in 2002. At this time, Zometa's information packet did not include information about a potential side effect of osteonecrosis of the jaw (ONJ). Plaintiff was diagnosed with ONJ in December 2003 and filed his complaint on March 29, 2006, three months after Virginia's statute of limitations expired. In his complaint, he alleged six counts: defective design, failure to warn, breach of implied warranty, negligence, violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -195, and punitive damages under common law, the Punitive Damages Act, N.J.S.A. 2A:15-5.9 to -5.17, and the Product Liability Act, N.J.S.A. 2A:58C-1 to -11. The parties agree that while plaintiff's claim is time-barred under Virginia's statute of limitation, it is not time-barred under New Jersey's statute of limitations.

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<sup>1</sup> Zometa helps to reduce pathologic fractures, bone pain and spinal cord compression.

The parties entered into a choice of law stipulation in September 2011. In pertinent part the stipulation reads:

1. Solely for the purpose of this case and without prejudice to choice of law issues governing other cases, the substantive law of the State of Virginia shall govern plaintiff's failure to warn, defective design, breach of implied warranty, negligence, and consumer fraud act claims.

2. New Jersey law shall govern all procedural or evidentiary disputes.

Thus, the parties agreed that New Jersey law would govern procedural issues, and Virginia law would govern substantive issues. Determining that the Virginia statute of limitations applied, the motion judge granted defendant's motion for summary judgment.

An appellate court reviews a grant of summary judgment de novo, applying the same standard governing the trial court under Rule 4:46. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010); see also Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). Generally, the court must "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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c).

Virginia imposes a two-year statute of limitations on personal injury claims. Va. Code. Ann. § 8.01-243(A). The time period begins to run when the injury occurs. Wade v. Danek Med., Inc., 182 F.3d 281, 285 (4th Cir. 1999) ("It is well settled in Virginia, however, that the limitations period begins running at the time of the initial injury, not at the time of diagnosis or discovery." (citing Va. Code. Ann. § 8.01-230)).

The controlling New Jersey statute of limitations, N.J.S.A. 2A:14-2, also provides that a personal injury action must be filed within two years from the date of injury. Unlike Virginia, however, New Jersey applies the discovery rule to product liability actions. Cornett v. Johnson & Johnson, 211 N.J. 362, 376-77 (2012) (citation omitted).

When granting summary judgment, the motion judge relied in part on Heavner v. Uniroyal, Inc., 63 N.J. 130, 132-34 (1973).<sup>2</sup>

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<sup>2</sup> The judge also relied on plaintiff's previous request that the judge defer consideration of the case because of the then-pending cases in Virginia, Casey v. Merck & Co., Inc., 722 S.E.2d 842 (2012) and New Jersey, the Cornett case, which "might have bearing on the timeliness of his claims for compensatory damages." Casey, which rejected the concepts of equitable and statutory tolling in Virginia, was decided after the summary judgment motion was filed and before the judge's decision. Casey does not support plaintiff's position on appeal. The judge noted in her decision denying plaintiff's motion for reconsideration that plaintiff could not "square his current contention that the statute of limitations is a procedural issue with his prior request that the court delay [its] ruling" until Casey and Cornett were decided. The judge also highlighted that  
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In Heavner, residents of North Carolina were in a truck accident in that state allegedly due to a faulty truck tire manufactured and sold by the defendants who were New Jersey and Delaware corporations. Id. at 133-34. The plaintiffs filed their complaint in New Jersey. Id. at 134. The defendants filed a motion to dismiss claiming that New Jersey's statute of limitations should govern. Id. at 133. Our Supreme Court determined that New Jersey should apply the North Carolina statute of limitations. Id. at 141. The Court acknowledged that generally procedural rules of the forum state are followed, but rejected "the common law conflicts rule that the statute of limitations is ordinarily a matter of procedure" as "fundamental[ly] illogic[al] and unsound[]." Id. at 135, 137.

The Court stated:

We are convinced the time has come . . . to discard the mechanical rule that the limitations law of this state must be employed in every suit on a foreign cause of action. We need go no further now than to say that 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

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in the summary judgment motion defendant relied solely on Virginia law, while plaintiff made only one reference in his opposition brief that left open the possibility that New Jersey's statute of limitations might apply.

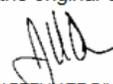
its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence, we will "borrow" the limitations law of the foreign state.

[Id. at 140-41.]

We agree with the motion judge that the parties' agreement to utilize the procedural law of New Jersey did not upend this forty-year history of New Jersey's application of the statute of limitations of the state where the cause of action arises, absent a substantial New Jersey interest in the matter. See Pitcock v. Kasowitz, Benson, Torres & Friedman, L.L.P., 426 N.J. Super. 582, 587-89 (App. Div. 2012) (commenting that the "most significant relationship" test to be used in tort cases after P.V. v. Camp Jaycee, 197 N.J. 132, 139-43 (2008), is not significantly different from the "governmental interest" test used in Heavner.)

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION