IN THE UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 94-40344
(Summary Calendar)

FELTON SUMNER AND RENE SUMNER,

Plaintiffs-Appellants,

versus

KIRIT S. PATEL, M.D.,
AND THE KROGER COMPANY, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

(5:92-CV-2000)

(September 9, 1994)

Before JOLLY, DUHÉ, and STEWART, Circuit Judges.

PER CURIAM:[1]

Plaintiffs, Felton and Rene Sumner, appeal two orders of the district court--one granting the motion to dismiss filed by defendant, Kirit Patel, M.D., the other granting defendant, The Kroger Company's, motion for summary judgment. For the following reasons, we affirm the decisions of the district court.

---

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I. BACKGROUND

Plaintiffs, Felton and Rene Sumner, filed suit in Texas state district court on July 23, 1992, against Kirit S. Patel, M.D., The Kroger Company, Inc., and Hoffman-La Roche, Inc., alleging damages associated with Mrs. Sumner's use of the drug Tegison to treat her severe psoriasis. Tegison, manufactured by Hoffman-LaRoche, Inc.,[2] is known to cause birth defects in fetuses. Plaintiffs allege that Dr. Patel committed medical malpractice in prescribing Tegison to Mrs. Sumner, as she is a woman of child-bearing years. Plaintiffs also sued The Kroger Company, Inc., for its alleged negligence in failing to warn Mrs. Sumner of the dangers of Tegison when its pharmacist filled her prescription. The case was removed to the federal district court for the Northern District of Texas on the basis of diversity. The federal district court in Texas, seemingly on its own motion, transferred the case to the federal district court for the Western District of Louisiana.

Kirit S. Patel filed a motion to dismiss the claims against him pursuant to Fed. R. Civ. P. 12(b)(6).[3] The motion alleged prematurity due to plaintiffs' failure to present their claim to a medical review panel prior to filing suit as required by Louisiana

---

[2]Plaintiffs voluntarily moved to have Hoffman-La Roche dismissed from the suit.

[3]Because Dr. Patel did not file his 12(b) motion until after an answer was filed, the district court properly treated it as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), as permitted by Fed. R. Civ. P. 12(h)(2), which allows a defense of failure to state a claim upon which relief can be granted to be made by a motion for judgment on the pleadings.

law.[4] Dr. Patel is a Shreveport, Louisiana, physician. The federal district court for the Western District of Louisiana granted Patel's motion to dismiss on grounds of prematurity for failure to comply with La. R.S. 40:1299.47(B)(1)(a)(i).

The Kroger Company moved for summary judgment on the basis that the Sumners' complaint was not timely filed pursuant to Texas' two-year statute of limitations. The district court granted Kroger's motion.

II. DR. PATEL'S MOTION TO DISMISS

Plaintiffs contend that Texas law should govern the dispute with Dr. Patel rather than Louisiana law. If Texas law applies, the Louisiana statute requiring presentation of a malpractice claim to a medical review panel would not govern, and the Sumners' complaint would not be premature. Because we conclude that Louisiana law applies to the dispute between plaintiffs and Dr. Patel, we affirm the decision of the district court granting Dr. Patel's motion to dismiss.

A. Standard of Review

We review a district court's choice-of-laws determination de novo. Arochem Corp. v. Wilomi, Inc., 962 F.2d 496 (5th Cir. 1992); Federal Deposit Ins. Corp. v. Massingill, 24 F.3d 768 (5th Cir. 1994). Federal courts sitting in diversity must apply the choice-of-laws methods of the state in which they are located. Klaxon Co.

[4]La. R.S. 40:1299.47(B)(1)(a)(i) states that "[n]o action against a health care provider covered by this Part, or his insurer, may be commenced in any court before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this Section."

v. Stentor Electric Manufacturing Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). However, when a case has been transferred via 28 U.S.C. § 1404(a), the transferee court must apply the law of the transferor court regardless of who initiated the transfer. Ferens v. John Deere Co., 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990). Thus, because this case was first filed in Texas, we must apply Texas' choice-of-law principles to determine which state's law will apply.

B. Discussion

In Texas, all conflicts cases sounding in tort are governed by the "most significant relationship" test as enunciated in the American Law Institute Restatement (Second) of Conflicts. Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979).

According to the Restatement, the factors relevant to the choice of the applicable rule of law in a case such as this include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and The relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result,

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflicts, § 6.

The Restatement goes on to list the types of contacts that should be taken into account to determine the law applicable to an issue:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Restatement (Second) of Conflicts, § 145.

We conclude that these Texas choice-of-law principles indicate that Louisiana law should apply to the dispute between the Sumners and Dr. Patel because Louisiana has the most significant relationship to the litigation. Dr. Patel's original alleged wrongful act, i.e., prescribing the Tegison for Mrs. Sumner, occurred in Louisiana. The doctor-patient relationship between Dr. Patel and Mrs. Sumner was centered in Louisiana. It developed in 1987, when Mrs. Sumner lived in Shreveport and began using Dr. Patel as her personal physician. For at least two years, Dr. Patel treated Mrs. Sumner in his office in Shreveport for her numerous maladies, including her psoriasis. Patel first prescribed Tegison to Mrs. Sumner in 1989, when Mrs. Sumner still lived in Shreveport. She had the prescription filled and actually began taking Tegison while still living there.

Later that year, the Sumners moved to Dallas, Texas. Mrs.

Sumner continued to take Tegison after moving to Dallas, until April or May of 1990. Plaintiffs contend that when Mrs. Sumner moved to Texas, the doctor-patient relationship became centered in Texas. Plaintiffs argue that because the doctor-patient relationship was centered in Texas for the majority of the time that Mrs. Sumner ingested Tegison, Texas law should be applied to the dispute. We disagree.

The physician-patient relationship between Dr. Patel and Mrs. Sumner never changed from being centered in Louisiana to being centered in Texas, regardless of whether or not Mrs. Sumner lived in Texas for the majority of the time she took Tegison. The record indicates that in March 1990, Mrs. Sumner returned to Shreveport to have lab work done, further establishing and evidencing the continuation of the physician-patient relationship in Shreveport, not in Dallas. The only contact Dr. Patel may have had with Texas involved a few alleged telephone calls to Dallas. Dr. Patel apparently refilled the Tegison prescription by telephone call to the Kroger pharmacy in Dallas. Also, Mrs. Sumner alleged that she spoke with Dr. Patel on the telephone from Dallas concerning her ingestion of Tegison.

We reject plaintiffs' contentions that these limited contacts with Texas, mere telephone calls, even if they did occur just as plaintiffs allege, are substantial enough to warrant the application of Texas law rather than Louisiana law to this medical malpractice dispute between the Sumners and Dr. Patel. The fact that Dr. Patel may have refilled the Tegison prescription by

telephone at a Kroger pharmacy in Dallas after Mrs. Sumner moved to Texas does not change the fact that the doctor-patient relationship between the two remained centered in Louisiana.

Texas does not have any conceivable competing interest in the dispute between Dr. Patel and Mrs. Sumner. At the time plaintiffs' lawsuit was filed, they lived in South Dakota where they presumably remain. There has been no allegation whatsoever that Dr. Patel ever saw Mrs. Sumner anywhere but in his office in Shreveport. Dr. Patel has resided in Shreveport at all times and has his medical practice located there. He is licensed to practice medicine by the State of Louisiana, not by the State of Texas. He is a duly qualified health care provider under the provisions of La. R.S. 40:1299.41, et seq.. He justifiably has expectations of having Louisiana law apply to him. Any medical malpractice claims involving patients Dr. Patel sees in his Shreveport office should be governed by Louisiana law.

We hold that Louisiana law governs the dispute between Dr. Patel and the Sumners. Accordingly, plaintiffs violated the provisions of La. R.S. 40:1299.47(B)(1)(a)(i) in failing to first present their claim to a medical review panel before filing suit. Thus, their complaint is premature. Dr. Patel's motion to dismiss was properly granted.

III. KROGER'S MOTION FOR SUMMARY JUDGMENT

Defendant, The Kroger Company ("Kroger"), moved for summary judgment on the grounds that plaintiffs' complaint against it was not timely filed within the applicable statute of limitations

period and that it was under no duty to warn Mrs. Sumner of the dangers of the drug, Tegison, prescribed by Dr. Patel. The district court correctly concluded that Texas law applies to the dispute between plaintiffs and Kroger.[5] The district court granted Kroger's motion on the basis that the suit was not timely filed and that Kroger was under no tort duty to warn Mrs. Sumner of the teratogenic effects of Tegison.

A. Standard of Review

We review a district court's grant of summary judgment de novo. Topalian v. Ehrman, 954 F.2d 1125 (5th Cir. 1992). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits filed in support of the motion, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

B. Discussion

Because Texas law applies to the dispute between the Sumners and Kroger, we must look to Texas' statute of limitations to determine whether the Sumners' complaint was timely filed and thus

[5] The alleged wrongful acts committed by Kroger in Texas were failing to warn Mrs. Sumner of the dangers of Tegison and covering up the warning label on the prescription bottle with a Kroger pharmacy label. The Kroger pharmacy in question is located in Texas. Mrs. Sumner lived in Texas at the time of the alleged wrongful conduct. Texas has an interest in the dispute between Mrs. Sumner and Kroger because Kroger was operating a pharmacy within its territorial boundaries. The pharmacist who filled the prescription was presumably licensed pursuant to Texas law. Plaintiffs have not appealed the district court's ruling that Texas law applies to the dispute with Kroger.

whether Kroger's motion for summary judgment was properly granted.

Tort actions in Texas are governed by a two-year statute of limitations, which specifically provides, in pertinent part, that "[a] person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.003(a) and (b) (Vernon 1986). Thus, claims which are not brought within two years from the date the cause of action accrues are barred as a matter of law. Schaefer v. Gulf Coast Regional Blood Center, 10 F.3d 327 (5th Cir. 1994).

However, Texas does recognize the so-called "discovery rule" in statute of limitations inquiries whereby in some situations a suit may be filed more than two years after the cause of action accrues if the claimant is unable to know of his injury at the time it actually accrues. Saenz v. Keller Industries of Texas, Inc., 951 F.2d 665 (5th Cir. 1992). Under the discovery rule, the statute of limitations is tolled until the plaintiff discovers, or through the exercise of care and diligence should have discovered, the nature of her injury and its cause in fact. Schaefer, supra, 10 F.3d at 331.

The district court granted Kroger's summary judgment on the basis that Mrs. Sumner knew as early as April or May 1990 of the teratogenic effects of Tegison, and yet suit was not filed until July 23, 1992, more than two years later. The initial event which triggered this litigation seems to have been an encounter in April or May 1990 that Mrs. Sumner had with a Kroger pharmacist when she

went to get her Tegison prescription refilled. The pharmacist asked her if she ever intended to have children, and she said "yes." The pharmacist refused to fill the prescription for her and told her she needed to talk to her doctor.

Mrs. Sumner admitted in her deposition that she knew the reason the pharmacist would not fill the prescription had something to do with her ability to reproduce:

> Q. The pharmacist never told you why he wouldn't give [the Tegison] to you?
>
> A. No. I knew it had something to do with having kids though because he asked me, did I have kids, did I intend to have kids? (emphasis added)

Mrs. Sumner also stated in her deposition that she discontinued taking Tegison immediately after the pharmacist refused to refill the prescription, even though she still had some pills left from her prior prescription:

> Q. Your original petition alleges that you continued to take one pill each day until mid April of 1990. Would that have been correct?
>
> A. I don't know for sure.
>
> Q. Is [the conversation with the pharmacist] the reason why you discontinued taking the Tegison?
>
> A. Yes.
>
> . . . .
>
> A. . . . The bottle has still got pills in it.

Mrs. Sumner also has admitted that she called Dr. Patel to question him about the Tegison immediately after talking with the pharmacist, and that she contacted Baylor Psoriasis Center shortly thereafter and made an appointment to talk with them about her

prior ingestion of Tegison:

> A. That is the same day I called Dr. Patel. I called him at home.
>
> . . . .
>
> Q. . . . So how soon after that did you call Baylor?
>
> A. I think I called Baylor really soon after that, probably within a day or two.

Plaintiffs argue that pursuant to the discovery rule, the statute of limitations was tolled until Mrs. Sumner went to Baylor Psoriasis Center on July 24, 1990, and obtained more specific information about the dangers of Tegison. We disagree. Mrs. Sumner became aware that she should not have been taking Tegison if she intended to have children upon speaking with the Kroger pharmacist in April or May 1990. The statute of limitations began to run that day. Because Mrs. Sumner and her husband did not file suit until some two years and two months later, their claim is barred. The district court properly granted Kroger's motion for summary judgment on the basis that plaintiffs' petition was not timely filed.

Because we affirm the district court's grant of Kroger's motion for summary judgment on the basis that plaintiffs' claim is barred under Texas' statute of limitations, we do not reach the issue of whether pharmacies have a tort duty under Texas law to warn prescription drug users of possible teratogenic effects of drugs prescribed by their duly licensed physicians.

IV. CONCLUSION

For the foregoing reasons, the motion to dismiss granted in

favor of defendant, Kirit Patel, M.D., and the motion for summary judgment granted in favor of defendant, The Kroger Company, Inc., are affirmed.

AFFIRMED.