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United States Court of Appeals
Tenth Circuit

October 27, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JANICE NOWELL,

Plaintiff - Appellant,

v.

MEDTRONIC, INC.; COVIDIEN LP,

Defendants – Appellees,

and

COVIDIEN, PLC; MEDTRONIC, PLC,

Defendants.

No. 19-2073
(D.C. No. 2:17-CV-01010-JB-SMV)
(D. N.M.)

ORDER AND JUDGMENT[*]

Before **McHUGH**, **LUCERO**, and **EID**, Circuit Judges.[**]

At stake in this diversity action is whether the defendants Medtronic, Inc.; Covidien LP; Covidien, PLC; and Medtronic, PLC (collectively, "Medtronic") are liable

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[**] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

for personal injuries suffered by Janice Nowell after a doctor used Medtronic's Parietex Composite Mesh ("Parietex mesh" or "mesh") to help repair her abdominal hernia in 2010. The district court granted Medtronic's motion to dismiss after finding the applicable statutes of limitations barred all of her state law claims. Exercising our jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

I. FACTUAL BACKGROUND

Nowell suffered from an abdominal hernia measuring roughly 15 centimeters in length. On October 27, 2010, Dr. William Pollard surgically repaired her hernia by implanting a polyester Parietex mesh manufactured by Medtronic. Six months later, on April 27, 2011, Pollard operated on Nowell once again to reinforce her existing mesh, which had begun to "pull away" from its edges. R. Vol. I at 126 (internal quotation marks omitted). Between April 27, 2011 and March 1, 2014, Nowell reported she "began experiencing . . . pain in the area of the mesh." *Id.*

Discomfort in the mesh area caused Nowell to undergo a CT scan on March 1, 2014. This examination revealed, in part, the existence of two cysts "in the area associated with the mesh," which needed draining. *Id.* at 126–27. The physicians who

[1] On April 24, 2020, this court ordered the Appellees to file a response listing Covidien LP's general and limited partners and to provide the information necessary to ascertain the citizenship of each. Nowell's amended complaint failed to make clear the citizenship of all Covidien LP's general and limited partners at the time the proceedings commenced in the district court. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 187–96 (1990) (holding that limited partnerships are deemed citizens of every state where any partner resides). In response, the Appellees clarified to our satisfaction that on October 5, 2017 (the date Nowell filed her original complaint), and at all times since, none of Covidien LP's general and limited partners has been a citizen of New Mexico. Accordingly, at all times complete diversity has existed between plaintiff and defendants.

performed this diagnostic test neither concluded nor advised Nowell that her mesh caused these issues. The pain did not subside, and so Nowell underwent a second CT scan on October 6, 2014. This examination "revealed a large fluid collection associated with the mesh." *Id.* Two days later, on October 8, 2014, Pollard informed Nowell he needed "to remove the Parietex mesh and replace it with a biological mesh." *Id.* And so on October 20, 2014, Pollard "removed an infected and disintegrated" mesh from Nowell's abdomen. *Id.* Nowell admits that prior to October 8, 2014, "[she] was skeptical about the safety of the mesh." *Id.* at 202. She also claims Dr. Pollard never "advised" her the mesh caused any of her problems. *Id.* at 126.

It was not until October 5, 2017, that Nowell filed her original complaint against Covidien LP. This complaint asserted claims of negligence; strict liability under theories of manufacturing defect, design defect, and failure to warn; and breach of implied and express warranties. On the following day, Nowell filed a first amended complaint—adding claims against Medtronic, Inc.; Covidien, PLC; and Medtronic, PLC.[2] The collective defendants ("Medtronic") moved to dismiss the first amended complaint on the grounds that Nowell's claims were time-barred and that her complaint failed to state a claim under Rule 12(b)(6). In response, Nowell sought leave to file a second amended complaint ("SAC"), which Medtronic did not oppose.

[2] Medtronic, Inc. and Covidien LP were the only defendants properly served and named in the first amended complaint. *See* Aple. Br. at 9 n.2 ("Covidien PLC was acquired by Medtronic PLC in 2015 and no longer exists as its own entity, and Medtronic PLC was not properly served in this matter.").

Subsequently, Nowell filed the SAC—which is the operative complaint in this appeal. Once again, Medtronic moved to dismiss, asserting similar arguments as in its first motion to dismiss. Nowell opposed the motion and attached to her opposition three new exhibits: two medical records from October 2014 along with a declaration containing certain factual allegations that never appeared in her two prior complaints. The district court issued a 145-page opinion dismissing all of Nowell's claims as time-barred. As an alternative ground, the district court dismissed her claims for failure to state a plausible claim for relief under Rule 12(b)(6).

II. ANALYSIS

On appeal, Nowell challenges the district court's rulings concerning her claims for negligence; strict liability under theories of failure to warn, design defect, and manufacturing defect; and a breach of implied warranty.[3] Although she contests both grounds the district court ruled on, we need only address whether her claims were timely.

We review de novo a district court's grant of a motion to dismiss, applying the same standards as the district court. *See Russell v. United States*, 551 F.3d 1174, 1178 (10th Cir. 2008) (citation omitted). "We also review de novo a district court's ruling regarding the applicability of a statute of limitations." *Plaza Speedway Inc. v. United States*, 311 F.3d 1262, 1266 (10th Cir. 2002) (internal quotation marks and citation omitted).

[3] Nowell does not appeal the district court's dismissal of her express warranty claim, which she conceded below was time-barred.

As a federal court sitting in diversity, we apply the substantive law of the forum state. *See Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 906 F.3d 926, 930 (10th Cir. 2018). "When the federal courts are called upon to interpret state law, the federal court must look to the rulings of the highest state court, and, if no such rulings exist, must endeavor to predict how that high court would rule." *Nelson v. United States*, 915 F.3d 1243, 1248 (10th Cir. 2019) (internal quotation marks and citation omitted). In undertaking this inquiry, we "may seek guidance from decisions rendered by lower courts in the relevant state, appellate decisions in other states with similar legal principles, district court decisions interpreting the law of the state in question, and the general weight and trend of authority." *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 666 (10th Cir. 2007) (internal quotation marks and citations omitted).

A. Negligence and Strict Liability Claims

1. Legal Framework

New Mexico's personal injury statute provides that "[a]ctions must be brought . . . for an injury to the person . . . within three years." N.M. Stat. Ann. § 37-1-8; *see also Roberts v. Sw. Cmty. Health Servs.*, 837 P.2d 442, 446 (N.M. 1992) (noting that New Mexico's "personal injury statute of limitations, Section 37-1-8, bars actions that are not brought within three years of the accrual of the cause of action.").

"Depending on the nature of the claims asserted and the context out of which they arise, personal injury claims may accrue at the time of the occurrence, the time of injury, or the time of discovery." *Gerke v. Romero*, 237 P.3d 111, 114 (N.M. Ct. App. 2010) (internal quotation marks and citation omitted); *see also Maestas v. Zager*, 152 P.3d 141,

147 (N.M. 2007) (referring to this discovery-based accrual standard as the "discovery rule"). Nowell assumes the discovery rule applies to products liability cases such as this one. Medtronic does not contest the issue of whether the discovery rule applies, instead contending that Nowell has not satisfied her burden under this rule.

Under the discovery rule, "the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause." *Maestas*, 152 P.3d at 147. Put another way, "the statute of limitations begins when the plaintiff 'acquires knowledge of facts, conditions, or circumstances which would cause a reasonable person to make an inquiry leading to the discovery of the concealed cause of action.'" *Gerke*, 237 P.3d at 115 (quoting *Martinez v. Showa Denko, K.K.*, 964 P.2d 176, 183 (N.M. Ct. App. 1998)). In applying this rule, New Mexico courts draw a distinction between a plaintiff's constructive knowledge—acquired through awareness of sufficient facts to put one on notice—and actual knowledge of the entire claim. *See Maestas*, 152 P.3d at 147 ("The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. . . . Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney.") (internal quotation marks and citations omitted).[4]

But the New Mexico Supreme Court has not yet extended the discovery rule to personal injury cases involving products liability. In *Roberts*, the New Mexico Supreme

[4] "[D]iscovery is defined as the discovery of such facts as would, on reasonable diligent investigation, lead to knowledge of [the] . . . injury." *Wilde v. Westland Dev. Co.*, 241 P.3d 628, 635 (N.M. Ct. App. 2010) (internal quotation marks and citation omitted).

Court did adopt the discovery rule for claims alleging medical malpractice under the same personal injury statute of limitations at issue here: N.M. Stat. Ann. § 37-1-8. *See Roberts*, 837 P.2d at 448–51. But it also noted that "in personal injury cases not involving malpractice, a cause of action accrues at the time of the injury." *Id.* at 449 (citations omitted).

Since *Roberts*, New Mexico courts have applied the discovery rule to a variety of claims involving causes of action which potentially remained undiscoverable within the default statutes of limitations. For example, in *Maestas*, the New Mexico Supreme Court held the discovery rule controls medical malpractice cases brought under New Mexico's Tort Claims Act. 152 P.3d at 146–47. And in *Sharts v. Natelson*, the New Mexico Supreme Court applied the discovery rule to ascertain when the statute of limitations began to run in a legal malpractice case. 885 P.2d 642, 645 (N.M. 1994); *see also Little v. Baigas*, 390 P.3d 201, 206 (N.M. Ct. App. 2016) (applying the discovery rule to a personal injury claim brought against a building contractor); *Gerke*, 237 P.3d at 115 (applying the discovery rule to a personal injury case that involved claims of exposure to toxic substances); *Showa Denko*, 964 P.2d at 181 (concluding "the district court correctly determined that where an individual has been injured by an unsafe or defective product and the resulting injury does not immediately manifest itself, the three-year statute of limitations . . . commences when a plaintiff knows, or reasonably should know through diligent inquiry, that he or she has been injured.").

Whether New Mexico law would recognize such a theory in the type of case before our court is an unsettled question. Ultimately, our task is to predict what the state

supreme court would do if faced with the same facts and issue. *See Siloam Springs Hotel*, 906 F.3d at 930. For three reasons, we predict that the New Mexico Supreme Court would apply the discovery rule to products liability cases brought under the personal injury statute of limitations.

First, New Mexico's intermediate court suggests that the New Mexico Supreme Court would support extending this rule to products liability cases. *See Webco Industries, Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1132 (10th Cir. 2002) ("[W]here an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.") (internal quotation marks and citations omitted). In *Showa Denko*, the New Mexico Court of Appeals noted two reasons which supported application of the discovery rule to its products liability case. It seized on the fact that, in the absence of discovery statutes, many jurisdictions still applied the discovery rule in products liability cases. Next, the court identified similar policy concerns in products liability cases as found in medical malpractice suits—an area in which the New Mexico Supreme Court had already upheld the discovery rule. And so the court concluded, "[w]e do not believe that our Supreme Court, in *Roberts*, intended to foreclose the application of the discovery rule in situations involving product liability actions wherein the injury is not readily attributable to a party's use of a defective product." *Id.* Then in *Gerke*, the New Mexico Court of Appeals extended the state's discovery rule to cases involving claims of exposure to toxic substances. It held, "[u]nder

the discovery rule, the statute of limitations begins to run when the plaintiff knows or, with reasonable diligence should know, of his injury and its cause." *Gerke*, 237 P.3d at 115 (citing *Roberts*, 837 P.2d at 449–50).

Second, the New Mexico Supreme Court has based its extension of a discovery-based accrual rule to medical malpractice on the same concerns that exist in products liability cases. Primary among these factors is that—similar to medical malpractice cases—the injury to a potential plaintiff from a product's defect may not manifest itself within the normal statute of limitations period. Seeking to strike a balance between fairness to a defendant and the plaintiff's ability to "ascertain the cause of [ ] pain" when an "injury does not necessarily manifest itself at the time of the negligent act," the New Mexico Supreme Court ruled that "the [medical malpractice] cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause." *Roberts*, 837 P.2d at 450–51. In so doing, it applied the discovery rule to the same statute of limitations applicable to this case: N.M. Stat. Ann. § 37-1-8.

In *Maestas*, the New Mexico Supreme Court echoed these sentiments roughly 15 years later when it applied the discovery-based rule to a medical malpractice case under New Mexico's Tort Claims Act. 152 P.3d at 147. The court's application was motived by "principles of fairness" centered on the fact "that the sensation of pain does not necessarily provide the average person with relevant information about an injury." *Id.* This possibility is equally as likely in a products liability context, where interactions with a product can result in injuries with long latency periods. Not only may a potential

plaintiff fail to immediately discern the exact cause of injury, but in some cases, the harm may not be immediately apparent—just like in medical malpractice suits.

Third, the trend of nationwide authorities supports application of the discovery rule in this context. In *Sawtell v. E.I. du Pont de Nemours and Co., Inc.*, we noted that "[i]n most states . . . a plaintiff's lack of knowledge of a product's defect causing personal injury affects the statute of limitations if a reasonably prudent and intelligent person could not, without specialized knowledge, have been made aware of such cause." 22 F.3d 248, 251 (10th Cir. 1994) (citation omitted). Nothing in our survey of the current caselaw suggests that this principle has changed. *See, e.g.*, *Fox v. Ethicon Endo-Surgery, Inc.*, 110 P.3d 914, 921 (Cal. 2005) ("Products liability claims brought under either negligence or strict liability theories are subject to delayed accrual under the discovery rule.") (citation omitted); *Roseville Plaza Ltd. P'ship v. U.S. Gypsum Co.,* 31 F.3d 397, 399 (6th Cir. 1994) ("It is now clear that in Michigan, a products liability plaintiff's cause of action accrues when he discovers, or through reasonable diligence should have discovered, a *possible* cause of action."); *Golla v. General Motors Corp.*, 657 N.E.2d 894, 897–99 (Ill. 1995) (discussing Illinois's application of the discovery rule to products liability cases). As one treatise observes: "[t]oday, courts in a great majority of jurisdictions apply the discovery rule to products liability cases" so that it "has become the near-unanimous rule." 2 David G. Owen & Mary J. Davis, OWEN & DAVIS ON PRODUCTS LIABILITY § 14:11 (4th ed. 2020) (internal quotation marks and citation omitted).

In short, these three reasons persuade us that the New Mexico Supreme Court would apply the discovery rule to the case at hand.

2. Application of the Discovery Rule

With this threshold inquiry resolved, we now turn to the facts of this case. Although a statute of limitations bar is an affirmative defense, it "may be appropriately resolved on a [Rule] 12(b) motion when the dates given in the complaint make clear that the right sued upon has been extinguished." *Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666, 671 (10th Cir. 2016) (internal quotation marks and citation omitted). Because the critical dates appear plainly on the face of Nowell's complaint, the statute of limitations defense was properly raised and resolved in the Rule 12(b) context.

Nowell argues that the discovery rule should have tolled the statute of limitations until her "doctor identified the problem giving rise to the cause of action." Aplt. Br. at 19. But for substantially the same reasons as the district court explained, we conclude Nowell has not demonstrated "that if she had diligently investigated the problem she would have been unable to discover the cause of her injury." *Showa Denko*, 964 P.2d at 181 (citation omitted).

On October 27, 2010, Dr. Pollard surgically repaired Nowell's abdominal hernia using Medtronic's Parietex mesh. Because the mesh eventually "began to pull away from the actual edges," Nowell underwent a second operation on April 27, 2011—six months after the first surgery. R. Vol. I at 126 (internal quotation marks omitted). This time, Pollard reinforced the mesh with additional sutures. Between April 27, 2011, and March

1, 2014, Nowell reported she "began experiencing . . . pain *in the area of the mesh*." *Id.* (emphasis added).

Nowell then underwent a CT scan on March 1, 2014, which revealed, in part, "cysts in the area associated with the mesh." *Id.* She claims that the physicians who performed this test neither concluded nor advised her the mesh was causing these issues. *Id.* But with the pain persisting, she underwent a second CT scan on October 6, 2014, "which revealed a large fluid collection associated with the mesh." *Id.* Two days later, Pollard informed Nowell that he needed "to remove the Parietex mesh and replace it with a biological mesh." *Id.* And so on October 20, 2014, Pollard "removed an infected and disintegrated" mesh from Nowell's abdomen. *Id.*

From this set of facts, Nowell contends "the only just standard would be for the statute of limitations to begin to run when Ms. Nowell's doctor identified the problem giving rise to the cause of action." Aplt. Br. at 19. In other words, Nowell asserts the statute of limitations began to run on October 8, 2014, when Pollard informed Nowell that he needed to remove the Parietex mesh. To hold otherwise, "would be unjust" according to Nowell, because "[w]hen your doctor tells you that your injury is not caused by surgical mesh it is not reasonable to expect you to sue the surgical mesh company." *Id.* at 18–19. And because Nowell filed her complaint on October 5, 2017, less than three after October 8, 2014, Nowell concludes that her claims fall within the three-year statute of limitations.

Nowell advances a policy argument unsupported by New Mexico's caselaw. In so doing, she seeks to shift the burden concerning the discovery of the cause of her injury from her shoulders onto that of her treating physicians. This she cannot do.

Consider, for example, *Showa Denko*, the New Mexico Court of Appeals case involving injuries allegedly stemming from consumption of a tablet containing a dietary supplement. Soon after consuming the tablet, the plaintiff began to experience a variety of symptoms including a full-body rash. Due in part to suspicions that the tablet was the source of her skin problems, she stopped taking the product. Over the next year, she consulted with a variety of doctors regarding the possible connection between her use of the dietary supplement and her symptoms. Though several physicians suggested a "relationship" between use of the tablet and her symptoms, not one doctor provided a conclusive diagnosis. *Showa Denko*, 964 P.2d at 178. In fact, the overwhelming majority of physicians she spoke to confirmed an initial diagnosis she received: that she was suffering as a result of lupus and not from symptoms associated with her tablet consumption. It was not until roughly six and a half years after halting consumption of the dietary supplement that a doctor definitively concluded the tablet caused at least some of her injuries. On appeal, the plaintiff, relying on the discovery rule, argued that the statute of limitations should not run "until she received a *definitive* medical opinion indicating that her condition was due to taking [the dietary supplement]." *Id.* at 181. She noted "that because a majority of the physicians diagnosed her condition as lupus . . . she should not be charged with disputing the opinions of a majority of medical experts who had examined her." *Id.*

This closely echoes Nowell's arguments. Like the plaintiff in *Showa Denko*, Nowell alleges that she was reasonably diligent between April 2011 and October 2014, because she saw physicians but was never alerted as to the exact cause of her injury. And again, like in *Showa Denko*, Nowell claims that the statute of limitations was thus tolled until she received a conclusive diagnosis from her doctor. These same arguments did not save the plaintiff in *Showa Denko* from surviving summary judgment in favor of the defendant. First, the court rejected any notion that the statute of limitations runs only when the plaintiff receives a "definitive" medical opinion as to the cause of one's injury. *See id.* at 182 (noting that "nothing in the discovery rule serves to suspend the running of the statute of limitations merely because there are divergent medical opinions concerning the nature or cause of her illness or injuries"); *see also Gerke*, 237 P.3d at 115 (rejecting the argument that under the discovery rule, the cause of action did not run until the plaintiff received "a proper diagnosis of mold poisoning"). Second, in spite of the lack of physician clarity as to the source of her sickness, the burden remained 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." *Showa Denko*, 964 P.2d at 181 (citation omitted). And the court found the information the plaintiff possessed "would [have] put a reasonable person on notice and a duty to timely initiate a claim." *Id.* at 182 (citations omitted).

Similarly, these arguments do not rescue Nowell from Medtronic's motion to dismiss. Even after applying the discovery rule, Nowell failed to prevent the statute of limitations from barring her claims because she did not satisfy the discovery rule's

reasonable diligence standard. *See Wilde v. Westland Dev. Co.*, 241 P.3d 628, 635 (N.M. Ct. App. 2010) ("[D]iscovery is defined as the discovery of such facts as would, on reasonable diligent investigation, lead to knowledge of [the] . . . injury.").[5] Indeed, Nowell "kn[ew] or with reasonable diligence should have known of [her] injury and its cause," *Maestas*, 152 P.3d at 147, at least three years prior to the filing of her complaint. Six months after Nowell received the mesh, she underwent surgery once again for the express purpose of repairing her mesh. That Nowell needed to undergo a second surgery to reinforce the mesh in her abdomen—a mere six months after her first surgery—suggests she was aware that her mesh was potentially problematic more than six years prior to the filing of her complaint. Then for roughly the next three years, until March 1, 2014, Nowell acknowledged she "began experiencing symptoms including but not limited to exhaustion and pain in the area of the mesh." R. Vol. I at 126. Regardless of whether or not Dr. Pollard advised Nowell that her "problems were caused by the mesh," none of the facts pleaded in her complaint indicate Nowell undertook action during this timeframe to investigate the origins of her pain "in the area of the mesh." *Id.* This level of diligence does not satisfy the discovery rule's reasonable diligence standard.

Even if Nowell's knowledge of her injury during this time period did not suffice to trigger the running of the statute of limitations, Nowell's March 1, 2014, CT scan certainly did. It was during this consultation that she learned there were "cysts in the area

[5] New Mexico courts have stated that, under the discovery rule, a plaintiff must act with reasonable diligence to find one's injury and its cause. *See Wilde*, 241 P.3d at 635. Whether or not a plaintiff acted with reasonable diligence is, in turn, evaluated by "a reasonable-person standard." *Id.* (internal quotation marks and citation omitted).

associated with the mesh." *Id.* And it was pain in the mesh area which compelled Nowell to undergo this CT scan in the first place. Further, Nowell admitted that prior to October 8, 2014, she "was skeptical about the safety of the mesh." *Id.* at 202.[6]

As a final point, Nowell claims October 8, 2014, was the "first time" her doctor confirmed there was a problem with her mesh, and that prior to this date, she "did not know that there was a problem with [her] mesh." *Id.* at 212–13. But the district court declined to consider this statement because it arose from a declaration Nowell made and attached as an exhibit to her brief opposing Medtronic's 12(b)(6) motion. However, in her amended complaint, Nowell only stated that on October 8, 2014, "[she] was told by the doctor that there was a problem with the mesh itself." *Id.* at 126. Claiming to be informed of an issue with the mesh, as Nowell did in her amended complaint, is a distinct premise from claiming that, prior to October 8, 2014, Nowell never knew there was an issue with the mesh—as she stated in one of the three exhibits attached to her brief below.

On appeal, Nowell assumes we are to consider these extra facts outside her complaint but offers no justification as to why the district court erred in excluding these exhibits from its consideration. Regardless of the fact that Nowell has likely waived any argument concerning the viability of her declaration, we review the district court's refusal to consider Nowell's declarations as part of its decision concerning Medtronic's Rule

[6] We also note that Nowell's SAC cites to three publicly available scientific articles regarding the potential risks of hernia mesh products, one of which was published in 2010. *See* R. Vol. I at 128.

12(b)(6) motion for an abuse of discretion. *See Lowe v. Town of Fairland*, 143 F.3d 1378, 1381 (10th Cir. 1998); *see also Carter v. Daniels*, 91 F. App'x 83, 85 (10th Cir. 2004) (unpublished) ("When ruling on a Rule 12(b)(6) motion, the district court must examine only the plaintiff's complaint.") (internal quotation marks and citation omitted).

Here, the district court decided it "[could not] consider the exhibits" because it was not going to convert Medtronic's motion to dismiss to a motion for summary judgment. *Nowell v. Medtronic Inc.*, 372 F. Supp. 3d 1166, 1243 n.21 (D.N.M. 2019). While there are limited exceptions which can permit a district court to consider materials extraneous to the complaint on a motion to dismiss, none of them are relevant to this case.[7] The district court was under no obligation to consider Nowell's exhibits. *See Lowe*, 143 F.3d at 1381 ("[C]ourts have broad discretion in determining whether or not to accept materials beyond the pleadings.") (citation omitted).

We find that the district court did not abuse its discretion in declining to consider Nowell's declaration. Nowell was on full notice of Medtronic's statute of limitations defense when she filed the second amended complaint, but she simply failed to allege the claims she submitted in her later declaration. Where, as here, Nowell had the opportunity to file two amended pleadings—neither of which included the allegations from the

[7] Three exceptions permit a district court to consider materials outside of the complaint: "(1) documents that the complaint incorporates by reference," "(2) documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity," and "(3) matters of which a court may take judicial notice." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) (internal quotation marks and citations omitted).

untimely declaration—the district court exercised its considerable discretion to exclude these exhibits.

In conclusion, because Nowell knew or with reasonable diligence should have known of her injury and its cause by at least March 1, 2014, we hold that Nowell's cause of action accrued more than three years prior to the filing of her original complaint on October 5, 2017. Nowell 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. And so application of the discovery rule does not save her untimely claims.

B. Implied Warranty Claim

Under New Mexico's Uniform Commercial Code ("UCC"), claims for breach of implied warranty are governed by a four-year statute of limitations. N.M. Stat. Ann. § 55-2-725(1); *see also Badilla v. Wal-Mart Stores E. Inc.*, 357 P.3d 936, 939 (N.M. 2015) (concluding that "the UCC [four-year] statute of limitation applies to actions for breach of warranty where a party seeks to recover damages for personal injuries").[8]

And this "cause of action accrues when the breach [of warranty] occurs." N.M. Stat. Ann. § 55-2-725(2). New Mexico law explains the "breach of warranty occurs when tender of delivery is made." *Id.* There is one statutory exception to this accrual-upon-delivery rule: in instances where the "warranty explicitly extends to future

[8] Nowell incorrectly claims that this issue "has not been determined by the courts of the state of New Mexico." Aplt. Br. at 21.

performance of the goods."[9] *Id.* However, implied warranties, by their nature, "do not explicitly guarantee future performance." *AIG Aviation Ins. v. Avco Corp.*, 709 F. Supp. 2d 1124, 1132 (D.N.M. 2010). As such, this exception is inapplicable to this case.

Dr. Pollard implanted Medtronic's mesh into Nowell on October 27, 2010. In other words, tender of delivery was made on this day, and it serves as the date when Nowell's alleged breach of warranty occurred. Yet, Nowell did not file suit until October 5, 2017—almost three years after the applicable statute of limitations had run.

Nowell advances a policy argument, asserting that when a buyer accepts delivered goods, "he or she has the right to inspect the goods for conformity to the sales contract." Aplt. Br. at 21. "However, this determination can not [sic] be made when a patient is implanted by a surgical device." *Id.* at 22. Therefore, Nowell argues "[i]t is poor public policy to require an individual to bring a lawsuit before they know one exists." *Id.* at 20. Instead, "the only logical approach is to have the statute of limitations begin to run from the discovery of the injury." *Id.* at 22.

Other than this plea for fairness, Nowell's sole support for this reasoning is a 1984 United States District Court for the District of Kansas decision applying Kansas law. But the New Mexico UCC does not include a discovery rule that applies to claims for a breach of implied warranty. New Mexico is clear that a plaintiff's breach of warranty claim accrues upon tender of delivery "regardless of the aggrieved party's lack of

[9] But Nowell does not attempt to reference any aspect of Medtronic's warranty that provides this guarantee. Nor could she, because she is bringing an implied warranty claim. By nature, there is no explicit guarantee.

knowledge of the breach." N.M. Stat. Ann. § 55-2-725(2). We find the applicable four-year statute of limitations bars Nowell's remaining warranty claim.

III. CONCLUSION

For the reasons explained above, we AFFIRM the district court's grant of Medtronic's motion to dismiss.

Entered for the Court

Allison H. Eid
Circuit Judge