

## Tenth Circuit Finds Discovery Rule Applies to New Mexico's Statute of Limitations for Products Liability

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In *Nowell v. Medtronic, Inc., et al.*, the Tenth Circuit recently held that the discovery rule extended to New Mexico's statute of limitations for personal injury cases involving products liability. This means that a cause of action for products liability "accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause." 2021 WL 4979300, at \*2 (10th Cir. Oct. 27, 2021) (quoting *Maestas v. Zager*, 152 P.3d 141, 147 (N.M. 2007)).

In *Nowell*, the plaintiff had a hernia repaired in 2010 using a polyester Parietex mesh manufactured by Medtronic. *Id.* at \*1. Six months later, the plaintiff needed a second operation to reinforce the mesh, and subsequently the plaintiff experienced pain in the area of the mesh for the next three years. *Id.*

In March 2014, the plaintiff underwent a CT scan, which revealed two cysts in the area around the mesh. *Id.* However, at that time, the physicians who performed the scan did not conclude that the mesh caused the issues although the plaintiff was "skeptical about the safety of the mesh." *Id.* The plaintiff underwent a second CT scan on October 8, 2014, and that scan "revealed a large fluid collection associated with the mesh." *Id.* A physician recommended removal of the mesh two days after the second scan, and surgery occurred later that month. *Id.*

The plaintiff filed suit against Medtronic on October 6, 2017. *Id.* Medtronic moved to dismiss, based in part on New Mexico's three-year statute of limitations for personal injury, and the district court dismissed the plaintiff's claims. *Id.* at \*2. The plaintiff appealed. *Id.*

Because the New Mexico Supreme Court had not yet addressed whether the statute of limitations for personal injury caused by products liability accrued at the time of occurrence, and the time of injury, or at the time of discovery, the Tenth Circuit endeavored to predict what rule the New Mexico Supreme Court would apply. *Id.* The court ultimately concluded that the New Mexico Supreme Court would apply the rule of discovery (i.e., the claim accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause) because (i) this interpretation was supported by New Mexico's intermediate courts; (ii) the New Mexico Supreme Court had extended the discovery rule to medical malpractice cases based on the same concerns that exist in products liability cases; and (iii) "the trend of nationwide authorities supports application of the discovery rule" in products liability cases. *Id.* at \*3-\*4. Thus, in federal product liability cases in the Tenth Circuit involving New Mexico's statute of limitations, the discovery rule will apply to the accrual of the claim.

However, even though the discovery rule applied, the Tenth Circuit concluded that the plaintiff had not proven the reasonable diligence required by the discovery rule. *Id.* at \*5. The plaintiff had previously had the mesh repaired, felt pain in the area of the mesh since 2011, and underwent a CT scan in March 2014 that revealed two cysts near the mesh. *Id.* at \*6. This should have caused the plaintiff to investigate the origins of her pain. *Id.* at \*6. Further, the fact that no physician had informed the plaintiff that the mesh could have been the cause of the pain prior to the second CT scan was of no import because the burden remains on the plaintiff to demonstrate that if she had diligently investigated the problem, she would have been unable to discover the cause of her injury. *Id.* The plaintiff could not “shift the burden concerning the discovery of the cause of her injury from her shoulders onto that of her treating physicians.” *Id.* at \*5. Because the plaintiff failed to demonstrate that, “despite a reasonably diligent investigation as to the origin of her injury, she could not have discovered facts supporting her current cause of action within the statute of limitations,” the application of the discovery rule did not save the plaintiff’s claims. *Id.* at \*7.

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## Author

Matthew Saxon

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Matthew Saxon

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