

STATE OF MICHIGAN
COURT OF APPEALS

ROBIN M. SMITH and CRAIG A. SMITH,
Plaintiffs-Appellants,

UNPUBLISHED
February 8, 2011

V

STRYKER CORPORATION and STRYKER
SALES CORPORATION,

No. 294916
Oakland Circuit Court
LC No. 2009-101273-NP

Defendants-Appellees.

Before: BORRELLO, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Plaintiffs¹ appeal as of right from the trial court's order granting defendants' motion for summary disposition. We affirm.

In this products liability and negligence action, plaintiff alleged that she suffered injury as a result of the use of defendants' product known as the pain pump. Plaintiff also alleged that defendants marketed its product for use at the site of the injury when it had not been approved for that use. Plaintiff used the product in 2003, but did not file her lawsuit until 2009. Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), alleging that the lawsuit was barred by the statute of limitations. Plaintiff opposed the motion, asserting that her claim did not accrue until the injury progressed to total destruction in November 2007. The trial court granted defendants' motion, and plaintiffs appeal as of right.

The trial court's decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). Questions involving statutory interpretation present questions of law subject to review de novo. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). The statute of limitations for products liability cases is three years. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147; 624 NW2d 197 (2000); see also MCL 600.5805(10) ("The period of limitations is 3 years after the

¹ The claims raised by Craig A. Smith are derivative, and therefore, the singular term plaintiff refers to Robin M. Smith only.

time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.”). “[T]he period of limitations runs from the time the claim accrues. The claim accrues at the time ... the wrong upon which the claim is based was done regardless of the time when damage results.” MCL 600.5827; see also *Brennan v Edward D Jones & Co*, 245 Mich App 156, 158; 626 NW2d 917 (2001). Untimely filed tort claims are barred by the statute of limitations. *Lemmerman v Fealk*, 449 Mich 56, 63; 534 NW2d 695 (1995). The claim accrues at the time the wrong upon which the claim is based on was done, regardless of when the damage results. *Nelson v Ho*, 222 Mich App 74, 85; 564 NW2d 482 (1997). The time of the wrong triggered the limitations period, and that date was the date on which plaintiff was harmed by the defendant’s act. *Id.* citing *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995).

In the present case, plaintiff utilized the pain pump in 2003, but her complaint alleging products liability and negligence was not filed until 2009. Therefore, the wrong occurred during the use of the product in 2003. *Nelson*, 222 Mich App at 85. The fact that plaintiff contends that she did not manifest the damages until 2007 when she required replacement surgery is not the correct date to utilize for purposes of the statute of limitations. The date that damage results is not the appropriate standard. MCL 600.5827; *Brennan*, 245 Mich App at 158.

To avoid summary disposition, plaintiffs allege that defendants fraudulently concealed that the device was not approved for use in the joint space, and this fraud tolled the statute of limitations. MCL 600.5855 provides that an action may be commenced within two years after the person discovers or should have discovered the claim when a person fraudulently conceals the existence of the claim. However, in the present case, plaintiffs failed to provide documentary evidence of fraudulent concealment. *Kuznar*, 481 Mich at 176.²

Also, to avoid summary disposition, plaintiffs contend that the trial court erred in applying the decision in *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007), that the *Trentadue* decision does not apply to product liability cases, and that the *Trentadue* case was wrongly decided. In *Trentadue*, our Supreme Court held that an extrastatutory discovery rule could not apply to toll or delay the time of accrual of a plaintiff’s claim. Rather, the Legislature had to expressly carve out an exception in the language of the statute. *Trentadue*, 479 Mich at 390-391. Plaintiffs fail to identify statutory language that creates an exception for products liability cases. Plaintiffs’ contention that *Trentadue* was wrongly decided must be directed to our Supreme Court. We are bound by stare decisis to follow the decisions of our Supreme Court. *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007).

² We note that plaintiffs filed documentary evidence that was not filed in the trial court, and a prior panel of this Court entered an order striking the exhibit.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Karen M. Fort Hood