

## Suspicion Starts the Clock

Wednesday, February 29, 2012

Suspicion. It is the stuff of great movies. We could name just about any Hitchcock movie here, but why not go with the aptly titled *Suspicion* starring Cary Grant and Joan Fontaine (who by the way won the Best Lead Actress Oscar for her role in this film). After a chance meeting on a train, Johnnie Aysgarth, reckless gambler and playboy, and Lina McLaidlaw, shy heiress, have a whirlwind romance and are married. It is only after the honeymoon that Lina discovers her new husband's true character and she starts to become suspicious that he is a murderer and she is his next intended victim. Cue eerie music.

It is also the stuff of great songs. And here we could quote any of a number of country hits about cheating spouses and double-crossing gamblers. But, again, why not go straight for the most obvious. *Suspicious Minds* was Elvis Presley's seventeenth and last number one hit single. Written and originally recorded by Mark James (who also wrote Grammy-winning "Always on My Mind"), the song is about two people whose suspicions of one another are ruining their relationship.

Which brings us to today's case – Messina v. Amylin Pharmaceuticals, Inc., 2011 U.S. Dist. LEXIS 153392 (W.D. Pa. Dec. 30, 2011) -- which is all about suspicions. While we typically don't spend much time on statute of limitations cases, we liked the message of this case which is rooted less in state law and more in general common sense.

Plaintiff was prescribed Exenatide, commonly known as Byetta, for treatment of her diabetes. The Byetta warning label included acute pancreatitis as a possible adverse reaction. Id. at \*3. Plaintiff was diagnosed with pancreatitis in March 2007 and hospitalized for treatment for almost two months. Shortly after her discharge in June 2007, she retained her attorney to investigate the matter. Id. at \*2. Her attorney filed suit against the drug manufacturers on November 18, 2009 – more than two years after being retained. Id.

Pennsylvania has a two year personal injury statute of limitations. Like many states, Pennsylvania has also adopted the discovery rule – meaning the "running of the statute is

tolled until the injured party is reasonably aware that her injury has been caused by another's conduct." Id. at \*5 (citation omitted). A party must also exercise "due diligence" in becoming aware. Id. at \*7. To the lay person, the answer to when someone knew something may seem fairly straightforward and due diligence can be as easy as asking your wife "what year did we vacation in the Keys?" In the legal arena, however, what constitutes "reasonably aware" is the question most often at the heart of drug and device statute of limitations cases. And, as with the Messina case, plaintiffs often want to argue that their own suspicions are trumped by medical certainty. Fortunately, this court didn't agree.

Plaintiff testified "that she believed Byetta caused her injury when she was discharged from the hospital in June, 2007." Id. at \*7 This would be enough for us and it was enough for the court too:

*"Given Plaintiff's testimony that she subjectively attributed her injury to Byetta at that time, she was clearly on at least inquiry notice, i.e., her belief was sufficient to trigger running of her two-year statutory period to investigate."*

Id. Plaintiff's counsel tried to muddy the waters with testimony from plaintiff's mother that while her daughter was in a coma "her physicians did not tell [plaintiff's mother] that Byetta *did not* cause her daughter's pancreatitis and she did not know if [the doctors] were sure what caused it. Id. at \*8-9. That's a lot of double negatives. Her doctor's certainty wasn't the trigger. Plaintiff's suspicions were. Whether that suspicion was specifically that Byetta caused her injury or a more general suspicion that "something went wrong with her care" – the time for plaintiff to investigate started to run. And because plaintiff had retained counsel, that duty to investigate applied equally (if not more so) to her counsel:

*"[Plaintiff] and [her] counsel on [her] behalf were obliged to make adequate inquiry during the two (2) year period applicable under Pennsylvania law, to form/substantiate reasonable beliefs as to the cause of Plaintiff's injuries and any resultant potential legal liability, and to file the appropriate actions in the appropriate courts."*

*Counsel's failure to file the Complaint against Defendants within the statutory period leaves this Court no alternative but to hold the action time barred.”*

Id. at \*9.

Pennsylvania actually has a fairly long history of cases that support the proposition that, absent an affirmative diagnosis to the contrary, the plaintiff's subjective suspicion satisfies the discovery rule. See Danysh v. Eli Lilly & Co., 2011 U.S. Dist. Lexis 104997 (Mag. M.D. Pa. July 13, 2011) (summary judgment granted on statute of limitations grounds, holding that knowledge of the precise cause of injury is unnecessary to the discovery rule); Debiec v. Cabot Corp., 352 F.3d 117 (3d Cir. 2003) (summary judgment affirmed in one of four consolidated cases; a definitive medical diagnosis is not necessary to start the statute running when a plaintiff suspects he or she has been injured and believes he or she knows the cause of her injury; where plaintiff did not receive a definitive negative diagnosis, he should have investigated his condition further and had additional tests); Russo v. Cabot Corp., 2002 U.S. Dist. Lexis 12134 (E.D. Pa. Apr. 22, 2002) (summary judgment granted where decedent was suspicious and began collecting newspaper clippings about possible links to beryllium disease; suspicions obligated her to investigate her potential claim); Love v. Raymark Industries, Inc., 633 A.2d 1185 (Pa. Super. 1993) (knowledge of a “dirty lung” and a diagnosis of lung cancer, combined with the plaintiff's suspicion that both were related to occupational exposure to asbestos, satisfies the discovery rule; even if plaintiff was not informed of the cause by his physicians, it was unreasonable as a matter of law for him not to make inquiry); McD v. Rosen, 621 A.2d 128 (Pa. Super. 1993) (the statute begins to run when 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); Stauffer v. Ebersole, 560 A.2d 816 (Pa. Super. 1989) (while a speculative diagnosis may have been insufficient in and of itself to satisfy the discovery rule, it activated a duty on plaintiffs' part to pursue whether the injury was caused by an outside act or otherwise a potential plaintiff with a tentative diagnosis could wait indefinitely).

While the suspicion of movies and music makes for good entertainment, plaintiffs in products cases (at least in Pennsylvania) should take their suspicions seriously.

Labels: [Pennsylvania](#), [Statute Of Limitations](#)