

NA
(215) 981-4000

Philip Lebowitz
[COR NTC]
Pepper, Hamilton & Scheetz
18th & Arch Streets
3000 Two Logan Square
Philadelphia, PA 19103-2799

NA
(215) 981-1200
FTS 4000

SOFAMOR, INC.
defendant

Gary J. Spahn
(See above)
[COR LD NTC]

Stephen S. Phillips
(See above)
[COR]

Philip Lebowitz
(See above)
[COR NTC]

SOFAMOR-DANEK GROUP, INC.
defendant

Gary J. Spahn
(See above)
[COR LD NTC]

Stephen S. Phillips
(See above)
[COR]

Philip Lebowitz
(See above)
[COR NTC]

SOFAMOR, S.N.C.
defendant

Gary J. Spahn
(See above)
[COR LD NTC]

Stephen S. Phillips
(See above)
[COR]

Philip Lebowitz
(See above)
[COR NTC]

WARSAW ORTHOPEDIC, INC.

Gary J. Spahn

defendant

(See above)
[COR LD NTC]

Stephen S. Phillips
(See above)
[COR]

Philip Lebowitz
(See above)
[COR NTC]

DANEK CAPITAL CORPORATION
defendant
[term 10/29/96]

DANEK SALES CORPORATION
defendant
[term 10/29/96]

BUCKMAN COMPANY, INC.
defendant
[term 10/29/96]

NOREX USA, INC.
defendant
[term 10/29/96]

NATIONAL MEDICAL SPECIALTY,
INC.
fka
Stuart Medical Specialty
defendant
[term 10/29/96]

STUART, INC.
defendant
[term 10/29/96]

EDUARDO LUQUE
defendant

Margaret S. Woodruff
[COR NTC]
Schnader, Harrison, Segal &
Lewis
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2168

PAUL MCAFEE
defendant
[term 10/29/96]

ROGER P. JACKSON
defendant
[term 10/29/96]

DAVID BRADFORD
defendant
[term 10/29/96]

YVES COTREL
defendant
[term 10/29/96]

JEAN DUBOUSSET
defendant
[term 10/29/96]

HARRY SHUFFLEBARGER
defendant
[term 10/29/96]

R. GEOFFREY WILBER
defendant
[term 10/29/96]

CHARLES E. JOHNSTON, II
defendant

Robert Armistead Angle
[COR LD NTC]
Mays & Valentine
NationsBank Center
1111 East Main Street
P.O. Box 1122
Richmond, VA 23218-1122
(804) 697-1200

Gary J. Spahn
(See above)
[COR LD NTC]

Margaret S. Woodruff
(See above)
[COR NTC]

Edward Hutton Starr, Jr.
[COR LD NTC]

Mays & Valentine
P.O. Box 1122
Richmond, VA 23208-1122
(804) 697-1200

Dabney Jefferson Carr, IV
[COR]
Mays & Valentine, L.L.P.
PO Box 1122
Richmond, VA 23218-1122
(804) 697-1200

George Lehner
[COR NTC]
Pepper Hamilton
1300 19th St. NW
Washington, DC 20036
NA
(202) 828-1200

RICHARD ASHMAN, PH.D.
defendant

Robert Armistead Angle
(See above)
[COR LD NTC]

Gary J. Spahn
(See above)
[COR LD NTC]

Margaret S. Woodruff
(See above)
[COR NTC]

Edward Hutton Starr, Jr.
(See above)
[COR LD NTC]

Dabney Jefferson Carr, IV
(See above)
[COR]

George Lehner
(See above)
[COR NTC]

GARY LOWERY
defendant

Robert Armistead Angle
(See above)
[COR LD NTC]

Gary J. Spahn
(See above)
[COR LD NTC]

Margaret S. Woodruff
(See above)
[COR NTC]

Edward Hutton Starr, Jr.
(See above)
[COR LD NTC]

Philip Lebowitz
(See above)
[COR NTC]

Dabney Jefferson Carr, IV
(See above)
[COR]

George Lehner
(See above)
[COR NTC]

GEORGE RAPP
defendant

Robert Armistead Angle
(See above)
[COR LD NTC]

Gary J. Spahn
(See above)
[COR LD NTC]

Margaret S. Woodruff
(See above)
[COR NTC]

Edward Hutton Starr, Jr.
(See above)
[COR LD NTC]

Stephen S. Phillips
(See above)
[COR]

Philip Lebowitz
(See above)
[COR NTC]

Dabney Jefferson Carr, IV
(See above)
[COR]

George Lehner
(See above)
[COR NTC]

ENSOR TRANSFELDT
defendant

Robert Armistead Angle
(See above)
[COR LD NTC]

Gary J. Spahn
(See above)
[COR LD NTC]

Edward Hutton Starr, Jr.
(See above)
[COR LD NTC]

Dabney Jefferson Carr, IV
(See above)
[COR]

James F. Roegge
[COR NTC]
Richard L. Pemberton, Jr.
[COR]
Meagher & Geer
33 S. 6th Street
4200 Multifoods Tower
Minneapolis, MN 55402
NA
(612) 338-0661

George Lehner
(See above)
[COR NTC]

HANSEN YUAN
defendant
[term 10/29/96]

JOHN A. HERRING
defendant

Robert Armistead Angle
(See above)
[COR LD NTC]

Gary J. Spahn
(See above)
[COR LD NTC]

Margaret S. Woodruff
(See above)
[COR NTC]

Edward Hutton Starr, Jr.
(See above)
[COR LD NTC]

Dabney Jefferson Carr, IV

(See above)
[COR]

George Lehner
(See above)
[COR NTC]

JOHN P. BARRETT
defendant
[term 10/29/96]

THOMAS WHITECLOUD, III
defendant

Robert Armistead Angle
(See above)
[COR LD NTC]

Gary J. Spahn
(See above)
[COR LD NTC]

Margaret S. Woodruff
(See above)
[COR NTC]

Edward Hutton Starr, Jr.
(See above)
[COR LD NTC]

Philip Lebowitz
(See above)
[COR NTC]

Dabney Jefferson Carr, IV
(See above)
[COR]

George Lehner
(See above)
[COR NTC]

THOMAS A. ZDEBLICK
defendant

Robert Armistead Angle
(See above)
[COR LD NTC]

Gary J. Spahn
(See above)
[COR LD NTC]

Margaret S. Woodruff
(See above)
[COR NTC]

Edward Hutton Starr, Jr.
(See above)
[COR LD NTC]

Philip Lebowitz
(See above)
[COR NTC]

Dabney Jefferson Carr, IV
(See above)
[COR]

George Lehner
(See above)
[COR NTC]

TEXAS SCOTTISH RITE HOSPITAL
FOR CRIPPLED CHILDREN
defendant

Robert Armistead Angle
(See above)
[COR LD NTC]

Gary J. Spahn
(See above)
[COR LD NTC]

Margaret S. Woodruff
(See above)
[COR NTC]

Edward Hutton Starr, Jr.
(See above)
[COR LD NTC]

Dabney Jefferson Carr, IV
(See above)
[COR]

George Lehner
(See above)
[COR NTC]

AMERICAN ACADEMY OF
ORTHOPAEDIC SURGEONS
defendant

Hill Beverley Wellford, III
[COR LD NTC]
Christian & Barton
909 E Main St
Suite 1200
Richmond, VA 23219-3095
(804) 697-4100

Norman P. Jeddeloh
[COR NTC]
David M. Rownd
[COR]

Burditt & Radzius
333 W. Wacker Drive
Suite 2600
Chicago, IL 60606-1218
NA
(312) 781-6633

Lauren E. Remick
[COR NTC]
Burditt and Radzius
1608 Walnut Street
Suite 703
Philadelphia, PA 19103-5449
NA

Mitchell Stearn
[COR NTC]
Porter, Wright, Morris & Arthur
1667 K. Street, N.W.
Suite 1100
Washington, DC 20006-1605
NA
(202) 778-3000

K. Thomas Shahriari
[COR]
Porter, Wright, Morris & Arthur
1667 K Street, N.W.
Suite 1100
Washington, DC 20006-1605
(202) 778-3000

NORTH AMERICAN SPINE SOCIETY
defendant

Hill Beverley Wellford, III
(See above)
[COR LD NTC]

June J. Essis
[COR NTC]
Fineman & Bach, P.C.
1608 Walnut Street
19th Floor
Philadelphia, PA 19103-5413
NA
(215) 893-9300

Shawn M. Collins
[COR NTC]
The Collins Law Firm
1979 N. Mill Street
Suite 109
Naperville, IL 60563
NA
(708) 527-1595

Fred Krutz
[COR NTC]
Daniel J. Mulholland
[COR]
David H. Fulcher
[COR]
Roland M. Slover
[COR]
Edwin S. Gault, Jr.
[COR]
Forman, Perry, Watkins, Krutz &
Tardy, P.L.L.C.
1200 One Jackson Place
188 E. Capitol Street
Jackson, MS 39201
NA

SCOLIOSIS RESEARCH SOCIETY
defendant

Robert E. Nord
[COR NTC]
Hinshaw & Culbertson
222 North La Salle Street
Chicago, IL 60601-1081
N/A
(312) 704-3000

Hill Beverley Wellford, III
(See above)
[COR LD NTC]

Janet L. MacDonell
[COR NTC]
Deutsch, Kerrigan & Stiles
755 Magazine Street
New Orleans, LA 70130
NA
(504) 581-5141

Julie A. Harms
[COR NTC]
Michael J. Leech
[COR]
Thomas F. Ging
[COR]
Hinshaw and Culbertson
222 N. La Salle
Suite 300
Chicago, IL 60601-1081
NA

W. Lee Kohler
[COR]
Joseph McReynolds

[COR]
Douglas Elliott
[COR]
Deutsch, Kerrigan & Stiles,
L.L.P.
755 Magazine Street
New Orleans, LA 70130
NA
(504) 581-5141

GICD-USA
defendant
[term 10/29/96]

GROUPE INTERNATIONALE COTREL-
DUBOUSSET
defendant
[term 10/29/96]

ACROMED CORPORATION, CHARTER
NUMBER 614043
defendant

Richard I. Werder, Jr.
[COR NTC]
Jones, Day, Reavis & Pogue
901 Lakeside Avenue
Cleveland, OH 44114
NA
(216) 586-7093

Louis A. Bove
[COR NTC]
Bodell, Bove & Van Horn
One Penn Square West
30 S. 15th Street
Suite 1801
Philadelphia, PA 19102-2316
NA
(215) 864-6600

ACROMED CORP., (Now Acromed
Corporation, Charter Number
614043)
defendant

Richard I. Werder, Jr.
(See above)
[COR NTC]

Louis A. Bove
(See above)
[COR NTC]

ACROMED CORPORATION, CHARTER
NUMBER 816942
defendant

Richard I. Werder, Jr.
(See above)
[COR NTC]

Louis A. Bove
(See above)
[COR NTC]

ACROMED RESEARCH AND
DEVELOPMENT CORPORATION
defendant
[term 10/29/96]

ACROMED SPINE RESEARCH
FOUNDATION, INC.
defendant
[term 10/29/96]

ACROMED, INC. CHARTER NUMBER
811415
defendant

Richard I. Werder, Jr.
(See above)
[COR NTC]

Louis A. Bove
(See above)
[COR NTC]

ACROMED INCORPORATED, (Now
Acromed Inc., Charter No.
811415)
defendant

Richard I. Werder, Jr.
(See above)
[COR NTC]

Louis A. Bove
(See above)
[COR NTC]

ACROMED INCORPORATED, CHARTER
NUMBER 816943
defendant

Richard I. Werder, Jr.
(See above)
[COR NTC]

Louis A. Bove
(See above)
[COR NTC]

ACROMED HOLDING CORPORATION,
CHARTER NUMBER 811416
defendant

Richard I. Werder, Jr.
(See above)
[COR NTC]

Louis A. Bove
(See above)
[COR NTC]

ACROMED CORPORATION, (Now

Richard I. Werder, Jr.

Acromed Holding Corporation,
Charter Number 811416)
defendant

(See above)
[COR NTC]

Louis A. Bove
(See above)
[COR NTC]

ACE MEDICAL COMPANY
defendant

John C. Ivins, Jr.
[COR LD NTC]
Hirschler, Fleischer, Weinberg,
Cox & Allen
P.O. Box 500
Richmond, VA 23218-0500
(804) 771-9500

David Wayne Robinson
[COR]
Hirschler, Fleischer, Weinberg,
Cox & Allen
701 East Byrd St
PO Box 500
Richmond, VA 23204-0500
(804) 771-9500

Michael R. Fruehwald
[COR NTC]
Barnes & Thornburg
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, IN 46204
NA
(317) 638-1313

ADVANCED SPINE FIXATION
SYSTEMS, INC.
defendant

Franklin Brawner Greer
(804) 775-1132
[COR]
McGuire, Woods, Battle & Boothe
901 E Cary St
One James Center
Richmond, VA 23219
(804) 775-1000

Robert William McFarland
[COR LD NTC]
McGuire, Woods, Battle & Boothe
9000 World Trade Center
Norfolk, VA 23510
(804) 640-3700

George J. Murphy
[COR NTC]
Hecker, Brown, Sherry and

Johnson
18th & Arch Street
1700 Two Logan Squire
Philadelphia, PA 19103-2769
NA
(215) 665-0400

Tracy E. Gold
[COR NTC]
Aubert and Pajares
3850 N. Causeway Blvd.
Two Lakeway Center, Suite 1650
Metairie, LA 70002
NA
(504) 836-5200

William W. Dunlap, Jr.
[COR NTC]
James D. Wilson
[COR]
Harris, Shelton, Dunlap and
Cobb
2700 One Commerce Square
Memphis, TN 38103
NA

CROSS MEDICAL PRODUCTS
defendant

Gary Allen Kalbaugh, Jr.
[COR LD NTC]
Kalbaugh, Pfund & Messersmith
9030 Stony Point Parkway
Ste 540
Richmond, VA 23235
(804) 320-6300

Robert Gerard Harrington
[COR]
Kalbaugh, Pfund & Messersmith,
P.C.
9030 Stony Point Parkway
Suite 540
Richmond, VA 23235
(804) 320-6300

Lawrence A. Mann
[COR NTC]
Stanton E. Shuler, Jr.
[COR]
Leake and Andersson
1100 Poydras Street
1700 Energy Centre
New Orleans, LA 70163-1701
NA
(504) 585-7500

DEPUY-MOTECH, INC.
defendant

John C. Ivins, Jr.
(See above)
[COR LD NTC]

David Wayne Robinson
(See above)
[COR]

Michael R. Fruehwald
(See above)
[COR NTC]

HOWMEDICA, INC. AND ITS PARENT,
PFIZER, INC.
defendant
[term 10/29/96]

SCIENTIFIC SPINAL
defendant

J. Kurt Straub
[COR NTC]
Obermayer, Rebmann, Maxwell &
Sippel
1617 JFK Boulevard
19th Floor
Philadelphia, PA 19103-7329
NA
(215) 665-3011

SMITH & NEPHEW RICHARDS, INC.
defendant

Vijay Kumar Mago
(804) 788-8755
[COR]
Hunton & Williams
951 E Byrd St
Riverfront Plaza, East Tower
Richmond, VA 23219
(804) 788-7320

Harry Margerum Johnson, III
[COR LD NTC]
Hunton & Williams
951 E. Byrd Street
Riverfront Plaza, East Tower
Richmond, VA 23219-4074
(804) 788-8200

Matthew James Calvert
[COR NTC]
Hunton & Williams
NationsBank Plaza
600 Peachtree Street, N.E.

Suite 4100
Atlanta, GA 30308-2216
(404) 888-4000

Brian P. Quirk
[COR NTC]
Montgomery, Barnett, Brown,
Read, Hammond & Mintz, LLP
1100 Poydras Street
3200 Energy Centre
New Orleans, LA 70163-3200
NA
(504) 585-3200

SYNTHES (U.S.A)
defendant

Paul Dennis Krause
[COR LD NTC]
Wilson, Elser, Moskowitz,
Edelman & Dicker
1341 G Street, N.W.
Suite 500
Washington, DC 20005-3105
(202) 626-7660

Robert R. Reeder
[COR NTC]
Cozen & O'Connor
1900 Market Street
The Atrium-Third Floor
Philadelphia, PA 19103-3527
NA
(215) 665-2000

SYNTHES, INC.
defendant

Paul Dennis Krause
(See above)
[COR LD NTC]

Robert R. Reeder
(See above)
[COR NTC]

SYNTHES NORTH AMERICA, INC.
defendant

Paul Dennis Krause
(See above)
[COR LD NTC]

Robert R. Reeder
(See above)
[COR NTC]

SYNTHES, A.G. CHUR
defendant

ZIMMER, INC.
defendant

David P. Corrigan
[COR LD NTC]
Harman, Claytor, Corrigan &
Wellman
P O Box 70280
Richmond, VA 23255
(804) 747-5200

Thomas G. Stayton
[COR NTC]
Leslie S. Rogers
[COR]
Baker & Daniels
300 N. Meridan Street
Suite 2700
Indianapolis, IN 46204
NA
(317) 237-1260

Albert J. Dahm
[COR NTC]
Baker & Daniels
111 E. Wayne Street
Suite 800
Fort Wayne, IN 46802
NA
(219) 460-1677

ADVANCED BIOSEARCH ASSOCIATES
defendant
[term 10/29/96]

SPINAL SCIENCE ADVANCEMENT
FOUNDATION
defendant

Gary J. Spahn
(See above)
[COR LD NTC]

Philip Lebowitz
(See above)
[COR NTC]

Sarah L. Olson
[COR NTC]
Richard C. Bartelt
[COR]
Wildman, Harrold, Allen and
Dixon
225 W. Wacker Drive
Chicago, IL 60606-1229
NA
(312) 201-2000

George Lehner
(See above)
[COR NTC]

HEALTH INDUSTRY MANUFACTURER'S
ASSOCIATION
defendant
[term 10/29/96]

ORTHOPEDIC SURGICAL
MANUFACTURERS ASSOCIATION
defendant
[term 10/29/96]

SPINAL IMPLANT MANUFACTURERS
GROUP
defendant
[term 10/29/96]

YOUNGWOOD MEDICAL SPECIALITIES,
INC.
fka
National Medical Specialty,
Inc.
fka
Stuart Medical Speciality,
Inc.
fka
Stuart Medical Inc.
fka
Stuart Drug and Surgical
Supply, Inc.
defendant

Carl A. Henlein
[COR NTC]
Brown, Todd and Heyburn
3200 Providian Center
Louisville, KY 40202-3363
NA
(502) 589-5400

Stacy C. Taylor
[COR LD NTC]
Woods, Rogers & Hazlegrove, PLC
823 East Main Street
Suite 1200
Richmond, VA 23219
(804) 343-5024

Susan S. Wettle
[COR NTC]
Lori E. Hammond
[COR]
Charles M. Pritchett, Jr.
[COR]
Brown, Todd & Heyburn
3200 Providian Center
Louisville, KY 40202-3363
NA
(502) 589-5400

Douglas W. Langdon
[COR NTC]

Brown, Todd & Heyburn
400 W. Market Street
32nd Floor
Louisville, KY 40202-3363
NA
(502) 589-5400

HANSEN YUAN, M.D.
defendant
[term 11/04/97]

RICHARD W. TREHARNE, Ph.D.
defendant

Gary J. Spahn
(See above)
[COR LD NTC]

Stephen S. Phillips
(See above)
[COR]

Philip Lebowitz
(See above)
[COR NTC]

Dabney Jefferson Carr, IV
(See above)
[COR]

ERMON R. PICKARD
defendant

Stephen S. Phillips
(See above)
[COR]

Philip Lebowitz
(See above)
[COR NTC]

STUART MEDICAL INC.
fka
Stuart Drug and Surgical
Supply, Inc.
defendant
[term 08/29/97]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Jeanette Wade, et al.,

Plaintiffs

v.

Civil Action Number 3:95CV876

Danek Medical Inc., et al.,

Defendants

MEMORANDUM OPINION

This matter is before the Court on defendants' motions for summary judgment and dismissal for lack of personal jurisdiction. This case is one of more than two thousand separate products liability actions filed by more than five thousand plaintiffs claiming that defective "pedicle screw fixation devices" which have been surgically attached to the pedicles of their spine have caused them to suffer physical injuries. Pursuant to 28 U.S.C. §1407, the Judicial Panel on Multi-district Litigation transferred these cases to the United States District Court for the Eastern District of Pennsylvania for consolidated pretrial proceedings, following which two separate groups of plaintiffs filed consolidated "Omni Actions." Generally speaking, the plaintiffs in the first of these two groups, including Janet Wade and Edwin Wade, the plaintiffs herein, sued not only the manufacturers, designers and distributors of the devices on products liability theories of recovery, but they sued, as well, a number of medical associations, charging that these defendants had

unlawfully conspired with the device manufacturers to promote, market and sell pedicle screw fixation devices to medical providers.¹

The MDL court, through Judge Louis C. Bechtle, managed the litigation through extensive procedural matters, including dismissal of the original complaints, the filing of amended omnibus complaints, discovery, and the resolution of numerous motions, including two motions to dismiss, and that court has recently remanded Wade's case to this court for final disposition. Their case is now before the court on: (1) the Medical Associations' motion for summary judgment; (2) Zimmer, Inc.'s motion for summary judgment; (3) Warsaw Orthopedic, I., Sofamor, S.N.C., Sofamor-Danek Group, Sofamor, Inc., Danek Medical, Inc.'s motion for summary judgment; (4) Richard Ashman, Ph.D., John A. Herring, M.D., Charles E. Johnston, II, M.D., Gary Lowery, M.D., Ph.D., George Rapp, M.D., Ensor E. Transfeldt, M.D., Thomas Whitecloud, III, M.D., Thomas A. Zdeblick, M.D., and Texas Scottish Rite Hospital for Children's motion to dismiss for lack of personal jurisdiction and motion for summary judgment; (5) Youngwood Medical's motion for summary judgment; (6) Synthes, USA, Synthes, Inc., and Synthes North America's motion for summary judgment; (7) DePuy-Motech, Inc.'s motion for summary judgment; (8) Ace Medical Company's motion for summary judgment; (9) Cross Medical Products Inc.'s motion for summary judgment; (10) Smith & Nephew Richards, Inc.'s motion for summary judgment; and (11) Advanced Spine Fixation Systems, Inc.'s motion to dismiss for lack of personal jurisdiction.

¹ The medical association defendants named herein included the American Academy of Orthopaedic Surgeons, the North American Spine Society, and the Scoliosis Research Society.

Defendants move for summary judgment on the ground that Plaintiffs' claims are barred by the statute of limitations. All of plaintiffs' claims are subject to Virginia Code Section 8.01-243(A), which requires that actions for personal injury be brought within two years of when the injury, no matter how slight, is sustained. St. George v. Pariser, 253 Va. 329 (1997) (injury is deemed to occur, and the statute of limitations period begins to run, whenever any injury, however slight, is sustained). The date on which the statute of limitations begins to run is the date when the injury is received, notwithstanding that the plaintiff may sustain more substantial injuries at a later date. See Locke v. Johns-Manville Corp., 221 Va. 951, 957 (1981).

Plaintiff's spinal fusion surgery occurred on October 26, 1992. According to Ms. Wade's deposition, her back pain never diminished after her October 1992 surgery. In fact she states that she specifically told individuals responsible for her pain management, "Please, something is going wrong, and I know y'all are doing your best." Wade Dep. at 167. She stated that her back pain became worse immediately after surgery and "was not improved at all." Id. Ms. Wade makes abundantly clear in her deposition that she was aware of her alleged injury and its alleged cause within days of her implantation surgery. She testified that she knew that she was having a problem that was caused by the screws before she went to pain management in April 1993. Id. at 196. She states the same in her questionnaire at the Pain Management Center at MCV. See Questionnaire at JRW-001-000013, Exhibit H to Defendant Danek's Reply Memorandum. There is no question that Ms. Wade knew of her alleged injury immediately following her back surgery, but certainly no later than April 1993.

Plaintiffs put forth three arguments that the statute of limitations does not bar their action.² First, plaintiffs argue that because of Ms. Wade's long history of back pain, she could not have reasonably known of a connection between her symptoms and the TSRH device until her doctors told her there may be a link. Second, plaintiffs contend that the defendants have failed to meet their burden of showing with precision when plaintiff's injury occurred. Finally, the plaintiffs allege that all statutes of limitation were tolled for any putative class member under the U.S. Supreme Court's ruling in American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974). The court addresses each of these arguments in turn and finds them without merit.

There can be no dispute that Ms. Wade has had serious medical problems throughout much of her life. See Danek's motion pp.4-7. However, as discussed above, Ms. Wade herself testified in her deposition that she believed the 1992 fusion surgery was the source of her injury. Plaintiffs are mistaken when they argue both that Ms. Wade could not know the source of her pain and that her cause of action did not accrue until her physicians told her of the possible connection between her symptoms and the device. Virginia law does not calculate statute of limitations in personal injury from the date of diagnosis. Brown v. Plywood Panels, Inc., 67 F.3d 293 (4th Cir. 1995) (citing Locke v. Johns-Manville Corp., 221 Va. 951 (1981)).³ Ms. Wade, and her causation expert, Dr. Yarus, claim that it was due to the implantation of the device that plaintiff suffered permanent

² Two are set forth in plaintiffs' memorandum in opposition to Danek's motion for summary judgment and the third is the subject of plaintiffs' supplemental memorandum filed May 5, 1998.

³ Defendants correctly characterize plaintiffs' reliance on Hing-Har Lo v. Burke 249 Va. 311 (1995) as "misplaced." In the instant case, it is Wade and her expert that claim she suffered immediate physical injury as well as subsequent pain. It is from the time of injury that the statute of limitations accrues.

physical harm. Dr. Yarus Dep. at 29, 31. Even if the court were to disregard the testimony of plaintiffs' own expert, Ms. Wade testified in her deposition that she knew something was wrong when she began to have pain in her left leg as soon as she began walking after the surgery. Wade Dep. at 196. This occurred before she went into pain management in the spring of 1993. Id. In any event, defendants are not required to establish as a matter of law the exact date that the injury was first sustained; they need only to establish that it was more probable than not that it occurred more than two years prior to the filing of the suit on October 23, 1995. This they have amply demonstrated. See Brown v. Plywood Panels.

Finally, plaintiffs argue that the Supreme Court's ruling in American Pipe and Construction Company v. Utah, 414 U.S. 538 (1974), precludes a dismissal in this case on statute of limitations ground.⁴ On January 12, 1994, a class action suit was filed in the Eastern District of Pennsylvania, naming Sofamor-Danek as a defendant and naming as putative class members all persons who had Sofamor-Danek pedicle screws implanted into their spines. Class certification was denied on February 22, 1995.

In American Pipe the Court held that the filing of a class action suit tolls the statute of limitations for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. 414 U.S. at 553. Plaintiffs' reliance on American Pipe and Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983) for support in this case is misplaced. The limitation periods in the above cited cases were derived from federal

⁴ Plaintiffs' argument only applies to defendants named in the class action. According to Exhibit 4 attached to plaintiffs' supplemental memorandum filed May 5, 1998, the two defendants were Acromed Corporation and Sofamor Danek Group, Inc. Accordingly, the argument is moot as to the other defendants in this case.

statutes. As the court said in In re Agent Orange Product Liab. Litig., 818 F.2d 210, 213 (2d. Cir. 1987), it is “doubtful” that they would be applicable precedent with regard to a state statute of limitations. This court agrees. The court further notes that the instant case is a mass tort personal-injury litigation, where this court is sitting in diversity. There is no overriding federal interest in this case as there was in American Pipe. Compare In re “Agent Orange” Prod. Liab. Litig. v. Dow Chem. Co., 818 F.2d at 213, cert denied Fraticelli v. Dow Chem. Co., 484 U.S. 1004 (1988); Sentry Corp. v. Harris, 802 F.2d 229, 244 (7th Cir. 1986) (“rationale applicable to diversity cases is inapposite in federal question cases because the federalist considerations . . . are absent”), cert. denied, 481 U.S. 1004(1987); and Carter v. Washington Metro Area Transit Auth., 764 F.2d 854, 857 (D.C. Cir. 1985)(“no remotely compelling federal interest in overriding the local statute of limitations” in personal-injury suit between private parties) with Adams Pub. Sch. Dist. v. Asbestos Corp., 7 F.3d 717, 719 (8th Cir. 1993) (viewing federal interest in American Pipe tolling “sufficiently strong to justify tolling in a diversity case when the state law provides no relief”).⁵ Absent an applicable Virginia tolling law, this Court will not apply American Pipe to toll the statute of limitations in a personal-injury litigation.

Conclusion

Despite the notable breadth of plaintiffs’ claims, in terms of defendants and causes of action, plaintiffs’ complaint must fail as untimely for the reasons above stated. Because the statute of limitations argument is common to all claims and defendants, the court declines to address the merits

⁵ Cited from Barela v. Showa Denko K.K., 1996 WL 316544 *11 (D.N.M. Feb. 28 1996).

of the case with regard to defendants' motions to dismiss. However, the court notes that had it not dismissed plaintiffs' case as untimely, it would have adopted the reasoning in Mary Coleman v. Danek Medical, Inc. et al, Civil Action No. 3:96CV776LN (S.D. Miss. Apr. 30, 1998). The court wholeheartedly concurs with Coleman's interpretation of Judge Bechtle's Order In re Orthopedic Bone Screw Prods. Liab. Litig., No. MDL-1014, 1995 WL 925671 (E.D. Pa. July 12, 1995)(PTO 68). Likewise this court would have followed Coleman's analysis of the conspiracy and concert of action claims against the Medical Associations.

For the reasons set forth above, the defendants' motions for summary judgment are GRANTED on the ground that plaintiffs' claims are time barred and the case is DISMISSED WITH PREJUDICE as to all claims against all defendants.

5/13/98

DATE

/s/ Richard L. Williams

SENIOR UNITED STATES DISTRICT JUDGE