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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

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Tim McKenzie and Sherrie McKenzie

v.

Janssen Biotech, Inc.

**Appeal from Monroe Circuit Court
(CV-16-900110)**

MITCHELL, Justice.

This appeal is an attempt to breathe life into a clearly deficient complaint with untimely claims. We reject that attempt and affirm the judgment of the trial court.

Facts and Procedural History

In July 2012, Dr. William Sullivan prescribed Remicade, a medication manufactured by Janssen Biotech, Inc. ("JBI"), to Tim McKenzie as a treatment for Tim's psoriatic arthritis. Tim thereafter received Remicade intravenously every two weeks until November 2014, when he developed severe neuropathy causing significant weakness, the inability to walk without assistance, and the loss of feeling in, and use of, his hands and arms. Although Tim stopped receiving Remicade at that time, he and his wife, Sherrie, allege that they were not told that Remicade was responsible for his injuries. In December 2015, Tim traveled to the Mayo Clinic in Rochester, Minnesota, to receive treatment for his neuropathy. The McKenzies state that at the Mayo Clinic Tim was eventually diagnosed with demyelinating polyneuropathy and doctors told them that it was likely caused by the Remicade.

On October 22, 2016, the McKenzies sued JBI and Dr. Sullivan in the Monroe Circuit Court, asserting failure-to-warn, negligence, breach-of-warranty, fraud, and loss-of-consortium claims.¹ The complaint filed by the McKenzies was

¹Although the McKenzies named Dr. Sullivan as a defendant in their complaint, the claims they asserted were all directed

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not signed, but it indicated that it had been prepared by Sherrie, who is not only a named plaintiff, but also an attorney and active member of the Alabama State Bar. Keith Altman, an attorney from California admitted pro hac vice in November 2017, assisted with the preparation of the complaint. It is apparent from even a cursory review of the complaint that it was copied from a complaint filed in another action. The complaint included numerous factual and legal errors, including an assertion that Tim was dead even though he is alive and claims invoking the laws of Indiana even though that state has no apparent connection to this litigation.² Moreover, the complaint included a "verification" by an attorney who does not represent the McKenzies and who is not admitted to practice law in Alabama, certifying, in accordance with Pennsylvania law, that the facts asserted in the complaint are true to the best of his knowledge. This verification was electronically signed in December 2013,

at JBI. The McKenzies eventually agreed to dismiss Dr. Sullivan from the action, and he is not a party to this appeal.

²Information in the record indicates that JBI is a Pennsylvania corporation with its principal place of business in that state.

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approximately a year before Tim suffered the injuries giving rise to this lawsuit.

There is no indication that JBI was ever served with the McKenzies' October 2016 complaint. At the time of filing, the McKenzies completed a summons form on which they checked a box notifying the "sheriff or any person authorized by the Alabama Rules of Civil Procedure to serve process" that "service by certified mail of this summons is initiated upon the written request of Tim McKenzie pursuant to the Alabama Rules of the Civil Procedure." The McKenzies, however, did not otherwise request in writing that the Monroe Circuit Clerk serve JBI by certified mail, nor did they provide the required certified-mail supplies or postage to the clerk. The McKenzies also took no steps to initiate service by certified mail themselves. We further note that, even if the McKenzies had taken the proper steps to serve JBI by certified mail, the address for service that was provided by the McKenzies on the summons form was not the address of JBI's registered agent in Alabama. The McKenzies assert that any error regarding the service of their October 2016 complaint lies with the circuit clerk's office.

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On February 14, 2017, the McKenzies filed an amended complaint that was properly signed by Sherrie and that omitted the extraneous verification made under Pennsylvania law. On February 16, 2017, a private process server delivered the complaint and accompanying summons to JBI's registered agent in Alabama. JBI thereafter removed the case to the United States District Court for the Southern District of Alabama. While the case was pending in federal court, the McKenzies again amended their complaint and JBI filed multiple motions seeking the dismissal of the action on statute-of-limitations grounds.

The case was eventually remanded to the Monroe Circuit Court, and on November 14, 2017, JBI moved that court to dismiss the McKenzies' complaint. In its motion, JBI argued, among other things, that Tim suffered his injuries in November 2014; that the tort claims the McKenzies had asserted were subject to a two-year statute of limitations; and that the McKenzies had failed to properly commence an action against JBI until February 2017, when they filed their signed amended complaint and properly served JBI. Therefore, JBI argued, the McKenzies' tort claims were untimely and due to be dismissed.

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The McKenzies opposed JBI's motion to dismiss, arguing both that their October 2016 complaint properly commenced an action against JBI and that the statute of limitations had been tolled by JBI's alleged fraud.

While JBI's motion to dismiss was pending, the McKenzies agreed to dismiss Dr. Sullivan from the action. On April 24, 2018, the trial court entered an order in which it struck the McKenzies' October 2016 complaint under Rule 11(a), Ala. R. Civ. P., based both on the complaint's "numerous, substantial errors" and "the failure of any counsel to sign the document." The trial court further dismissed as untimely all of the McKenzies' claims, except their breach-of-warranty and fraud claims. The McKenzies and JBI thereafter agreed to dismiss those remaining claims, and on May 21, 2018, the trial court entered a final judgment. On May 24, 2018, the McKenzies filed a timely notice of appeal to this Court. That notice of appeal did not indicate whether the McKenzies were appealing the dismissal of all the claims they had asserted against JBI or just some of those claims. Their subsequent brief, however, makes clear that they are appealing only the dismissal of their failure-to-warn and negligence claims.

Standard of Review

In State v. \$93,917.50 & 376 Gambling Devices, 171 So. 3d 10, 16 (Ala. 2014), this Court stated:

"Rule 11(a) provides that, if a pleading is not signed or is signed with intent to defeat the purpose of the rule, it 'may' be stricken. A trial court, under the rule, is not required to strike an unsigned pleading. Thus, Rule 11(a) itself contemplates that even a pleading that violates Rule 11(a) can stand."

Because a trial court is vested with the discretion to decide whether an unsigned complaint should be stricken under Rule 11(a), the trial court's decision to strike the McKenzies' October 2016 complaint will be reversed only if it is established that the trial court exceeded its discretion in doing so.

This Court has also explained the standard of review we apply to a trial court's ruling on a motion to dismiss:

"On appeal, a dismissal is not entitled to a presumption of correctness. The appropriate standard of review under Rule 12(b)(6) [, Ala. R. Civ. P.,] is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [it] to relief. In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether [it] may possibly prevail. We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond

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doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief."

Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993) (citations omitted). Therefore, we review the trial court's dismissal of the McKenzies' tort claims de novo. See Bay Lines, Inc. v. Stoughton Trailers, Inc., 838 So. 2d 1013, 1017 (Ala. 2002) (explaining that "[t]his Court must review de novo the propriety of a dismissal for failure to state a claim").

Analysis

The trial court concluded that the McKenzies' failure-to-warn and negligence claims were untimely and due to be dismissed after it struck the October 2016 complaint under Rule 11(a). Accordingly, we first review the trial court's application of Rule 11(a), which provides:

"Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. ... The signature of an attorney constitutes a certificate by the attorney that the attorney has read the pleading, motion, or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. ... If a pleading, motion, or other paper is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the

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action may proceed as though the pleading, motion, or other paper had not been served."

(Emphasis added.) In its order striking the McKenzies' October 2016 complaint, the trial court noted that the McKenzies had acknowledged that the complaint was largely a verbatim copy of a complaint filed against JBI in an unrelated out-of-state action and that the complaint contained what the McKenzies termed "vestigial clauses" and "erroneous paragraphs" that were not relevant to the McKenzies' case. Despite the McKenzies' contention that those mistakes should not be fatal, the trial court concluded that striking the complaint was appropriate based on "the numerous, substantial errors contained throughout the original complaint, as well as the failure of any counsel to sign the document."

The McKenzies argue to this Court that the lack of a signature on the October 2016 complaint was merely a clerical error and that excusing the error will not unduly prejudice JBI. In support of their argument, the McKenzies cite 376 Gambling Devices, in which this Court considered the State's argument that the trial court improperly applied Rule 11(a) and dismissed the State's petition seeking the forfeiture of certain property and currency seized from a gambling operation

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because the pleading initiating the forfeiture proceeding was not signed by the State's attorneys. This Court ultimately reversed the trial court's order of dismissal, holding that, under the circumstances of that case, the trial court's application of Rule 11(a) was inappropriate. 171 So. 3d at 16. The McKenzies argue that this Court should reach the same conclusion in this case.

The McKenzies cited 376 Gambling Devices in the trial court, but that court found their reliance to be misplaced, explaining that the defendants in 376 Gambling Devices had actually received a copy of the unsigned pleading initiating the case and that there were no statute-of-limitations issues in that case.³ We agree that 376 Gambling Devices is distinguishable. As the trial court noted, it is undisputed that the defendants in that case were served with a copy of the deficient pleading. Moreover, the State corrected its error by submitting an amended signed pleading only 14 days later. 171 So. 3d at 13. It is also notable that no statute of limitations that would otherwise bar the State's forfeiture

³Section 13A-12-30, Ala. Code 1975, authorizes the State to seek the forfeiture of illegal gambling devices and provides no specific time within which a forfeiture action must be commenced following the seizure of the devices.

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action ran during that interval, unlike in this case, where an amended complaint was not filed for almost four months, at which time the statute of limitations had run.

Finally, we note that the 376 Gambling Devices Court emphasized that it was holding only that "Rule 11(a) does not require the striking of [the State's] petitions in this case." 171 So. 3d at 16. As the Court explained, there was nothing else before it that would indicate that the State's pleading should be struck -- the only apparent error was the lack of a signature -- and the Court concluded that striking the pleading on that basis alone "would elevate form over substance." Id. In contrast, we have reviewed the October 2016 complaint filed in this action, and we agree with the trial court that the complaint is riddled with "numerous, substantial errors." One of the purposes of the signature requirement in Rule 11(a) is that the signature serves as the attorney's certification that he or she has read the filing, and the obvious errors in the October 2016 complaint -- including the false assertion that Tim is deceased when it is undisputed that he is alive -- raise the question of whether the attorney who should have signed the complaint, who is also

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Tim's wife and presumably in good position to have knowledge of his condition, read the complaint at all. This Court in 376 Gambling Devices emphasized that under Rule 11(a) a trial court "may" strike a pleading that is not properly signed, 171 So. 3d at 16, and, if we are to recognize the discretion this rule grants a trial court to any meaningful extent, we must uphold the trial court's decision to strike the McKenzies' problematic and unsigned October 2016 complaint.

Accordingly, the operative complaint in this case was the amended complaint filed in February 2017. The McKenzies alleged in that complaint that Tim suffered an injury that occurred on an unspecified day in November 2014 and that the limitations period applicable to any claims based on that injury began to run at that time. See Smith v. Medtronic, Inc., 607 So. 2d 156, 159 (Ala. 1992) (explaining that the two-year statute of limitations applicable to tort claims generally begins to run on the date the injury occurs). The trial court concluded that, assuming Tim's injury took place on November 30, 2014, the McKenzies were required to assert their failure-to-warn and negligence claims based on that injury by, at the latest, November 30, 2016. As previously

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discussed, the trial court struck the McKenzies' October 2016 complaint as not in compliance with Rule 11, and they did not file an amended complaint until February 2017, after the expiration of the two-year limitations period. Thus, the two-year statute of limitations appears to bar the McKenzies' claims.

The McKenzies nevertheless argue that the statute of limitations governing their claims was tolled as a result of JBI's alleged fraud and that the trial court's dismissal of their claims was thus erroneous. See Ladd v. Stockham, 209 So. 3d 457, 468 (Ala. 2016) (explaining that under § 6-2-3, Ala. Code 1975, a defendant's fraudulent concealment of a cause of action tolls the running of the statute of limitations until the tort was actually discovered or could have been discovered); see also Ex parte Price, 244 So. 3d 949, 957 n. 2 (Ala. 2017) (explaining that the savings clause of § 6-2-3 applies not only to fraud-based claims, "but also to any cause of action fraudulently concealed" (emphasis added)). The basis of the McKenzies' tolling argument is that JBI concealed the serious adverse effects of Remicade from the public and that the McKenzies did not learn that Tim's

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injuries were attributable to Remicade until December 2015, when Tim was diagnosed by the physicians at the Mayo Clinic. Thus, the McKenzies argue, the failure-to-warn and negligence claims they asserted against JBI when they filed their amended complaint in February 2017 -- less than two years after their alleged discovery of those claims in December 2015 -- were timely.

When a reasonable person should have discovered a claim that is alleged to have been fraudulently concealed is generally a question to be determined by the trier of fact. Jim Walter Homes, Inc. v. Kendrick, 810 So. 2d 645, 650 (Ala. 2001). Nevertheless, before that determination can be submitted to the trier of fact, the plaintiff's allegations of fraud must meet certain pleading requirements. This Court discussed those requirements in DGB, LLC v. Hinds, 55 So. 3d 218, 226 (Ala. 2010):

"This Court has stated: 'When, as in this case, the plaintiff's complaint on its face is barred by the statute of limitations, the complaint must also show that he or she falls within the savings clause of § 6-2-3.' Miller v. Mobile County Bd. of Health, 409 So. 2d 420, 422 (Ala. 1981). '[T]he burden is upon he who claims the benefit of § 6-2-3 to show that he comes within it.' Amason v. First State Bank of Lineville, 369 So. 2d 547, 551 (Ala. 1979). ...

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"This Court has held that to show that a plaintiff's claims fall within the savings clause of § 6-2-3 a complaint must allege the time and circumstances of the discovery of the cause of action. See, e.g., Angell v. Shannon, 455 So. 2d 823, 823-24 (Ala. 1984); Papastefan v. B & L Constr. Co., 356 So. 2d 158, 160 (Ala. 1978). The complaint must also allege the facts or circumstances by which the defendants concealed the cause of action or injury and what prevented the plaintiff from discovering the facts surrounding the injury. See, e.g., Smith v. National Sec. Ins. Co., 860 So. 2d 343, 345, 347 (Ala. 2003); Lowe v. East End Mem'l Hosp. & Health Ctrs., 477 So. 2d 339, 341-42 (Ala. 1985); Miller, 409 So. 2d at 422. See also Amason, 369 So. 2d at 550."

The DGB Court further recited the facts from Miller v. Mobile County Board of Health, 409 So. 2d 420 (Ala. 1981), Lowe v. East End Memorial Hospital & Health Centers, 477 So. 2d 339 (Ala. 1985), and Smith v. National Security Insurance Co., 860 So. 2d 343 (Ala. 2003), and noted that, in each of those cases, this Court had concluded that generalized allegations that a defendant had concealed a cause of action, unsupported by specific facts concerning that concealment or the plaintiffs' discovery of that concealment, were insufficient to toll the statute of limitations under § 6-2-3. 55 So. 3d at 226-27.

In this case, JBI argued to the trial court that the McKenzies failed to allege any facts or circumstances

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concerning JBI's alleged concealment of those claims; nor did the McKenzies explain why they were unable to discover the alleged facts relevant to their claims at an earlier time. In its April 24, 2018, order dismissing the McKenzies' claims, the trial court noted JBI's argument on this issue but did not fully evaluate the merits of the argument, instead directing the McKenzies to file a more definite statement of the alleged fraud, after which the trial court would presumably consider whether tolling was appropriate and whether the dismissed claims should be reinstated. The McKenzies, however, elected not to file anything further explaining the details of the alleged fraud and their discovery of it, choosing instead to consent to the dismissal of their remaining claims and to challenge the dismissal of their failure-to-warn and negligence claims in this Court.

We are thus left with only the statements made by the McKenzies in the February 2017 amended complaint. Those statements fail to allege the facts and circumstances of JBI's alleged fraud with the required specificity; nor do those statements explain why the McKenzies were prevented from discovering the facts surrounding the fraud at an earlier

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date. The McKenzies have consequently failed to meet their burden of showing that the statute of limitations governing their failure-to-warn and negligence claims should have been tolled pursuant to § 6-2-3. DGB, 55 So. 3d at 226. The trial court's decision to dismiss those claims as untimely was therefore proper.

Conclusion

The McKenzies sued JBI in October 2016, alleging that Tim developed demyelinating polyneuropathy as a result of being administered Remicade, a prescription medication manufactured by JBI. The trial court, however, struck the McKenzies' initial complaint because it was not signed as required by Rule 11(a) and because it contained substantial errors and misstatements of fact and law. The trial court later dismissed the failure-to-warn and negligence claims asserted by the McKenzies in a subsequent amended complaint because that amended complaint was not filed until after the expiration of the two-year statute of limitations applicable to those claims. Because the trial court acted within the discretion granted it by Rule 11(a) when it struck the McKenzies' initial complaint and because the McKenzies did not

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establish that the applicable statute of limitations should have been tolled by § 6-2-3, the trial court's order dismissing the McKenzies' claims as untimely was properly entered. That judgment is therefore affirmed.

AFFIRMED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, and Stewart, JJ., concur.

Sellers and Mendheim, JJ., concur in the result.