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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VICKIE L. ZACHER,

Plaintiff and Appellant,

v.

ROBINSON HELICOPTER
COMPANY, INC.,

Defendant and Respondent.

B279673

(Los Angeles County
Super. Ct. No. BC527622)

APPEAL from a judgment of the Superior Court for Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Law Offices of Michael J. Harrington and Michael J. Harrington for Plaintiff and Appellant.

Tim A. Goetz, Cathrine E. Tauscher; Clyde & Co US, Kevin R. Sutherland, Sarah W. Orrick and Kathryn C. Ashton for Defendant and Respondent.

Plaintiff Vickie L. Zacher appeals from a judgment of dismissal following the sustaining of a demurrer to her wrongful death action and the voluntary dismissal of her remaining personal injury claims. The wrongful death action was brought against defendant Robinson Helicopter Company, Inc. (Robinson) and others for the death of John Zacher, Vickie's husband, in a helicopter crash.¹ The helicopter -- which Vickie alleged was defective -- had been manufactured and sold by Robinson in California, but the crash occurred in Minnesota. John and Vickie were residents of Minnesota at the time of the crash. Applying the Minnesota statute governing wrongful death actions in accordance with California's so-called "borrowing statute" (Code Civ. Proc.,² § 361), which provides that when a cause of action arises in another state California courts must apply the limitation laws of that state, the trial court found that Vickie's wrongful death action was time-barred.

Vickie contends that California's borrowing statute did not apply because the cause of action arose in California, where the helicopter was defectively manufactured, but even if Minnesota law applied, her action was timely.³ We conclude the trial court correctly applied section

¹ We refer to members of the Zacher family by their first names for ease of reference, and mean no disrespect.

² Further undesignated statutory references are to the Code of Civil Procedure.

³ Vickie makes additional arguments that we need not address in light of our conclusion that Minnesota's limitations law applies and that her action is time-barred under that law.

361, and that Vickie's wrongful death action was time-barred. Accordingly, we affirm the judgment.

BACKGROUND

Because this appeal is from the sustaining of a demurrer, our summary of the facts is taken from the pleadings and facts that have been judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) None of those facts is disputed.

On November 24, 2011, John and Vickie were occupants of a helicopter flying from Alexandria, Minnesota to Hackensack, Minnesota. John was piloting the helicopter, and Vickie was the only passenger. The helicopter lost control and power, and crashed into Ten Mile Lake near Hackensack. John, who could not swim, drowned. Vickie suffered injuries but survived. John and Vickie were residents of Minnesota at the time of John's death.

The helicopter John was piloting was manufactured in California by Robinson in September 2003.⁴ Four Winds Leasing LLC (Four Winds) purchased the helicopter in 2003 and owned it at the time of the crash; John was president of Four Winds.

On November 15, 2013, a complaint for wrongful death, personal injury, survival, and property damage was filed against Robinson and

⁴ Robinson is a California company with its headquarters and principal place of business in Torrance, California.

other defendants⁵ in Los Angeles Superior Court by Vickie and her six children⁶ (for wrongful death as to all and for personal injury only as to Vickie), the personal representatives of John's estate (for survival claims), and Four Winds (for property damage). The complaint alleged two causes of action, for products liability and negligence, and sought wrongful death damages for Vickie and her children (the wrongful death plaintiffs), damages for the injuries Vickie suffered in the crash, survivor damages for the injuries John suffered between the time of the crash and his death, and damages to Four Winds for the loss of the helicopter.

After the trial court granted a motion brought by another defendant for summary adjudication of the wrongful death and survival claims, plaintiffs filed a first amended complaint. The amended complaint, which is the operative complaint, contained additional allegations regarding Robinson's knowledge of alleged problems with its Model R44 II helicopter (the model John was flying when the crash occurred) -- problems that plaintiffs alleged Robinson had received reports about since the mid-1990s -- and Robinson's alleged failure to warn pilots about those problems. It also added causes of action for (1) fraud by concealment, (2) negligent failure to recall, retrofit, or warn, and (3) negligent infliction of emotional distress-bystander. The

⁵ The other defendants are not parties to this appeal; our discussion is limited to the facts related to Robinson.

⁶ All but one of the children were Minnesota residents at the time of the accident; the other child resided in Colorado.

first two were alleged on behalf of all plaintiffs, and the third was alleged only on behalf of Vickie individually.

Robinson filed a demurrer to the amended complaint on the grounds that (1) plaintiffs did not have the capacity to maintain their wrongful death and survival causes of action under Minnesota law; (2) the wrongful death action was time-barred under Minnesota law, which California courts are required to apply under section 361; and (3) the survival action was not recognized under Minnesota law. The trial court sustained the demurrer without leave to amend, finding that the wrongful death claims were time-barred and the survival claims were not recognized under Minnesota law. On March 16, 2016, the court dismissed those claims with prejudice, leaving only the causes of action for personal injury damages asserted by Vickie and for property damages asserted by Four Winds.⁷ Seven months later, on October 26, 2016, Vickie and Four Winds voluntarily dismissed their remaining claims without prejudice.

Vickie, her children, and the personal representatives of John's estate filed a notice of appeal on December 21, 2016; Four Winds was not included in the notice of appeal. Robinson moved in this court to dismiss as untimely the appeal as to all plaintiffs except Vickie. Robinson noted that all of the claims asserted by the children and the personal representatives of John's estate were dismissed with prejudice

⁷ Robinson had filed a cross-complaint against John's estate and Four Winds. Its claims against the estate were dismissed by the court in April 2015, and Robinson voluntarily dismissed the remainder of the cross-complaint with prejudice in May 2016.

on March 16, 2016, the claims Robinson alleged against the estate were dismissed on April 2, 2015, and Robinson’s entire cross-complaint was dismissed on May 20, 2016. Therefore, all of the claims with respect to Vickie’s children and the estate had been dismissed by May 20, 2016, and the notice of appeal filed more than seven months later was untimely as to those parties. We granted Robinson’s motion and dismissed the appeal as to Vickie’s children and the personal representatives of John’s estate, leaving Vickie as the sole appellant.

DISCUSSION

A. *California’s Borrowing Statute*

Because this case involves Minnesota residents bringing claims in a California court against a California defendant for injuries resulting from an accident that occurred in Minnesota but was allegedly caused by defective manufacturing in California, the trial court was required to determine which state’s law applied. As a general rule, courts in California apply the “governmental interest” analysis to resolve choice-of-law questions. (*McCann v. Foster Wheeler LLC* (2010) 48 Cal.4th 68, 83 (*McCann*).) There is, however, an exception to that general rule. “With respect to the category of statutes of limitation and statutes of repose, . . . many jurisdictions[, including California,] have enacted specific statutory provisions that address the subject of choice of law. . . . [A] majority of American states have adopted so-called ‘borrowing statutes’ that direct the courts of a state, in lawsuits filed within that state, to apply or ‘borrow’ the relevant statute of limitations or statute of repose *of a foreign jurisdiction* under the particular circumstances

specified in the statute, rather than to apply the statute of limitations of the forum jurisdiction.” (*Id.* at pp. 83-84.)

The California borrowing statute is found in section 361. It provides: “When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.” (§ 361.) “Section 361 thus creates a general rule [with one exception not relevant here] that when a cause of action has arisen in another jurisdiction but cannot be maintained against a particular defendant in that jurisdiction because of the lapse of time, the action cannot be maintained against that defendant in a California court.” (*McCann, supra*, 48 Cal.4th at p. 85.)

In determining whether section 361 applies, the focus is on where the cause of action “has arisen.” If it arose in another state, section 361 applies, and the California court *must* apply the statute of limitations or statute of repose of that other state; there is no need for the court to conduct the “governmental interest” analysis ordinarily applied to choice-of-law questions. (*Cossman v. DaimlerChrysler Corp.* (2003) 108 Cal.App.4th 370, 375.) It is only when section 361 does not apply, either because the cause of action arose in California, the exception applies, or the location where the cause of action arose is debatable -- for example, when a plaintiff was exposed to asbestos in one state but his or her illness or injury did not become apparent until he or she had established residency in another -- that the court will conduct the

“governmental interest” analysis to determine which state’s statute of limitations or statute of repose to apply. (*McCann, supra*, 48 Cal.4th at pp. 85-86 & fn. 5.)

B. *Where Did Vickie’s Wrongful Death Cause of Action Arise?*

Section 361 does not define the term “has arisen.” In examining the statute in *McCann*, the Supreme Court appears to have distinguished between when a cause of action “arose” and when it “accrued,” but provides no guidance to determine when a cause of action “has arisen.” (See *McCann, supra*, 48 Cal.4th at p. 86 & fn. 5.) We will apply a common sense meaning to the term, and interpret it to mean when a cause of action came into being. (See, e.g., Merriam-Webster (10th ed. 1995) p. 62 [defining “arise”: “to come into being or to attention”].)

Vickie contends her wrongful death causes of action arose in California because that is where the wrongful conduct that allegedly caused the helicopter to crash occurred: Robinson designed, assembled, marketed, sold, and transferred the allegedly defective helicopter in California. In making this argument, she relies upon federal district court cases holding that a tort cause of action arises when the wrongful act is committed, even if damages resulting from the wrongful act were not sustained at that time, and even if the plaintiff did not know that a tort has been committed. (E.g., *Dalkilic v. Titan Corp.* (S.D.Cal. 2007) 516 F.Supp.2d 1177, 1184.) Her reliance is misplaced.

While it is true that in some cases a tort cause of action arises when the wrongful act is committed even though no damages were

sustained until later, a wrongful death cause of action is not a typical tort cause of action. Wrongful death is a statutorily created cause of action. (§§ 377.60-377.62.) “Its purpose is to compensate specified persons -- heirs -- for the loss of companionship and for other losses suffered as a result of a decedent’s death.” (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263.) “Unlike some jurisdictions wherein wrongful death actions are derivative, Code of Civil Procedure section 377.60 “creates a new cause of action in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained had he survived.”” (*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 844.) The elements of the cause of action are “the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the *pecuniary loss* suffered by the *heirs*.” (*Quiroz v. Seventh Ave. Center, supra*, 140 Cal.App.4th at p. 1263, citing 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 891, p. 350.)

What makes wrongful death actions unique is that “the breach of duty to be established [as the first element] in a wrongful death case is that owed by defendant to the decedent, rather than to the victim’s survivors, even though it is the loss suffered by the survivors which forms the basis for the suit.” (Stuart M. Speiser & James E. Rooks, Jr., *Recovery for Wrongful Death* (4th ed. 2005, July 2017 Update), § 2:1 (*Wrongful Death*).) Thus, the occurrence of the tort to be proved as part of a wrongful death case is not what causes the wrongful death action to “come into being.” (Merriam-Webster, *supra*, at p. 62 [defining “arise”].)

A wrongful death action does not come into being -- or arise -- until the death of the decedent. The tort suffered by the decedent is simply the theory of liability for the wrongful death action brought by the decedent's heirs. (*Wrongful Death, supra*, at § 2:1.)

In this case, the accident that resulted in John's death occurred in Minnesota. Vickie was a resident of Minnesota at the time of the accident. Therefore, Vickie's cause of action for wrongful death arose in Minnesota. Accordingly, the trial court was required to look to Minnesota law to determine whether Vickie's wrongful death action is time-barred.

C. *Vickie's Wrongful Death Action is Time-Barred Under Minnesota Law*

Minnesota Statutes section 573.02 provides in relevant part:
“When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 3 may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission. An action to recover damages for a death caused by the alleged professional negligence of a [health professional] shall be commenced within three years of the date of the death, but in no event shall be commenced beyond the time set forth in [Minnesota Statutes] section 541.076. An action to recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent. *Any other action under this section may be commenced within three years after the date of death provided that*

the action must be commenced within six years after the act or omission.”
(Italics added.)

In this case, John died on November 24, 2011. The original complaint was filed on November 15, 2013, less than two years later. Thus, the complaint was filed within three years of the date of death. The acts or omissions that form the theories of liability, however, are all alleged to have occurred more than six years before the lawsuit was filed.

For example, Vickie alleges that Robinson carelessly and negligently designed and manufactured the Model R44 II helicopter that was sold to Four Winds. But Robinson manufactured and sold the helicopter in 2003, 10 years before the complaint was filed. As another possible theory of liability, Vickie alleges that Robinson was aware in 2006 of abnormal main rotor mast vibrations in the Model R44 II helicopter that caused serious accidents and incidents. Therefore, she alleges that, “[c]ommencing not later than 2006,” Robinson had a duty to conduct a recall, warning, and retrofit campaign but failed to do so. But once again, this alleged wrongdoing occurred more than six years before the complaint was filed. Finally, Vickie alleges that Robinson entered into an agreement with the Federal Aviation Administration “[i]n early 2007” to issue a service letter to warn pilots of the “dangerous abnormal main rotor mast vibration” and advise pilots of how to correct it, but failed to do so. The complaint was not filed, however, until late November 2013, more than six years after this alleged omission.

Because all of the alleged wrongful acts or omissions occurred more than six years before the complaint was filed in this case, Vickie's wrongful death action is barred by Minnesota law. Vickie argues, however, that her action is not barred because her claim did not accrue until the crash occurred because there was no compensable damage until then. She also argues that the statute of limitations was equitably tolled due to Robinson's alleged fraudulent concealment. Neither argument has merit.

Vickie's first argument fails to take into consideration that the Minnesota wrongful death statute contains both a statute of limitations (three years from the date of death) and a statute of repose (six years from the alleged wrongful act or omission). As the Minnesota Supreme Court explained in *Weston v. McWilliams & Associates, Inc.* (Minn. 2006) 716 N.W.2d 634, "a statute of limitations limits the time within which a party can pursue a remedy (that is, it is a procedural limit), whereas a statute of repose limits the time within which a party can acquire a cause of action (thus it is a substantive limit)." (*Id.* at p. 641.) The Court continued: "Because statutes of limitations are procedural in nature, intended to deny a remedy even though a right has vested, they typically are not triggered until the cause of action has accrued. . . . [¶] A statute of repose, on the other hand, is intended to eliminate the cause of action. In at least the majority of jurisdictions, it has been held that such statutes may constitutionally eliminate causes of action even before they accrue." (*Ibid.*)

In *DeCosse v. Armstrong Cork Co.* (Minn. 1982) 319 N.W.2d 45 (*DeCosse*), the Minnesota Supreme Court so held with respect to the

wrongful death statute of repose, which was added by amendment in 1978, finding that the statute “presents the possibility that a wrongful death action could expire before death by limiting the bringing of actions to six years after the act or omission. Time-barring a wrongful death action before death triggers accrual of the right to bring the action has been criticized as illogical and unjust. [Citation.] Despite any injustice or illogic to such an approach, the plain meaning of the statute seems to be clear. By the 1978 amendment the legislature is expressing its intention to bar actions for some deaths caused by wrongful acts or omissions even if they are brought on the day of death.” (*Id.* at p. 48.) Thus, the fact that Vickie’s cause of action had not yet accrued by the time the statute of repose ran does not save her action.

Neither does equitable tolling save Vickie’s action. Vickie is correct that the Minnesota Supreme Court held in *DeCosse* that “the wrongful death act is subject to tolling where a cause of action is fraudulently concealed” (*DeCosse, supra*, 319 N.W.2d at p. 52), a holding which the Minnesota Court of Appeals cited with approval in *Lamere v. St. Jude Medical, Inc.* (Minn.App. 2013) 827 N.W.2d 782, 788 (*Lamere*). It is not entirely clear whether the holding in *DeCosse* remains viable, however, in light of a more recent Minnesota Supreme Court case, *Carlton v. State* (Minn. 2012) 816 N.W.2d 590 (*Carlton*).

In *Carlton*, the Court examined whether the statute of limitations for filing post-conviction relief petitions was jurisdictional and thus not subject to waiver by the state. (*Carlton, supra*, 816 N.W.2d at pp. 599-

607.) In addressing the jurisdiction question, the Court observed that “in statutorily-created causes of action that establish jurisdictional prerequisites, . . . a plaintiff’s failure to comply with the limitations period results in dismissal of the claim, even in the face of a defendant’s silence on the issue. [Citation.] Dismissal is required because the court in such a case has no jurisdiction to hear the untimely claim, as compliance with the time period is a condition of the statutory right. [Citation.] Jurisdictional limitations periods therefore, ‘do not have flexible parameters permitting them to be ignored’ by courts, [citation], and *are not subject to ‘waiver, estoppel, and equitable tolling,’* [citation].” (*Carlton*, 816 N.W.2d at p. 601 [citing, among other cases, *Ortiz v. Gavenda* (Minn. 1999) 590 N.W.2d 119, 122, which held that the limitation provisions of the wrongful death act are jurisdictional], italics added.) Although *Lamere, supra*, 827 N.W.2d 782, was decided seven months after *Carlton*, the Minnesota Court of Appeals did not address the Supreme Court’s statement (albeit dictum) that jurisdictional limitations periods are not subject to equitable tolling.

We need not decide, however, how the Minnesota Supreme Court would rule if presented now with the issue whether fraudulent concealment tolls the wrongful death act’s statute of repose, because Vickie’s allegations are insufficient to toll the statute under Minnesota law. For tolling to apply, “the alleged concealment must be fraudulent or intentional. [Citation.] In the absence of a fiduciary relationship, there must be an affirmative act designed to and which does prevent the discovery of the cause of action.” (*State Farm Mut. Auto. Inc. Co. v.*

Ford Motor Co. (Minn.App. 1997) 572 N.W.2d 321, 325, citing *Wild v. Rarig* (Minn. 1975) 234 N.W.2d 775, 795.) “Mere silence” is insufficient to toll the statute. (*The Funds v. Granite Re, Inc.* (2014) 844 N.W.2d 509, 514.) In this case, Vickie alleges only that Robinson concealed the alleged defect in its Model R44 II by failing to disclose; she alleges no affirmative conduct.⁸ Therefore, equitable tolling does not apply, and the trial court properly found that Vickie’s wrongful death action was time-barred.

⁸ Vickie argues in her appellant’s reply brief that the trial court erred by failing to examine the allegations of the amended complaint, and cites to the allegations that she asserts properly allege fraudulent concealment. Because we review the trial court’s ruling de novo (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415), the fact that the trial court did not examine the allegations (because it found *DeCrosse, supra*, 319 N.W.2d 45 distinguishable) does not preclude this court from determining that they do not allege fraudulent concealment under Minnesota law. We have examined the allegations that Vickie cites and conclude that they do not because they do not include any affirmative acts to conceal or defraud. Vickie does not suggest any additional facts she could allege to overcome the deficiencies in her amended complaint.

DISPOSITION

The judgment is affirmed. Robinson shall recover its costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.