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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PAULA NELSON, Plaintiff and Appellant, v. INDEVUS PHARMACEUTICALS, INC., Defendant and Respondent.	B183942 (Los Angeles County Super. Ct. No. DD001275)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daniel S. Pratt, Judge. Reversed.

Hackard & Holt and Theodore J. Holt and Peter T. Holt, for Plaintiff and Appellant.

Skadden, Arps, Slate, Meagher & Flom LLP and Raoul D. Kennedy; and Katherine Armstrong, pro hac vice, for Defendant and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the section entitled *Collateral estoppel.*

This lawsuit arises from plaintiff and appellant Paula Nelson's use of the prescription diet drug dexfenfluramine (sold as Redux), which was promoted and marketed by defendant and respondent Indevus. Redux and a similar drug, Pondimin (both commonly known as "Fen-phen") were withdrawn from the market in September of 1997, on reports that they could cause valvular heart disease.

Nelson took Redux for about a month, starting in January of 1997, after she had taken other Fen-phen drugs for about nine months. She stopped taking Redux because she was not losing weight. She first contacted an attorney in June of 2002, after she saw the attorney's television advertisement, and first had an echocardiogram (the means by which valvular heart disease is diagnosed) in September of that year. In July 2003, as the result of the echocardiogram, Nelson filed this personal injury lawsuit.

Indevus moved for summary judgment on the ground that the complaint was barred by the statute of limitations, based in part on a theory of (to use its phrase) "constructive suspicion." Indevus contended that under California's discovery rule, the statute of limitations began to ran when the dangers of Fen-phen were publicized. Nelson argued to the contrary, that an actual suspicion of wrongdoing is required, relying on long-standing California law and on Code of Civil Procedure[1] section 340.8, and citing her testimony that before she saw the ad in June of 2002, she did not know that Fen-phen drugs could have caused her an injury. The trial court granted the motion and entered judgment for Indevus. We reverse.

Discussion

"Constructive suspicion"

Indevus's motion principally rested on its contention that under the discovery rule, the statute began to run when the danger of Fen-phen was publicized. That is, although it was undisputed for purposes of summary judgment that Nelson did not know about the

[1] All further statutory references are to that code.

danger of Fen-phen drugs before the spring of 2002,[2] Indevus argues that she should have known sooner, when, through newspaper articles, television news reports, and other means, the public in general was given information sufficient to arouse suspicion, and that "should have" is enough.[3]

In factual support, Indevus proffered evidence about the television and newspaper coverage which began in July 9, 1997, when the Mayo clinic reported a connection between Redux and other Fen-phen drugs and heart disease, and which continued after those drugs were withdrawn from the market and included coverage of Fen-phen litigation.[4] After the withdrawal, news reports often cautioned patients to "call your doctor" to check for heart problems. In addition, Indevus proffered evidence that when the drugs were withdrawn Wyeth, which also promoted and marketed Redux, sent letters to approximately 450,000 doctors and pharmacists informing them of the potential association of the drugs with heart valve damage and took out ads in unspecified newspapers informing patents of the drugs' withdrawal from the market.[5] Indevus also

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[2] At her deposition, Nelson testified that before September 2002, no doctor had ever suggested that she get an echocardiogram. The television ad which caused her to call an attorney was the only advertisement she had ever seen concerning Fen-Phen use, lawsuits, or claims. Before she saw the ad, it had never occurred to her that she was at risk of having suffered an injury from diet drugs. She was not aware that the diet drugs had been pulled from the market until several months before her deposition, and had never received notification of that fact from the doctor who prescribed them or from anyone else.

[3] Thus, Indevus argues that (to mis-quote section 340.8, discussed later in this opinion) "Media reports regarding the hazardous material or toxic substance contamination . . ." will "constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another."

[4] The newspapers included USA Today, the Los Angeles Times, the Los Angeles Daily News, and the San Bernardino Sun -- Nelson lived in Los Angeles when she took Redux, but moved to San Bernardino County later in 1997.

[5] Those ads, like the press releases that Indevus sent out after Redux was withdrawn from the market, refer to "new, preliminary information regarding heart valve abnormalities."

proffered evidence about the publicity and legal notices surrounding and concerning the November 1999 settlement of Federal Court class action lawsuit against Wyeth[6] concerning those drugs.

Legally, Indevus relies on leading California discovery rule cases. For instance, Indevus quotes *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103 for the proposition that under the discovery rule, the statue begins to run when the "the plaintiff suspects or *should suspect* that her injury was caused by wrongdoing . . ." (*Jolly, supra,* 44 Cal.3d at p. 1110; emphasis added), and cites *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93 for its reference to "presumptive knowledge," and a plaintiff's "opportunity to obtain knowledge from sources open to his investigation . . . ." (*Id*. at p. 101.) Indevus concludes that under California law constructive suspicion is enough.

The quotes are accurate, but they distort the holding of the cases cited, and the conclusion Indevus draws is wrong. Our Supreme Court has never held that under the discovery rule, the suspicion necessary to trigger the statute may be imputed to a plaintiff, and we do not believe that to be the law. When the cases are read in whole, rather than in isolated quotes, it is clear that a plaintiff's duty to investigate does not begin until the plaintiff actually has a reason to investigate. "A plaintiff has reason to discover a cause of action when he or she 'has *reason* at least to suspect a factual basis for its elements.' [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807[emphasis added].) "[W]e look to whether the plaintiffs have *reason* to at least suspect that a type of wrongdoing has injured them." (*Ibid* [emphasis added].)

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[6] Indevus was a non-settling defendant in that litigation. The Federal judge who presided over the litigation found that an elaborate and extensive plan of notice was used to inform class members of the settlement, including a sophisticated advertising campaign which ran from November 1999 through February 2000, on television, on the internet and in newspapers and magazines, informing Redux users that they might have heart valve problems and might be eligible for free medical care and for compensation.

The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only "once the plaintiff *has* a suspicion of wrongdoing." (*Jolly, supra,* 44 Cal.3d at p. 1111, emphasis added.)

An examination of the cases Indevus cites reveals the flaws in its analysis.

Jolly v. Eli Lilly & Co. was a DES case. The plaintiff knew of the DES litigation and believed that DES had caused her injuries, and thus had a suspicion of wrongdoing. She did not file suit because she did not know who to sue, and the holding of *Jolly* is that the statute was triggered by the knowledge she did have. She was not held to generally available knowledge.

Jolly made the "should suspect" statement in its discussion of another case, *Kensinger v. Abbott Laboratories* (1985) 171 Cal.App.3d 376. *Kensinger* considered the rule that only ignorance of a "critical fact" can delay the running of the statute, and determined that wrongful conduct was a critical fact, so that "the statutory clock did not begin to tick until the plaintiff knew or reasonably should have known of the facts constituting wrongful conduct, as well as the fact of her injury and its relation to DES." (*Jolly, supra,* 44 Cal.3d at p. 1110.)

Jolly rejected that holding, and held instead that "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly, supra,* 44 Cal.3d at p. 1111).

Sanchez v. South Hoover Hospital, supra, 18 Cal.3d 93, is the same. In that medical malpractice case, the plaintiff had a long and difficult labor, a Caesarean, a stillborn baby, and post-surgical complications. By the day of her hospital discharge she suspected that malpractice had caused the stillbirth and the complications. The case held that by the date of her discharge, "plaintiff had become alerted to the necessity for investigation and pursuit of her remedies," so that the statute began to run on that date. (*Id.* at p. 102.)

The principle issue on appeal concerned the doctors' duty of disclosure, and *Sanchez*'s reference to presumptive knowledge was in its discussion of the discovery rule. In *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, the Supreme Court summarized its holding in *Sanchez*: "The patient is charged with 'presumptive' knowledge of his negligent injury, and the statute commences to run, once he has '"notice or information of circumstances to put a reasonable person *on inquiry*, or *has the opportunity to obtain knowledge* from sources open to his investigation . . . ."' (*Sanchez, supra*, at p. 101, quoting 2 Witkin, Cal. Procedure (2d ed. 1970) Actions, § 339, p. 1181 [citing numerous cases]; italics added by *Sanchez*.) Thus, 'when the patient's 'reasonably founded suspicions [have been aroused],' and she has actually 'become alerted to the necessity for investigation and pursuit of her remedies,' the one-year period for suit begins. (18 Cal.3d at p. 102.)" (*Gutierrez v. Mofid, supra,* 39 Cal.3d at pp. 896-897.)

The Supreme Court recently restated the rule: "A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' [Citations.] . . . In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox v. Ethicon Endo-Surgery, Inc., supra,* 35 Cal.4th at p. 807.)

Indevus's argument amounts to a contention that, having taken a prescription drug, Nelson had an obligation to read newspapers and watch television news and otherwise seek out news of dangerous side effects not disclosed by the prescribing doctor, or indeed by the drug manufacturer, and that if she failed in this obligation, she could lose her right to sue. We see no such obligation. Instead, "If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation." (*Mangini v. Aerojet-General Corp*. (1991) 230 Cal.App.3d 1125, 1150.) A patient who *actually* learns of the dangerous side effects of a drug she has taken ignores her knowledge at her peril, but the law only requires an investigation when a plaintiff has a reason to investigate.

Code of Civil Procedure section 340.8

Our conclusion is bolstered by this statute, which provides that "In any civil action for injury or illness based upon exposure to a hazardous material or toxic substance, the time for commencement of the action shall be no later than either two years from the date of injury, or two years after the plaintiff becomes aware of, or reasonably should have become aware of, (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another, whichever occurs later. [¶] . . . [¶] (2) Media reports regarding the hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another." (Code Civ. Proc., § 340.8(a), (c)(2).)

Indevus argues that the statute applies only to actions concerning environmental hazards, not to personal injury actions such as this one, which are governed solely by section 335.1. Nelson argues that section 340.8 is not limited to environmental hazards, but under its plain meaning applies to cases which allege personal injury caused by harmful chemicals.

We agree with Nelson. When we look to the clear language of the statute (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32) we see that it applies to "any" civil action "for injury or illness based upon exposure to a hazardous material or toxic substance." Nothing in the statute limits its provisions to environmental hazards, or provides that they do not apply to cases alleging injury from prescription drugs, and we cannot import such a provision into the law.[7]

Further, as Nelson argues, the Legislature has expressed its intent that the statute apply to actions concerning prescription drugs. The Legislative intent is found in the chaptered bill, which states that "It is the intent of the Legislature to codify the rulings in

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[7] This may also be an action for personal injury under section 335.1, but that makes no difference.

Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, and *Clark v. Baxter HealthCare Corp*. (2000) 83 Cal.App.4th 1048, in subdivisions (a) and (b) of Section 340.8 of the Code of Civil Procedure, as set forth in this measure, and to disapprove the ruling *McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, to the extent the ruling in *McKelvey* is inconsistent with paragraph (2) of subdivision (c) of Section 340.8 of the Code of Civil Procedure, as set forth in this measure."

Both *Jolly* and *Norgart* alleged injuries arising from prescription drugs. In *Jolly*, the plaintiff alleged that she was damaged by her mother's use of DES, and *Norgart* was a wrongful death suit which alleged that a prescription drug, Halcion, caused the decedent's suicide. *Jolly* held that "Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Id*. at p. 1111.) *Norgart* applied that rule to wrongful death actions.

Clark concerned an allergy to latex gloves. It too applied the discovery rule, holding that, "[T]he plaintiff must be aware of her injury, its factual cause, and sufficient facts to put her on inquiry notice of a negligent cause." (*Clark v. Baxter Healthcare Corp*. (2000) 83 Cal.App.4th 1048, 1057.)

McKelvey was a personal injury case against Boeing, with allegations about groundwater contamination at the Southern California Rocketdyne facilities. The case reached the Court of Appeal on Boeing's successful statute of limitations demurrer. Boeing's position was, in part, that extensive publicity meant that plaintiffs knew or as a matter of law could have with diligence discovered the facts essential to their cause of action. The Court affirmed, finding that the complaints failed because they did not allege the time or manner of discovery. (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160.) The case includes a good deal of discussion about the publicity, noting that "the bottom line is that plaintiffs' amended (and proposed amended) complaints acknowledge the publicity surrounding Boeing's operation of the Rocketdyne facilities, yet nevertheless fail to explain how they managed to ignore those 'newspaper

articles.' . . . *They do not allege that they did not read, hear or see the articles and broadcasts they admit were published.*" (*Id*. at p. 161, emphasis in the original.)

Thus, the statement of legislative intent can only be read as a rejection of the theory Indevus proposes here, that the statute of limitations begins to run when the effects of a drug are publicized, and not when an individual plaintiff has reason to suspect that she has been harmed.

Nelson's reasons to suspect/other evidence

Indevus does make an argument under the discovery rule that is independent of any theory of constructive suspicion. The argument is that Nelson's symptoms were sufficient to give her a reason to investigate, triggering the statute, and that Nelson failed to show that she acted with diligence. These are the facts:

Nelson testified that she had several symptoms which she thought could have been caused by diet drugs: intermittent heart palpitations, fatigue, and dizziness. She testified that she began suffering those symptoms "in the late 1990s," and that she "really noticed them" after she stopped taking the diet drugs. Some of her medical records indicated that she had heart palpitations prior to taking the drugs, something she did not recall. Nelson also testified that she had been diagnosed with thyroid problems, and with GIRD, a gastrointestinal problem. She smoked, and had done so for 30 years, generally about a pack a day. She was five feet, six inches tall, and at the time of her deposition weighed 180 pounds, and considered herself overweight.

She told a doctor, Dr. Vijay Wijeyakumar, about fatigue as soon as she began to suffer the fatigue, in the late 90s. Dr. Wijeyakumar did not make a diagnosis. She also asked Dr. Wijeyakumar about palpitations, and asked her current doctor, Dr. Sood, about the palpitations and the fatigue. Neither doctor made a diagnosis. Nelson testified that she never asked a doctor whether those symptoms were related to Redux, and that no doctor had ever told her that these were symptoms of valvular heart disease or were connected to Fen-phen drugs

We cannot see that symptoms as common and non-specific as those Nelson suffered should, as a matter of law, have caused her to investigate the possibility that she had been harmed by Fen-phen drugs. The symptoms do not, in and of themselves, suggest a drug side-effect, and Nelson did not begin to suffer them when she started the drugs, a scenario which would normally suggest that they were caused by the drugs. Indeed, medical records indicated that some of her symptoms may have pre-dated her use of the drugs.

Further, the evidence is that Nelson did investigate the cause of her symptoms. She did not ask her doctors whether her symptoms could have been caused by Redux, but she did ask her doctors about the symptoms, apparently making some of the inquiries at a time when Indevus was selling the drug as a safe drug.

Finally, it is not clear that Nelson would have learned of the connection between her symptoms and Fen-phen even if she had read the newspaper articles and seen the tv news stories Indevus cites. Few of the newspaper articles and television stories listed the symptoms of valvular heart injury. As Nelson argues, most of those articles and the ones which came later said only that patients should stop taking Fen-phen -- Nelson had -- and to see a doctor -- which she did -- not to get an echocardiogram and sue.

Collateral estoppel[8]

[The portion of this opinion that follows is deleted from publication.]

Nothing in this opinion is intended to prevent Indevus from raising the issue of statute of limitations at trial, and seeking a jury determination of Nelson's knowledge. (see Code Civ. Proc., § 437c, subd. (e).) For that reason, we address two additional contentions raised by the parties, both involving collateral estoppel.

We begin with Indevus's contention: in the trial court, Nelson argued that even if she had reason to suspect wrongdoing prior to 2002, the statute of limitations would not have accrued then because she had not suffered appreciable harm. At summary

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[8] See footnote, *ante*, page 1.

judgment, Indevus sought to counter the argument by proffering facts which would establish that that there is no latency period for valvular heart damage caused by the drugs, so that any injury Nelson suffered would have been discernable by echocardiogram in 1997. In support, Indevus cited portions of the order approving the settlement of the class action litigation against Wyeth. For instance, as part of its discussion of the appropriateness of class certification, that court wrote that any damage caused by the diet drugs "is detectable by echocardiogram shortly after the patients discontinue use of diet drugs." Indevus contended that Nelson was collaterally estopped by those findings, so that she cannot deny that if she had had an echocardiogram in 1997 or 1998, her disease would have been revealed.

"Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) There are five threshold requirements. The issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. This issue must have been actually litigated in the former proceeding. It must have been necessarily decided in the former proceeding. The decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*People v. Garcia* (August 28, 2006, S124090) ___ Cal. 4th ____ [D.A.R. 11400].) "The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido v. Superior Court, supra,* 51 Cal.3d at p. 341.)

Indevus did not carry its burden. The diet drug litigation was resolved by a negotiated settlement, and "A settlement which avoids trial generally does not constitute actually litigating any issues and thus prevents application of collateral estoppel. [Citations.]" (*Rice v. Crow* (2000) 81 Cal.App.4th 725, 736, 97 Cal.Rptr.2d 110; but see *In re Diet Drugs Products* (E.D.Pa.2004) 352 F.Supp.2d 533, 541 [determination of no latency was actually litigated in the class action litigation and collaterally estopped plaintiff who opted out of the settlement from raising the issue to defeat statue of limitations].)

Nelson also raised a collateral estoppel issue, contending that a decision of a Superior Court in Massachusetts, in the case of *Sawyer v. Indevus/Pharmaceuticals, Inc.* (2004) 18 Mass. L. Rep. 108, barred Indevus's entire statute of limitations motion. In *Sawyer*, the Massachusetts court considered Indevus's "constructive suspicion" theory under the Massachusetts discovery rule.[9] Its decision can have no preclusive effect on our determination of the merits of the theory, under California law.

[The remainder of this opinion is to be published.]

Disposition

The judgment is reversed, as is the ruling on summary judgment. Appellant to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P.J.

KRIEGLER, J.

[9] The court also considered the collateral estoppel effect of the findings of the Federal Court in the diet drug class action, on the question of latency, and found no estoppel.