

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>TIMOTHY MCGINLEY and CATHERINE MCGINLEY, h/w</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 04-CV-3500</b>
	:	
<b>GEORGE W. MCGINLEY, M.D., et al.</b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**December 2, 2005**

Timothy McGinley (“McGinley”) and Catherine McGinley, his wife, (collectively, “Plaintiffs”) bring this diversity action against George W. McGinley, M.D., (“Dr. McGinley”), George W. McGinley, M.D., P.C., individually and d/b/a Optical Effects, and Walter’s Pharmacy for professional negligence and loss of consortium.<sup>1</sup> Now before the Court are Defendants’ Motions for Judgment on the Pleadings.<sup>2</sup> For the reasons that follow, both motions will be granted.

**I. Background**

Between 1989 and 1993, McGinley struggled with an addiction to narcotic painkillers prescribed by Dr. McGinley and filled by Walter’s Pharmacy. Complaint ¶¶ 13-14; Plaintiffs’ Answer to Defendant Walter Pharmacy’s Motion for Judgment on Pleadings (“Plaintiffs’ Answer to Defendant’s Motion”) at 2. Between 1993 and June 2002, McGinley stopped using the

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<sup>1</sup> McGinley and his wife Catherine are now residents of the state of Florida. Complaint ¶¶ 1-2. At all relevant times, Defendants resided or had a principal place of business in Allentown, Pennsylvania. *Id.* ¶¶ 3, 6, 9.

<sup>2</sup> Defendant George W. McGinley, M.D., P.C., individually and d/b/a Optical Effects has not filed a Motion for Judgment on the Pleadings. Accordingly, “Defendants” shall hereafter include only Dr. McGinley and Walter’s Pharmacy.

painkillers and entered a methadone program. Complaint ¶¶ 15-16; Plaintiffs' Answer to Defendant's Motion at 2. In June 2002, McGinley suffered a work-related injury and about one month later, Dr. McGinley prescribed and provided narcotic painkillers to McGinley. Complaint ¶¶ 15-16; Plaintiffs' Answer to Defendant's Motion at 2. Some of the prescriptions were filled by Walter's Pharmacy. Complaint ¶¶ 17-19, 32; Plaintiffs' Answer to Defendant's Motion at 2. Dr. McGinley sent the painkillers to McGinley in California, where he then resided. Complaint ¶¶ 17; Plaintiffs' Answer to Defendant's Motion at 2.

On July 26, 2002, McGinley was involved in a one-car accident in Walnut Creek, California, resulting in a traumatic brain injury and nerve damage. Complaint ¶¶ 19, 22. McGinley alleges that the accident occurred because he was overmedicated on narcotic painkillers negligently prescribed by Dr. McGinley and dispensed by Walter's Pharmacy. *Id.* ¶¶ 21, 32-34. Plaintiffs filed their Complaint in this action on July 23, 2004.

## **II. Legal Standard**

Under Rule 12(c), a court may not grant a motion for judgment on the pleadings ““unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.”” *Kruzits v. Okuma Mach. Tool, Inc.*, 40 F.3d 52, 54 (3d Cir. 1994) (quoting *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980)). The Court must view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Society Hill Civic Ass'n*, 632 F.2d at 1054.

## **III. Analysis**

Defendants move for judgment on the pleadings on the grounds that Plaintiffs' professional negligence claims are time-barred. In a diversity case, the Court must apply the

forum state's choice of law rules. Ross v. Johns-Manville Corp., 766 F.2d 823, 826 (3d Cir. 1985). In the instant case, Pennsylvania, as the forum state, has a borrowing statute that provides that "the period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim." 42 Pa. C.S.A. § 5521(b) (emphasis added); Ross, 766 F.2d at 828. For purposes of this statute, the cause of action accrues where the final significant event essential to the claim occurs. Rostron v. Marriott Hotels, 677 F. Supp. 801, 802 (E.D. Pa. 1987). Here, the cause of action accrued in California on July 26, 2002, the date of McGinley's car accident.

Pennsylvania has a two-year statute of limitations for an "action to recover damages for injuries to the person . . . caused by the . . . negligence of another." 42 Pa. C.S.A. § 5524(2).

California's statute of limitations provides, in relevant part:

In an action for injury or death against a health care provider based on a person's alleged professional negligence, the time for the commencement of action shall be three years after the date of the injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.

Cal. Code Civ. P. § 340.5. Because Plaintiffs discovered their alleged injury at the latest on July 26, 2002, the date of the accident, the statute of limitations period under California law is one year from July 26, 2002. See Cal. Code Civ. P. § 340.5. Accordingly, under the Pennsylvania borrowing statute, the California statute of limitations, which "first bars the claim[s]," applies.<sup>3</sup>

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<sup>3</sup> Plaintiffs assert that additional discovery is needed to establish the date that McGinley knew he had a cause of action. However, additional discovery is not needed because McGinley knew on July 26, 2002, that (1) he was injured when he was involved in the car accident and (2) he was allegedly under the influence of the narcotic painkillers supplied by Defendants at that time. Complaint ¶¶ 18-19. In addition, Plaintiffs request that the Court

Since the one-year period commenced at the latest on July 26, 2002, and Plaintiffs did not file this action until July 23, 2004, their claims will be barred.

Plaintiffs, however, dispute this result and argue that under California law, the one-year limitations period is tolled while Dr. McGinley and Walter's Pharmacy remain outside of the State. Cal. Code Civ. P. § 351. Section 351 states, "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Plaintiffs' reliance on Section 351 is misplaced. The purpose of Section 351 is to prevent the running of the statute of limitations against a plaintiff who was unable to present his cause of action against a defendant not amenable to service of process. Bertha Bldg. Corp. v. Nat'l Theatres Corp., 140 F. Supp. 909, 913 (E.D.N.Y. 1956) (internal citations omitted), reversed on other grounds, 248 F.2d 833 (2d Cir. 1957); see Dew v. Appleberry, 591 P.2d 509, 511-14 (Cal. 1979); Cardoso v. Am. Med. Sys., Inc., 183 Cal. App. 3d 994, 999 (Cal. Ct. App. 1986); Loope v. Greyhound Lines, Inc., 250 P.2d 651, 652-53 (Cal. Ct. App. 1952). Here, Plaintiffs, now Florida residents, chose a forum where Defendants are subject to service of process. As a result, applying Section 351 would give Plaintiffs a benefit that the California legislature never

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consider the application of equitable tolling. However, the equitable tolling doctrine is fundamentally inconsistent with the one- and three-year structure of the California Code of Civil Procedure Section 340.5. The one-year period by its terms, begins only after discovery, or reasonable diligence leading to discovery, of the injury, thereby making tolling unnecessary. The three-year limit is a period of repose similarly inconsistent with tolling.

intended.<sup>4</sup> Accordingly, California's one-year statute of limitations bars Plaintiffs' claims filed on July 23, 2004, almost two years after their accrual.

**IV. Conclusion**

For the foregoing reasons, the Court will grant Defendants' Motions. An appropriate Order follows.

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<sup>4</sup> See Cardoso, 183 Cal. App. 3d at 999, where the court wrote that "the availability of substituted service of process upon a foreign corporation renders the tolling provisions of [S]ection 351 inapplicable. To rule otherwise would result in the anomalous situation that a statute of limitations would never run in actions filed against foreign corporations."

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**ORDER**

**AND NOW**, this 2nd day of December, 2005, upon consideration of Defendant George W. McGinley, M.D.'s Motion for Judgment on the Pleadings (docket no. 17) and Defendant Walter's Pharmacy's Motion for Judgment on the Pleadings (docket no. 14), it is **ORDERED** that Defendants' Motions are **GRANTED** for the reasons stated in the accompanying Memorandum. Accordingly, judgment on all counts is entered in favor of Defendants George W. McGinley, M.D. and Walter's Pharmacy.

**BY THE COURT:**

/s/ Bruce W. Kauffman  
**BRUCE W. KAUFFMAN, J.**