

**SUPREME COURT OF PENNSYLVANIA AND THE THIRD CIRCUIT
RULE THAT THE START DATE OF THE STATUTE OF LIMITATIONS
IS AN ISSUE TO BE DETERMINED BY THE JURY:**

In re: Risperdal Litigation, No.'s 22 EAP 2018 and 23 EAP 2018 and Adams v. Zimmer US, Inc., No. 18-3011, 2019 U.S. App. LEXIS 34513 (3d Cir. Nov. 20, 2019)

I. INTRODUCTION

On November 20, 2019, both the Pennsylvania Supreme Court and Third Circuit Court of Appeals issued opinions with legal and practical implications regarding the scope of the discovery rule in Pennsylvania.

In *In re Risperdal*, the Pennsylvania Supreme Court found that a plaintiff's understanding of their physical symptoms—male breast growth—did not equate to knowledge of the actual injury—gynecomastia. The court held that laypersons, absent a treating doctor's instructions, cannot be expected to understand a link between symptomology and actual, pathological injury. This holding comes after from two consolidated appeals in the Risperdal MDL currently operating in the Philadelphia County Court of Common Pleas: *Winter v. Janssen Pharmaceuticals, Inc.* and *Saksek v. Janssen Pharmaceuticals, Inc.*

That same day, the Third Circuit handed down a very similar opinion regarding the discovery rule in *Adams v. Zimmer US, Inc.*, 2019 WL 6139673 (3d Cir. Nov. 20, 2019), a case involving defective hip implants. In *Adams*, the court emphasized what it describes as the limited medical knowledge of laypersons, and that notice of a medical diagnosis does not necessarily link an injury to another's conduct, as required by the discovery rule.

Together, these findings affect the discovery rule in the personal injury/professional liability setting in two important ways, holding that: 1) physical symptoms do not *per se* equal knowledge of an actual injury; and 2) a medical diagnosis does not *per se* equal knowledge of the cause of an injury.

II. STATUTE OF LIMITATIONS AND THE DISCOVERY RULE

The applicable statute of limitations for personal injury actions in Pennsylvania is two years from the date of injury. See generally 42 Pa.C.S. § 5502. It is well settled that “[a] cause of action accrues, and thus the applicable limitations period begins to run, when an injury is inflicted.” *Wilson v. El-Daief*, 964 A.2d 354, 361 (Pa. 2009).

However, the discovery rule acts as an exception and tolls the statute of limitations “until a plaintiff could reasonably discover the cause of his action, including in circumstances where the connection between the injury and the conduct of another are not readily apparent.” *In re Risperdal*, Maj. Opinion at 10 (citing *Wilson*, 964 A.2d at 361). The discovery rule is triggered when a person exhibiting reasonable diligence would have discovered the injury and that it was caused by another. See *Gleason v. Borough of Moosic*, 15 A.3d 479, 485 (Pa. 2011). Pennsylvania's reasonable diligence standard is objective and requires factual determinations to be decided by a jury. *Id.* Note that Pennsylvania courts have “expressly declined to hold, as a matter of law that a layperson may be charged with knowledge greater than that which was communicated to her by the medical professionals who provided treatment and diagnosis.” *In re Risperdal*, Maj. Opinion at 12 (citing *Wilson*, 964 A.2d at 365).

III. IN RE RISPERDAL**a. Relevant Facts/Procedural History**

On February 4, 2014, Plaintiffs Saksek and Winter filed personal injury actions against Janssen Pharmaceuticals, Inc., a subsidiary of Johnson and Johnson. Appellants alleged that consumption of Risperdal caused them to develop gynecomastia—the development of female breast tissue and excessive weight gain in men. In conjunction with their complaints, Appellants submitted affidavits attesting that they filed their lawsuits after speaking to their mothers, who each saw a television commercial in 2013 explaining a link between Risperdal and gynecomastia. Appellants further stated that no doctor had ever informed them or their parents that their breast growth and weight gain was caused by Risperdal or any other drug. Importantly, Winter claimed that he noticed his breast development and weight gain in 1998, while Saksek noted the same in 2001-2002.

On May 19, 2014, Janssen filed a motion for partial summary judgment based on the statute of limitations, applicable to all plaintiffs in the consolidated Philadelphia actions. After the trial court failed to issue a ruling on the motion, Janssen filed individual motions for summary judgment in the *Saksek* and *Winter* cases. Janssen argued that the discovery rule to toll the statutes of limitations should have begun on October 31, 2006, when the label on Risperdal was changed to indicate a link between Risperdal and gynecomastia (male breast growth).

The trial court, *sua sponte*, determined that the start date of the statute of limitations was June 31, 2009, based on the cumulative effect of media representations and medical literature indicating a link between the drug and the endocrine disorder.

The Superior Court affirmed defendant's motions for summary judgment, although finding that the claims accrued no later than the 2009 date.

In review, the Supreme Court rejected both dates based on plaintiffs' lack of knowledge of their injuries, and held that a plaintiff's understanding of their physical symptoms—male breast growth—did not equate to knowledge of the actual injury—gynecomastia; laypersons, absent a treating doctor's instructions, cannot be expected to understand a link between symptomology and actual, pathological injury. The Supreme Court concluded that the fact-intensive discovery rule issue was better left to a jury. Both lower courts' rulings were accordingly reversed and the cases were remanded for further fact finding.

Over 20% of the Risperdal cases in the consolidated Philadelphia actions program were affected by the ruling.

b. Analysis of the Supreme Court of Pennsylvania

Appellants primarily argued that Janssen's motions for summary judgment were premature, and that no discovery had taken place prior to the trial court's rulings. Conversely, Janssen argued that Appellants' claims were filed over 10 years after the discovery of their injuries, and that one conducting a reasonably diligent inquiry would have discovered the link between the injuries and Risperdal.

The Supreme Court began its analysis by noting that "discovery rule determinations are fact-intensive inquires that should typically be left for juries to decide, and summary judgment is appropriately granted only in cases where reasonable minds would not differ in finding that the plaintiff knew or should have known, based upon the exercise of reasonable diligence, of his injury and its cause." Maj. Opinion at 12 (citing *Gleason*, 15 A.3d at 485).

The Court agreed with Appellants that the motions were premature, noting that there was no record evidence indicating Appellants' physical appearance or explaining their deformations, or medical records concerning interactions between Appellants and their treating doctors. *Id.* Importantly, neither of Appellants' doctors diagnosed them with gynecomastia until at least 2013. *Id.*

Despite Janssen's argument that Appellants were aware of their injuries in 1998 and 2001-2002, respectively, the Court held that neither of the Appellants knew specifically that they had developed gynecomastia, and that the Superior Court "fail[ed] to distinguish between knowledge of the **physical condition** of large breasts and the critical knowledge of an **injury**, gynecomastia." *Id.* at 14 (emphasis in original). No record evidence existed to indicate that Appellants were aware that their weight gain and breast growth were the result of an endocrine system disorder—the actual injury caused by Risperdal. Instead, the Court explained that Appellants could have plausibly believed that they were experiencing general weight gain, a listed side effect of Risperdal prior to 2006. *Id.* The Court held that "the mere experience of a physical condition does not trigger any obligation to actively seek out further information, including whether it is the result of another person's conduct." *Id.* at 18.

The Supreme Court criticized the trial court's ruling establishing a June 30, 2009 date on which the statute would begin to run. The trial court had, *sua sponte*, undertaken a review of advertising and medical literature that it believed would have put an individual conducting a reasonably diligent inquiry on notice that their gynecomastia was linked to Risperdal use. *Id.* at 20; 23. No record evidence existed to indicate that Appellants were aware of any of the advertising or literature cited to by the trial court.

Similarly, the Court held that the 2006 date used by the Superior Court to establish a statute of limitations was inappropriate. *Id.* at 23-4. Appellants had stopped taking Risperdal well before 2006, and were never informed by their treating doctors of the label change. Moreover, laypersons cannot be expected to understand a link between symptoms and injury absent instruction from a treating doctor. *Id.* at 17, n. 6 (citing *Nicolaou v. Martin*, 195 A.3d 880, 893 (Pa. 2018) (while inquiry notice does not require knowledge of the "full extent of the injury," nevertheless "a layperson is only charged with the knowledge communicated to him or her by the medical professionals who provided treatment and diagnosis"))).

Ultimately, the Court reversed both lower courts, and remanded *Winter* and *Saksek* to the trial court for further fact finding on the discovery rule issue. The ruling revived over 20% of cases in the consolidated Philadelphia actions program which would have been dismissed as outside the statute of limitations.

Justice Baer issued a concurring opinion which went a step further, arguing that the majority's opinion did not go far enough to broaden the discovery rule. Justice Baer urged the Court to adopt the position of sister states, which have found that the discovery rule window begins only when a "reasonable plaintiff would have knowledge not only that an injury was caused by another *but that the injury resulted from the negligence of another.*" Concurring Opinion at 2 (emphasis added). The Justice noted that the Court would "await a future case to consider whether to adopt the [more] liberal approach." *Id.* (internal quotations omitted).

IV. ADAMS V. ZIMMER US, INC.

a. Relevant Facts/Procedural History

In September of 2010, Plaintiff Marilyn Adams was diagnosed by Dr. Prodromos Ververeli with degenerative arthritis and was recommended for a total hip replacement. 2019 U.S. App. LEXIS 34513, at *2. Adams was advised that this hip replacement would deteriorate in fifteen to twenty years, potentially sooner. *Id.* On January 18, 2011, Dr. Ververeli conducted the hip replacement surgery. *Id.* at *2-*3. In late 2012, Adams began experiencing severe pain. *Id.* at *3. Dr. Ververeli conducted various tests and diagnosed the pain as an infection. *Id.* Dr. Ververeli warned Adams that a severe infection may necessitate removing part of the hip replacement, however, in 2013, the infection was seemingly treated through other, nonsurgical methods. *Id.* In November 2014, Adams dislocated her hip in Florida. *Id.* Emergency room doctors put the implant back in place. *Id.* In January 2015, Adams went back to Dr. Ververeli as she returned home from Florida. *Id.* Dr. Ververeli took x-rays which revealed calcification around the implant. *Id.* Dr. Ververeli believed the calcification to be related to either the infection or the dislocation. *Id.* Dr. Ververeli recommended that Adams replace a metal piece of the implant with a ceramic piece to which Adams reluctantly consented. *Id.* at *4.

On January 30, 2015, Adams went for a pre-operative visit. *Id.* Records from the visit indicate that Adams was suffering from “right total hip metallosis”—“metal wear that then causes a reaction to the surrounding tissue.” *Id.* Adams testified that she did not recall hearing about the metallosis. *Id.* On February 12, 2015, Adams underwent the revision surgery. *Id.* During surgery, however, Dr. Ververeli discovered metal debris and a pseudotumor in the area. *Id.* Dr. Ververeli “replaced all of the main components of the implant hip, which had been discharging excessive and potentially toxic metals.” *Id.* at *4-*5. Adams continued to experience hip pain. *Id.* at *5. On February 10, 2017, Adams brought a products liability suit against Zimmer. *Id.*

The Eastern District of Pennsylvania granted summary judgment in favor of medical device manufacturer, finding that the January 30, 2015, preoperative visit would have put a reasonably diligent person on notice of her injury as a matter of law.

b. Analysis of the Third Circuit Court of Appeals

The central issue in *Adams* was “whether a jury would conclude Adams reasonably did not discover her injury until February 12, 2015, when Dr. Ververeli apprised her of his intraoperative finding that her implant had deteriorated and emitted metal shards into her hip.” *Id.* at*8.

The *Adams* court began by analyzing the statute of limitations rule: “the statute of limitations . . . begins to run when the plaintiff knew, or exercising reasonable diligence, should have known (1) he or she was injured and (2) that the injury was caused by another.” *Id.* at *6 (citing *Coleman v. Wyeth Pharms.*, 6 A.3d 502, 510-11 (Pa. Super. Ct. 2010)). Looking at the reasonable diligence requirement, the court relied on *Fine v. Checcio*, 870 A.2d 850, 861 (Pa. 2005) in which the plaintiff was not barred by the statute of limitations because, although he experienced facial numbness after a wisdom tooth extraction outside of the two year window, this numbness was “indicative of two distinct phenomena”—temporary side effect or permanent injury. *Id.* at *9. The court concluded based on *Fine* that, here, a jury could conclude that Adams did not know the nature of her injury—the implant deterioration—until the revision surgery on February 12, 2015.

Further, the Court reiterated that “a lay person is only to be charged with the knowledge communicated to him or her by the medical professions who provided treatment and diagnosis.” *Id.* at *12 (citing *Nicolaou v. Martin*, 195 A.3d 880 (Pa. 2018)). Here, the circuit court found that Dr. Ververeli did not know of the nature of Adam’s injury until he was in the middle of the revision surgery. *Id.* at *12-*13.

Defendant Zimmer argued, first, that Adams had actual or constructive notice that the Zimmer metal piece caused her injury because she wanted the Zimmer piece to be replaced with another brand, and she accordingly testified during a deposition that “it just seemed that something was wrong [. . .] It had to come out.” *Id.* at *15. However, the Third Circuit concluded that “a plaintiff’s after-the-fact recollection of general suspicions does not start the statutory clock as a matter of law.” *Id.* (citing *Nicolaou*, 195 A.3d at 884-85, 894) (finding that even though plaintiff was diagnosed with probable Lyme disease in July 2009, a reasonable jury could find that she did not discover her injury until she received a positive Lyme disease test in February 2020)). *See also Wilson*, 964 A.2d at 358 (plaintiff’s after-the-fact testimony that she knew at an earlier point that “something is wrong here [s]omething is really wrong” did not start the statutory clock as a matter of law). The court in *Adams* found other reasons why Adams wanted the device to come out without linking her pain to a problem caused by the device itself, i.e. she was under much duress over the situation; she considered getting the implant out in late 2012 when the pain was from the supposed infection. *Id.* at *16.

Defendant Zimmer argued, second, that on January 30, 2015, and February 9, 2015, Dr. Ververeli, his staff, and various documents provided to Adams notified her that she was suffering from metallosis. However, the court found that because Dr. Ververeli did not know Adams had an injury caused by the implant until the revision surgery, his metallosis diagnosis could not have communicated to Adams that she

was, in fact, injured by the implant and that he could not have provided information sufficient to begin the running of the statute of limitation until after he notified her of such after the revision surgery. *Id.* at *17.

Judge Greenaway dissented, finding that Adams knew of the right hip pain and knew of its connection to the allegedly defective device. *Id.* at *18. Judge Greenaway initially noted that the discovery rule is meant to be narrow and places a heavy burden on the injured party invoking the rule. *Id.* at *21 (citing *Wilson*, 964 A.2d at 364). Judge Greenaway then categorically described the majority's missteps: A) oversight of undisputed material facts; B) misapplication of the appropriate legal standard; and C) reliance on inapposite cases.

Under section A, oversight of undisputed material facts, Judge Greenaway noted that: plaintiff knew by January 30, 2015 that her injury was casually linked to the Zimmer device when stating that "it just seemed that something was wrong. [The Zimmer Device] had to come out. . . . It was a problem." *Id.* at *24 (citing *Gleason*, 15 A.3d at 484 (requiring only knowledge of "some form . . . of a factual cause linked to another's conduct, without necessity of notice of the . . . precise cause")); Dr. Ververeli informed Adams of the metallosis diagnosis which he described as "metal wear that then causes a reaction to the surrounding tissues" and that she was suffering from "adverse local tissue reaction from wear and fretting to the Zimmer Device," which would necessitate "revision surgery and changing the Zimmer Device to a prosthesis with a ceramic head" to "correct the problem." *Id.* at *26. While the revision surgery uncovered more erosion than expected, Dr. Ververeli's initial diagnosis was nonetheless accurate. *Id.* at *27.

Under section B, misapplication of the appropriate legal standard, Judge Greenaway noted that the Majority heightened the statute of limitations standard and that rather: an injured party (1) need only know about some form of significant harm, not the full extent of her injury; and (2) need only know about a causal link between her injury and another's conduct, not misconduct. *Id.* at *27-28. Judge Greenaway opined that much of the Majority's opinion rests on Dr. Ververeli not appreciating the full extent of the deterioration until he was in the middle of surgery, however, his discovery only confirmed his prior diagnosis causally connected to the Zimmer device. *Id.* at *28-*30.

Under section C, reliance on inapposite cases, Judge Greenaway pointed out that those cases relied on, namely, *Fine*, *Nicolaou*, and *Wilson*, involved (1) multiple or uncertain cases or (2) incorrect diagnoses, whereas, here, there was a single, correct diagnosis given.

V. IMPLICATIONS AND RECOMMENDATIONS

As noted by Judge Greenaway in his dissenting opinion of *Adams*, the *Risperdal* and *Adams* courts heightened the statute of limitations standard and misinterpreted what exactly triggers the clock to begin running under the discovery rule.¹ These rulings have the potential to bar a statute of limitations defense from a case or to force submission of those issues to a jury, rather than a judge. Obviously, neither is helpful to a party seeking to defend claims arising long ago.

As further noted in *In re Risperdal*, Supreme Court Justice Baer hopes to eventually adopt a rule under which a "reasonable plaintiff would have knowledge not only that an injury was caused by another but that the injury resulted from the negligence of another."

These holdings make assertion of a statute of limitations defense on motion more difficult. First, they heighten the level of knowledge a plaintiff must be shown to have to defeat a "discovery rule" argument. These holdings suggest that in medical cases, a plaintiff must have had communication from her or his doctor that attributes a symptom or condition to a specific cause, and that the bar is high for attribution of "medical knowledge" to a plaintiff. Indeed, under Justice Baer's approach, a plaintiff must apparently possess knowledge of another party's negligence to start the statute running. Second, these cases continue the trend in Pennsylvania of decreasing the type of cases that can be resolved on motion. By

¹ Currently, the rule is that: an injured party (1) need only know about some form of significant harm, not the full extent of her injury; and (2) need only know about a causal link between her injury and another's conduct, not misconduct.

increasing the amount of disputed factual issues that go into a statute of limitations analysis, the Courts have made it harder to make an argument for judgment on statute of limitations as a matter of law. With more facts to be disputed it becomes harder for a defendant to argue that no reasonable jury could find the claims timely. While this trend is not new, it does make the record needed for Motion practice more complex, and the types of cases amenable to motion practice narrower.

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