NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

SANDRA COOPER, IN HER OWN RIGHT, AND AS PLENARY GUARDIAN OF GENE M. COOPER, AND GENE M. COOPER,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
BREENTAG NORTHEAST, INC., MALLINCKRODT BAKER, INC. AND DOW CHEMICAL COMPANY,	:	
Appellees	:	No. 1227 EDA 2011

Appeal from the Order Entered April 4, 2011,
In the Court of Common Pleas of Philadelphia County,
Civil Division, at No. 0911-4966

SANDRA COOPER, IN HER OWN RIGHT, AND AS PLENARY GUARDIAN OF GENE M. COOPER, AND GENE M. COOPER,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
BREENTAG NORTHEAST, INC., MALLINCKRODT BAKER, INC. AND DOW CHEMICAL COMPANY,	:	
Appellees	:	No. 1228 EDA 2011

Appeal from the Order Entered April 28, 2011,
In the Court of Common Pleas of Philadelphia County,
Civil Division, at No. 0911-4966

BEFORE: SHOGAN, WECHT and FITZGERALD*, JJ.

MEMORANDUM BY SHOGAN, J.: Filed: January 31, 2013

In these consolidated appeals, Sandra Cooper, in her own right and as plenary guardian of Gene M. Cooper, as well as Gene M. Cooper ("Cooper") himself (collectively "Appellants"), appeal from two separate trial court orders. At 1227 EDA 2011, Appellants appeal the order granting judgment on the pleadings in favor of Breentag Northeast, Inc., Mallinckrodt Baker, Inc., and Dow Chemical Company (collectively "Appellees") entered on April 4, 2011. At 1228 EDA 2011, Appellants appeal the April 28, 2011 order denying their motion to amend their second amended complaint. After review, we reverse both orders and remand for further proceedings.

On December 1, 2009, Appellants commenced this action by filing a writ of summons against Appellees. On June 17, 2010, Appellants filed their first complaint. In it, Appellants alleged that Cooper was exposed to high levels of toxic chemicals during the course of his employment with Armstrong World Industries ("AWI") in Lancaster, Pennsylvania. The chemicals, 1-1-1-trichloroethane, tricholorothylene, and methylene chloride (collectively referred to as "TCE"), were manufactured by Appellees. Appellants claimed that the chemical exposure caused severe, permanent neurological injury to Cooper, causing him to be declared *non compos mentis* in 2006. However, the complaint contained no details about when Cooper was exposed to the chemicals, when his symptoms first occurred, or when his diagnosis was made. On July 7, 2010, Appellees filed preliminary

objections seeking dismissal of the complaint because it contained only general and conclusory allegations. Appellants filed no response. On August 3, 2010, the trial court sustained the objections and directed Appellants to file a more specific pleading. On August 5, 2010, Appellants timely complied with the trial court's order.

Appellants' amended complaint alleged that TCE caused toxic solvent encephalopathy and Parkinson's syndrome, and that Cooper suffers from both of these conditions. Further, the amended complaint accused Appellees of failing to warn about the dangers of these chemicals. Appellees again filed preliminary objections, asserting that Appellants did not plead any specific facts regarding Cooper's exposure to TCE or Cooper's diagnosis. On December 20, 2010, the trial court again sustained the preliminary objections and directed Appellants to specify the dates upon which Cooper was exposed to TCE as well as the date of Cooper's diagnosis.

On December 30, 2010, Appellants filed their second amended complaint. In it, they stated that Cooper was exposed to TCE throughout the regular course of his employment with AWI from September 1974 to May 2004. Appellants also averred that scientific articles published prior to 1999 demonstrated a causal relationship between TCE exposure and permanent neurological damage and that Appellees knew of the dangers of TCE exposure. Additionally, Appellants asserted that, between 1999 and 2001, Dow Chemical Company ("Dow") published three scientific articles

(the "Albers articles") based upon falsified and manipulated data. These articles contradicted other studies at the time that proved a causal connection between exposure to TCE and permanent brain damage. Appellants allege that Dow sought thereby to mislead the public into believing that TCE was safe.

Appellees responded to the second amended complaint by raising the statute of limitations in a new matter. Appellees stated that the triggering event for purposes of the statute was the date upon which Cooper was declared *non compos mentis*. Appellees argue that Appellants should have had notice of Cooper's injuries when this occurred in 2006, and that Appellants, therefore, had until 2008 to bring the claim. Appellees concluded that, since Cooper did not bring his claim until December 1, 2009, it should be barred as untimely.

On February 24, 2011, Appellees filed a motion for judgment on the pleadings based upon the statute of limitations, despite the second amended complaint containing allegations that Appellee fabricated data and concealed the dangers of TCE. Appellants responded to Appellees' motion arguing that the triggering event for statute of limitations purposes should be deemed to have occurred in December 2010, when a forensic toxicologist retained by Appellants issued a report stating that Cooper's injuries were caused by exposure to TCE.

On April 1, 2011, the trial court heard argument on the motion for judgment on the pleadings. Rather than permitting amendment of the pleadings, on April 4, 2011, the trial court granted Appellees' motion for judgment on the pleadings. The court concluded the statute of limitations barred the claim and dismissed the claim with prejudice.[1]

On April 4, 2011, hours after the trial court granted Appellees' motion, Appellants filed a motion for reconsideration and leave to amend the complaint. Attached to the motion to amend was a proposed third amended complaint. In their proposed third amended complaint, Appellants included a new section with facts aimed at raising both the doctrine of fraudulent concealment and the discovery rule.[2] Appellants averred that, on September 26, 2003, Cooper was exposed to large amounts of TCE during a chemical spill. Cooper began having cognitive problems almost immediately after this spill, and was placed on disability eight months after. Appellants alleged that Appellees' fraudulent conduct hindered Cooper's diagnosis. Specifically, Appellants contended that, when they were attempting to diagnose the source of Cooper's injuries, Cooper's doctors relied on Material

[1] Appellants timely appealed this order on May 2, 2012, in the appeal docketed at 1227 EDA 2011.

[2] As discussed *infra*, the discovery rule acts to toll the statute of limitations from the time when an injury occurs until the time when that injury becomes known or knowable. ***Stein v. Richardson***, 448 A.2d 558, 563 (Pa. Super. 1982).

Safety Data Sheets ("MSDS") that contained fraudulent data similar to that found in the Albers articles.

However, the trial court held that Appellants' third amended complaint still had not alleged sufficient facts to meet the requirements of the discovery rule or the doctrine of fraudulent concealment so as to toll the statute of limitations. Consequently, on April 28, 2011, the trial court denied Appellants' petition. This denial was the subject of Appellants' second appeal, docketed at 1228 EDA 2011.[3]

On May 12, 2011, the trial court directed Appellants to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellants timely complied. On September 20, 2011, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a).

Appellant now raises two issues for this Court's consideration:

> 1. Whether the lower court erred when it granted [Appellees'] motion for judgment on the pleadings where a question of fact exists as to when the Coopers knew or should have known that Mr. Cooper's injuries were caused by their products.
>
> 2. Whether the lower court erred when it denied the Coopers' motion to amend their second amended complaint where, even if that complaint was insufficient to invoke the discovery rule, their proposed third amended complaint was more than adequate in that regard.

Appellants' Brief at 6 (italics omitted).

[3] In an order filed on May 19, 2011, this Court consolidated the appeals.

Appellants first contend that the trial court erred when it granted Appellees' motion for judgment on the pleadings. Specifically, Appellants contend that a genuine issue of fact existed in the pleadings and that a jury should have heard this issue. Appellants argue that a jury should have decided the issue of when the statute of limitations began to run. Appellants' Brief at 11.

When reviewing a trial court's decision to grant judgment on the pleadings, this Court is guided by a well-established standard of review. We are limited to determining whether the trial court committed an error of law, or whether there are issues of fact present that warrant a jury trial. ***See John T. Gallaher Timber Transfer v. Hamilton***, 932 A.2d 963 (Pa. Super. 2007) (stating that judgment on the pleadings is proper only where the pleadings reveal that there are no material facts in dispute and we will affirm an order granting judgment on the pleadings **only where the moving party's right to succeed is certain and the case is so free from doubt that a trial would be a fruitless exercise**) (emphasis added). Our review will be limited to the pleadings and any documents properly attached to them. ***Id.*** We will uphold a judgment on the pleadings only if the pleadings raise no issues of material fact. ***Id.***

An action to recover for an injury caused by negligence or other tortious conduct is subject to a two-year statute of limitations. 42 Pa.C.S.A. § 5524. Typically, the statute begins to run "as soon as the right to institute and maintain a suit arises." ***Baselice v. Franciscan Friars Assumption***

BVM Province, Inc., 879 A.2d 270, 275 (Pa. Super. 2005) (quoting ***Pocono Int'l Raceway v. Pocono Produce, Inc.***, 503 Pa. 80, 84, 468 A.2d 468, 471 (1983)). Further, "lack of knowledge, mistake, or misunderstanding [does] not toll the statute of limitations." ***Id.*** The person bringing the claim has a duty to use reasonable diligence to ascertain the facts and circumstances upon which recovery may be based and should bring the suit within the prescribed statutory period. ***Id.***

However, pursuant to the discovery rule, the statute of limitations does not begin to run on the date the injury occurs; instead, it is triggered on the date the injury is, or should reasonably have been, discovered. ***Stein***, 448 A.2d at 562 (citing ***Donnelly v. DeBourke***, 421 A.2d 826, 829 (Pa. Super. 1980)). The discovery rule tolls the statute of limitations until the "injured party 'possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress.'" ***Baselice***, 879 A.2d at 276 (quoting ***Haggart v. Cho***, 703 A.2d 522, 526 (Pa. Super. 1997)). When a party does not know the cause of his injury, nor reasonably should have known, the discovery rule will toll the statute of limitations. ***Id.*** (citing ***Fine v. Checcio***, 582 Pa. 253, 268, 870 A.2d 850, 859 (2005)).

Once a defendant asserts a statute of limitations defense to a claim, "it is the plaintiff's obligation to present facts that the discovery rule is applicable." ***Fox v. Byrne***, 525 A.2d 428, 431 (Pa. Super. 1987) (citing ***Stein***, 448 A.2d at 566). A plaintiff can accomplish this in two different

ways. ***Id.*** First, the plaintiff can wait until the defendant raises the statute of limitations defense as a new matter, and then file a responsive pleading presenting sufficient facts to support the application of the discovery rule. ***Id.*** Alternatively, in its initial complaint, the plaintiff can plead sufficient facts to raise the discovery rule. ***Id.*** If the plaintiff does this, it need not respond if the defendant raises the statute of limitations as a new matter later in the proceedings. If the plaintiff does not file a response to a statute of limitations defense, this Court may independently review the pleadings to determine whether the plaintiff pleaded sufficient facts to show it was unable to discover the injury until after the statute of limitations had expired. ***See generally Stein***, 448 A.2d 558.

In the present case, Appellants claim that the cause of Cooper's injuries was not immediately discoverable because Appellees concealed known dangers and the MSDS contained fraudulent data that hindered a timely diagnosis. Therefore, they argue, the discovery rule should apply to this case. Further, they maintain that a jury should decide whether Appellants have raised sufficient facts to raise a discovery rule claim and toll the statute of limitations. Appellants' Brief at 11. However, in Appellants' response to Appellees' new matter, they did not raise an argument that the discovery rule applied to this case. Appellants only averred that the suit was timely brought within the statute of limitations period. Because Appellants did not specifically raise the discovery rule, we will look to the pleadings to

ascertain whether Appellants presented sufficient facts to raise a question sufficient to allow a jury to find that the discovery rule applies to this case.

When reviewing whether the discovery rule tolls the statute of limitations, this Court will look at whether the plaintiff was reasonably diligent in ascertaining the facts necessary to bring the action. "Once a plaintiff becomes aware of the injury and who occasioned it, [he] is under a duty to investigate the matter and commence a cause of action." ***Burton-Lister v. Siegel, Sivitz, & Lebed Assocs.***, 798 A.2d 231, 237 (Pa. Super. 2002) (citing ***Haggart***, 703 A.2d at 528). Further, the discovery rule "applies only to those situations where the nature of the injury itself is such that no amount of vigilance will enable the plaintiff to detect an injury." ***Id.*** (quoting ***Dalrymple v. Brown***, 549 Pa. 217, 228-229, 701 A.2d 164, 170 (1997). A plaintiff must only show the level of diligence that a reasonable person would employ under similar facts and circumstances. ***Id.*** (quoting ***Crouse v. Cyclops Industries***, 560 Pa. 394, 405, 745 A.2d 606, 611-12 (2000)).

In the instant case, Appellants argue that the discovery rule should apply because they were unable to discover the cause of Cooper's injury until they received their forensic toxicologist's report on December 10, 2010. Upon review, we are constrained to agree.

On September 26, 2003, during a chemical spill, Cooper was exposed to a substantial amount of TCE. Appellants knew that Cooper began to

experience adverse effects from the spill on the very night that it occurred. Eight months later, Cooper was placed on disability. In 2006, he was declared *non compos mentis*. In November 2007, Cooper was diagnosed with "work-related toxic encephalopathy." However, Appellant had worked with these chemicals for 30 years, and at that time Appellants were unaware of the extent of Appellees' alleged negligence.

While the trial court concluded Appellants exceeded the statute of limitations, it is apparent from the pleadings in this matter that there is a dispute, not as to when Appellants were aware that Cooper was injured, but as to when Appellants became aware that Cooper suffered an injury **that was caused by Appellees' alleged negligence**. Appellants raised an issue as to when they became aware of the alleged negligence and that any delay was caused by Appellees' alleged fraud in covering up knowledge regarding the dangers of TCE. As such, there are issues present that preclude judgment on the pleadings pursuant to our standard of review. Ultimately, what Appellants knew, and when they knew it, are questions of fact, fairly raised in the pleadings.[4]

Appellants next argue that the trial court erred when it denied them the opportunity to amend their second amended complaint. Appellants contend that, even if the second amended complaint was insufficient to raise

[4] We note that we are reviewing this matter under the standard applicable to appellate review of a judgment on the pleadings, which is distinct and less onerous than appellate review of an order granting summary judgment.

the discovery rule, the third amended complaint would have been more than sufficient to meet its requirements.

The decision to deny a motion to amend a complaint is within the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion. ***Ferraro v. McCarthy-Pascuzzo***, 777 A.2d 1128, 1132 (Pa. Super. 2001) (citing ***Borough of Mifflinburg v. Heim***, 705 A.2d 456, 463 (Pa. Super. 1997)). Further, the trial court should deny a request for leave to amend when the initial complaint reveals that the pleader cannot meet the *prima facie* elements of the claim and it is unlikely that an amendment will be able to cure the defects. ***Roach v. Port Auth. of Allegheny County***, 550 A.2d 1346, 1347-1348 (Pa. Super. 1988).

After a thorough review of the record, we hold that, under the facts of the instant case, the trial court abused its discretion when it denied Appellants' request to amend their pleadings. Pa.R.Civ.P. 126 requires the court to grant motions to amend pleadings liberally whenever appropriate.

Appellants' proposed third amended complaint included a section titled "Facts Related to the Application of the Doctrines of Fraudulent Concealment and the Discovery Rule in Relation to Plaintiff Gene M. Cooper's Lack of a Differential Diagnosis Before October 29, 2011." Appellants sought to plead facts showing that Cooper's diagnosis was impeded by fraudulent data contained in the MSDS and the Albers articles. Appellants maintained that these facts would establish a basis to apply either the discovery rule or the

fraudulent concealment doctrine and thereby to toll the statute of limitations. Appellants averred that it was thus improper for the court to deny their motion to amend.

Because the rules of civil procedure provide for the liberal granting of motions to amend pleadings, and because there is an arguable issue of fact, we conclude that it was an abuse of discretion to deny the motion and dismiss this matter with prejudice at this juncture.

Order granting judgment on the pleadings reversed. Order denying motion to amend the second amended complaint reversed. Case remanded for further proceedings. Jurisdiction relinquished.

WECHT, J., files a Dissenting Memorandum.