United States Court of Appeals
for the Fifth Circuit

No. 20-20661
Summary Calendar

DAMON SIMON; PATRICE SIMON,

Plaintiffs—Appellants,

versus

ROCHE DIAGNOSTICS CORPORATION,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas.
USDC No. 4:20-CV-3625

(Filed Jul. 6, 2021)

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

PER CURIAM:*

Damon Simon and his wife Patrice filed a personal injury suit in Texas state court against Roche Diagnostics Corporation ("Roche") after Mr. Simon suffered a

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* Pursuant to 5th CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

stroke. Simon had been monitoring his blood's anticoagulation levels using Roche's "CoaguChek XS" at-home testing machine. The couple allege the machine's faulty test strips provided inaccurate results that left him unaware he was in danger of blood clots. Roche removed the case to the Southern District of Texas and moved to dismiss because plaintiffs' claims were barred by Texas's two-year statute of limitations. The district court granted the motion, and the Simons have appealed. We AFFIRM.

In the early hours of May 26, 2018, Mr. Simon suffered a stroke, although plaintiffs assert that he had tested his anticoagulation level that evening with the Roche strips. The Simons allege that contrary to the strips' display, the hospital personnel informed them that Mr. Simon's anticoagulation levels were very low, and that Mr. Simon's anticoagulation levels "wouldn't dip that fast."

In November of that year, Roche issued a nationwide recall of the CoaguChek strips that Mr. Simon had been using, and a Roche representative called Mr. Simon on November 2, 2018, asking him to return the strips.

Close to two years later, the Texas Supreme Court extended most filing deadlines to September 15, 2020, because Texas was under a "state of emergency" due to the COVID-19 pandemic. The couple filed suit pro se against Roche on September 24, 2020. As noted above, the case was dismissed for untimely filing under Texas law.

DISCUSSION

A district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6) is subject to *de novo* review. *Young v. Hosemann*, 598 F.3d 184, 188 (5th Cir. 2010).

The Simons argue that their September 24, 2020, filing is not outside Texas's two-year statute of limitations because the date their claims accrued for statute of limitations purposes was the day that Roche telephoned Mr. Simon to recall the strips. Therefore, they continue, their September filing was timely, because the statutory period didn't run until November 2, 2020. To support this alternative date, the Simons contend that the "discovery rule" applies to their case.

In Texas, "a cause of action accrues and the two-year limitations period begins to run as soon as the owner suffers some injury, regardless of when the injury becomes discoverable." *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 458 (Tex. 1996). The discovery rule is one of two exceptions that can extend the statute of limitations. *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 65 (Tex. 2011). The discovery rule provides that "the cause of action does not accrue until the injury could reasonably have been discovered," and it is applied "categorically to instances in which 'the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Id.* at 65–66 (citing *Comput. Assocs. Int'l, Inc.*, 918 S.W.2d at 456). However, the discovery rule does not apply to cases where "the traumatic or injurious event

causing personal injury is sudden and distinguishable, and the plaintiff knew that injury occurred at the time the event occurred." *Howard v. Fiesta Texas Show Park, Inc.*, 980 S.W.2d 716, 721 (Tex. App. 1998).

Texas courts have applied the rule to certain types of latent injuries, like mesothelioma caused by exposure to asbestos or human immunodeficiency virus contracted by a nurse exposed to a patient's blood. *Childs v. Haussecker*, 974 S.W.2d 31, 37–38 (Tex. 1998). Key in these cases is the latent nature of the injury, which typically means the injured party "does not and cannot immediately know about the injury or its cause because these injuries often do not manifest themselves for two or three decades following exposure to the hazardous substance." *Id.* at 38. The discovery rule "operates to defer accrual of a cause of action until a plaintiff discovers or, through the exercise of reasonable care and diligence, should discover the 'nature of his injury." *Id.* at 40. Even in the category of latent-type injuries, such as those from exposure to asbestos, courts have determined that the statute of limitations begins to run when a plaintiff knows or *should have known* the cause of the injury. *Glassock v. Armstrong Cork Co.*, 946 F.2d 1085, 1092 (5th Cir. 1991).

In this case, the injury was immediately apparent—Mr. Simons suffered a stroke. Further, given the proximity between the stroke and the perhaps erroneous reading on the Roche device, compounded by the hospital personnel's statement that the levels don't dip that fast, their pleadings indicate that they *should have known* his stroke was likely caused by the faulty

product. Consequently, even under the discovery rule, the date of the injury—May 26, 2018—was the date the statute of limitations began to run.

We see nothing in Texas law that suggests this fact-specific application of the discovery rule merits certification to the state Supreme Court.

The district court correctly held that the Simons's claim is time-barred by the Texas statute of limitations. AFFIRMED.

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Before HIGGINBOTHAM, JONES, and COSTA, *Circuit Judges*.

JUDGMENT

(Filed Jul. 6, 2021)

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that appellants pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAMON SIMON, *et al*, Plaintiffs, VS. ROCHE DIAGNOSTICS CORPORATION, Defendant.	§ § § § § § § § §	CIVIL ACTION NO. 4:20-CV-3625

ORDER

(Filed Dec. 4, 2020)

Pending before the Court is Defendant Roche Diagnostics Corporation's ("Roche") Motion to Dismiss Based on Statute of Limitations. (Doc. No. 4). The Plaintiffs filed a Response, (Doc. No. 6), and Roche filed a Reply. (Doc. No. 9). After considering the briefing and applicable law, the Court GRANTS Roche's motion.

I. BACKGROUND

According to the Plaintiffs' complaint, beginning in 2016 Damon Simon used CoaguChek XS Test Strips ("Test Strips"), manufactured by Defendant Roche, to test his anticoagulation levels at home. (Doc. No. 1, Ex. 4 at 4). On May 26, 2018, Mr. Simon suffered a stroke, which allegedly could have been prevented but for inaccurate readings from the Test Strips. (*Id.* at 5). Mr. Simon was admitted to Houston Methodist

Willowbrook Hospital where his International Normalized Ratio (INR) was tested. (*Id.*). Plaintiffs were told that Mr. Simon's INR was "really low." (*Id.*). This surprised them because Mr. Simon "had tested his INR and it was in range." (*Id.*). Allegedly, when Plaintiffs "told the ER personnel" that Mr. Simon's prior test was in his INR range, the ER personnel "proceeded to tell [Plaintiffs] what [they] already knew . . . it wouldn't dip that fast." (*Id.*). In November of 2018, the Plaintiffs discovered that the Test Strips had been recalled. (*Id.* at 6–7).

Plaintiffs filed their original petition in Texas state court in Harris County on September 24, 2020. (*Id.* at 2). They alleged negligence and strict products liability. (*Id.* at 7–9). Roche timely removed the action to this Court based on diversity jurisdiction, (*see* Doc. No. 1), and subsequently filed its Motion to Dismiss claiming that the Plaintiffs' action was time-barred. (Doc. No. 4).

II. LEGAL STANDARD

A defendant may file a motion to dismiss a complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). To defeat a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Twombly*, 550 U.S. at 556). In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007). The court is not bound to accept factual assumptions or legal conclusions as true, and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 556 U.S. at 678–79. When there are well-pleaded factual allegations, the court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.*

"A motion to dismiss for failure to state a claim under Rule 12(b)(6) is a valid means to raise a statute of limitations defense." *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 651 (S.D. Tex. 2011) (citing *Bush v. United States*, 823 F.2d 909, 910 (5th Cir. 1987)). "A motion to dismiss may be granted on a statute of limitations defense where it is evident from the pleadings that the action is time-barred, and the pleadings fail to raise some basis for tolling." *Taylor v. Bailey Tool Mfg. Co.*, 744 F.3d 944, 946 (5th Cir. 2014).

III. ANALYSIS

Texas has a two-year statute of limitations on personal injury claims. Tex. Civ. Prac. & Rem. Code § 16.003. Generally, "a cause of action accrues when a wrongful act causes an injury, regardless of when

the plaintiff learns of that injury or if all resulting damages have yet to occur." *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex. 1998). Therefore, in Texas, personal injury claims are time-barred unless filed within two years of the date of injury. *See Schaefer v. Gulf Coast Reg'l Blood Ctr.*, 10 F.3d 327, 331 (5th Cir. 1994).

Here, the Plaintiffs have unequivocally pleaded that the date of injury was May 26, 2018—when Mr. Simon had the stroke. (Doc. No 1, Ex. 4 ¶ 7–8). Therefore, their personal injury claims accrued on May 26, 2018, *see Childs*, 974 S.W.2d at 36, and the statute of limitations expired two years from that date on May 26, 2020. *See* Tex. Civ. Prac. & Rem. Code § 16.003. Nevertheless, because of the global COVID-19 pandemic, the Supreme Court of Texas extended the deadline on any statutes of limitations that were to expire between March 13, 2020 and September 1, 2020 to September 15, 2020. Tex. Sup. Ct., Misc. Docket No. 20-9091 (Jul. 31, 2020). Since the statute of limitations on Plaintiffs' claims was to expire during this period, per that order, their claims became time-barred as of September 15, 2020.

As noted, this case was not filed until September 24, 2020. The Plaintiffs argue that Texas's discovery rule should apply here and that their cause of action did not accrue until November of 2018 when they learned of the recall of the Test Strips. (Doc. No. 6 at 2, 3). If the discovery rule applies to a cause of action, "the cause of action does not accrue until the injury could reasonably have been discovered." *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 65 (Tex. 2011). The discovery

rule only applies to cases in which "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Id.* at 65–66 (quoting *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996)). "An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence." *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (quoting *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734–35 (Tex. 2001)). An injury is not inherently undiscoverable if it is "sudden and distinguishable, and the plaintiff knew that injury occurred at the time the event occurred." *Howard v. Fiesta Tex. Show Park, Inc.*, 980 S.W.2d 716, 721 (Tex. App.—San Antonio 1998, pet. denied). Here, the alleged injury is Mr. Simon's stroke. (Doc. No 1, Ex. 4 at 4–5). A stroke is not an "inherently undiscoverable" injury and is instead "sudden and distinguishable." Indeed, the Plaintiffs pleaded that they knew on May 26, 2018 that Mr. Simon had suffered a stroke. (*Id.*).

Moreover, even if the discovery rule did apply here, the time period the Plaintiffs have identified—November 2018 when they learned of the recall—still would not be the accrual date. When the discovery rule applies, accrual is delayed until the plaintiff discovers or reasonably could have discovered her *injury*, not to when she discovers the *wrongdoing* by the defendant. *See Timberlake v. A.H. Robins Co., Inc.*, 727 F.2d 1363, 1365 (5th Cir. 1984) ("[No Texas authority applying the discovery rule] implies that the statutory period should be tolled until the plaintiff learns that the defendant's conduct may have been wrongful.").

Not only that, but if the Court assumes the pleaded facts as true as it must in ruling on a motion to dismiss, Plaintiffs knew that there was a discrepancy between the INR readings that Mr. Simon was allegedly getting from the Test Strips and those when he was hospitalized in May of 2018. (*See* Doc. 1, Ex. 4 at 5) ("[Hospital personnel] tested [Mr. Simon's] INR in the Emergency Room and told him it was really low and we just looked at each other because he'd tested his INR and it was in range. When we told the ER personnel, they proceeded to tell us what we already knew . . . it wouldn't dip that fast."). Consequently, they clearly had reason to suspect the Test Strip result was faulty at the time. Therefore, the discovery rule is inapplicable; the Plaintiffs' alleged injury accrued at the time of Mr. Simon's stroke in May of 2018.[1]

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[1] The Plaintiffs state in their response to Roche's motion that they "were represented by an attorney and [were] told that their Statute of Limitations ended in November because of the saved Roche Diagnostics Corporation message[s] left on the Plaintiff's phone and the known Recalls released in November." (Doc. No. 6 at 2). The pleaded facts concerning the phone call only state that a Roche representative called in November of 2018 and asked Plaintiffs to return the unused Test Strips. (Doc. No. 1, Ex. 4 at 6). This caused Plaintiffs to do research and discover the recall. (*Id.*). They also allege that Roche made a second call and sent a letter informing them of the recall. (*Id.* at 7). The fact that an attorney mistakenly informed the Plaintiffs that the statute of limitations would not expire until November of 2020 does not change the fact that it actually expired earlier. *See Weaver v. E-Z Mart Stores, Inc.*, 942 S.W.2d 167, 169 (Tex. App.—Texarkana 1997, no writ) (running of limitations generally not interrupted until suit is filed and defendant is served).

IV. CONCLUSION

As the foregoing discussion demonstrates, the statute of limitations on Plaintiffs' claims expired on September 15, 2020. Since the Plaintiffs did not file this action until September 24, 2020, the claims are time-barred. Accordingly, the Court GRANTS Roche's Motion to Dismiss.

Signed at Houston, Texas, this 4th day of December, 2020.

/s/ Andrew S. Hanen
Andrew S. Hanen
United States District Judge