

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)
Glenna Gray; and Michael W. Gray as)
Personal Representative of the Estate of)
Joseph S. Gray,)
)
Plaintiff,)
)
vs.)
)
Larousse Lamur, Phoenix Grand, LLC, and)
Lamur Transportation Services, LLC,)
)
Defendant.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2023-CP-32-01750
**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS AS TO
PLAINTIFFS’ CAUSES OF ACTION FOR
NEGLIGENCE AND SURVIVAL
ACTION**

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SC Court of Appeals

This matter is before the Court upon Defendant’s Motion to Dismiss (the “Motion”), filed July 20, 2023. A hearing on the matter was held via WebEx in the virtual courtroom on October 10, 2023. Plaintiffs were represented by attorney Jonathan Riddle, Esq., and Defendants were represented by attorney Everett A. Kendall III, Esq. The parties have stipulated the procedural history of this case as set forth below. Having considered the parties’ memoranda, the arguments heard on October 10, 2023, and the applicable law, this Court hereby **GRANTS**, Defendants’ Motion to Dismiss.

STIPULATION OF FACTS

This case originates from a November 13, 2019, motor vehicle accident on I-26 in Lexington County. Joseph S. Gray, the husband of Plaintiff Glenna Gray, was operating a 2010 Chevrolet Malibu and Defendant Larousse Lamar was operating a 2015 Freightliner 18-wheeler during the subject accident.

On March 30, 2021, Plaintiff Glenna Gray filed her Complaint in the Federal District Court for the District of South Carolina against Defendants (hereinafter the “Federal Court Action”). In the Federal Court Action, Plaintiff Glenna Gray asserted causes of action for

negligence, gross negligence, and negligence *per se*. Defendants filed their Answer on June 2, 2021, and then filed an Amended Answer on June 6, 2021. On June 22, 2021, Plaintiff Glenna Gray filed a Motion to Amend her Complaint to add Plaintiff Michael W. Gray, as Personal Representative of the Estate of Joseph S. Gray (hereinafter “Plaintiff Michael Gray”), to Federal Court Action and assert causes of action for wrongful death and a survival action.

On August 30, 2021, Plaintiff Michael Gray filed a Complaint in the Lexington County Court of Pleas against the Defendants (hereinafter the “Initial State Court Action”), asserting causes of action for wrongful death, pursuant to S.C. Code Ann. § 15-5-10 *et seq.*, and a survival action pursuant to S.C. Code Ann. § 15-5-90. Defendants filed their Answer to the Initial State Court Action on September 13, 2021.

On January 10, 2022, Plaintiff Glenna Gray filed her Amended Complaint in the Federal Court Action, adding Plaintiff Micheal W. Gray as a party and asserting causes of action for wrongful death and a survival action. Defendants filed their Answer to the Amended Complaint in the Federal Court Action on January 13, 2023.

Plaintiff Michael Gray voluntarily dismissed the State Court Action under Rule 41(a) of the South Carolina Rules of Civil Procedure on February 18, 2022. Thereafter, the claims of Plaintiff Michael Gray and Plaintiff Glenna were combined in the Federal Court Action.

On February 16, 2023, the Federal Court Action was dismissed by the Court *sua sponte* for lack of subject matter jurisdiction. Plaintiffs filed a Motion to Reconsider, which was denied by the Court on May 2, 2023.

On May 8, 2023, Plaintiffs filed a Complaint in the Lexington County Court of Common Pleas, with Plaintiff Glenna Gray asserting negligence and Plaintiff Micheal Gray asserting causes of action for wrongful death and a survival action (hereinafter the “Second State Court Action”).

Defendants filed a Motion to Dismiss Plaintiff Glenna Gray’s cause of action for negligence and Plaintiff Michael Gray’s survival action on July 20, 2023, citing the applicable statute of limitations. Defendant’s acknowledged that the wrongful death action was permitted to go forward as the trigger date for the statute of limitations was different than that of the negligence and survival actions. Defendants then filed an Answer responding to Plaintiff Michael Gray’s wrongful death cause of action on July 21, 2023. Plaintiffs filed a Memorandum in Opposition to Defendants’ Motion to Dismiss on October 9, 2023.

Defendants’ Motion to Dismiss was heard before the Court on October 10, 2023.

STANDARD OF REVIEW

“Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action.” *Baird v. Charleston Cty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995); *see also Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987) (noting trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); *Williams*, 347 S.C. at 233, 553 S.E.2d at 499 (finding that trial court’s ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

FINDINGS OF LAW

I. The Statute of Limitations Bars Plaintiffs' Claims for Negligence and Survival Action Pursuant to S.C. Code Ann. § 15-5-90.

The Court finds that the Plaintiffs' causes of action for negligence and survival action under S.C. Code § 15-5-90 are barred by the applicable statute of limitations. South Carolina law provides a three-year statute of limitations for cases arising out of negligence or for a survival action. S.C. Code Ann. § 15-3-530(5). The statute of limitations begins to accrue once the plaintiff "knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535. This is an objective determination that does not require the development of a fully actualized theory of recovery. *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (citing *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981); *Wilson v. Shannon*, 299 S.C. 512, 513, 386 S.E.2d 257, 258 (Ct. App. 1989)). South Carolina law is clear that in personal injuries arising out of an automobile accident, the statute of limitations begins to accrue at the date of the accident. *See Wiggins v. Edwards*, 299 S.C. at 130, 386 S.E.2d at 171 (holding there is no question that the accident occurred on November 11, 1989 and that is the date that Plaintiff should have known that a cause of action accrued).

Here, the parties do not contest that the accident occurred on November 13, 2019, nor that the Complaint was then filed May 8, 2023. Plaintiffs' Complaint does not allege tolling of the statute of limitations. Thus, under South Carolina law, the statute of limitations on the negligence and survival action began to accrue on November 13, 2019, and the limitations period lapsed on November 13, 2022, barring the Complaint that was filled over a year later, on May 8, 2023. The Court therefore holds that, on the face of the Complaint, the applicable statute of limitations bars Plaintiffs recovery on their negligence and survival action.

II. Equitable Tolling of the Statute of Limitations is not Warranted Under the Undisputed Facts.

In response to the Motion, Plaintiffs have asserted that the effect of the Statute of Limitations should be equitably tolled. The Plaintiffs' argued that they have diligently pursued the litigation and simply put, made a bad strategic decision that resulted in an unduly harsh outcome. Although this defense was not raised in any pleading, the Parties have raised no objection to its consideration at this time. Based on the Stipulated Facts, this Court finds no allegation that the Defendants actions caused or contributed to the circumstances whereby the Plaintiffs filed this lawsuit after the running of the Statute of Limitations. Therefore, the Court finds that the Statute of Limitations should not be equitably tolled.

South Carolina law provides for tolling of the applicable limitations period by statute in certain circumstances. *See* S.C.Code Ann. § 15–3–30 (2005) (stating exceptions to the running of the statute of limitations when the defendant is out of the state); *id.* § 15–3–40 (providing exceptions for persons under a disability, including being underage or insane). In addition to these statutory tolling mechanisms, however, “[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations.” *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009) (*citing* 54 C.J.S. *Limitations of Actions* § 115 (2005)). “Equitable tolling is a nonstatutory tolling theory which suspends a limitations period.” *Ocana v. Am. Furniture Co.*, 135 N.M. 539, 91 P.3d 58, 66 (2004). However, “equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.” *Hooper*, at 117, 687 S.E.2d at 33. “The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.” *Id.* at 115, 687 S.E.2d at 32.

Plaintiff's request for this Court to apply equitable tolling relies heavily of the South Carolina Supreme Court's decision in *Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 386 S.C. 108, 687 S.E.2d 29 (2009). In that case, plaintiff filed a summons and complaint against the defendant for a survival action and wrongful death on February 6, 2006, based on an incident that occurred on May 15, 2003. *Hooper*, at 111, 687 S.E.2d at 30. The plaintiff repeatedly tried to effect service on the defendant's registered agent whose address was not listed in the South Carolina Secretary of State's records. *Id.*, at 112, 687 S.E.2d at 30. Plaintiff took several additional steps to effect service, including retaining a private investigator and contacting multiple sheriff's offices for assistance. *Id.* Plaintiff was assured that service would be timely made. *Id.* However, on June 12, 2006, almost a month after the applicable statute of limitations expired, the Lexington County Sheriff's Office told counsel that service could not be affected. *Id.* Plaintiff's counsel then affected service via process server on June 15, 2006. *Id.*, 386 S.C. at 113. Defendant moved to dismiss, which was subsequently turned into a motion for summary judgment, on the basis that the applicable statute of limitations and the time limits of Rule 3(a)(2) SCRCPLapsed. On appeal, the South Carolina Supreme Court ultimately decided to equitably toll the statute of limitations because the defendant's failure to list the address of its registered agent, as required by state law, hindered the pursuit of service. *Id.* at 118, 687 S.E.2d at 34. The Court pointed out that plaintiff's delays in properly serving the defendant were due entirely to the defendant's failure to list the address of its registered agent. *Id.*

In a recent published decision by the South Carolina Court of Appeals, equitable tolling was not applied because the defendant did not participate in any deceptive or bad faith attempts to conceal the existence of a cause of action. *Crocker v. S.C. Dep't of Health & Env't Control*, 428 S.C. 1, 10, 831 S.E.2d 924, 930 (Ct. App. 2019) (citing *Hooper*, 386 S.C. at 117, 687 S.E.2d at 33

(“[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.”); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987). (“To invoke equitable tolling, the plaintiff must therefore show that the defendant attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge.”).

In the present matter, Defendants did not act with fraud or deceit to prevent Plaintiff from filing this matter in the correct venue. Plaintiffs were free to file this action in this Court before the statute of limitations expired. Plaintiffs filed the Initial State Court Action, encompassing the survival and wrongful death causes of action, on August 30, 2021. Plaintiffs voluntarily dismissed the Initial State Court Action via Rule 41(a) SCRCP on February 18, 2022, thus requiring no consent from the Defendants. It is notable that this dismissal from State Court was not based on removal by the Defendant’s or any defective pleading. Plaintiffs effort to amend the complaint in the Federal Court action was, in fact, objected to by the Defendants.

Ultimately, Plaintiffs’ Federal Court Action was dismissed, not upon the motion of the Defendants, but by the U.S. District Court *sua sponte* on February 16, 2023, for lack of subject matter jurisdiction. The Defendants did not use deceit or fraud to prevent them from bringing the Second State Court Action. Rather, the Court finds that the Plaintiffs made a strategic decision to consolidate their Action in Federal Court and was not the consequence of any third-party actions. Therefore, for the reasons stated above, this Court denies Plaintiffs’ requests to equitably toll the applicable statute of limitations.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss Plaintiff Glenna Gray and Plaintiff Michael W. Gray's cause of action for negligence and Plaintiff Michael W. Gray's survival cause of action, pursuant to S.C. Code Ann. § 15-5-90, is hereby **GRANTED**.

As the trigger date for Plaintiff Michael W. Gray's wrongful death cause of action is different, Defendants have not moved for a dismissal of that cause of action. Thus, this action is not fully concluded by this Order.

IT IS SO ORDERED.

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]



Lexington Common Pleas

Case Caption: Glenna Gray , plaintiff, et al VS Larousse Lamur , defendant, et al

Case Number: 2023CP3201750

Type: Order/Dismissal

It Is So Ordered

s/ Walton J. McLeod