Filed 11/4/03

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BRANDI R. FOX,

Plaintiff and Appellant,

v.

ETHICON ENDO-SURGICAL, INC.,

Defendant and Respondent.

F041148

(Super. Ct. No. 0654613-9)

# OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Stephen J. Kane, Judge.

David J. St. Louis for Plaintiff and Appellant.

Drinker Biddle & Reath, Charles F. Preuss and Alan J. Lazarus for Defendant and Respondent.

---

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

Appellant Brandi Fox (Fox) filed a medical malpractice action against her surgeon, asserting his negligence during surgery caused a perforation of her small intestine and subsequent complications. During his deposition, the surgeon first raised the possibility that the perforation was caused by a malfunctioning stapler. Fox then filed an amended complaint asserting a products liability cause of action against the manufacturer of the stapler, respondent Ethicon Endo-Surgery, Inc. (Ethicon). The amended complaint was filed three months after the deposition, but 31 months after the initial surgery.

Ethicon filed a demurrer, asserting the cause of action was time barred by the one-year statute of limitations. The trial court sustained the demurrer without leave to amend based on the principle of imputed simultaneous discovery of causes of action, i.e., "[w]hen a plaintiff has cause to sue based on knowledge or suspicion of negligence the statute [of limitations] begins to run as to *all* potential defendants." (*Bristol-Myers Squibb Co. v. Superior Court* (1995) 32 Cal.App.4th 959, 966, disapproved on other grounds in *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 410, fn. 8.)

Although we agree with the result reached in *Bristol-Myers Squibb*, we reject its bright line rule of imputed simultaneous discovery of causes of action and conclude the delayed discovery of Fox's products liability claim should be analyzed based on the facts and circumstances relevant to that claim. Therefore, Fox should be given an opportunity to allege facts explaining why she did not have reason to discover earlier the factual basis of her products liability claim. Accordingly, we reverse judgment and direct the trial court to grant Fox leave to amend.

## FACTS AND PROCEEDINGS

On April 10, 1999, Fox underwent gastric bypass surgery performed by Dr. Herbert Gladen. During this surgery, Fox was unconscious as the result of general anesthesia and, thus, did not observe the procedures or equipment used. After the surgery--the record is not clear as to the exact length of time--Fox went home. However, she returned to the hospital a few days after the surgery because she did not feel well. Her condition

deteriorated, and she was taken to the operating room for exploratory surgery. Dr. Gladen found a perforation or leak at the staple closure of the proximal jejunum and attempted to close it. Dr. Gladen's operative report for the exploration and remedial action states, "no reason could be identified for the perforation."[1] Subsequently, Fox remained hospitalized until March 4, 2000, and apparently required additional surgeries.

On April 6, 2000, in accordance with Code of Civil Procedure section 364,[2] Fox served a "Notice of Intent to Commence Action" on Dr. Gladen and the two hospitals where the surgery and subsequent care took place. Prelitigation discussions with these health care providers did not resolve Fox's claim of professional negligence.

On June 28, 2000, Fox filed a complaint in Fresno County Superior Court for medical malpractice against Dr. Gladen and the two hospitals alleging that "Defendants lacked the necessary knowledge and skill to properly care for [Fox's] condition and were negligent and unskillful in the diagnosis, treatment and prescription procedures utilized in treating [her] condition. The negligence claimed is for negligently performing pre-surgical, surgical, and post-surgical care so as to cause injuries and damages to … Fox."

The complaint was filed on the Judicial Council form for personal injury complaints and named as defendants Dr. Gladen, the two hospitals, and Does 1 to 100, inclusive. The complaint alleged, "[a]t all times herein mentioned, the defendants named herein as DOES 1 through 100, inclusive, were the agents, servants, and employees of each of the remaining defendants, and in doing the things hereinafter alleged, were acting within the course and scope of their authority as such agents, servants and employees, and with the permission and consent of their co-defendants."

---

1 The exploratory surgery may have been performed on April 13, 1999 (as stated in the operative report) or on the 14th (as stated by Dr. Gladen in his deposition testimony). The operative report bears a signature date of May 20, 1999.

2 All subsequent statutory references are to the Code of Civil Procedure.

During his August 13, 2001, deposition, Dr. Gladen testified that when he performed a postsurgery exploration of Fox's abdomen he found a leak at the staple closure of the small intestine. Dr. Gladen further testified that the bowel had been stapled using an Ethicon GIA-type stapler, the stapler had been furnished by the hospital, and he had experienced occasions where the stapler was used and subsequent leaks occurred.

On November 28, 2001, Fox filed a first amended complaint that restated her negligence cause of action against Dr. Gladen and the hospitals, added Ethicon as a named defendant, and added a products liability cause of action against Ethicon that alleged she was injured by an Ethicon GIA-type stapler on or about April 10, 1999. The claims against Ethicon were set forth on the Judicial Council form for a products liability cause of action; Fox checked the boxes relating to "counts" for (1) strict liability concerning the design, manufacture and assembly of the product, (2) negligence, and (3) breach of implied warranty.

The first amended complaint also added the allegation that Fox "did not discover, nor suspect, nor was there any means through which her reasonable diligence would have revealed, or through which she would have suspected the Ethicon GIA-type Stapler as a cause of her injury until the deposition of [Dr. Gladen] was taken on August 13, 2001." The first amended complaint continued to name as defendants Does 1 through 100.

Ethicon filed a demurrer to the first amended complaint on the ground that the products liability cause of action against Ethicon showed on its face that it was time-barred by the one-year statute of limitations contained in former section 340, subdivision (3).

In her declaration opposing the demurrer, Fox stated that she (1) was never told during the course of her care and treatment subsequent to the gastric bypass surgery that the stapler had malfunctioned in any way or was responsible for the postsurgery problems she suffered; (2) did not believe she was told that a stapler type instrument was to be used on her during the gastric bypass surgery; and (3) first became aware of a possible stapler malfunction when her attorneys told her about the doctor's testimony after his deposition.

Fox's declaration also states her willingness to file a second amended complaint to clarify the facts that support her position that until the deposition of her doctor she had no suspicions, and no basis on which a reasonable person would have had suspicions, that Ethicon's stapler had malfunctioned.

Fox's attorney filed a declaration stating that neither the operative report nor the reparative operative report indicated that the stapler had malfunctioned or misfired. The declaration also asserts that (1) Dr. Gladen's deposition was taken during the normal course of discovery in a medical malpractice lawsuit, (2) Fox pursued the lawsuit and discovery with reasonable diligence, and (3) Fox could allege that during the entire time of Dr. Gladen's care of Fox after the surgery he never mentioned to Fox a malfunction or defect in the stapler he used in her surgery.

On May 15, 2002, the trial court issued a tentative ruling indicating its intention to sustain the demurrer without leave to amend. In concluding the products liability cause of action was time barred, the trial court relied upon *Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th 383 (*Norgart*); and *Bristol-Myers Squibb Co. v. Superior Court*, *supra*, 32 Cal.App.4th 959 (*Bristol-Myers Squibb*). In applying those cases, the trial court determined that when a plaintiff has cause to sue based on knowledge or suspicion of negligence (in this case suspicion of medical malpractice by the doctor and hospitals), the statute of limitations begins to run as to all defendants, including a manufacturer subject to a products liability claim. The tentative ruling also stated Fox failed to show that an amendment could overcome the statute of limitations defense.

After hearing argument from counsel, the trial court adopted the tentative ruling as its order; the demurrer was sustained without leave to amend. Subsequently, a judgment was entered in favor of Ethicon. Fox appeals from that judgment.

## DISCUSSION

### I. Standard of Review

On appeal from a judgment sustaining a demurrer without leave to amend, the reviewing court gives the complaint a reasonable interpretation and treats the demurrer as admitting all material facts properly pleaded. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The reviewing court must reverse the judgment if (1) the plaintiff has stated a cause of action under any possible legal theory, or (2) the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The burden of proving a reasonable possibility of cure is squarely on the plaintiff. (*Ibid*.)

### II. Statute of Limitations and The Discovery Rule

#### A. General Rule For Accrual of a Cause of Action

Under the statute of limitations for personal injury actions in effect at the time Fox filed her complaint (see former § 340, subd. (3), as amended by Stats.1982, ch. 517, § 97, pp. 2334-2335),[3] Fox was required to bring her products liability cause of action within one year after its accrual. (*Norgart*, *supra*, 21 Cal.4th at pp. 397, 404 [wrongful death]; *G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22 [personal injury]). The general rule for the accrual of a cause of action "sets the date as the time when the cause of action is complete with all of it elements." (*Norgart* at p. 397.) The essential elements of a cause of action are described generically by the Supreme Court as (1) wrongdoing or wrongful conduct, (2) cause or causation, and (3) harm or injury. (*Ibid*.)

---

[3] Currently, "[a]n action for … injury to … an individual caused by the wrongful act or neglect of another" must be commenced within the two-year period prescribed by section 335.1. In 2002, the Legislature found the one-year limitations period of section 340, subdivision (3) "unduly short" and adopted a two-year period "to ensure fairness to all parties." (Stats. 2002, ch. 448, p. 2137, § 1.)

### B. Postponed Accrual Under The Discovery Rule

The general rule regarding accrual of a cause of action for purposes of former section 340, subdivision (3) is subject to an exception referred to as the "discovery rule." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [personal injury allegedly caused by defective drug] (*Jolly*).) Under the discovery rule, the accrual of the cause of action is postponed "until the plaintiff discovers, or has reason to discover, the cause of action." (*Norgart*, *supra*, 21 Cal.4th at p. 397.) A reason to discover the cause of action exists when the plaintiff "has reason at least to suspect a factual basis for its elements." (*Id*. at p. 398.)

A reason to suspect a factual basis for the elements of a cause of action exists when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. (*Norgart*, *supra*, 21 Cal.4th at p. 398; *Jolly*, *supra*, 44 Cal.3d at pp. 1110-1111.) Ignorance of legal theories or the legal significance of facts does not delay the running of the statute. (*Norgart* at p. 397; *Jolly* at p. 1110.) Furthermore, a "plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly* at p. 1111.)

The language used by the Supreme Court in articulating the discovery rule--"plaintiff discovers, or has reason to discover" (*Norgart*, *supra*, 21 Cal.4th at p. 397) and "plaintiff suspects or should suspect" (*Jolly*, *supra*, 44 Cal.3d at p. 1110)--clearly indicates that the discovery rule contains a subjective alternative and an objective alternative. The words "plaintiff suspects" refer to "a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing." (*Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391, citing *Jolly* at p. 1110.) The words "plaintiff should suspect"

refer to "an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing." (*Kitzig* at p. 1391.)

Applying the subjective and objective alternatives to a particular case is recognized as "presumptively in the domain of the jury" (*Bristol-Myers Squibb*, *supra*, 32 Cal.App.4th at p. 964) or "usually … for the trier of fact" (*Rose v. Fife* (1989) 207 Cal.App.3d 760, 771). Nevertheless, these issues may be resolved by the court as a matter of law in certain circumstances. "While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper." (*Jolly*, *supra*, 44 Cal.3d at p. 1112.) For example, *Norgart*, *Jolly*, *Bristol-Myers Squibb*, and *Rose v. Fife* are all cases in which the application of the discovery rule was decided in favor of the defendants as a matter of law on motions for summary judgment.

Based on the foregoing principles concerning the discovery rule and the elements of a cause of action, a fundamental or basic approach to the delayed accrual of a cause of action for purposes of former section 340, subdivision (3) involves the following steps. First, the identification of each element of the cause of action--a question of law. Second, as to each element, a determination of whether or not the plaintiff had actual knowledge of the factual basis for that element--a question of fact. Third, as to the remaining elements, a determination of whether or not the plaintiff had an actual suspicion of the factual basis for those elements--a question of fact. Fourth, as to the remaining elements of the cause of action not actually known or suspected by the plaintiff, a determination of whether a reasonable person would have suspected the factual basis for each such element--generally a question of fact. (See *Rose v. Fife*, *supra*, 207 Cal.App.3d at p. 770 [reasonability is generally a question of fact].) This four-step method of analysis subsequently will be referred to as the "Basic Approach" to the discovery rule.[4]

---

[4] Application of the Basic Approach can be organized by placing the relevant facts into a nine-cell (3 x 3) matrix comprised of three columns for the three generic elements

In *Rose v. Fife*, *supra*, the Second District applied the discovery rule to a medical malpractice cause of action and a products liability cause of action using the Basic Approach, although it did not label its method or number its steps. The Second District found as a matter of law that the plaintiff suspected or should have suspected that (1) the manufacturer of her intrauterine device (IUD) wronged her by supplying a defective product, and (2) her doctor wronged her by prescribing it. (*Rose v. Fife*, *supra*, 207 Cal.App.3d at p. 771.) As to the elements of injury and causation, when plaintiff was hospitalized with a pelvic infection she was told by two doctors that the IUD caused the infection and one of those doctors told her that she was "no doubt sterile" because of her infection and high fever. (*Id*. at p. 766.) As to the element of wrongdoing by the manufacturer--the remaining element of her products liability cause of action--more than one year before filing her lawsuit, plaintiff was suspicious of IUD's per se, worried about using one without having had children, and alerted to the dangers of IUDs by the media. (*Id*. at p. 771.) The Second District inferred from this uncontradicted evidence plaintiff suspected or should have suspected the manufacturer of her IUD of wrongdoing and issued a writ of mandate directing the trial court to grant the manufacturer's motion for summary judgment. (*Id*. at pp. 771-773.)

### C. *Bristol-Myers Squibb* Rule of Simultaneous Discovery

In the *Bristol-Myers Squibb* case, the Fourth District did not use the Basic Approach to determine if there was a delay in the plaintiff's discovery of a products liability cause of action against the manufacturer of her silicone breast implants. Instead, the Fourth District "reinterpreted the *Jolly* test"[5] to create the following version of the discovery rule: "When a plaintiff has cause to sue based on knowledge or suspicion of

---

(injury, causation and wrongdoing) and three rows representing the hierarchy for the three states of mind (actual knowledge, actual suspicion and reasonable suspicion).

[5] This is the Fourth District's own characterization of what it did in the *Bristol-Myers Squibb* case. (*Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1058, fn. 5.)

negligence the statute starts to run as to *all* potential defendants" (*BMS* rule). (*Bristol-Myers Squibb*, *supra*, 32 Cal.App.4th at p. 966, italics in original.) It appears the *Jolly* test referred to by the Fourth District is the often quoted statement that "'the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, *that someone had done something wrong to her*.'" (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th at 926, 932, italics added (*Bernson*), quoting *Jolly*, *supra*, 44 Cal.3d at p. 1110.)

Because the *BMS* rule is based on the discussion and holding in *Jolly*, we first consider whether the *BMS* rule was mandated by the holding in *Jolly* and subsequent decisions by the Supreme Court.

**1. *BMS* rule not mandated by Supreme Court precedent**

a. *Norgart*

In *Norgart*, the Supreme Court's most recent decision applying the delayed discovery rule to a products liability cause of action, the Supreme Court had the opportunity to approve and apply the *BMS* rule, but left its status undecided. (See *Norgart*, *supra*, 21 Cal.4th 383.)

In *Norgart*, parents sued the manufacturer of the prescription drug Halcion for the wrongful death of their daughter six years after the daughter's suicide was allegedly caused by the drug's side effects. At the time of the daughter's death in 1985, the father suspected some outside agent had caused her to commit suicide. Prior to the death, the parents were aware of their daughter's depression and prior suicide attempts. Soon after her death, the father had reason to learn of a connection between her suicide and Halcion because the connection was disclosed by the package insert Upjohn Co. prepared. The insert cautioned about the possibility the drug could intensify depression and mentioned suicide and intentional overdoses. Under these circumstances, the Supreme Court found as a matter of law that the parents had reason to suspect wrongdoing by Upjohn Co. in

manufacturing and distributing Halcion soon after their daughter's suicide. (*Norgart*, *supra*, 21 Cal.4th at pp. 406-407.)

The Supreme Court mentioned the *BMS* rule in *Norgart* but did not explicitly approve or disapprove it: "[W]e need not resolve any conflict between the holding of the Court of Appeal in *Bristol-Myers Squibb* and the holding of the Court of Appeal below." (*Norgart*, *supra*, 21 Cal.4th at p. 406.) However, the Supreme Court did disapprove of another aspect of the *Bristol-Myers Squibb* court's reading of *Jolly*. (See *Norgart*, *supra*, 21 Cal.4th at p. 410, fn. 8 [a plaintiff is not required to do more than suspect a factual basis for the elements of a cause of action to discover it].)

In *Norgart*, the Supreme Court did not need to address the status of the *BMS* rule or rely on imputed simultaneous discovery of causes of action because it determined that, even under the version of the discovery rule the First District had adopted below in *Norgart*, the start of the limitation period was not sufficiently delayed to save plaintiffs' causes of action. (*Norgart*, *supra*, 21 Cal.4th at pp. 406-407.) Furthermore, the Supreme Court found the undisputed facts showed the parents should have suspected the alleged wrongdoing by Upjohn Co. soon after their daughter's suicide. (*Id.* at p. 407.)

If the BMS rule had been mandated by *Jolly* or other Supreme Court decisions, it is unlikely that the Supreme Court would have expressly left its status undecided in *Norgart*. A closer look at *Jolly* will be helpful.

b. *Jolly*

A direct analysis of *Jolly* shows that the *BMS* rule is an extension of its holding. The *Jolly* case concerned a drug, diethylstilbestrol (DES), that the plaintiff's mother had taken during her pregnancy to prevent miscarriage. Plaintiff, who was born in 1951, learned in 1972 that her mother had taken DES and that DES daughters could suffer injuries. Plaintiff had a checkup in 1972 and was diagnosed as having adenosis, a precancerous condition that required monitoring. In 1976, plaintiff underwent surgery to remove abnormal tissue and in 1978 underwent a complete hysterectomy and partial

vaginectomy to remove malignancy. (*Jolly*, *supra*, 44 Cal.3d at p. 1107.) During her deposition, plaintiff testified that in 1978 she believed (1) DES was a defective drug, (2) someone had done something wrong to her, and (3) she should be compensated. (*Jolly*, *supra*, 44 Cal.3d at p. 1112, fn. 9.) Also during 1978, plaintiff was aware of lawsuits against DES manufacturers, but she believed she had no cause of action because she could not identify the particular manufacturer of the drug her mother took during pregnancy. (*Id.* at p. 1108.) Plaintiff did not file her lawsuit until nearly a year after the Supreme Court decided *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, and held that a plaintiff who is unable to identify the particular manufacturer of the DES that injured her may jointly sue all the manufacturers of that drug on the theory of enterprise liability.

In *Jolly*, the Supreme Court held that plaintiff's cause of action did not accrue when she learned of the *Sindell* decision. (*Jolly*, *supra*, 44 Cal.3d at pp. 1113-1114.) Furthermore, plaintiff's ignorance of the identity of the particular manufacturer of the DES used by plaintiff's mother did not delay the accrual of her cause of action. Subsequently, in *Bernson*, the Supreme Court stated that "the rationale for distinguishing between ignorance of the wrongdoer and ignorance of the injury itself appears to be premised on the commonsense assumption that once the plaintiff is aware of the injury, the applicable limitations period (often effectively extended by the filing of a Doe complaint) normally affords sufficient opportunity to discover the identity of all the wrongdoers." (*Bernson*, *supra*, 7 Cal.4th at p. 932 [cause of action for libel against persons who allegedly concealed their identities].)

On one hand, the *BMS* rule can be derived from a literal reading of the statement in *Jolly* that a statute of limitations starts to runs when the plaintiff suspects or should suspect "that someone had done something wrong to [plaintiff]."[6] Also, the *BMS* rule appears

---

[6] This turn of phrase originates in a question posed to plaintiff during her deposition. Plaintiff answered yes when asked, "[y]ou felt that someone had done something wrong to you?" (*Jolly*, *supra*, 44 Cal.3d at p. 1112, fn. 9.)

consistent with the rationale stated in *Bernson* that "once the plaintiff is aware of the injury, the applicable limitations period (often effectively extended by the filing of a Doe complaint) normally affords sufficient opportunity to discover the identity of all the wrongdoers." (*Bernson*, *supra*, 7 Cal.4th at p. 932.) The *BMS* rule is supported by broadly interpreting this statement of rationale, particularly the phrase "identity of all the wrongdoers," to mean that the applicable discovery period is normally sufficient not only to discover the identity of the person who committed the *suspected* wrong but also to discover *unsuspected* wrongs.

On the other hand, the Fourth District in *Bristol-Myers Squibb* went beyond the facts of *Jolly* when it created a rule of imputed simultaneous discovery of causes of action for medical malpractice and products liability. In both *Bernson* and *Jolly*, the plaintiffs actually suspected the wrongdoing but could not identify the person who did the wrong. (*Bernson*, *supra*, 7 Cal.4th at p. 929 [plaintiff had a copy of the libelous document, but not know its author or distributor]; *Jolly*, *supra*, 44 Cal.3d at p. 1112 [plaintiff actually suspected DES was a defective drug but could not identity which manufacturer made it].) In *Bristol-Myers Squibb*, the plaintiff claimed she did not suspect the manufacturer of her silicone breast implant did anything wrong because she did not actually suspect a defect in the product.

This factual difference between ignorance of the identity of who did a suspected wrong and ignorance of the wrong itself is legally significant. The identity of the manufacturer-wrongdoer that made a defective product is not an essential element of a products liability cause of action and therefore ignorance of wrongdoer's identity will not delay the running of the statute of limitations. (*Bernson*, *supra*, 7 Cal.4th at p. 932.) In contrast, the existence of the potential defect in the product, i.e., the manufacturer's wrongdoing, is one of the three generic elements essential to a cause of action. (E.g. *Clark v. Baxter Healthcare Corp.*, *supra*, 83 Cal.App.4th at p. 1060 [triable issue of fact as to when plaintiff knew or suspected wrongfulness component of cause of action regarding

defective manufacture of latex gloves]; see *Norgart*, *supra*, 21 Cal.4th at p. 397 [regarding generic elements].) Moreover, the significance of this distinction was recognized by the Supreme Court when it stated the "failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does." (*Id.* at p. 399.)

In addition, the complaint in *Jolly* asserted a single type of wrongdoing--the manufacture and distribution of defective DES--for which all of the defendants potentially shared liability under the market share or enterprise liability theory recognized by the Supreme Court in *Sindell v. Abbott Laboratories*, *supra*, 26 Cal.3d 588. In contrast, *Bristol-Myers Squibb* involved two types of potential wrongdoing--negligence by plaintiff's treating physician and production of a defective silicone breast implant by the manufacturer.

Thus, we conclude the factual differences between *Bristol-Myers Squibb* and *Jolly* lead to the conclusion that the *BMS* rule is not a principle inherent in the *Jolly* holding, but is an extension of that holding.

**2. Choosing between the Basic Approach and the *BMS* rule**

Having determined that the *BMS* rule is not mandated by prior Supreme Court holdings, we next discuss why we find it inappropriate to adopt and apply the bright line *BMS* rule[7] in this case. Instead, we to follow the method of analysis used by the

---

[7] The adoption of a bright line rule in *Bristol-Myers Squibb* may be explained by its historical context. In December 1992, a Texas jury awarded a Houston woman $25 million in damages against breast implant manufacturer Bristol-Myers Squibb. (Naik, *Woman Receives $25 Million Judgment in Bristol-Myers Breast Implant Suit*, Wall Street Journal (Dec. 24, 1992) pp. A1, A3.) This award led to the filing of many other breast implant lawsuits. (See Note, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs* (1993) 44 Case W.R.L. Rev. 197, 230 [150 suits filed in the last week of December 1992 in the same Texas county].) When the Fourth District decided in 1995 to grant writ relief and publish its decision in *Bristol-Myers Squibb*, other breast implant cases were under administration by the San Diego County Superior Court and the Fourth District believed the bright line rule it adopted "w[ould] likely have

Second District in *Rose v. Fife*, *supra*, which is essentially the Basic Approach we have outlined.

The trial court here decided to apply the *BMS* rule to the facts of this case, causing it to sustain Ethicon's demurrer.[8] Ethicon argues we should follow the *BMS* rule because it is a viable and unblemished rule of law since the Supreme Court did not criticize or disapprove it in *Norgart*. In response, Fox argues the facts of this case are distinguishable from the facts of *Bristol-Myers Squibb* and the holding in *Bristol-Myers Squibb* should not be extended to apply to a case where the plaintiff did not know a particular product was to be used on her, could not observe the injury the product may have caused, and did not learn of the possibility of wrongdoing connected to the product, i.e., a product defect, until the doctor who performed the operation and used the product testified about that possible defect in his deposition.

One method of analyzing the *BMS* rule of imputed simultaneous discovery is to restate the actual holding as well as the rule itself in terms of the Basic Approach.

*Bristol-Myers Squibb* held the limitation period on the plaintiff's products liability cause of action against the manufacturer of her silicone breast implant began to run at the same time plaintiff suspected negligence by her treating physician. (*Bristol-Myers Squibb*, *supra*, 32 Cal.App.4th at p. 967.) Because it would be highly fictionalized to restate this holding in terms of the subjective alternative of the discovery rule (actual suspicion), we will use the objective alternative. Stated in terms of what a reasonable person should have suspected, the Fourth District in effect held that based on the information available to plaintiff when she suspected professional negligence by her treating physician, she also should have suspected that her implant was defective.

---

application to other cases presently pending." (*Bristol-Myers Squibb*, *supra*, 32 Cal.App.4th at p. 961.) Similar circumstances do not exist in this case.

**8** We have not found, nor has Ethicon cited, any published decision of a California or federal court applying the *BMS* rule since it was adopted by the Fourth District over eight years ago.

It appears the result in *Bristol-Myers Squibb* would have been the same if the Fourth District had applied the Basic Approach because the facts of that case showed that plaintiff should have suspected her implant was defective. In *Bristol-Myers Squibb*, the plaintiff's implant was ruptured in an altercation in 1982. By 1984, plaintiff knew that the implant had ruptured, that silicone was migrating down her arm and that the silicone was a cause of physical injury in the form of ulcerations. (*Bristol-Myers Squibb*, *supra*, 32 Cal.App.4th at p. 962.) Plaintiff argued she did not actually suspect the manufacturer of the implant of wrongdoing because she had been told that silicone was an inert substance that could do no harm by itself. (*Id*. at p. 966.) Instead of applying a rule of simultaneous discovery of causes of action, the Fourth District could have held that a reasonable person should have suspected the implant was defective at some point prior to April 1990, one year before she filed her complaint, because plaintiff should have suspected that what she had been told about silicone doing no harm was not true since she knew the silicone was a cause of her ulcerations.

With respect to the *BMS* rule itself,[9] it can be restated using the objective alternative in the Basic Approach as follows: When a plaintiff knows, suspects or has reason to suspect a factual basis for negligence by one potential defendant, then a plaintiff also has, as a matter of law, reason to suspect a factual basis for all potential wrongdoing by all potential defendants.

When the consequences that flow from this restatement of the *BMS* rule are examined, we find the rule is too broad to be accepted without limitation. For example, if a reasonable plaintiff suspects malpractice by the surgeon in connection with an operation, then that plaintiff, to be objectively reasonable in the eyes of the *BMS* rule, must also suspect every manufacturer of every piece of equipment and each material used in

---

**9** "When a plaintiff has cause to sue based on knowledge or suspicion of negligence the statute starts to run as to *all* potential defendants." (*Bristol-Myers Squibb*, *supra*, 32 Cal.App.4th at p. 966.)

connection with the operation. This suspicion would include manufacturers of scalpels, clamps, sponges, latex gloves, staplers, sutures and other items. For example, applying the *BMS* rule to this case would imply that Fox also should have suspected her slow healing after the operation was caused by a material that was toxic or to which she was allergic and that this material was one of the items used in her surgery. (Cf. *Clark v. Baxter Healthcare Corp.*, *supra*, 83 Cal.App.4th at p. 1060 [plaintiff not aware that chemical substances may have been added to latex gloves that cause her severe allergic reaction; a triable issue of fact existed with respect to when she should have suspected the latex gloves might have been defectively manufactured].) Similarly, in the context of accidents involving negligence, the *BMS* rule also would require the injured plaintiff to suspect a defect in every manufactured item involved in the accident or the causal chain of events leading to the accident.

Requiring as a rule of law that a plaintiff exercise such a high degree of suspicion, without regard to the actual facts known or available to the plaintiff (and perhaps in contradiction to those facts),[10] disconnects the discovery rule from the facts of the case. Because the imputed suspicions of the *BMS* rule are disconnected from the facts, that rule will produce a different result than the Basic Approach in cases where the trier of fact would have found the cause of action was (1) timely, i.e., the plaintiff had no reason to suspect its factual basis before the applicable limitations period, and (2) meritorious.[11]

---

[10] In this appeal, we need not address whether actual or reasonable suspicions were allayed by investigation. (See *Jolly*, *supra*, 44 Cal.3d at p. 1112 [suspicions would not have been allayed by investigation].)

[11] The social cost of the *BMS* rule's elimination of meritorious and otherwise timely claims might be justified if it is outweighed by the social benefit, i.e., the savings to the court system and the parties resulting from eliminating untimely causes of action sooner than they would have been eliminated under the Basic Approach. There is no factual basis in the record for making findings one way or the other with respect to these costs and benefits. To the extent the cost-benefit findings are a matter for the Legislature, neither party has referenced any relevant legislative findings.

Furthermore, to deal with such imputed suspicions, drafters of complaints seeking to comply with the view of objective reasonableness embodied in the *BMS* rule would be required to include allegations that would reach all potential wrongdoing by all potential wrongdoers. These pleading requirements necessitated by the *BMS* rule would be a regression to the more formalistic pleading requirements of bygone years.

In addition, requiring the pleading of all potential wrongs committed by all potential defendants in order to take advantage of relation back would result in an expansion of section 474 beyond its literal terms.[12] Section 474 addresses Doe pleading when a plaintiff is "ignorant of the name of a defendant" (§ 474), but does not mention situations where the plaintiff does not know or actually suspect (1) wrongdoing of a known person or (2) wrongdoing of an unknown person.

In addition to the foregoing implications of the *BMS* rule, that rule also creates a pitfall[13] in cases where the plaintiff has relied upon the 90-day extension in section 364[14] to extend the time for filing a professional negligence action against a health care provider beyond the one-year period set forth in section 340.5. Subdivision (d) of section 364 does not appear to extend the statute of limitations for causes of action other than professional

---

[12] Section 474 states in relevant part, "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly...."

[13] For purposes of this discussion, the pitfall traps an unwitting plaintiff only where the imputed simultaneous discovery imposed by the *BMS* rule bars a cause of action that would have survived under the Basic Approach. In other words, a plaintiff who suspects or should have suspected a cause of action besides professional negligence more than one year before filing a complaint is not unwitting.

[14] Section 364 provides in part: "(a) No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action. [¶] … [¶] (d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice."

negligence. (See *Noble v. Superior Court* (1987) 191 Cal.App.3d 1189, 1192-1193 [§ 364, subd. (d) does not extend limitation period for intentional tort of battery].) Thus, a plaintiff who did not file his or her lawsuit within one year of discovering or suspecting professional negligence would be barred from asserting any other causes of action subject to a one-year limitation period, such as a personal injury claim based on products liability. For example, in the present case, plaintiff did not file her complaint until June 28, 2000, which was more than one year after her April 10, 1999, operation. The claim of professional negligence is timely because of the extension granted by section 364, subdivision (d). However, even if Fox has the benefit of the relation-back doctrine, if she is held to have simultaneously discovered the products liability cause of action against Ethicon when she suspected professional negligence, i.e., shortly after the initial operation, her products liability cause of action would be time barred.

To avoid this pitfall, an objectively reasonable plaintiff, who is required by the *BMS* rule to suspect other types of wrongdoing simultaneously with suspicions of professional negligence, would never rely on the provisions of subdivision (d) of section 364 to extend the time for filing the lawsuit. Thus, one consequence of the *BMS* rule would be to eliminate the use of the extension and undermine the purpose served by the extension. The legislative purpose of the 90-day waiting period is to encourage negotiated resolution of medical malpractice disputes outside the formal litigation process. (*Russell v. Stanford University Hospital* (1997) 15 Cal.4th 783, 788.) Accordingly, to avoid disharmony between section 364 and former section 340, subdivision (3), as interpreted and applied through the *BMS* rule, we conclude that application of the *BMS* rule should not be extended beyond those situations where the plaintiff actually suspects or has reason to suspect a factual basis for the wrongdoing on the part of the product manufacturer. The practical effect of this limitation is that the BMS rule has no independent application beyond situations covered by the Basic Approach.

In summary, we conclude a bright line rule that imputes the simultaneous discovery of a products liability cause of action with the discovery of a professional negligence cause of action should not be applied in this case. Instead, we adopt the more reliable Basic Approach, which is dependent upon the facts and circumstances surrounding the products liability claim and its delayed discovery.

### D. Application of the Basic Approach

The next question is whether Ethicon's demurrer should be sustained under the Basic Approach to the discovery rule. Specifically, did Fox know, actually suspect, or have reason to suspect a factual basis for the three elements of her products liability cause of action against Ethicon more than one year prior to the November 28, 2001, filing of her first amended complaint?

#### 1. What Fox actually knew and suspected

Fox's opening appellate brief states that she "proceeded to file a timely claim for medical malpractice against her health care providers since she knew or suspected when she awoke from the anesthesia utilized in the initial surgery on April 10, 1999 that professional negligence occurred." Thus, Fox concedes an actual suspicion of wrongdoing in the form of professional negligence shortly after her initial operation. Notwithstanding her suspicion of professional negligence, Fox's declaration indicates that until the deposition of Dr. Gladen she had no actual suspicion that Ethicon's stapler had malfunctioned. Similarly, Fox's first amended complaint states that she did not discover or suspect "the Ethicon GIA-type Stapler was a cause of her injuries until the deposition of [Dr. Gladen] was taken on August 13, 2001."

Fox's pleading of her products liability cause of action does not contain separate allegations with respect to the injury for which recovery is sought. For purposes of Ethicon's demurrer, the reasonable inference is that the injury is the same as set forth in her professional negligence cause of action and that she suspected the injury shortly after her initial surgery. Therefore, the following application of the Basic Approach will focus

on when Fox actually suspected or should have suspected (1) a defective product and (2) causation.

As to the causation and wrongdoing elements of Fox's products liability cause of action against Ethicon, we cannot reasonably infer from the record before us that Fox actually suspected a factual basis for either of these elements prior to November 28, 2000, i.e., one year before the date her first amended complaint was filed. Rather, accepting Fox's allegation of actual suspicion as true, it appears for purposes of the demurrer that Fox did not actually suspect a stapler defect until August 13, 2001.

**2. What Fox should have suspected**

In parallel to her allegations regarding actual suspicion, Fox's first amended complaint alleges that there were not any means through which her reasonable diligence would have revealed or through which she would have suspected the Ethicon GIA-type stapler was a cause of her injuries until the deposition of Dr. Gladen.

The adequacy of these allegations of delayed discovery is tested under the following rule. "A plaintiff whose complaint shows on its face that [the] claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence. The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer. [Citations.]" (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160; *G. D. Searle & Co. v. Superior Court*, *supra*, 49 Cal.App.3d at p. 26 [mandamus issued to compel trial court to sustain, with leave to amend, demurrer to products liability complaint against drug manufacturer].)

Fox's allegations about Dr. Gladen's deposition comply with the first requirement regarding the time and manner of actual discovery. However, Fox's allegations regarding the circumstance justifying delayed discovery are conclusory. (Cf. *Frederick v. Calbio Pharmaceuticals* (1979) 89 Cal.App.3d 49, 59 [conclusory allegations of discovery].)

Therefore, the question becomes whether Fox showed a reasonable possibility of curing the defect.

Fox and her attorney both filed declarations opposing the demurrer that set forth some facts explaining why the discovery of the potentially defective stapler was not made earlier. In addition to the facts set forth in the declarations, Fox may be able to include allegations about whether or not a timely investigation would have disclosed (1) articles in the media concerning defective staplers (see *Jolly*, *supra*, 44 Cal.3d at pp. 1112-1113 [numerous articles concerning DES]; see also *Norgart*, *supra*, 21 Cal.4th at p. 408 [controversy about drug Halcion had arisen in popular press]); (2) lawsuits alleging wrongdoing in connection with the stapler (see *Jolly*, *supra*, 44 Cal.3d at p. 1113 [many DES suits filed throughout the country alleged wrongdoing]); (3) a support group with information about the alleged defect (see *Clark v. Baxter Healthcare Corp.*, *supra*, 83 Cal.App.4th at p. 1054); or (4) a manufacturer warning regarding the use of the product (see *Norgart* at p. 407 [written precaution inserted in drug packaging]; see generally *Frederick v. Calbio Pharmaceuticals*, *supra*, 89 Cal.App.3d at p. 59).

Fox's awareness of her injury is not enough by itself to find, as a matter of law, that she reasonably should have suspected a factual basis for wrongdoing related to the stapler and causation. (See *Bristol-Myers Squibb*, *supra*, 32 Cal.App.4th at pp. 964-965; *Kilburn v. Pineda* (1982) 137 Cal.App.3d 1046 [negligence not inferred where operation leads to rare and unforeseen injuries]; cf. *Barrett v . Altas Powder Company.* (1978) 86 Cal.App.3d 560 [doctrine of res ipsa loquitur does not apply in strict liability actions].)

In light of the foregoing, Fox has shown a reasonable probability of alleging facts explaining why a reasonable person would not have suspected the causation and wrongdoing elements of her cause of action before November 28, 2000. Therefore, those factual issues cannot be decided as a matter law at this stage of the proceeding. Because Fox may be able to cure the defects in her first amended complaint, the trial court should have granted her leave to amend.

## III. Section 474 and Substituting Ethicon for a Doe Defendant*

We requested the parties to submit supplemental letter briefs regarding legal issues concerning a possible amendment in which Ethicon was substituted for one of the Doe defendants named in the original complaint. One of the reasons for this request was to have a full presentation of the issues that could have arisen in the event we determined that Fox's cause of action against Ethicon could survive demurrer only if she had the benefit of relation back. That situation would have arisen if it was clear that Fox's delayed discovery of the products liability cause of action occurred sometime between June 28, 1999, and November 27, 2000.

Because that situation did not arise on the record before us, we do not address the various issues that might arise from the substitution of Ethicon for a Doe defendant. On remand, Fox will have to choose when filing her second amended complaint whether to continue to plead the products liability cause of action against Ethicon as a new defendant or substitute Ethicon for one of the Doe defendants, or both. (See generally 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 365, p. 468 [pleading alternatives when in doubt about rights].) The legal issues that may arise from her choice must be addressed in the first instance in the trial court, rather than in an advisory opinion here.

A second reason for our request was to provide a more comprehensive discussion of the legal context surrounding this case. Because the Supreme Court has determined the parameters of the discovery rule by reference in part to the rules regarding Doe pleading, an analysis of how those rules applied to the facts of this case could have influenced how the discovery rule applied. For example, does the question of whether or not the new cause of action alleged refers to the "same instrumentality"[15] as the original cause of

---

* See footnote on page 1, *ante*.

[15] The concept of "same instrumentality" is one of the three prongs for application of the relation-back doctrine. (*Norgart*, *supra*, 21 Cal.4th at pp. 408-409.)

action have any influence on or relationship to whether or not the plaintiff had reason to suspect a factual basis for the new cause of action? However, it was not necessary to incorporate this and other issues concerning relation back into our analysis of this appeal because it was resolved by a straightforward application of the Basic Approach.

**DISPOSITION**

The judgment is reversed and the case remanded to the trial court with directions to vacate its order sustaining the demurrer without leave to amend and to enter an order sustaining the demurrer with leave to amend the cause of action for products liability. Fox is awarded her costs on appeal.

_____
VARTABEDIAN, J.

WE CONCUR:

_____
DIBIASO, Acting P. J.

_____
CORNELL, J.