

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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In re: BRIDGESTONE/FIRESTONE, INC.,)
TIRES PRODUCTS LIABILITY LITIGATION) Master File No. IP 00-9373-C-B/S
_____) MDL No. 1373
) (centralized before Hon. Sarah Evans Barker,
THIS ORDER RELATES TO:) Judge)
)
BARBARA JO NORTH, Individually, and as)
Guardian of Nicole Marie North, NICOLE) Individual Case No. IP 01-5252-C-B/S
MARIE NORTH, and STEVEN REED NORTH,)
Plaintiffs,)
v.)
BRIDGESTONE/FIRESTONE, INC., an Ohio)
Corporation, et al.,)
Defendants.)
)
)

ENTRY GRANTING IN PART AND DENYING IN PART FORD’S MOTION FOR
SUMMARY JUDGMENT AND GRANTING FORD’S MOTION TO DISMISS

This entry addresses a summary judgment motion/motion to dismiss filed by Defendant Ford Motor Company (“Ford”) in a product liability/personal injury case pending in this Multidistrict Litigation (“MDL”). In support of its motions, Ford contends that the applicable statute of limitations expired before Plaintiffs filed this action and that Plaintiffs have failed to plead their action for punitive damages with sufficient particularity to satisfy the requirements of Federal Rule of Civil Procedure 9(b). For the reasons explained in detail below, we GRANT IN PART and DENY IN PART Defendants Ford’s Motion for Summary Judgment, and we GRANT Ford’s Motion to Dismiss Plaintiffs’ claim for

punitive damages without prejudice. Plaintiff has 30 days in which to amend this claim to comply with Rule 9(b).¹

Factual Background

At around 3:20 p.m. on April 12, 1993, Barbara North, along with her minor children Nicole and Steven North, was traveling eastbound on I-80 in her 1992 Ford Explorer, approximately 40 miles east of Wendover, Utah. Def's Statement of Material Facts ¶¶ 1, 2. On this date, Nicole and Steven North were ages 12 and 15 respectively. Id. ¶ 5.

While driving, Barbara North experienced some control difficulty with her vehicle and, as she attempted to correct for this difficulty, the car flipped at least twice, ultimately coming to rest upright facing west roughly 40 feet from the lane in which it formerly traveled. Complaint ¶ 11; Def's Statement of Material Facts ¶ 3. Nicole and Steven were ejected from the vehicle and seriously injured, and Barbara was also injured. Def.'s Statement of Material Facts ¶ 4. In order to obtain court approval of the insurance settlement from the accident, Barbara was appointed guardian and/or conservator for Steven and Nicole on April 25, 1994. Id. ¶ 6; Pl's Response to Def's Statement of Material Facts ¶ 6. Nicole suffered a severe brain injury as a result of the accident and remains permanently disabled and unable to manage her own affairs. Def.'s Statement of Material Facts ¶ 7.

Plaintiffs filed this action against Ford and Bridgestone/Firestone Inc. ("Firestone"), among

¹ In addition, we DENY AS MOOT Ford's Motion to Strike, and we DENY AS MOOT Plaintiffs' Cross-Motion for Stay.

others, on December 13, 2000, nearly eight years after the accident occurred. Id. ¶ 8. Plaintiffs state claims for strict liability and negligence, seeking both compensatory and punitive damages. Id. Plaintiffs base their claims against Ford on allegations that the 1992 Ford Explorer driven by Barbara North at the time of the accident was defective and unreasonably dangerous. Id. ¶ 9. Barbara North was deposed in this matter on February 15, 2002. During her deposition, Barbara testified that at the time of the accident she was generally familiar with the possibility of vehicle rollover, particularly with regard to certain Jeep vehicles. Barbara North Depo. at 120-21. She also testified that at the time of the accident, she considered whether a tire failure or some other unspecified mechanical problem contributed to the accident. Id. at 155-56.

Standard of Review

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Bellaver v. Quanex Corp., 200 F.3d 485, 492 (7th Cir. 2000) (citation omitted). The court must “construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. Liberty Lobby, Inc., 477 U.S. at 255; Del Raso v. U.S., 244 F.3d 567, 570 (7th Cir. 2001). However, the nonmovant “may not simply rest on his pleadings, but must demonstrate by specific evidence that there

is a genuine issue of triable fact.” Colip v. Clare, 26 F.3d 712, 714 (7th Cir. 1994) (citation omitted).

Legal Issues

Ford contends that the statute of limitations applicable to Plaintiffs’ claims expired well before the filing date of this action. Plaintiffs’ product liability and negligence claims do not fall subject to identical accrual rules or statutes of limitation. Therefore, we must consider each of the claims and the applicable rules separately to determine whether the claims are time-barred.

1. Products liability

Ford moves for summary judgment on the ground that Plaintiffs’ claims were not timely filed.² The determination whether Plaintiffs’ action against Ford is time-barred necessarily begins with determining when the action accrued. As a court sitting in diversity, we must look to state law in deciding all matters of substance, including the operation of the relevant statute of limitations. Horbach v. Kaczmarek, 288 F.3d 969, 976 (7th Cir. 2002), citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Doe v. Roe No. 1, 52 F.3d 151, 154 (7th Cir. 1995). The parties do not dispute that Utah

² Plaintiffs contend that Ford’s Motion should actually be construed in its entirety as a motion to dismiss, not a motion for summary judgment. While statute of limitations arguments may in some cases lend themselves to resolution at the Motion to Dismiss stage, here we face fact-sensitive questions regarding when Plaintiffs should have discovered their causes of action and whether Plaintiffs exercised due diligence in discovering same. Therefore, because the discovery period has now elapsed, the parties have provided the Court with evidentiary support for the arguments, and neither has moved to extend the discovery period to supplement the evidence in support of or opposition to this Motion, we consider this to be a motion for summary judgment, as Defendants originally presented it.

law governs this action, and so we look to Utah's guiding principles relating to the accrual and limitations on causes of action. Recently, in Spears v. Warr, 44 P.3d 742 (Utah 2002), the Utah Supreme Court explained the rules governing the accrual of a cause of action under that state's law:

“Generally, a cause of action accrues ‘upon the happening of the last event necessary to complete the cause of action.’” Berenda v. Langford, 914 P.2d 45, 50 (Utah 1996), quoting Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981). Thus, “statutes of limitations begin running upon the happening of the last event necessary to complete the cause of action.” Burkholz v. Joyce, 972 P.2d 1235, 1236 (Utah 1998). In certain instances, however, the discovery rule tolls the limitations period until facts forming the basis for the cause of action are discovered. Id. at 50-51. The discovery rule applies: (1) in situations where the discovery rule is mandated by statute; (2) in situations where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct; and (3) in situations where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action. Warren v. Provo City Corp., 838 P.2d 1125, 1129 (Utah 1992) (footnote citations omitted). “Under the discovery rule, ‘the limitations period does not begin to run until the discovery of facts forming the basis for the cause of action.’” Berenda, 914 P.2d at 51, quoting O’Neal v. Div. of Family Servs., 821 P.2d 1139, 1143 (Utah 1991).

Id. at 753.

Utah's Products Liability Act directs that all product liability actions “shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause.” Utah Code § 78-15-3 (emphasis added). By its terms, the Act invokes the discovery rule, requiring that Plaintiffs filed their products liability claim within two years from the time they knew or should have known the fact of their injury and its cause. Utah courts have interpreted the phrase “and its cause” to mean both the identity of the allegedly defective product's manufacturer and the causal relationship between the product and

the harm. Aragon v. Clover Club Foods Co., 857 P.2d 250 (Utah Ct. App. 1993), cited in Bank One Utah, N.A. v. West Jordan City, 54 P.3d 135, 137 (Utah Ct. App. 2002).

Here, the parties dispute the precise moment Plaintiffs should reasonably have discovered the alleged cause of their alleged injuries and, more specifically, whether such “cause” included the mere fact of the rollover or also the alleged design defect in the Ford Explorer that caused the rollover. While not deciding this precise issue, a Utah appellate court elaborated on the “cause” component of the discovery rule in Aragon v. Clover Club Foods Company, 857 P.2d 250. There, the plaintiff, Mr. Aragon, was injured while operating a dough mixing machine in the course of his employment by Clover Club Foods (“Clover Club”). Mr. Aragon sent Clover Club a Notice of Intent to Commence Product Liability Action, which requested the name of the mixer’s manufacturer. Id. at 251. Clover Club did not provide such information. Id. Mr. Aragon filed suit against Clover Club in federal court, but the suit was dismissed for lack of diversity prior to Clover Club filing a response. Id. Mr. Aragon refiled in state court and again served discovery requests upon Clover Club, which finally provided the manufacturer’s name – Casa Herrera – in response to Aragon’s third request for information. Id. Casa Herrera was joined as a defendant in the action and, upon its failure to respond after being served with the complaint, a default judgment was entered against Casa Herrera. Id. The default judgment was later set aside and summary judgment was granted in favor of Casa Herrera on the ground that Mr. Aragon’s claims against it were time-barred. Id. In reviewing the trial court’s grant of summary judgment, the Utah appellate court, deciding what was then a question of first impression for Utah courts, concluded that the statutory language “and its cause” included the identity of the allegedly faulty

product's manufacturer. Id. at 253. The court based its interpretation of the phrase on rules adopted by several other states, namely Arizona, West Virginia, and Washington. While the cases cited by the Utah court in Aragon appear consistent on the issue of whether a claim accrues before the plaintiff identifies the manufacturer, they are not consistent as to whether accrual requires knowledge of a defendant's alleged negligent conduct. Arizona's rule, for example, mandates that a "cause of action does not accrue until the plaintiff knows or should have known of both the what and who elements of causation," in other words, that he or she has been injured "by a particular defendant's negligent conduct." Lawhon v. L.B.J. Institutional Supply, Inc., 765 P.2d 1003, 1007 (Ariz. Ct. App. 1988). By contrast, West Virginia declined to adopt a rule that would delay claim accrual until a plaintiff learned that "the product was defective as a result of the conduct of its manufacturer." Hickman v. Grover, 358 S.E.2d 810, 814 (W. Va. 1987).

Despite the apparent conflict in the cited Arizona and West Virginia rules, the Aragon court relied heavily on the approach embraced by Washington's product liability statute, which the Aragon court recognized was "identical in all material respects" to the Utah statute. The Washington statute defines "cause" as "cause in fact," or "the design defect that caused the harm" Aragon, 857 P.2d at 253, and includes the requirement that a plaintiff know "of a possible legal responsibility of this defendant" before the claim accrues. Id., citing Orear v. International Paint Co., 796 P.2d 759 (1990), cert denied, 812 P.2d 103 (Wash. 1991).

Admittedly, the Utah Supreme Court has not yet decided whether "cause" as mentioned in Utah Code § 78-15-3 means only "identity of the manufacturer," "cause in fact," or "possible legal

responsibility.” However, as a federal court sitting in diversity, we are charged with applying Utah’s law as interpreted by the highest court of the state, Fidelity and Guar. Ins. Underwriters, Inc. v. Everett I. Brown Co, L.P., 25 F.3d 484, 486 (7th Cir.1994), and, “[w]hen a state’s highest court has not ruled on an issue, a federal court sitting in diversity must attempt to predict what ruling the state court would make.” C.I.R. v. Bosch’s Estate, 387 U.S. 456, 465 (1967). To this end, we find it difficult to imagine that the Utah Court of Appeals would so closely link Utah’s statutory language to that of Washington, and adopt in the Aragon decision the same rule as Washington with regard to the identity of the manufacturer, only later to adopt a meaning of “and its cause” that directly contradicts Washington’s principles of claim accrual. We believe Washington’s approach most closely tracks the rule Utah courts would adopt, and we therefore apply Washington’s rule in this case. Ford simply has not demonstrated the absence of material factual issues as to when Plaintiffs actually became or should have become aware of conduct giving rise to Ford’s possible legal responsibility.

As to Defendants’ argument that Plaintiffs did not exercise due diligence in ascertaining their claims, such a determination is a highly fact-sensitive inquiry, requiring the court to consider whether plaintiff exhibited “that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so.” Aragon, 857 P.2d at 253, quoting Weber v. Snyderville West, 800 P.2d 316, 318-19 (Utah Ct. App. 1990), quoting Parker v. Ross, 217 P.2d 373, 379 (Utah 1950). “All that is required [to trigger the statute of limitations] is ... sufficient information to apprise [the plaintiffs of the underlying cause of action] so as to put them on notice to make further inquiry if they harbor doubts or questions” about the defendant’s conduct. United Park City Mines Co. v. Greater

Park City Co., 870 P.2d 880, 889 (Utah 1993). Generally, the question of when a plaintiff knew, or with reasonable diligence should have known, of a cause of action is a question of fact for the jury, and precludes a grant of summary judgment. See Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1387 (10th Cir. 1985); see also Andreini v. Hultgren, 860 P.2d 916, 919 (Utah 1993).

Because Plaintiffs have raised genuine factual issues as to the date on which their cause of action accrued, and because Ford has failed to establish as a matter of law that the two-year statute of limitations on Plaintiffs' products liability claim expired prior to the filing of the Complaint, Ford's Motion for Summary Judgment is DENIED as to Plaintiffs' product liability claim.³

2. Negligence action

Unlike products liability actions, under Utah law, negligence actions accrue upon the happening of the last event necessary to give rise to liability. Spears, 44 P.3d at 753, citing Berenda v. Langford, 914 P.2d 45, 50 (Utah 1996). In this case, the last event giving rise to liability was the April 12, 1993 automobile accident in which Plaintiffs were injured. Negligence actions fall subject to a four-year statute of limitations. Utah Code Ann. 78-12-25. Therefore, Plaintiffs' window of opportunity to file this negligence claim arising from the accident would have closed on April 12, 1997, more than three

³ In opposition to summary judgment, Plaintiffs cite this Court's decisions in two factually similar cases also arising in the context of this MDL. See Yund v. Bridestone/Firestone, et al., IP 01-5459-C-B/S; Oines v. Island Ford, et al., IP 01-5391-C-B/S. While these cases relate generally to the matters at issue in this case, factual and procedural distinctions render them unhelpful in deciding the issues presented here.

years before Plaintiffs filed their Complaint in this case.

Plaintiffs contend that the discovery rule tolled the limitations period for this cause of action, as well as for the products liability action discussed earlier. The discovery rule applies to negligence actions only in limited circumstances. Misener v. General Motors, 924 F. Supp. 130, 131-32 (D. Utah 1996), citing Dansie v. Anderson Lumber Co., 878 P.2d 1155, 1159 (Utah Ct. App. 1994). In order to avail themselves of the discovery rule with respect to the negligence claim, however, Plaintiffs must offer evidence tending to show that Ford fraudulently concealed facts leading to the discovery of their claims or misled Plaintiffs regarding their claims, or that special circumstances mandate an extension of the limitations period. Spears, 44 P.3d 742. To make out the prima facie case for fraudulent concealment, Plaintiffs must show “(1) the use of fraudulent means by [Defendant]; (2) successful concealment from the injured party; and (3) that the party claiming fraudulent concealment did not know or by the exercise of due diligence could not have known that he might have a cause of action.” Sinclair Oil Corp. v. Atlantic Richfield Co., 720 F. Supp. 894, 906-07 (D. Utah. 1989), citing King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147, 1154 (10th Cir. 1981).

Plaintiffs contend that Ford knew of the alleged defects in the Ford Explorer and acted, in concert and independently, to conceal this information from consumers, specifically Plaintiffs. In support of this contention, Plaintiffs offer the following testimony of David Renfroe, a case specific liability expert:

Ford knew that there were problems with the vehicle with regard to the rollover propensity from their own testing and ADAMS modeling. During the early stages of the design and

analysis of the vehicle it was evident that the UN46, which was to become the Explorer, would not pass Ford's internal standard. ...

... Ford had actual knowledge that the product was defective from the results of their own testing and from reports from the field of numerous injuries and deaths. Ford knew from their experience with the Ford Bronco II that numerous injuries and deaths would result from their design. ...

After reviewing documents and based on engineering principles concerning vehicle dynamics which are commonly understood, it is evident that Ford has been aware of the rollover instability of the vehicle since 1990 before the vehicle was ever produced.

Pl.'s Statement of Material Facts ¶ 10.

We do not find in Renfroe's proffered testimony, nor anywhere else in Plaintiffs' Statement of Material Facts, any evidence that Ford affirmatively acted to mislead or concealed information from Plaintiffs. Despite Renfroe's assertion that "Ford has been aware of the rollover instability of the vehicle since 1990 before the vehicle was ever produced," his testimony does not evidence any personal knowledge that Ford made efforts or took affirmative steps to mislead Plaintiffs or conceal from them their possible cause of action.

Similarly, we do not find "special circumstances" in this case that would mandate the application of the discovery rule. Utah case law makes clear that "[b]efore a period of limitations may be tolled under the [exceptional circumstances] version[] of the discovery rule, an initial showing must be made that the plaintiff did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within that period." Burkholz v. Joyce, 972 P.2d 1235, 1236 (Utah 1998), quoting Walker Drug, 902 P.2d at 1231 (emphasis added). Plaintiffs allege that Ford failed to disclose certain information related to the allegedly defective Ford Explorer, but Plaintiffs have

not produced evidence tending to show that Plaintiffs could not reasonably have discovered sufficient facts to apprise them of the cause of action, whether those facts were obtained from Ford, Firestone, or public records or outside opinions related to the April 12, 1993 accident.

Because Steven North was fifteen years old at the time of the accident, Utah law provides that the applicable statute of limitations on Steven North's negligence claim was tolled until he reached the age of majority on December 1, 1995. Def.'s Statement of Material Facts ¶ 5. The four-year limitations period would have expired on December 1, 1999. Plaintiff has not offered any justification for the subsequent one-year delay in filing this action. Therefore, because we find that the discovery rule does not toll the limitations period applicable to Plaintiffs' negligence claims, Ford's Motion for Summary Judgment is GRANTED as to Barbara North's and Steven North's negligence claims. However, we must consider whether Nicole North's age at the time of the accident and subsequent disability tolled the limitations period as to her claim.

3. Age/disability

Plaintiffs contend that Nicole North's age and legal disability tolled the statute of limitations applicable to her negligence action. Utah Code § 78-12-36 provides:

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the commencement of the action.

The accident in this case occurred on April 12, 1993. Consequently, the four-year statute of

limitations governing negligence actions would have expired on April 12, 1997. Nicole reached the age of majority on December 13, 1998. By the plain terms of the Utah statute, therefore, the four-year limitations period for Nicole's negligence claim would actually have expired on December 13, 2002.

Ford disputes this application of the statute, arguing that because Nicole's ability to bring the negligence action did not change upon her reaching the age of majority (in light of Nicole's disabilities and the fact that Barbara North had been appointed her legal guardian as early as 1994), the limitations period should instead be calculated from the time Barbara North was appointed Nicole's guardian. Under Utah law, the appointment of an administrator or guardian may commence the running of the statute of limitations for a minor's cause of action under certain narrow circumstances. Forrer v. Reed, 560 P.2d 1113, 1115 (Utah 1977). Utah courts have stated repeatedly that "absent an express, unequivocal, and exacting legislative mandate," the limitations period must be tolled during minority. Sulzen v. Williams, 977 P.2d 497, 503-04 (Utah Ct. App. 1999), citing Cole v. Jordan Sch. Dist., 899 P.2d 776, 778 (Utah 1995); Blum v. Stone, 752 P.2d 898, 900 (Utah 1988). Despite offering policy arguments in support of its position that the limitations period should have run during Nicole North's minority, Ford has not identified and we have not found any evidence to suggest that Barbara North's appointment as Nicole's guardian was meant to facilitate the investigation and prosecution of claims against alleged tortfeasors liable for Nicole's injuries. Nor have we found any statement by the Utah legislature reflecting the intent to abbreviate the tolling period otherwise applicable to minors upon the appointment of a legal guardian. As a federal court sitting in diversity, we are in no position to adjust or supplement Utah law in pursuit of public policy initiatives in the manner Ford advocates. Accordingly,

we find that the filing period for Nicole’s negligence action commenced when Nicole reached the age of majority – December 13, 1998 – and would not expire until December 13, 2002. Therefore, Nicole’s claim filed December 13, 2000, is not barred by the statute of limitations, and Ford’s Motion for Summary Judgment is DENIED as to Nicole North’s negligence claim.

4. Motion to dismiss for failure to plead fraud with particularity⁴

Defendant next moves for summary judgment on Plaintiffs’ claim for punitive damages on the basis that such claim is based on an allegation of fraud, which Plaintiffs failed to plead with particularity as required by Federal Rule of Civil Procedure 9(b). Procedurally, such an action is actually a motion to dismiss, not a motion for summary judgment, because we are asked to evaluate only whether the Complaint contains sufficient detail to satisfy federal pleading requirements. It is well settled that the Federal Rules employ a notice-based pleading system rather than a fact-based pleading system. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993); Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998). However, when the complaint contains an allegation of fraud, more stringent requirements are imposed. Fed. R. Civ. P. 9(b). A plaintiff must plead all averments of fraud with particularity. Vicom, Inc. v. Harbridge Merchant Servs., Inc., 20 F.3d 771, 777 (7th Cir. 1994). Providing the defendant with “fair notice is ‘perhaps the most basic consideration’ underlying Rule 9(b).” Vicom, Inc., 20 F.3d at 777-78.

⁴ Although Ford alternatively refers to this as a motion to dismiss and a motion for summary judgment, we note that it seeks to dismiss Plaintiffs’ claims for punitive damages, based on the content of the pleadings without reference to outside facts, and so we decide it as a motion to dismiss, consistent with the form in which Ford first presented it.

In the Seventh Circuit, a plaintiff may satisfy Rule 9(b) by providing a “general outline” of the circumstances constituting the alleged fraud, sufficient to “reasonably notify the defendant[] of [its] purported role” in the fraud. Midwest Grinding Co., Inc. v. Spitz, 976 F.2d 1016, 1020 (7th Cir. 1992). Generally, this outline must include “the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated.” Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 683 (7th Cir. 1992) (citations omitted); see also General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1078 (7th Cir. 1997). “By requiring the plaintiff to allege the who, what, where, and when of the alleged fraud, the rule requires the plaintiff to conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate.” Ackerman v. Northwestern Mutual Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999). These requirements are tempered somewhat where a plaintiff alleging fraud does not have access to all the facts necessary to provide details, such as when those facts are within the exclusive knowledge of the defendant. See Katz v. Household Int’l, Inc., 91 F.3d 1036, 1040 (7th Cir. 1996); Jepson, Inc. v. Makita Corp., 34 F.3d 1321, 1328 (7th Cir. 1994); Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 684 (7th Cir. 1992). However, the requirements apply to allegedly fraudulent omissions as well as fraudulent representations. DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990); Ackerman, 172 F.3d at 469.

As phrased in the Complaint, Plaintiffs’ punitive damages claim does not satisfy the pleading requirements of Rule 9(b). Plaintiffs’ request for punitive damages is based on both allegedly fraudulent

representations and omissions by Ford, and Ford's participation in such conduct by Firestone, such that Rule 9(b)'s heightened pleading standard applies.⁵ Although the Complaint provides a general picture of Ford's allegedly wrongful conduct, it nowhere identifies specific communications by Ford that either constituted misrepresentations or, by virtue of their content, would have suggested a duty to disclose the allegedly omitted information. The Complaint provides no information as to the timing of such representations, the frequency, the medium by which they were transmitted, or any of the agents involved. While the heightened pleading standards of Rule 9(b) may be relaxed where a plaintiff does not have equal access to all the salient facts, such is not the case here. Consequently, pursuant to Rule 9(b), Plaintiffs' punitive damages claim is DISMISSED without prejudice. Within 30 days of this Entry, Plaintiffs may amend their Complaint to provide the detail required under Rule 9(b) to support their claim for punitive damages.

Conclusion

Ford moved for summary judgment on Plaintiffs' products liability and negligence claims based on the expiration of the applicable statutes of limitations. For the reasons set out in detail above, we

⁵ As to Plaintiffs' contention that the request for punitive damages is based not on alleged fraud but more generally on Ford's wrongful conduct, we find that Plaintiffs have not provided material facts to support such a request. Utah courts have held that "punitive damages are appropriate only for conduct which is willful and malicious or that manifests a knowing and reckless indifference and disregard toward the rights of others." Lake Philgas Service v. Valley Bank & Trust Co., 845 P.2d 951, 959 (Utah Ct. App. 1993), citing Johnson v. Rogers, 763 P.2d 771, 774 (Utah 1988). The only "willful and malicious" conduct Plaintiffs have identified is Ford's alleged misrepresentations or omissions of facts related to the safety or rollover tendency of Ford Explorers. Such conduct is, at its heart, fraudulent, and therefore requires application of the heightened pleading standard of Rule 9(b).

find that 1) genuine issues of material fact remain as to whether Plaintiffs exercised due diligence in discovering their products liability claims within the applicable limitations period; 2) Barbara and Steven North's negligence claims are barred by the statute of limitations; 3) Nicole North's negligence claim against Ford is not barred by the statute of limitations; and 4) Plaintiffs have failed to provide sufficient detail required by Rule 9(b) to support their claim for punitive damages. Accordingly, we GRANT IN PART and DENY IN PART Ford's Motion for Summary Judgment, and we GRANT Ford's Motion to Dismiss (without prejudice). Plaintiffs have 30 days from the date of this Entry in which to amend their claim for punitive damages with sufficient detail to satisfy Rule 9(b).

It is so ORDERED this _____ day of November, 2002.

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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