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KATE BARRETT,

Plaintiff,

v.

BAYER HEALTHCARE PHARMACEUTICALS, INC., BAYER PHARMA AG, AND BAYER OY

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-4199-13

In Re: Mirena Litigation
Case No. 297

Civil Action

**ORDER**

THIS MATTER having been brought before the Court by way of motion of Coughlin Duffy LLP, counsel for defendants Bayer HealthCare Pharmaceuticals Inc., Bayer Pharma AG, and Bayer OY for an Order for Summary Judgment; and the Court having considered the papers submitted; and the Court having heard the arguments of counsel, if any; and for good cause shown; for the reasons set forth in the accompanying opinion.

IT IS, on this 14 day of January, 2016;

ORDERED that the Defendants Bayer HealthCare Pharmaceuticals Inc., Bayer Pharma AG, and Bayer OY be and hereby are granted summary judgment dismissing plaintiff's Complaint against it with prejudice; and it is further

ORDERED that a signed copy of this Order be served upon all counsel within seven (7) days of the date hereof.

_____, J.S.C.
HONORABLE BRIAN R. MARTINOTTI, J.S.C.

[ ] Opposed
[ ] Unopposed

NOT TO BE PUBLISHED WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINIONS

KATE BARRETT,
Plaintiff,

v.

BAYER HEALTHCARE PHARMACEUTICALS INC., BAYER PHARMA AG, AND BAYER OY,

Defendants.

(In re Mirena® Litigation Case No. 297)

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

BERGEN COUNTY

DOCKET NO. BER-L-4199-13

CIVIL ACTION

DAPHNE COLVIN,
Plaintiff,

v.

BAYER HEALTHCARE PHARMACEUTICALS INC., BAYER PHARMA AG, AND BAYER OY,

Defendants.

DOCKET NO. BER-L-4924-13

KELSIE DENTON,
Plaintiff,

v.

BAYER HEALTHCARE PHARMACEUTICALS INC., BAYER PHARMA AG, AND BAYER OY,

Defendants.

DOCKET NO. BER-L-4754-13

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|---|---|
| LAKISHA WHATLEY,<br>Plaintiff,<br><br>v.<br><br>BAYER HEALTHCARE PHARMACEUTICALS INC., BAYER PHARMA AG, AND BAYER OY,<br><br>Defendants. | DOCKET NO. BER-L-8881-13 |

Argued: December 2, 2015
Decided: January 14, 2016

APPEARING:

For Plaintiffs Kate Barrett, Daphne Colvin, Kelsie Denton, and Lakisha Whatley: Gregory S, Spizer, Esq. (Anapol Weiss)

For Defendants Bayer HealthCare Pharmaceuticals, Bayer Pharma AG, and Bayer Oy: Shayna Cook, Esq. (Goldman Ismail Tomaselli Brennan & Baum)

**MARTINOTTI, J.S.C.**

Before this Court is Defendant Bayer HealthCare Pharmaceuticals' ("Bayer") Motion for Summary Judgment.[1] Bayer seeks Summary Judgment on the ground that the claims of Plaintiffs Kate Barrett, Daphne Colvin, Kelsie Denton, and Lakisha Whatley (collectively "Plaintiffs"; individually "Barrett," "Colvin," "Denton," and "Whatley") were not timely filed. This Motion is opposed by Plaintiffs.[2]

[1] On December 11, 2015, Lorna Dotro, Esq. emailed the Court and requested the opportunity to supplement the record by letter, citing to Judge Seibel's December 2, 2015 decision. This request was denied.
[2] The Court is aware of the opinions of Judge Seibel in In re Mirena IUD Products Liab. Litig., 29 F. Supp. 3d 345, 354 (S.D.N.Y. 2014) and in Abrams v. Bayer (In re Mirena Products Liab. Litig., 2015 U.S. Dist.

## I.

## FACTS

### Mirena

Mirena is an intrauterine device ("IUD") that the FDA approved in 2000. The device, which is still on the market, requires a doctor's prescription and is inserted into the user's uterus during an office procedure. The device includes threads that users must check monthly to ensure the IUD is in the proper position.

### The Plaintiffs

#### Kate Barrett

Barrett, a Pennsylvania resident, had a Mirena IUD inserted in April 2006. She was unable to feel the IUD's threads during her monthly self-check, so she visited her doctor in March 2007. A CT scan revealed Barrett's Mirena had perforated her uterus and was in her omentum. On March 21, 2007, she underwent surgery to remove the device. On or about March 27, 2013, she saw a commercial about Mirena litigation, which led her to file her Complaint in this action on June 6, 2013.

#### Daphne Colvin

Colvin, a California resident, had a Mirena implanted in June 2009, and her doctor was unable to locate the device during a follow-up visit. On August 1, 2009, an x-ray revealed the device was in her abdomen. She had surgery to remove the device on August 21, 2009. Colvin saw an ad regarding the Mirena litigation in December 2012 and filed her Complaint in this action on June 24, 2013.

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LEXIS 3372 (S.D.N.Y. Jan. 9, 2015). The Court notes, as well, that neither party requested a Lopez hearing regarding this Motion.

**Kelsey Denton**

Denton, a Texas resident, had her Mirena inserted on November 20, 2008. At a follow-up visit a month later, the Certified Nurse Midwife who had inserted the device could not locate it. The Certified Nurse Midwife attempted to schedule an ultrasound to determine the device's location, but there was no appointment available. She told Denton the device likely settled high in her uterus and that an ultrasound was not necessary. In April 2011, Denton visited a doctor who ordered an x-ray, which confirmed the Mirena had perforated Denton's uterus and was in her pelvis. On April 19, 2011, Denton's doctor told her surgery was required to remove the device. Denton had surgery on June 14, 2011 to remove the Mirena. She filed this lawsuit on May 2, 2013.

**Lakisha Whatley**

Whatley, a resident of Georgia, had her Mirena inserted on July 15, 2008. She experienced pain a few months later, and an x-ray on September 9, 2008 revealed the Mirena was in the posterior aspect of her pelvis. Whatley had surgery to remove the Mirena on September 11, 2008. At some time in 2013, Whatley performed an Internet search on Mirena and learned of the litigation related to the device. Whatley filed her Complaint in this action on November 15, 2013.

## II.

## ARGUMENTS

**Bayer's Argument**

Bayer argues Plaintiffs' claims are time-barred under New Jersey's two-year statute of limitations for products liabilities actions and under the statute of limitations in

each Plaintiff's state. The two-year statute of limitations applies, Bayer argues, because Plaintiffs' "injuries are marked in all instances by definitive diagnoses by medical professionals linking Mirena to the alleged injury." (Def.'s Mem. in Supp. of Summ. J. at 1.) Bayer maintains Plaintiffs' injuries, such as perforations of the uterus by the Mirena device, were obviously related to Mirena, as opposed to injuries in "other cases claiming a pharmaceutical product caused a latent or generic injury (*e.g.* a heart attack) with no immediately apparent connection to the product at issue." Id.

Bayer notes "three different judges, including Judge Seibel in the Mirena MDL, have held a total of thirty-three (33) perforation or embedment plaintiffs to be time-barred" in cases with facts similar to those of Plaintiffs in this motion. Id. Bayer cites Judge Seibel's ruling that "when an IUD is found somewhere in a woman's body where it is not supposed to be – here, Plaintiff's abdomen – and surgery is required to remove it, a diligent individual would know, at the very least, that there was a 'reasonable possibility,' that the IUD harmed her and she should therefore make further inquiry to determine her legal rights." In re Mirena IUD Products Liab. Litig., 29 F. Supp. 3d 345, 354 (S.D.N.Y. 2014). Judge Seibel wrote later in her opinion that, "[w]hen the plaintiff knows that the IUD is no longer in the uterus and has to be removed from wherever it has migrated, the conclusion that the statute of limitations is triggered seems unavoidable." Id. at 355.

More specifically, Bayer notes, two courts have ruled that under New Jersey law, a plaintiff's cause of action accrues when she learns the Mirena has perforated her uterus. Witherspoon v. Bayer HealthCare Pharmaceuticals Inc., 2013 U.S. Dist. LEXIS 163617, *11 (E.D. Mo. Nov. 18, 2013) (plaintiff's claim accrued, at the latest, when she learned

the IUD had perforated her uterus); In re Mirena IUD Products Liab. Litig., supra, at 359 n.8 (citing Witherspoon and agreeing with Judge Webber's application of New Jersey law). Bayer argues that Plaintiffs' claims are time-barred under New Jersey law, because each was told that the Mirena perforated her uterus more than two years before she filed her respective action.

Bayer argues New Jersey's "discovery rule" does not change the outcome. "The discovery rule delays the accrual of a cause of action until 'the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.'" Baird v. Am. Med. Optics, 155 N.J. 54, 66 (1998) (citation omitted). The discovery rule applies when "the relationship between a plaintiff's injury and a defendant's fault is not self-evident." Cornett v. Johnson & Johnson, 211 N.J. 362 (2012). "Actual knowledge of the basis for the legal liability or a provable cause of action is not required for the statute of limitations to begin to run." Millian v. Organon USA Inc., No. BER-L-2848-09, slip op. at 13 (N.J. Super. Ct. Law Div. Mar. 15, 2011) (Martinotti, J.S.C.) aff'd by Millian v. Organon USA Inc. A-4115-10T2, 2012 WL 3101306 (N.J. Super. Ct. App. Div. Aug. 1, 2012). Under New Jersey law, a party seeking the benefit of a discovery rule bears the burden of proof with respect to that rule. Yarchak v. Trek Bicycle Corp., 208 F. Supp. 2d 470, 487 (D.N.J. 2002). Thus, Plaintiffs must prove they did not know and could not reasonably have learned that Mirena caused their injuries at the time of their operations. Bayer asserts that under these facts and legal precedents, Plaintiffs' claims are time-barred under New Jersey law.

**A. Plaintiff Kate Barrett**

In Pennsylvania, "the statute of limitations [generally] begins to run as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations." Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983) (citation omitted). "If, however, an injury is undiscovered (that is, it is hidden and therefore unknown or latent), the time within which to sue does not begin to run until the plaintiff first knows, or reasonably should know, that s/he has been injured and that her/his injury has been caused by another party's conduct." Vitalo v. Cabot Corp., 399 F.3d 536, 542, (3d Cir. 2005) (citation omitted). "[T]he fact that a plaintiff is not aware that the defendant's conduct is wrongful, injurious or legally actionable is irrelevant to the discovery rule analysis." Haggart v. Cho, 703 A.2d 522, 528, (Pa. Super. Ct. 1997) (citation omitted).

Bayer cites a Pennsylvania case where an IUD moved out of position and caused plaintiff's injuries, including an infection, hospitalization, and exploratory surgery. Place v. Ortho Pharm. Corp., 595 F. Supp. 1009, 1011(W.D. Pa. 1984). The IUD was inserted in 1972, and plaintiff experienced nausea in 1977. Id. Plaintiff's doctor diagnosed a perforation of her vagina by the IUD, and the IUD was removed on December 28, 1977. Id. Plaintiff was admitted to the hospital on January 12, 1978, and had periodic treatment through July 1978. Id. The court ruled that the statute of limitations began to run "on all immediate consequences of the movement of the IUD, the puncture of the vaginal wall, and the resultant infection and treatment" in January 1978, when plaintiff was treated. Id. "It is sufficient that the plaintiff know the cause or source of her injury; it is not necessary that she know the legal basis for the prospective claim." Id. (citations omitted).

Bayer argues that Barrett's case is analogous to the plaintiff in Place and that the statute of limitations on her claim began running no later than March 21, 2007, when she had surgery to remove the Mirena. Whether she knew some defect in Mirena was at fault, she knew it was the source of her injury at that time. Even if Barrett argues she did not know the Mirena caused her injuries, she cannot raise a question of material fact with respect to her diligence in investigating her cause of injury. Bayer relies on a Pennsylvania case in which a plaintiff's claim against an asbestos manufacturer was time-barred, because for four years he did not investigate whether anything other than smoking had caused his lung cancer. Cochran v. GAF Corp., 666 A.2d 245 (Pa. 1995). Bayer asserts that Barrett can show no evidence that she diligently investigated the cause of her injury during the six years between her surgery and the commencement of her action.

Bayer argues it is entitled to Summary Judgment on Barrett's product liability claims, as well as her claims for breach of warranty, which are governed by a four-year statute of limitations from when the IUD was inserted. Since Barrett's only remaining claim for punitive damages is incidental to her other claims, it too should be dismissed. See Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 80, 802 (Pa. 1989).

**B. Plaintiff Daphne Colvin**

Bayer argues Colvin's claims are time-barred under California's two-year statute of limitations. Judge Seibel held in dismissing the claims of seventeen (17) California resident plaintiffs that, under California law, "statutes of limitations began to run upon removal of the Mirena." Abrams v. Bayer (In re Mirena IUD Prods. Liab. Litig., 2015 U.S. Dist. LEXIS 3372, *26 (S.D.N.Y. Jan. 9, 2015). As Colvin's Mirena was removed

on August 21, 2009, and she did not file her suit until June 24, 2013, her claim is time-barred under California's statute of limitations.

Under California's discovery rule, "a cause of action does not accrue until the plaintiff discovers, or has reason to discover, that he has been wrongfully injured." Hendrix v. Novartis Pharm. Corp., 975 F. Supp. 2d 1100, 1105 (C.D. Cal. 2013) (citation omitted). A plaintiff does not need to know a technical or legal theory as to her claim, only a factual basis. Id. at 1106 (citation omitted). That is, Colvin did not need to know or understand that Bayer was negligent in some way in order for the claim to have accrued, only that the Mirena injured her.

To determine when the discovery rule applies, the Ninth Circuit distinguishes between injuries directly related to a medical device and those with no obvious connection to the device. Tucker v. Baxter Healthcare Corp., 158 F.3d 1046, 1049 (9th Cir. 1998). The statute of limitations is not tolled when there is a direct connection, such as when breast implants migrate within the body, but the statute is tolled when the connection is not apparent, such as when breast implants cause an autoimmune disease. Id. Further, the Northern District of California ruled a plaintiff had adequate knowledge of the connection between her injury and an IUD when her physician told her the device perforated her uterus. In re N. Dist. of Cal. "Dalkon Shield", 503 F. Supp. 194, 198 (N.D. Cal. 1980).

Under California law, Colvin had a factual basis to support a claim when her doctor informed her the Mirena had perforated her uterus and that she would need surgery to remove it. Even if Colvin was not aware of the facts necessary to put her on notice that she had a claim, there is no evidence that she diligently investigated the causes

of her injuries. Thus, her claim is time-barred. Further, her remaining causes of action are also barred, as California's two-year statute of limitations applies to all personal injury claims based upon defective products, as well as breach of warranty claims.

**C. Plaintiff Kelsie Denton**

Bayer argues Denton's claims are barred under Texas' two-year statute of limitations for personal injury. Judge Seibel, applying Texas law, determined that a cause of action accrues when a plaintiff "discover[s] the nature of her injury." In re Mirena IUD Products Liab. Litig., supra, 29 F. Supp. 3d at 354. In a case in which the IUD perforated a plaintiff's uterus, the date the cause of action accrues is "when Plaintiff learn[s] that the Mirena perforated her uterus and would have to be removed." Id.

Texas courts have applied the state's discovery rule to IUD cases and determined the cause of action accrues when a plaintiff "discovered that the injury was caused by her use of the IUD." Coody v. A.H. Robins Co., 696 S.W.2d 154, 156 (Tex. App. 1985). The Texas Court of Appeals rejected Coody's argument that the statute was tolled until the plaintiff learned the manufacturer of her IUD and that the device was defectively designed. Id.

Bayer argues that under Coody, Denton's cause of action accrued when she learned her Mirena needed to be removed surgically. Denton wrote in an April 20, 2011 email to her mother that she learned the day before that she would need surgery to remove her Mirena. (Ex. 26, 4/20/11 Email). She did not file her Complaint until May 2, 2013, more than two years after her cause of action accrued. Thus, Denton's product liability claims are time-barred.

Her breach of warranty claims are also barred, as Texas has a four-year statute of limitations that accrues when tender of delivery is made. An IUD is tendered or delivered when it is inserted. Denton's Mirena was inserted on November 20, 2008, so her claim for breach of warranty was time-barred as of November 2012, several months before she filed her action.

Denton's claim for negligent misrepresentation and fraudulent misrepresentation are also time-barred. Texas' statute of limitations for negligent misrepresentation claims is two years. Ptasynski v. Shell Western E&P, Inc., 2002 U.S. App. LEXIS 28189, *9 (5th Cir. Tex. Feb 13, 2002) (citing HECI Exploration Co. v. Neel, 982 S.W.2d 881,885 (Tex. 1998)). The Texas Court of Appeals has also held that even a claim denominated as a cause of action for fraud falls under a two-year statute of limitations when the claim "sounds in tort, not in fraud." Martz v. Weyerhaeuser Co., 965 S.W.2d 584, 588 (Tex. App. 1998). As Denton's claim sounds in product liability, the statute of limitations on her claim for fraudulent misrepresentation was two years.

Denton's claim under the Texas Deceptive Trade Practices-Consumer Protection ("DTP-CPA") is also time-barred, as claims under that act must be commenced within two years of the false or misleading statement. Bayer maintains that even if the discovery rule applied, Denton's claim under the DTP-CPA is time-barred.

Finally, Denton's claims for punitive damages should be dismissed, as those claims are derivative of her other claims.

**D. Plaintiff Lakisha Whatley**

Bayer argues Whatley's product liability claims are time-barred under Georgia's two-year statute of limitations. Georgia's statute of limitations "begins to run from the

time the act is committed, however slight the actual damage then may be." M.H.D. v. Westminster Sch., 172 F.3d 797, 804 (11th Cir. 1999) (citation omitted). "[I]n Georgia the discovery rule only applies to cases involving continuing torts," which are "cases of bodily injury which develop only over an extended period of time." Id. (citations and internal quotations marks omitted).

The continuing tort doctrine applies in two types of cases: those in which a "surgeon negligently leaves a foreign object in the body of his patient," and those in which "the plaintiff's injury developed slowly from, and was not obviously traceable to, prolonged exposure to a defendant's tortious conduct." Rivell v. Private Health Care Sys., 887 F. Supp.2d 1277, 1285-86 (S.D. Ga. 2012). The second category of cases, those stemming from prolonged exposure to tortious conduct, include claims arising out of years of exposure to chemicals or prescription drugs. Id. at 1286 (citations omitted).

Bayer argues Whatley's claim fits neither of the two categories Georgia recognizes under the state's discovery rule. First, Whatley's Mirena does not qualify as a foreign object negligently left in the body, because claims arise in that category only when plaintiff is unaware of the object's presence. Parker v. Vaughan, 183 S.E.2d 605, 606 (Ga. Ct. App. 1971). The other category—where a plaintiff suffered prolonged exposure to a product—does not apply to Whatley's circumstances. As Georgia's discovery rule does not apply to Whatley's claim, her claim accrued on September 9, 2008 when she learned she needed surgery to remove the Mirena. She did not file her action until November 15, 2013, more than five years later.

Whatley's remaining causes of action are also time-barred. Georgia's statute of limitations for personal injury is two years. The Georgia Supreme Court has noted "[t]his

is a traditional general statute of limitations. By its very language, the scope of application of this statute of limitations is determined by the nature of the injury sustained rather than the legal theory underlying the claim for relief." Daniel v. Am. Optical Corp., 304 S.E.2d 383, 385 (Ga. 1983). A two-year statute of limitations also applies to warranty claims. Adair v. Baker Bros., 366 S.E.2d 164 (Ga. 1988).

***Lopez* Hearing**

As a final point of argument, Bayer contends that a Lopez hearing is not necessary. See Lopez v. Swyer, 62 N.J. 267, 272 (1973) (holding a determination of whether the discovery rule applies is to be determined by the court, at an evidentiary hearing). Plaintiffs agree a Lopez hearing is not needed and have not requested same.

**Plaintiffs' Response**

Plaintiffs acknowledge their claims would be time-barred under the MDL cases that have been decided.[3] However, they argue those cases were incorrectly decided because they failed to take into account that the discovery rule requires a plaintiff to know that another was at fault. As Plaintiffs did not know Bayer was at fault when they suffered their injuries, their claims had not yet accrued.

Plaintiffs note that New Jersey's discovery rule "prevents the statute of limitations from running when injured parties reasonably are unaware that they have been injured, or, although aware of an injury, do not know that the injury in attributable to the fault of another." Baird, supra, 155 N.J. at 66. Discovery rule analysis turns on the question of "whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another." Caravaggio v.

[3] It is worth noting that, to this Court's knowledge, there has not been any appeal of the motions that have been decided. Furthermore, since this is a mass tort those orders are final.

D'Agostini, 166 N.J. 237, 246 (2001). "[A] plaintiff must have an awareness of 'material facts' relating to the existence and origin of his injury rather than comprehension of the legal significance of such facts." Lynch v. Rubacky, 85 N.J. 65, 73 (1981) (citation omitted). "Although the discovery rule does not require knowledge of a specific basis for liability or a provable cause of action, it does require knowledge not only of the injury but also that another is at fault." Guichardo v. Rubinfeld, 177 N.J. 45, 51 (2003) (citation and internal quotation marks omitted). Plaintiffs argue that while Barrett, Colvin, Denton, and Whatley knew of their respective injuries, they were not aware that Bayer was at fault. Thus, under New Jersey's discovery rule, their claims were timely filed.

**Application of New Jersey Discovery Rule**

**A. Plaintiff Kate Barrett – New Jersey Law**

Plaintiffs contend that Barrett testified, "I was also told that this has . . . never happened to anybody. I was told that this is a good product. I was told that there were numerous procedures that Dr. Mecs performed himself. I was told that . . . anybody that had it [inserted] never had issues." (Pls.' Ex. 1, Barrett Dep., at 203:16-22.) Though Barrett knew her Mirena had perforated her uterus, she had no reason to suspect any wrongful conduct. After her injury, her doctor told her that perforations were highly uncommon. Thus, Plaintiffs contend, it was reasonable that Barrett was not aware she had a claim until she saw a television commercial regarding the Mirena litigation.

**B. Plaintiff Daphne Colvin – New Jersey Law**

Colvin also argues that her claim is timely because her doctor never told her a defect in the Mirena caused her injuries. She testified that she did not know Mirena

caused her injuries until she saw a commercial about the potential for Mirena to injure users.

**C. Plaintiff Kelsie Denton – New Jersey Law**

Denton asserts that, while she knew of her injury on April 19, 2011, she did not learn Mirena caused her injuries until a discussion with her doctor in June 2011. Thus, her claim was timely when filed.

**D. Plaintiff Lakisha Whatley – New Jersey Law**

Whatley argues her claim was timely filed because she was reasonably unaware that her injuries were due to Bayer's negligence until 2013, the year she filed this action. No healthcare provider told Whatley that the perforation of her uterus was a result of a defect in the Mirena. Thus, at the time of her operation she was not aware that her injuries were "due to the fault or neglect of another." Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012).

**Application of Plaintiffs' Respective State Discovery Rules**

**A. Plaintiff Kate Barrett – Pennsylvania Law**

Under Pennsylvania law "the point at which the complaining party should reasonably be aware that he has suffered an injury is a factual issue 'best determined by the collective judgment, wisdom and experience of jurors.'" Crouse v. Cyclops Indus., 745 A.2d 606, 612 (Pa. 2000) (quoting White v. Owens-Corning Fiberglas Corp., 683 A.2d 885 (Pa. 1996). Whether the plaintiff was reasonably diligent is an objective inquiry, but it must be applied with reference to individual characteristics. Wilson v. El-Daief, 964 A.2d 354, 366 (Pa. 2009).

Barrett reiterates her argument that, as no doctor told her Bayer's negligence or Mirena's defects contributed to injuries, it was reasonable that she did not bring her claim within two years of her surgery. The discovery rule therefore applies, and Barrett's claim was timely brought.

**B. Plaintiff Daphne Colvin – California Law**

Under California's discovery rule, the statute of limitations on a plaintiff's product liability claim is tolled "even when a related medical malpractice claim has already accrued, unless the plaintiff has reason to suspect that his or her injury resulted from a defective product." Fox v. Ethicon Endo-Surgery, Inc., 110 P.3d 914, 924 (Cal. 2005). "More broadly stated, if a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim." Id.

Colvin argues this principle applies to her case, as she received no specific warning that the Mirena could perforate her uterus. Further, her doctor told her there was not a high risk that the Mirena would move. Even after the device moved, she did not understand that there was any flaw in the device until December 2012 when she saw an attorney advertisement about Mirena defects.

Colvin refutes Bayer's reliance on the Dalkon Shield case, because the plaintiff whose claim was dismissed in that action had testified "that she had full knowledge of her injuries and was advised by her treating physician in March, 1973 that the Dalkon Shield caused her injuries." Dalkon Shield, supra, 503 F. Supp. at 198. Colvin argues

her case is distinguishable, as she lacked the sort of knowledge that the Dalkon Shield plaintiff possessed.

**C. Plaintiff Kelsie Denton – Texas Law**

Denton notes that Texas courts have applied the discovery rule to toll the statute of limitations in medical device cases, including IUDs. Mann v. A.H. Robins Co., 741 F.2d 79, 81 (5th Cir. 1984) (Dalkon Shield case); Timberlake v. A.H. Robins Co., 727 F.2d 1363 (5th Cir. 1984) (same); Corder v. A.H. Robins Co., 692 S.W.2d 194, 196-97 (Tex. Ct. App. 1985) (same).

Denton argues that there is no evidence that she knew the Mirena was the cause in fact of her injuries. Plaintiffs argue that having a physical problem with an IUD does not, on its own, start the clock ticking on a personal injury cause of action under Texas law. Denton testified that she did not know how the Mirena "got out" prior to her surgery, as it was never explained to her. (Pls.' Ex. 4, Denton Dep., at 185:10-17).

Denton refutes Bayer's reliance on the April 20, 2011 email from Denton to her mother. Denton argues Bayer shows only that Denton's mother—not Denton herself—suspected a link between the Mirena and Denton's injuries. The discovery rule requires a plaintiff him or herself to know the cause of injury.

Denton argues Judge Seibel's interpretation of Texas law in In re Mirena IUD Prods. Liab. Litig., 29 F. Supp 3d 345 (S.D.N.Y. 2014) is distinguishable, because the plaintiff in that case was told that the Mirena contributed to her injuries. Plaintiffs argue, although "Denton was told by Dr. Pellicena that the Mirena had perforated and migrated and needed to be surgically removed . . . . [s]he was not told the Mirena had anything to do with causing her injury." (Pls.' Opp. to Defs.' Mot. for Summ. J. at 25). The

knowledge that the Mirena contributed to her injury is essential to beginning the statute of limitations. The statute of limitations did not begin running on Denton's claim until June 2011, when her doctor explained to her that the Mirena caused her injuries.

**D. Plaintiff Lakisha Whatley – Georgia Law**

Under Georgia's discovery rule, a personal injury case of action does not accrue until a plaintiff knows, or through the exercise of reasonable diligence should discover, not only the nature of her injury, but also the causal connection between the injury and the alleged negligent conduct. Ballew v. A.H. Robins Co., 688 F.2d 1325 (11th Cir. 1982). Whatley argues she did not know that the perforation of her uterus was the fault of her Mirena at the time of her surgery. As she lacked this knowledge of the causal relationship between the device and her claim, her cause of action did not accrue at that time.

Whatley relies on Ballew, a case in which the Eleventh Circuit ruled plaintiff's action was timely more than two years after her IUD was removed, because her subsequent hysterectomy was an injury from a continuing tort. Ballew, supra, 688 F.2d at 1327. The court determined there was an issue of fact as to whether plaintiff should have discovered the connection between the IUD and her hysterectomy.

Whatley argues that the facts of Ballew apply to her claim. She notes that her physician testified that perforation can occur without anyone being at fault. (Pls.' Ex. 7, Dr. Peek Dep., at 82:4-11.) Whatley did not learn that Mirena caused her injuries until 2013. Under Georgia law, her claim did not accrue until that time.

**MDL Decisions Applying New Jersey's Discovery Rule**

Plaintiffs contend Witherspoon, upon which Judge Seibel relied in applying New Jersey's discovery rule to Mirena claims, does not apply to Plaintiffs' claims. Plaintiffs note that Witherspoon was decided on a fraudulent joinder motion. In Witherspoon, the court issued its decision before discovery. Plaintiffs argue that, while the claim in Witherspoon was decided on the pleadings, they have provided substantial evidence about the application of the discovery rule to their cases. Although Plaintiffs knew they were injured, they were not aware that Mirena's defect(s) caused their injuries.

**Bayer's Reply**

Bayer refutes Plaintiffs' theory that their causes of action did not accrue because they did not know that Mirena "had anything to do with causing [their] injur[ies]." (Pls.' Opp. to Defs.' Mot. for Summ. J. at 25.) Bayer responds that "[a] Mirena perforation by its very nature is related to, or causally associated with, the Mirena itself because it is the Mirena that has gone through the uterine wall and is found in the abdomen." (Defs.' Reply to Pls.' Opp. to Defs.' Mot. for Summ. J. at 2.) "This is not a situation where a woman's exposure to a drug during pregnancy caused her child's injuries, or where antibiotic use led to tooth discoloration (as the cases Plaintiffs rely on describe)." Id.

Bayer argues further that even if Plaintiffs' interpretation of the discovery rule were correct, their argument fails because they never demonstrated reasonable diligence in investigating their injuries. Further, Plaintiffs knew of all facts necessary in order to state their failure to warn claims.

### A. Perforation is Sufficient for the Cause of Action to Accrue

Bayer argues the cases Plaintiffs rely on involve products that caused a latent or generic injury. Plaintiffs reiterate the applicability of Tucker, supra, 158 F.3d at 1049 (9th Cir. 1998). The Ninth Circuit stated the statute of limitations would not be tolled when breast implants migrated, because that injury is obviously connected to the implants themselves. Id. Bayer argues the perforation of a Mirena is an injury that is obviously related to the device, such as breast implants that migrate.

Bayer notes that Plaintiffs do not mention the Stoker action, in which Judge Seibel held that under New Jersey's discovery rule plaintiff could be charged with knowledge "of the causal relationship between the IUD and her injury" when "[she] was advised that her IUD had migrated and become embedded in the uterine wall." (Defs.' Ex. 38, 10/22/14 MDL Conference Transcript, at 16:11-16.) Bayer argues further that Plaintiffs ignore courts' interpretations of the discovery rules of California and Pennsylvania, the home states of Colvin and Barrett, respectively. Judge Seibel interpreted California's discovery rule to dismiss seventeen (17) California plaintiffs who alleged perforation. In re: Mirena IUD Products Liab. Litig., 2015 U.S. Dist. LEXIS 3372 (S.D.N.Y. Jan. 9, 2015). The court in Place, supra, 595 F. Supp. at 1009 held that the statute of limitations began to run under Pennsylvania law after diagnosis of perforation.

Bayer argues Plaintiffs misinterpret case law, including in Dalkon Shield, supra, 503 F. Supp. at 194, which Plaintiffs claim is distinguishable from their claims because the Dalkon Shield plaintiff was told explicitly that her IUD caused her injuries. But Bayer notes that the Dalkon Shield court ruled plaintiff was "chargeable with knowledge of the causal relationship between her injuries and the Dalkon Shield" when she was "explicitly

advised by her treating physician that the intrauterine device had perforated." Id. at 198. Under that standard, Plaintiffs' claims would have accrued upon diagnosis of perforation and their claims would be time-barred.

Bayer refutes Plaintiffs' claim that Witherspoon does not apply to this case because it was decided on the pleadings. (Pls.' Br. at 14-15.) Bayer argues the motion to dismiss and fraudulent joinder standard applied in Witherspoon is more plaintiff-friendly, because it assumes all facts pled are true. Witherspoon held as a matter of law that a plaintiff possesses "reasonable medical information" connecting Mirena to a perforation injury upon learning that the Mirena perforated her uterus. Witherspoon, supra, at *3-*5 (citation omitted). That standard dictates Bayer is entitled to Summary Judgment.

Bayer refutes Plaintiffs' interpretation of the discovery rule standard as requiring "knowledge of Defendants' wrongdoing and tortious conduct." (Pls.' Br. at 1.) The standard requires less: "knowledge of fault does not mean knowledge of a basis for legal liability or a provable cause of action; knowledge of fault denotes only facts suggesting the possibility of wrongdoing." Staub v. Eastman Kodak Co., 320 N.J. Super. 34, 45 (App. Div. 1999) (citation omitted). "[L]egal and medical certainty of understanding the legal significance of known facts is not required for a claim to accrue." Cornett, supra, 211 N.J. at 377. Plaintiffs' diagnoses of perforation alone provided them with sufficient knowledge for their claims to accrue.

**B. Plaintiffs Offer No Evidence of Reasonable Diligence in Investigating Their Claims**

The discovery rules of New Jersey, Pennsylvania, California, Texas, and Georgia require a plaintiff to affirmatively show that she exercised reasonable diligence in

pursuing or investigating her claims. See Cnty. of Morris v. Fauver, 153 N.J. 80, 110 (1998); Cochran v. GAF Corp., 666 A.2d 245, 250 (Pa. 1995); In re N. Dist. of California "Dalkon Shield" IUD Products Liab. Litig., 503 F. Supp at 197; Bayou Bend Towers Council of Co-Owners v. Manhattan Const. Co., 866 S.W.2d 740, 742 (Tex. App. 1993); Rivell v. Private Health Care Sys., Inc., 87 F. Supp. 2d 1277, 1287 n.6 (S.D. Ga. 2012).

Even if Plaintiffs' interpretation of the discovery rule is correct, and their perforation diagnoses did not trigger the statute of limitations, Plaintiffs had an affirmative duty to investigate their claims. If they cannot put forth evidence of a diligent investigation, they cannot survive Summary Judgment.

1. **Plaintiff Kate Barrett**

Barrett does not offer any evidence that she diligently investigated her causes of action after her perforation diagnosis. Barrett alleges she asked her doctor whether any other patients had experienced a perforation before, and her doctor told her he had not. (Pls.' Br. at 3.) Bayer argues this was sufficient to arouse Barrett's suspicion. Bayer rejects as unreasonable Barrett's contention that she made no connection between the Mirena and her injuries until viewing an attorney advertisement. See Millian, supra, slip op. at 14 (N.J. Super. Ct. Law Div. Mar. 15, 2011) (Martinotti, J.S.C.) (rejecting plaintiffs' request to toll the statute of limitations until she saw an attorney advertisement; "[t]he law does not permit an injured party an indefinite amount of time until they happen to hear about other cases involving the product.")

2. **Plaintiff Daphne Colvin**

Colvin does not offer any evidence that she diligently investigated her causes of action after her perforation diagnosis. Rather, she describes no investigation until seeing a commercial about Mirena lawsuits in December 2012. See Millian, slip op. at 14.

3. **Plaintiff Kelsie Denton**

Denton does not offer any evidence that she diligently investigated her causes of action after her perforation was diagnosed. She argues that she did not know of her injuries until June 2011, less than two years before her case was filed on May 2, 2013. (Pls.' Br. at 6.) Denton asserts that she learned of her injury when her doctor x-rayed her and told her the Mirena would have to be removed. (Defs.' Ex. 19, Fifth Amend Plaintiff Fact Sheet, at KDenton PFS-000179-180.)

But Bayer cites evidence that Denton received an x-ray on April 19, 2011 that revealed her Mirena had perforated. Her doctor called her that night to inform her she would need surgery. Denton's email to her mother on April 20, 2011, in which she told her mother she needed surgery, confirms this timeline.

Bayer argues Denton never explains what information she lacked in April 2011 that she later learned in June. Nor does Denton explain any effort in April 2011 that would satisfy her duty to investigate her causes of action.

4. **Plaintiff Lakisha Whatley**

Whatley offers no evidence that she diligently investigated her causes of action after her perforation diagnosis. Moreover, Whatley testified that she concluded that her injuries were the result of the Mirena when she "had to have surgery." (Defs.' Ex. 33, L. Whatley Dep. At 150:7-10.)

### C. Plaintiffs Knew All Necessary Facts at the Time of Their Perforation Diagnoses

Bayer argues that even if Plaintiffs' interpretation of the discovery rules of New Jersey, Pennsylvania, California, Texas, and Georgia is correct, and Plaintiffs' claims did not accrue until they were aware of every detail necessary to state a claim, their perforation diagnoses were sufficient for that standard.

Plaintiffs were aware upon their perforation diagnoses that they had been warned of certain risks and that they had suffered an injury they believed to be outside of those warned risks. There was no additional information Plaintiffs could learn from attorney advertisements that was necessary to state their claim for failure to warn.

## III.

## DECISION

### A. Summary Judgment Standard

Under the developed governing standard, a summary judgment motion continues to require "searching review" of the record on the part of the trial court to ascertain whether there is a genuine issue of material fact. R. 4:46-2. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). As such, 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 fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. Summary judgment must be granted when the evidence "is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986). This means that summary judgment cannot be defeated if the non-

moving party does not "offer[] any concrete evidence from which a reasonable juror could return a verdict in his favor." Id. at 256, 106 S. Ct. at 2514, 91 L. Ed. 2d at 217. The non-movant has the "burden of producing in turn evidence that would support a jury verdict," and must "set forth specific facts showing that there is a genuine issue for trial." Id. at 256; 106 S. Ct. at 2514; 91 L. Ed. 2d at 217.

"[C]onclusory and self-serving assertions" in certifications without explanatory or supporting facts will not defeat a meritorious motion for summary judgment. Puder v. Buechel, 183 N.J. 428, 440 (2005) (citing Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 1999)). Competent opposition requires "competent evidential material" beyond mere "speculation" and "fanciful arguments." Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005), appeal dismissed, 183 N.J. 592 (2006); O'Loughlin v. Nat'l Cmty. Bank, 338 N.J. Super. 592, 606-07 (App. Div.) (opponent must do more than establish abstract doubt regarding material facts), certif. denied, 169 N.J. 606 (2001). See also James Talcott, Inc. v. Shulman, 82 N.J. Super. 438, 443 (App. Div. 1964) ("Mere sworn conclusions of ultimate facts, without material basis or supporting affidavits by persons having actual knowledge of the facts, are insufficient to withstand a motion for summary judgment.").

**B. Law of the Case**

The "law of the case" doctrine "applies to the principle that where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit." State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974) (citing Wilson v. Ohio River Co., 236 F. Supp. 96, 9 (S.D.W. Va. 1964)). Under law of the case doctrine, "once an issue is litigated and

decided in a suit, relitigation of that issue should be avoided if possible." Sisler v. Gannett Co., 222 N.J. Super. 153, 159 (App. Div. 1987) (citing Hale, 127 N.J. Super. at 410). "Prior decisions on legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous." Id. (citations omitted). Application of the law of the case doctrine is an exercise of discretion that requires a court to "take into account a number of relevant factors that bear on the pursuit of justice and, particularly, the search for truth." State v. Reldan, 100 N.J. 187 (1985).

This Court is a proponent of federal/state cooperation and has extended the law of the case doctrine to a mass tort [MCL]. In fact, this application is encouraged and is an underpinning of the goals and priorities of MDL/MCL litigation. See Manual for Complex Litigation (Fourth) § 22.1 (2004). This Court has noted that, while it shall not cede its jurisdiction, it takes notice of decisions in the parallel MDL cases. The coordination of state and federal courts is central to the goals of the MCL and MDL process. While the rulings in MDL litigation are not binding on this Court, they are persuasive.

**C. Discovery Rule**

New Jersey's discovery rule, was established "[t]o ameliorate the 'often harsh and unjust results which flow from a rigid and automatic adherence to a strict rule of law . . .'" Baird v. Am. Med. Optics, 155 N.J. 54, 65 (quoting Lopez v. Swyer, 62 N.J. 267, 273-74 (1973)). "The discovery rule delays the accrual of a cause of action until 'the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.'" Id. at 66 (quoting

Lopez, supra, 62 N.J. at 272). "Critical to the running of the statute is the injured party's awareness of the injury and the fault of another." Id. (citation omitted). "The discovery rule prevents the statute of limitations from running when injured parties are reasonably unaware that they have been injured, or, although aware of an injury, do not know that the injury is attributable to the fault of another." Id. (citation omitted).

Bayer has demonstrated that Plaintiffs' claims are time-barred under New Jersey law, as well as under the state laws of the individual plaintiffs' residence. Significantly, two MDL judges ruled Mirena plaintiffs' claims accrued when they learned of their perforations. Witherspoon, supra, 2013 U.S. Dist. LEXIS 163616; In re Mirena IUD Prods. Liab. Litig., supra, 29 F. Supp. 3d at 359, n.8. Further, under New Jersey law, an action accrues when a plaintiff has "knowledge of both injury and fault." Fahey v. Hollywood Bicycle Ctr., Inc., 386 F. App'x 289, 290 (3d Cir. 2010). "[K]nowledge of fault does not mean knowledge of a basis for legal liability or a provable cause of action; knowledge of fault denotes only facts suggesting the possibility of wrongdoing." Staub, supra, 320 N.J. Super. at 45.

As Bayer notes, Plaintiffs rely on cases involving latent injuries or injuries without an obvious connection to the product. (See Defs.' Reply to Pls.' Opp. to Defs.' Mot. for Summ. J. at 6-7.) Plaintiffs' injuries—the migration of and perforations by their IUDs—were related directly to the device. Plaintiffs' argument that their claims did not accrue until they received information explicitly stating that the Mirena migrated due to a defect in the product is unavailing. "The law does not permit an injured party an indefinite amount of time until they happen to hear about other cases involving the product." Millian, supra, slip op. at 14 (rejecting plaintiffs' request to toll the statute of limitations

until she saw an attorney advertisement). As the MDL courts have found, "[w]hen the plaintiff knows that the IUD is no longer in the uterus and has to be removed from wherever it has migrated, the conclusion that the statute of limitations is triggered seems unavoidable." In re Mirena IUD Prods. Liab. Litig., supra, 29 F. Supp. 3d at 355.

The discovery rules of the individual Plaintiffs' states apply with the same effect as New Jersey's for the reasons delineated above in Bayer's argument. Under the discovery rules of Pennsylvania, California, Texas, and Georgia, Plaintiffs' claims accrued when they learned their Mirenas had perforated or, in Barrett's case, no later than when she had surgery. Moreover, Plaintiffs have offered no evidence that they investigated their claims upon their perforation diagnoses.

**CONCLUSION**

For the foregoing reasons, Bayer's Motion for Summary Judgment is GRANTED.[4]

[4] This decision is limited to the facts presently before the Court regarding these Plaintiffs. Any contention that other plaintiffs are similarly situated to the Plaintiffs affected by this motion will be decided on a case-by-case basis after a formal notice of motion is filed. The Court will review each subsequent motion on the merits applying the appropriate principles of law.