What You Do Not Know Can Still Hurt You: The Statute of Limitations and the Discovery Rule are Extended to Encompass Unknown Causes of Injury

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In a matter of first impression, the Appellate Court of Illinois, First District, in *Mitsias v. I-Flow Corporation*, recently ruled that where the causal relationship between the allegedly defective product and the claimed injury is unknown to science, the statute of limitations does not run until such time as that causal relationship could have been known because to hold otherwise would defeat the purpose of the discovery rule. This is a significant ruling in products liability cases, medical malpractice cases, and any case in which the cause of an injury or damage could not be known to the plaintiff during the statutory limitations period. As a secondary matter the case also provides further elucidation on the right of an expert to subsequently seek to clarify a statement made at a deposition in order to avoid an adverse result to the party by which he or she was retained.

Procedural and Factual History

The plaintiff had left shoulder surgery in October 2001. As part of the surgery, the surgeon installed a pain pump that delivered the local anesthetic, Marcaine, to assist in controlling the plaintiff's pain post-surgery. After the surgery, the plaintiff experienced glenohumeral chondrolysis as a result of cartilage necrosis in her shoulder. Due to this post-surgical condition, in October 2003 the plaintiff filed a medical malpractice action against her treating orthopedic surgeon alleging that his errors had caused her injury. The case proceeded through discovery and the plaintiff's expert's deposition was taken in two sessions, one in August 2006 and one in October 2007. During the first deposition, the plaintiff's expert testified that there were three possibilities for the cause of the plaintiff's injury including:

> A third possibility which has become more apparent recently is the use of an interarticular anesthetic agent, particularly a medicine called Marcaine, and so the use of a postoperative interarticular pain pump, which I'm not aware of whether that was done or not, has been shown over the last year-and-a-half to two years to be highly associated with a condition where articular cartilage is aggressively lost in the shoulder after arthroscopic stabilization.

At that same session of the deposition, the plaintiff's expert testified that "in the last year and a half there's been a growing body of evidence that this can cause cartilage death or necrosis and lead to the loss of cartilage in a shoulder." At the second session of the deposition of plaintiff's expert in October 2007, the expert testified that as of that date it was recognized in the medical literature that Marcaine pain pumps "can be a cause for loss or destruction of articular cartilage at the glenohumeral joint space." He further testified that this information was not known at the time that the orthopedic surgeon installed the pump and was not known until a "few years later."

Based on this information, the plaintiff voluntarily dismissed the action against the surgeon in November 2008. However, in February 2009 the plaintiff refiled her action, and in addition to reasserting her claims against the defendant doctor, she included product liability claims against the manufacturer of the pain pump on theories of both negligence and strict liability. The product manufacturer successfully moved for dismissal arguing that the statute of limitations had expired by the time of the filing of the complaint against it and the trial court granted Supreme Court Rule 304(a) certification allowing immediate appeal.

The product manufacturer moved to dismiss the refiled complaint based on the two year statute of limi-

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tations found in 735 ILCS 5/2-213(d). The product manufacturer argued that the plaintiff was on notice that her injury was wrongfully caused as of the time of her filing her complaint in 2003. In opposition, the plaintiff argued that she was not on notice until her expert testified at his deposition in 2007 that the pain pump may have caused the injury. In addition, the plaintiff offered the affidavit of her expert, which in relevant part stated:

> It is my understanding, and opinion to a reasonable degree of medical certainty, that any information concerning potential chondrolysis caused by the wrongful use of pain pumps did not occur by publication for which a patient or other lay person might realize that chondrolysis might be wrongfully caused by pain pumps or their design or lack of warnings or instructions until the summer of 2007.

The expert also explained his testimony in his first deposition in which he expressed the opinion that the pain pump could have played a role in causing the plaintiff's injury, by saying that he was only speaking to the length of time that the anesthetic had been delivered and that he had no information that the pain pump was a defective product until the summer of 2007.

Considering the arguments on the motion to dismiss, the trial court held that the statute of limitations began at the same time for both the medical malpractice and product liability claims and that because the claims against the product manufacturer were not filed until over 8 years after the surgery, the claims against the product manufacturer were barred.

Ruling of the Appellate Court

In reversing the judgment of the trial court, the Appellate Court held that the central question was "**how the discovery rule is applied when a plaintiff is aware that her injury might have been wrongfully caused by one source but is unaware that her injury might have been caused by another source and, in fact, could not be aware of that source because the causal link was as yet unknown to science.**" The Court answered the question in favor of the plaintiff and held that allowing the statute of limitations to begin to run when the plaintiff is aware of one source of injury, (the alleged negligence of the treating physician), but unaware of another, (the allegedly defective product), would defeat the policy and purpose of the discovery rule.

The Court first addressed when the plaintiff is deemed to have knowledge that the injury suffered was wrongfully caused. Initially, the Court rejected the argument of the defendant that knowledge of *any* cause is notice of *all* causes and in doing so looked to the analysis under *Nolan v. Johns Mansville Asbestos*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981), *Knox College v. Celotex Corporation*, 88 Ill. 2d 407, 430 N.E.2d 976 (1982), and their progeny of what it means for the plaintiff to have knowledge that an injury is wrongfully caused. Recognizing that the Illinois Supreme Court has not addressed this specific question, the Court sought guidance from the United States Supreme Court opinion of *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352 (1979) which had been relied upon by the *Nolan* and *Knox* Courts. The *Kubrick* Court held that a plaintiff had a duty to inquire of individuals in order to ascertain if his injury had been wrongfully caused and that because he did not do that, the plaintiff's complaint was properly dismissed because it was possible for the plaintiff to determine that his injury had been wrongfully caused. Applying these principles to the instant case, the Court stated:

> Permitting knowledge of the one to trigger the discovery rule as to the other would seem to defeat the policy and purpose behind the discovery rule, which is to accommodate the need of the victim, upon reasonable inquiry, to discover her cause of action against a defendant who has wronged her. Therefore, where plaintiff has discovered one cause of her injury, but has not and, in fact, could not have discovered a second cause, tolling the statute of limitations

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> with regard to that second claim until such time as "[t]here are others who can tell him if he has been wronged, and he need only ask" would seem to be a logical extension of the *Kubrick* decision, as well as one that flows from our supreme court's concern that plaintiffs conduct diligent inquiry into potential causes of action without slumbering on their rights. (citations omitted).

Accordingly, the Court held that because the plaintiff in the instant case could not have known through inquiry that her injury had been caused by any action of the product manufacturer the statute did not begin to run until the summer of 2007.

The Court next turned to the plaintiff's expert's testimony in 2006 that suggested that the pain pump may have been a cause of the plaintiff's injury and the attempt to clarify that statement. The Court held that the 2006 deposition testimony was ambiguous, or at least insufficiently clear and unequivocal, to bar the expert from clarifying his statement that the pain pump could have caused the plaintiff's injury and that he was aware of such a cause as early as of that date. In refusing to resolve the ambiguity, the Court seemed to allow the issue to be raised by the defense at trial as to when and whether the plaintiff was aware of a wrongfully caused injury by the pain pump as early as 2006 when the plaintiff's expert testified at his first deposition. This issue is important because if the plaintiff's expert was aware as early as 2006 that the injury could have been caused by the pain pump, and not as of 2007 as claimed in the expert's affidavit, then the 2009 complaint filed against the product manufacturers would not have been timely and the plaintiff's complaint would have likely been properly dismissed.

Conclusion

Particularly in the areas of products liability and medical malpractice, but perhaps in many others areas of litigation, as scientific knowledge increases new potential causes of injury will likely be discovered. The *Mitsias* opinion lays the groundwork for an expansion of the time frame within which claims can be brought against defendants when a new cause of the injury is discovered long after the injury itself is discovered. A potential extension of this opinion is that the claim first could have been brought in 2009 against the product manufacturer even if the complaint was not filed against the defendant doctor in 2003, thus portending that the discovery rule exception could swallow the statute of limitations. Irrespective of how the rule evolves this is a significant development in the law. ■