2004 JAN -5 AM 11: 39
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

COLLEEN ALLEY and RALPH ALLEY, Plaintiffs, vs. JOHNSON & JOHNSON, a New Jersey Corporation; and CODMAN & SHURTLEFF, INC., a New Jersey Corporation, Defendants.	**No. 1:02-cv-40043** **ORDER ON MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on Defendants' Motion for Summary Judgment. Hearing was held on the motion on December 19, 2003. Attorneys Robert Houghton and Nancy Penner appeared for Defendants, and attorney Christopher Welsh appeared for the Plaintiffs. The matter is now fully submitted for review. For the reasons discussed below, Defendant's Motion for Summary Judgment must be **granted**.

SUMMARY OF MATERIAL FACTS

On October 4, 2000, Plaintiff Colleen Alley underwent surgery at Mercy Hospital in Council Bluffs for a herniated disk in her back. During the surgery, a Codman air drill was used. According to Dr. Trinh's surgery record, during the surgery the air drill jammed and then restarted. As a result, the hand-piece of the air drill jerked and caused a tear in the dura. The air drill at issue has been identified as a Codman air drill, product code number 26-5020, serial number 1049.

Documents indicate that the air drill was manufactured in 1978 at the latest by Pevrick Engineering Company of Sun Valley, California, for distribution by Defendant Codman and Shurtleff. Records indicate that the air drill was shipped on February 14, 1978. Although it is not clear when the air drill was actually purchased, there is evidence that Codman returned the air drill to Mercy Hospital after servicing the drill on April 19, 1984, indicating the drill was purchased and in use by that date. After the 1984 repairs, the drill was returned to Codman in 1985, 1993, and 2001 for other repairs.

Plaintiff filed the present action on September 30, 2002, in Pottawattamie County District Court. Plaintiff Colleen Alley alleges negligence, strict liability, breach of warranty, and a claim for punitive damages against both Defendants stemming from the alleged malfunction of the Codman air drill which was used during her back surgery. Plaintiff Ralph Alley alleges claims for loss of consortium and punitive damages against both Defendants stemming from the same incident. On October 15, 2002, Defendants removed the case to federal court on the basis of diversity jurisdiction.[1]

Defendants moved for summary judgment on all claims, arguing that Plaintiffs' claims are barred by Iowa Code § 614.1(2A)(a), Iowa's statute of repose for product liability claims. Defendants assert that the drill was in use at Mercy Hospital more than 15 years before Plaintiffs commenced this action and, therefore, Plaintiffs' claims were

[1] Plaintiffs are both citizens of Iowa. Defendant Johnson & Johnson is incorporated under the laws of the State of New Jersey with its principal place of business in New Jersey; Defendant Codman & Shurtleff is incorporated under the laws of the State of New Jersey with its principal place of business in Massachusetts. Plaintiffs' claims exceed the amount of $75,000.

brought more than 15 years after the air drill was "first purchased, leased, bailed, or installed for use" (citing Iowa Code § 614.1(2A)(a)). Plaintiffs contend that on or about September 20, 1993, the drill was refurbished and urges the Court to determine that the Iowa Supreme Court would find that the statute of repose recommences when a product has been refurbished.

APPLICABLE LAW AND DISCUSSION

A. Standard of Review

"[C]laims lacking merit may be dealt with through summary judgment under Rule 56." Swierkiewicz v. Soreman, 122 S. Ct. 992, 998-999 (2002). Summary judgment is a drastic remedy, and the Eighth Circuit has recognized that it "must be exercised with extreme care to prevent taking genuine issues of fact away from juries." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990). "The judgment sought shall be rendered forthwith 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." Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Herring v. Canada Life Ins. Co., 207 F.3d 1026, 1029 (8th Cir. 2000).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Celotex, 477 U.S. at 323); see also Shelter Ins. Co. v. Hildreth, 255 F.3d 921, 924

(8th Cir. 2001); McGee v. Broz, 251 F.3d 750, 752 (8th Cir. 2001). Once the moving party has carried its burden, the opponent must show that a genuine issue of material facts exists. Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co., 165 F.3d 602, 607 (8th Cir. 1999). The court gives the nonmoving party the benefit of all reasonable inferences and views the facts in the light most favorable to that party. de Llano v. Berglund, 282 F.3d 1031, 1034 (8th Cir. 2002); Pace v. City of Des Moines, 201 F.3d 1050, 1052 (8th Cir. 2000); Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997).

"Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." Shelton v. ContiGroup Companies, Inc., 285 F.3d 640, 642 (8th Cir. 2002) (citing Henerey v. City of St. Charles, 200 F.3d 1128, 1131 (8th Cir. 1999)). Summary judgment should not be granted if the court can conclude that a reasonable trier of fact could return a verdict for the non-moving party. Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Burk v. Beene, 948 F.2d 489, 492 (8th Cir. 1991). In light of these standards, the Court considers the present motion.

B. Iowa Code § 614.1

Defendant contends that the Codman air drill at issue in this case was in use more than 15 years before Plaintiffs commenced this action and, therefore, Plaintiffs' claims are barred by the statute of repose contained in Iowa Code § 614.1(2A)(a). An Air Drill

Inspection Report indicates that the drill was shipped from Codman on February 14, 1978; however, the report does not indicate to whom the air drill was shipped, or for what reason. A second Air Drill Inspection Report indicates that the air drill was inspected, cleaned, and shipped back to its owner on April 19, 1984. The 1984 Inspection Report indicates that dried blood was found on the air drill, which shows that the drill was in use prior to being shipped to Codman for the 1984 repairs. Therefore, at the very latest, the product had been purchased and was in use by 1984.

Iowa Code § 614.1 provides:

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> Those founded on the death of a person or injuries to the person or property brought against the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of a product based upon an alleged defect in the design, inspection, testing, manufacturing, formulation, marketing, packaging, warning, labeling of the product, or any other alleged defect or failure of whatever nature or kind, based on the theories of strict liability in tort, negligence, or breach of an implied warranty shall not be commenced more than fifteen years after the product was first purchased, leased, bailed, or installed for use or consumption unless expressly warranted for a longer period of time by the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product. This subsection shall not affect the time during which a person found liable may seek and obtain contribution or indemnity from another person whose actual fault caused a product to be defective. This subsection shall not apply if the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product intentionally misrepresents facts about the product or fraudulently conceals information about the product and that conduct was a substantial cause of the claimant's harm.

Iowa Code § 614.1(2A)(a).[2] The Iowa Supreme Court has not had occasion to visit the issue posed in the present case, and therefore it is unresolved whether that court would create a judicial exception to the 15-year statute of repose for refurbished products.

In Mason v. Schweizer Aircraft Corp., the Iowa Supreme Court reviewed a federal aviation statute with an 18-year statute of repose. Mason v. Schweizer Aircraft Corp., 653 N.W.2d 543 (Iowa 2002). The federal statute *expressly* allowed the statute of repose to reset with respect to a newly installed replacement component or part. 49 U.S.C. § 40101 note (Time limitations on civil actions against aircraft manufacturers).

> [N]o civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft . . . if the accident occurred . . . with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period *beginning on the date of completion of the replacement or addition.*[3]

Id. (emphasis added). Per the language of the statute, the Mason court found the federal statute would be reset only if the replacement component or part was alleged to have caused the harm. Id. at 552-53 (finding no evidence that revisions to a maintenance

---

[2] The instruction manual for the Codman air drill states: "The Codman Power Systems are warranted for one full year from the date of purchase." The air drill was therefore not expressly warranted for a longer period of time, and Plaintiffs do not argue such.

[3] "[T]he term 'limitation period' means 18 years with respect to general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft." 49 U.S.C. § 40101 note (Other definitions).

manual causally related to the crash at issue in the case). The court's analysis in Mason provides minimal guidance; Iowa Code § 614.1(2A)(a) does not expressly allow for the statute of repose to be reset. The Mason court was addressing the need for evidence of causation under the terms of a specific legislative choice to allow that statute to restart under narrowly defined circumstances. It suggests no tacit approval for a judicially created exception to the Iowa statute at issue nor any inference of how the Iowa high court would address this issue.[4]

Plaintiffs contend that there was a refurbishment of the air drill in 1993 which should have begun a new statute of repose period based on an essentially new product and that this action was filed within 15 years of such new statute of repose period. In arguing that the Iowa Supreme Court would adopt a judicial exception to the 15-year statute of repose for refurbished products, Plaintiffs refer this Court to a two-part test utilized in Divis v. Clarklift of Nebraska, 590 N.W.2d 696 (Neb. 1999). In Divis, the defendant alleged that Divis' negligence, strict liability, and breach of warranty claims were barred by Nebraska's product liability statute of repose, as the forklift at issue in that case was originally sold in 1979 and Divis' complaint was filed in 1995. Id. at 699. At the time of the Divis case, Nebraska had the following statute of repose: "[A]ny product liability action . . . shall be commenced within ten years after the date when the product which

[4] At oral argument, counsel for the Plaintiffs responded to the Court's questions regarding the proper analysis of any tendency by the Iowa Supreme Court by asserting this Court should examine Iowa Code § 614.1(2A)(a) and the approach of other courts to similar statutes of repose, rather than examining the approach of the Iowa court to judicially created relief from other statutes which limit the right of action.

allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption." Neb. Rev. Stat. § 25-224 (1995).[5] The Nebraska Supreme Court adopted and applied a two-part test employed by other jurisdictions in determining whether Divis' claims were time-barred. Divis, 590 N.W.2d at 700. "First, courts must determine whether the refurbishing resulted in a "new product." Id. See also Richardson v. Gallo Equip. Co., 990 F.2d 330 (7th Cir. 1993); Hinds v. CompAir Kellogg, 776 F. Supp. 1102 (E.D. Va. 1991), aff'd, 961 F.2d 211 (4th Cir. 1992). "Second, if the product is considered "new," the suit will still be time barred unless the refurbishing was defective and proximately caused the injury." Id.

The Southern District of Indiana takes a somewhat different approach.

> [T]here are two notable situations under Indiana law in which the liability of a manufacturer can be revived, and a new ten year repose period begun. First, if the manufacturer supplies replacement parts for the product and the replacement parts are the cause of the plaintiff's injury, then the ten year statute of repose begins to run from the time the manufacturer supplied the parts. See e.g. Richardson v. Gallo Equip. Co., 990 F.2d 330 (7th Cir. 1993) (Manufacturer of replacement parts which are defective cannot hide behind original manufacturer's statute of repose.) and Black v. Henry Pratt Co., 778

---

[5] Nebraska currently has the following statute of repose: "All product liability actions . . . shall be commenced as follows:

> (i) For products manufactured in Nebraska, within ten years after the date the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption; or (ii) For products manufactured outside Nebraska, within the time allowed by the applicable statute of repose, if any, of the state or country where the product was manufactured, but in no event less than ten years. If the state or country where the product was manufactured does not have an applicable statute of repose, then the only limitation upon the commencement of an action for product liability shall be as set forth in subsection (1) of this section.

Nev. Rev. Stat. § 25-224 (2003).

> F.2d 1278 (7th Cir. 1985) (Replacement parts themselves must be defective, or related to the defect, in order for manufacturer of replacement parts to be held liable.). Second, if the manufacturer rebuilds the product, to the point of significantly extending the life of the product and rendering it in like-new condition, then the statute of repose begins to run from the time the rebuilt product is delivered into the stream of commerce. See e.g. Denu v. Western Gear Corp., 581 F. Supp. 7 (S.D. Ind. 1983) (genuine issue of fact whether printing press reconditioned by original manufacturer became a new product for purposes of applying Indiana's ten year statute of repose and Whitaker v. T.J. Snow., Inc., 953 F. Supp 1034 (N.D. Ind. 1997).

Miller v. Honeywell Int'l Inc., 2001 U.S. Dist. LEXIS 5574 *18-19 (S.D. Ind. 2001); See also Fugate v. AAA Mach. & Equip. Co., 593 F. Supp. 392 (E.D. Tenn. 1984) (a piece of machinery that is substantially rebuilt or refurbished becomes a "new" product for the purpose of a products liability action, and a new statute of repose begins to run from the date of its sale). The only difference between these two approaches is that the Divis two-part test requires both of the situations noted in Honeywell to be present, whereas in Honeywell, the court indicated the liability could be revived as either long as one of the two situations stated existed.[6]

Plaintiffs assert that the Codman air drill was refurbished and repaired in 1993, thus becoming a "new" product and starting a new statute of repose period. In support of this assertion, Plaintiffs refer to a document entitled "Air Drill Inspection Report" dated

---

[6] The Iowa statute does not appear to preclude an action against a component part manufacturer where the new component part used in a later repair is defective and causally related to the claimed injury, as such a product would have been purchased or placed in use at the time of the repair. Also, constrained to the facts in this record, this Court need not consider whether there are factual circumstances in which an original product has been altered so extensively as to become a new product, manufactured at the time of the alteration.

September 20, 1993. The document indicates the customer complained that the distal end of the drill came apart. During the 1993 repair, the repair department disassembled the air drill's rear swivel body and found it was missing the retainer and that the throttle lever was missing shims. The missing retainer was installed on the swivel body; all seals were replaced, cleaned, and lubed, and the missing throttle lever shims were installed. Nothing in the record provided to the Court indicates the significance, magnitude, or meaning of these repairs to the essential operation or utility of the drill.

Defendants argue the legislature could have, but did not, create exception for repairs or refurbishment. Thus, Defendants contend that Plaintiffs' claims are barred under Iowa Code § 614.1(2A)(a). "Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, *except when otherwise specially declared.*" Iowa Code § 614.1 (emphasis added). There has been no special declaration authorizing Iowa Code § 614.1(2A)(a) to recommence when a product is refurbished. "Unless a statute is ambiguous, we will apply the statute in accordance with its plain meaning." Albrecht v. General Motors Corp., 648 N.W.2d 87, 89-90 (Iowa 2002). "[S]ection 614.1(2A)(a) is a statute of repose that reflects a legislative policy decision to close the door after fifteen years on certain product claims." Id. at 94 (holding Iowa Code § 614.8(2) does not extend the statute of repose found in § 614.1(2A)(a)).

This Court finds no basis upon which to conclude the Iowa Supreme Court would create the exception sought by the Plaintiffs. The statute, and the legal framework surrounding the statute, provides no hint of such an exception and an inference to the contrary.

This Court would not presume, much less predict, the Iowa Supreme Court would adopt an exception out of whole cloth. The Iowa statute quite unambiguously bars stale claims against the original product. This Court does not read the statute as barring later claims for negligence in repair or for defects against the manufacturers of new component parts used in repairs so long as causation can also be demonstrated. Thus, an injured party is not precluded from seeking a remedy against those responsible for negligence or defects in connection with the repair or refurbishing of the original product.

The air drill at issue in the present case was purchased and in use no later than 1984. Plaintiffs filed the present action on September 30, 2002. Under the plain meaning of the statute, that is more than 15 years after the air drill was first purchased for use, indicating that Plaintiffs' claims are time barred by the statute.

The Court would also be forced to find the Plaintiffs' claim lacking even under the assumption that the Iowa Supreme Court would adopt the refurbishment exception. "[A]ny reconstruction or reconditioning (as distinct from a mere repair – a familiar distinction in other areas of law, see, e.g., Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336, 81 S. Ct. 599, 5 L. Ed. 2d 592 (1961)) which has the effect of lengthening the useful life of a product beyond what was contemplated when the product was first sold starts the statute of repose running anew." Richardson, 990 F.2d at 331 (new warning device did not extend the useful life of a forklift). The repairs that have been documented in this record do not independently provide a basis upon which a jury could conclude this was a

refurbishment rather than a repair, and the Plaintiffs have provided no other record evidence to create a fact issue.

Moreover, any exception to the statute of repose would require a showing of causation, which does not arise in this record. Assuming that the 1993 repairs were of such a nature as to consider them a refurbishment resulting in a new product, under either the Divis or Honeywell tests the Court would need to examine whether the refurbishing was defective and proximately caused the injury. Defendants state that none of the 1993 replacement parts are in any way implicated in the 2000 incident.[7] In addition, Defendants claim there is no evidence that any of 1993 repairs done to the drill had anything to do with 2000 incident. Further, Defendants argue Plaintiffs failed to meet their burden to generate a fact issue on whether the 1993 repairs were causally related to their allegations.

After the incident with the air drill, Codman sent the air drill to Ace Surgical Supply Company for evaluation. On February 20, 2001, after the evaluation from Ace Surgical was complete, Codman sent Mercy Hospital a letter to share what the evaluation of the air drill had uncovered. The letter indicated that preliminary testing revealed that all three burr guards had failed bearings, the bur release lever was slightly loose, the drill had a broken spacer, a badly worn collet spring, and a worn burr release assembly, and a hose was leaking from both ends. None of these defects related to parts that were repaired or replaced in 1993, and there is no evidence in the record that the 1993 "refurbishing" was defective and proximately caused the injury. Where the replacement parts do not

[7] Seals were replaced in both 1993 and 2001, but there is no indication the seals were defective or a cause of malfunction in 2000.

proximately cause the injury, the statute of repose cannot be recommenced. See Richardson, 990 F.2d at 331- 32 (back-up alarm installed after original manufacture was not defective or the proximate cause of the injury); Black v. Henry Pratt Co., 778 F.2d 1278, 1282-83 (7th Cir. 1985) (malfunction of an unrelated part of the valve, and not replacement parts, which led to the deaths of the plaintiffs' decedents); Johnson v. Kempler Indus. Inc., 677 N.E.2d 531 (Ind. App. 1997) (safety guard installed on a shear machine after the machine's original manufacture was not itself defective and did not contribute to the plaintiff's accident); Hinds, 776 F. Supp. at 1107-08 (plaintiff cannot extend or toll the ten year statute of repose where no probative evidence had been produced demonstrating that the replacement parts were defective or unreasonably dangerous and that they somehow caused the injury); Divis, 590 N.W.2d at 701 (defendant's addition of a side-shifter to forklift did not proximately cause the injury, therefore statute of repose cannot be recommenced).

It is Plaintiffs' duty to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "Mere arguments or allegations are insufficient to defeat a properly supported motion for summary judgment; a non-movant must present more than a scintilla of evidence and must advance specific facts to create a genuine issue of material fact for trial." F.D.I.C. v. Bell, 106 F.3d 258, 263 (8th Cir. 1997) (internal quotation marks omitted) (citing Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202, 1211 (8th Cir. 1995). Even assuming the Iowa Supreme Court would create the exception sought by the Plaintiffs, the Plaintiffs have failed to generate a genuine issue of material fact that

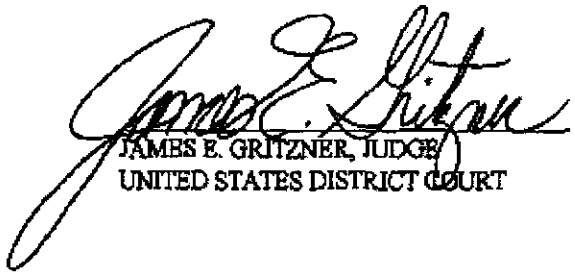
what occurred in 1993 was a refurbishment essentially creating a new product rather than a simple repair and, more importantly, a causal connection between the work done in 1993 and the malfunction causing Plaintiff's injury. Mere speculation on behalf of the non-movant is not enough to defeat a summary judgment motion. "[A] non-movant cannot simply rely on assertions in the pleadings to survive a motion for summary judgment." Krein v. DBA Corp., 327 F.3d 723, 726 (8th Cir. 2003).

CONCLUSION

The Court finds no basis upon which to determine the Iowa Supreme Court would adopt an exception to the State's statute of repose. Applying the plain meaning of the statute, Plaintiffs' claims would be time barred by Iowa Code § 614.1(2A)(a). Even assuming the Iowa Supreme Court would adopt the exceptions of either Divis or Honeywell, Plaintiffs' claims would fail in the absence of a genuine issue of material fact as to refurbishment or causation. The Defendants' Motion for Summary Judgment (Clerk's No. 14) must be **granted**.

IT IS SO ORDERED.

Dated this 5th day of January, 2004.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT