

RECEIVED

Jun 13 2024

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Court Judge

Appellate Case No. 2024-000020
Trial Court Case No. 2023-CP-32-01750

Glenna Gray; and Michael W. Gray, as
Personal Representative for the Estate
of Joseph S. Gray Appellants,

v.

Larousse Lamur, Phoenix Grand, LLC,
and Lamur Transportation Services, LLC..... Respondents.

INITIAL RESPONDENTS' BRIEF

Everett A. Kendall, II, Esquire
S.C. Bar # 8450
Phillip Florence, Jr., Esquire
S.C. Bar # 6721
R. Cameron Stephenson, Esquire
S.C. Bar #105862
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
rkendall@murphygrantland.com
pflorence@murphygrantland.com
Attorneys for Respondents
Larousse Lamur, Phoenix Grand, LLC,
and Lamur Transportation Services, LLC

Other Counsels of Record:

Lane D. Jefferies
S.C. Bar Number: 101764
Jonathan M. Riddle, Esquire
S.C. Bar Number: 101475
32 Ann Street
Charleston, South Carolina 29403
(803) 222-2222
teamjefferies@poulinwilley.com

Attorneys for Appellants

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal..... 1

Statement of the Case..... 1

Factual and Procedural Background 2

Standard of Review 3

Argument..... 4

 I. The Circuit Court considered “all circumstances”
 in refraining to apply equitable tolling..... 4

 A. Case law decided after the Circuit Court’s Order to Dismiss further shows
 the Circuit Court utilized the correct standard in its equitable tolling
 analysis..... 7

Conclusion 8

TABLE OF AUTHORITIES

Page Number

CASES

Hughes on behalf of Est. of Hughes v. Bank of Am. Nat’l Ass’n, 442 S.C. 113, 898 S.E.2d 102 (2024).....4, 6-7

Delaney v. First Fin. of Charleston, Inc., 426 S.C. 607, 829 S.E.2d 249 (2019).....3

Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009).....4-7

I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406 526 S.E.2d 716 (2000).....3-4

Hopkins v. Floyd’s Wholesale, 299 S.C. 127, 129, 382 S.E.2d 907, 128-29 (1989).....5-6

Hughes on behalf of Hughes v. Bank of Am. Nat’l Ass’n, 697 F. App’x 191 (4th Cir. 2017).....4

Hughes v. Bank of Am., N.A., No. CV 7:15-5083-MGL, (D.S.C. Feb. 13, 2017).....4

STATUTES/REGULATIONS

S.C. Code Ann. § 15-5-90.....1-2

S.C. Code Ann. § 15-51-10 *et seq.*.....1-2

Rule 41(a), SCRCP.....2, 4, 6

STATEMENT OF ISSUES ON APPEAL¹

- I. Whether the Circuit Court properly declined to toll the applicable statute of limitations for Appellants' negligence and survival action for negligence.**

STATEMENT OF THE CASE

This appeal arises out of the Circuit Court's Order to Dismiss Appellants' claims for negligence and survival action because the claims were barred by the applicable statute of limitations, S.C. Code Ann. § 15-5-90 (1976). Appellants' negligence and survival claims originate from a November 13, 2019, motor vehicle accident on I-26 in Lexington County. Joseph S. Gray, the husband of Appellant Glenna Gray, was operating a 2010 Chevrolet Malibu and Respondent Larousse Lamar was operating a 2015 Freightliner 18-wheeler at the time of the subject incident. The November 13, 2019, motor vehicle accident spawned an action in the Federal District Court for the District of South Carolina (hereinafter "Federal Court") and two actions in the South Carolina Court of Common Pleas for Lexington County (hereinafter "State Court"). The first action in the State Court was later situated with the Federal Court case. Ultimately, the Federal Court determined it did not have subject matter jurisdiction and remanded the case back to the State Court. The second action in the State Court was filed soon after. Though, by this point, the applicable statute of limitations lapsed on the negligence and survival action claims. Appellants' request for equitable tolling was denied.

¹ Appellants asserted a wrongful death claim, pursuant to S.C. Code Ann. § 15 – 51 – 10, *et. seq.*, which was not affected by Respondents' Motion to Dismiss because the trigger date for the applicable statute of limitations for the wrongful death claim is distinct from the survival and negligence claims. (Order Granting Defs.' Mot. to Dismiss at 8).

FACTUAL AND PROCEDURAL BACKGROUND

Appellants and Respondents stipulated the pertinent factual and procedural background of the Order Granting Defendants' Motion to Dismiss.

On March 30, 2021, Appellant Glenna Gray filed her Complaint in Federal Court against Respondents (hereinafter the "Federal Court Action"). In the Federal Court Action, Appellant Glenna Gray asserted causes of action for negligence, gross negligence, and negligence per se. Respondents filed their Answer on June 2, 2021, and then filed an Amended Answer on June 6, 2021. On June 22, 2021, Appellant Glenna Gray filed a Motion to Amend her Complaint to assert causes of action for wrongful death and a survival action and to add Appellant Michael W. Gray, as Personal Representative of the Estate of Joseph S. Gray (hereinafter "Appellant Michael Gray"), to the Federal Court Action. Respondents opposed the Appellants' Motion to Amend their Complaint in the Federal Court Action, but the Federal Court ruled for the Appellants.

On August 30, 2021, Appellant Michael Gray filed a Complaint in the Lexington County Court of Pleas against the Respondents (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 (1976). Respondents filed their Answer to the Initial State Court Action on September 13, 2021.

On January 10, 2022, Appellant Glenna Gray filed her Amended Complaint in the Federal Court Action, adding Appellant Micheal W. Gray as a party and asserting causes of action for wrongful death and a survival action. Respondents filed their Answer to the Amended Complaint in the Federal Court Action on January 13, 2022. Appellant Michael Gray voluntarily dismissed the Initial State Court Action under Rule 41(a), SCRPC on February 18, 2022. Thereafter, the

claims of Appellant Michael Gray and Appellant Glenna Gray were situated 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. Appellants filed a Motion to Reconsider, which was denied by the Court on May 2, 2023.

On May 8, 2023, Appellants filed a Complaint in the Lexington County Court of Common Pleas, with Appellant Glenna Gray asserting negligence and Appellant Micheal Gray asserting causes of action for wrongful death and a survival action (hereinafter the “Second State Court Action”). Respondents filed a Motion to Dismiss Appellant Glenna Gray’s cause of action for negligence and Appellant Michael Gray’s survival action on July 20, 2023, citing the applicable statute of limitations. Appellants filed an Answer responding to Appellant Michael Gray’s wrongful death cause of action on July 21, 2023. Appellants filed a Memorandum in Opposition to Respondents’ Motion to Dismiss on October 9, 2023, requesting equitable tolling of the statute of limitations for the first time.

Respondents’ Motion to Dismiss was heard before the Court on October 10, 2023, with the Honorable Judge Walton J. McLeod. The Circuit Court issued an Order Granting the Motion to Dismiss on December 4, 2023. This appeal followed.²

STANDARD OF REVIEW

“In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC, the appellate court applies the same standard of review as the Circuit Court.” *Delaney v. First Fin. of Charleston, Inc.*, 426 S.C. 607, 611, 829 S.E.2d 249, 250-51 (2019). Questions of law are decided *de novo*. *Id.*

² Appellants dismissed their wrongful death action with prejudice on May 13, 2024, after the Appellants’ Motion for Continuance was denied on May 9, 2024.

“[A] respondent—the ‘winner’ in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.” *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Therefore, as to the Order to Dismiss before the Court, the Circuit Court’s ruling may be affirmed in favor of Respondent on any ground supported by the record on appeal. *See Id.*

ARGUMENT

Appellants appeal the dismissal of their negligence and survival action, not based on the application of the statute of limitations., but rather on the Circuit Court’s refraining to apply the doctrine of equitable tolling. The Circuit Court’s decision to refrain from invoking the doctrine of equitable tolling was based on two principal reasons. First, the Circuit Court found that the Respondents did not act with “deceit or fraud”. (Order Granting Defs.’ Mot. to Dismiss at 7). Second, the Circuit Court found that the Appellants made a “strategic decision to consolidate their Action in Federal Court” and that the resulting *sua sponte* dismissal was the not result of any third-party. *Id.*

I. The Circuit Court considered “all circumstances” in refraining to apply equitable tolling.

The principle that the doctrine of equitable tolling is to be employed sparingly is so established as to make citation to authority unnecessary. *Hughes on behalf of Est. of Hughes v. Bank of Am. Nat'l Ass'n*, 442 S.C. 113, 135, 898 S.E.2d 102, 113 (2024) (citing *Hughes v. Bank of Am., N.A.*, No. CV 7:15-5083-MGL, 2017 WL 569847, at2 (D.S.C. Feb. 13, 2017), *aff'd sub nom. Hughes on behalf of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191 (4th Cir. 2017); *see also Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009) (holding that equitable tolling doctrine should be used sparingly and only when the interests of justice compel its use). Equitable tolling typically applies when a litigant was prevented from timely commencing an action because of

an extraordinary event beyond his control. *Hughes*, 442 S.C. at 136, 898 S.E.2d at 114 (citing *Hooper*, 386 S.C. at 116, 687 S.E.2d at 33) (emphasis added). “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.” *Crocker v. S.C. Dep’t of Health & Env’t Control*, 428 S.C. 1, 11, 831 S.E.2d 924, 930 (Ct. App. 2019) (quoting *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987)).

The Circuit Court, despite the assertions of the Appellants, examined “all circumstances” in rendering its Order to Dismiss. Appellants heavily relied on the S.C. Supreme Court’s decision in *Hooper v. Ebenezer Sr. Servs. & Rehab Ctr.*, in both their Memorandum in Opposition to the Motion to Dismiss and their Initial Brief to the S.C. Court of Appeals. The Circuit Court examined *Hooper* in detail in its Order to Dismiss. In *Hooper*, the Supreme Court reversed the Circuit Court’s order granting summary judgment on the lapsing of the applicable statute of limitations because the defendant’s failure to list a registered agent, as required by statute, delayed plaintiff’s service of process until the limitations period lapsed. 386 S.C. at 118, 687 S.E.2d at 34.

The decision in *Hooper*, despite the Appellant’s claims, never enumerated “an appropriate standard” for the application of equitable tolling. Rather, the Court gave a list of examples from other jurisdictions where equitable tolling was applied, and the Court ultimately held that equitable tolling may be applied where it is justified under “all circumstances.” *Id.* at 117, 687 S.E.2d at 33. The Court in *Hooper* also cited to an earlier S.C. Supreme Court decision, *Hopkins v. Floyd’s Wholesale*, where the Court equitably tolled the statute of limitations in a workers’ compensation claim because the plaintiff delayed filing suit due to assurances from his employer that that they would continue to pay for his medical expenses. *Hopkins*, 299 S.C. 127, 129, 382 S.E.2d 907, 128-29 (1989).

Here, the Circuit Court did not use an “inappropriate standard” in refusing to apply equitable tolling. The Circuit Court examined, in detail, the very authority that Appellants state the Circuit Court misconstrued. The Appellants failed to highlight in their Brief the appropriate standard the Circuit Court failed to apply. The Circuit Court, examining the circumstances presented, decided the uncontested facts showed that the Respondents did not prevent the Appellants from filing the Second State Court Action. Namely, the Circuit Court found that nothing precluded the Appellants from filing the Second State Court Action before the applicable statute of limitation elapsed. (Order Granting Defs.’ Mot. to Dismiss at 7). The Circuit Court’s decision is supported by the Appellants’ voluntarily dismissing the Initial State Court Action via Rule 41(a), SCRCP on February 18, 2022, without needing the Respondents’ consent. *Id.* Again, the Circuit Court noted that this dismissal, as noted by the Circuit Court, did not hinge upon removal by Respondents nor the presence of any defective pleading. *Id.* The Circuit Court also recognized that the Federal Action was dismissed by the Federal Court, *sua sponte*, not from the Respondents’ motion. *Id.* In fact, the Circuit Court noted that the Respondents objected and opposed the Appellants’ effort to consolidate the State Court Action and the Federal Court Action in Federal Court. *Id.* The Circuit Court found that the Respondents did not use deceit or fraud to prevent Appellants from filing the Second State Court Action, and that the Appellants failure to file within the applicable statute of limitations was the result of a strategic decision. *Id.*

The facts thoroughly examined by the Circuit Court are unlike those faced in *Hooper* or in *Hopkins*. In *Hooper*, the plaintiff failed to serve the defendant within the applicable statute of limitations because the defendant failed to name a registered agent as required by statute. Likewise, in *Hopkins*, the plaintiff relied upon the repeated assurances from defendant that they would

compensate the plaintiff for medical expenses and compensation. Nothing in the record before the Circuit Court mirrored such fact patterns.

A. Case law decided after the Circuit Court’s Order to Dismiss further shows the Circuit Court utilized the correct standard in its equitable tolling analysis.

In a January 17, 2024 decision, the South Carolina Supreme Court held that the equitable tolling standard enumerated by the Fourth Circuit Court of Appeals fits within South Carolina’s conception of the equitable tolling doctrine. *Hughes on behalf of Est. of Hughes v. Bank of Am. Nat’l Ass’n*, 442 S.C. 113, 137, 898 S.E.2d 102, 114 (2024). The Court, agreeing with the Fourth Circuit Court of Appeals, held that equitable tolling is only available if the plaintiff diligently pursued her rights and if extraordinary circumstances external to her own conduct prevented her from filing within the applicable limitations period. *See Id.* (“The Fourth Circuit reviewed the District Court’s findings on those points and concluded that a party such as Mrs. Hughes would be entitled to equitable tolling only if she has pursued her rights diligently and extraordinary circumstances external to her own conduct prevented her from commencing the action on time.”) (internal citations omitted). The Court, again citing the Fourth Circuit Court of Appeals, held, “the use of equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.” *Id.* (citing *Lawrence v. Lynch*, 826 F.3d 198, 203 (4th Cir. 2016)). The Supreme Court stated that this standard is consistent, “with what we declared in *Hooper* to be the law in South Carolina.” *Id.*

The Circuit Court’s Order to Dismiss, while certainly appropriate under prior case law, is bolstered by the decision in *Hughes*. In fact, *Hughes* did not supplant *Hooper*, but merely clarified that the standard for equitable tolling for the Fourth Circuit is consistent with S.C. law. The Appellants’ conduct, according to the Circuit Court, was the action which prevented the filing of the Second State Court Action within the applicable statute of limitations. The Appellants

voluntarily dismissed their action without the Respondents' consent. The Respondents objected to the Appellants' effort to amend their Complaint in Federal Court to consolidate. Nothing in the factual record presented to the Circuit Court fits within the proper standard for applying equitable tolling. Likewise, the finding that the Appellants "made a strategic decision to consolidate their Action in Federal Court and was not the consequence of any third-party actions" clearly fits into the S.C.'s equitable tolling standard.

CONCLUSION

The Circuit Court correctly considered the applicable standards for equitable tolling. Therefore, the Circuit Court's dismissal should be affirmed.

Respectfully Submitted,

s/R. Cameron Stephenson _____
Everett A. Kendall, II, Esquire
S.C. Bar # 8450
Phillip Florence, Jr., Esquire
S.C. Bar # 6721
R. Cameron Stephenson, Esquire
S.C. Bar # 105862
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
rkendall@murphygrantland.com
pflorence@murphygrantland.com
cstephenson@murphygrantland.com
Attorneys for Respondents
Larousse Lamur, Phoenix Grand, LLC, and
Lamur Transportation Services, LLC.

June 13, 2024
Columbia, SC

RECEIVED

Jun 13 2024

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Court Judge

Appellate Case No. 2024-000020
Trial Court Case No. 2023-CP-32-01750

Glenna Gray; and Michael W. Gray, as
Personal Representative for the Estate
of Joseph S. Gray Appellants,

v.

Larousse Lamur, Phoenix Grand, LLC,
and Lamur Transportation Services, LLC..... Respondents.

CERTIFICATE OF COMPLIANCE

I, Everett A. Kendall, II, attorney for Respondent, certify that the Initial Respondent Brief of Larousse Lamur, Phoenix Grand, LLC, and Lamur Transportation Services, LLC complies with the South Carolina Supreme Court Order of August 13, 2007.

s/ Everett A. Kendall, II

Everett A. Kendall, II, Esquire

S.C. Bar # 8450

Murphy & Grantland, P.A.

P.O. Box 6648

Columbia, SC 29260

(803) 782-4100

rkendall@murphygrantland.com

Attorney for Respondents

RECEIVED

Jun 13 2024

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Court Judge

Appellate Case No. 2024-000020
Trial Court Case No. 2023-CP-32-01750

Glenna Gray; and Michael W. Gray, as
Personal Representative for the Estate
of Joseph S. Gray Appellants,

v.

Larousse Lamur, Phoenix Grand, LLC,
and Lamur Transportation Services, LLC..... Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Respondent Brief of Respondent on Glenna Gray and Michael W. Gray, as Personal Representative for the Estate of Joseph S. Gray, by depositing a copy of it in the United States Mail, postage prepaid, on June 13, 2024, addressed to her attorneys of record, Lane D. Jefferies, Esquire, Poulin Willey Anastopoulos, LLC, 32 Ann Street, Charleston, SC 29403 and by electronic mail at teamjefferies@poulinwilley.com and Jonathan M. Riddle, Esquire, Poulin Willey Anastopoulos, LLC, 32 Ann Street, Charleston, SC 29403 and by electronic mail at teamriddle@poulinwilley.com.

s/ Everett A. Kendall, II
Everett A. Kendall, II, Esquire
S.C. Bar # 8450
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
rkendall@murphygrantland.com
Attorney for Respondents