

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

LEONARD MILLER and)	
DONNA MILLER,)	Civil Action No. 5:00CV30061
)	
Plaintiffs,)	
)	<u>MEMORANDUM OPINION</u>
v.)	
)	
R. E. SEDWICK, M.D., et al.,)	By: Samuel G. Wilson
)	Chief United States District Judge
Defendants.)	

Plaintiffs Leonard and Donna Miller (the “Millers”) bring this negligence action against defendants R. E. Sedwick, M.D.; Rockingham Memorial Hospital, Inc.; Carolyn Beckwith, R.N.; and Stacey Lam, L.P.N. (collectively, the “defendants”) seeking expenses for the treatment and care of their son, Cody Miller (“Cody”), that they have incurred and will incur until he reaches majority. The Millers allege that the defendants’ negligence during Donna Miller’s labor and delivery of Cody caused his injuries, which subsequently caused the Millers to incur expenses for Cody’s treatment and care.¹ This court has diversity jurisdiction pursuant to 28 U.S.C. § 1332. This matter is before the court on the defendants’ motion to dismiss based on the statute of limitations. Finding that the applicable statute of limitations bars the Millers’ claim, the court grants the defendants’ motion to dismiss.

I.

On January 30, 1993, Dr. Sedwick admitted Donna Miller into Rockingham Memorial Hospital in Harrisonburg, Virginia, for the delivery of Cody. During the course of her labor and delivery of Cody, the defendants attended and provided care to Donna Miller. Because of the

¹ On February 15, 2001, this court entered an order consolidating the Millers’ case with Cody’s case (Civil Action No. 5:00CV30060) against the defendants.

defendants' alleged negligence during Donna Miller's labor and delivery, which involved an emergency Cesarean section, Cody was deprived of oxygen and suffered anoxic encephalopathy. Consequently, Cody suffers from Cerebral Palsy and spastic quadriparesis, and he requires assistance in all daily living activities.

Due to the alleged negligence of the defendants, the Millers have brought this action to recover the expenses that they have incurred for Cody's treatment and care from July 6, 1995, and those that they will incur until January 30, 2011, the date Cody reaches majority. The defendants have moved to dismiss the Millers' claim, maintaining that the applicable statute of limitations bars it. Specifically, the defendants argue that the Millers' claim is derivative of Cody's cause of action, and, therefore, that it accrued on the same date as Cody's cause of action. Cody's cause of action accrued on January 30, 1993, the date that he sustained injury. Thus, because the Millers filed their complaint on July 6, 2000, and the applicable statute of limitations is five years, the defendants maintain that the statute of limitations bars the Millers' claim.

In response, the Millers contend that their claim did not accrue on the date of Cody's birth. Instead, the Millers argue that their cause of action does not accrue until they incur or pay expenses for Cody's treatment and care, because that is when they suffer "property damage." Since they only seek expenses that they have incurred in the five years prior to the filing of the complaint and those that they will incur up to the date that Cody reaches majority, the Millers maintain that the statute of limitations does not bar their claim.

II.

Because jurisdiction in this case is based upon diversity, the court must look to Virginia law to determine both the applicable statute of limitations and the date at which the Millers' claim

accrued. See Brown v. Plywood Panels, Inc., 1995 WL 559656, at *3 (4th Cir. Sept. 21, 1995); Joyce v. A.C. & S., Inc., 785 F.2d 1200, 1203 (4th Cir.1986). The parties agree that Virginia Code § 8.01.243(B) provides the applicable statute of limitations for the Millers' claim. That section states:

Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within *five years after the cause of action accrues*.

Va. Code § 8.01-243(B) (emphasis added). Thus, the determinative issue is whether the Millers' cause of action accrued on the date of Cody's injury as the defendants argue, or, alternatively, whether it accrues whenever they incur or pay expenses for Cody's treatment and care as the Millers maintain.

That precise issue has not been addressed directly by the Supreme Court of Virginia. When faced with an area of state law that is unclear, a federal court must predict how the highest court of the state would decide the issue if confronted with it. See Kline v. Wheels by Kinney, Inc., 464 F.2d 184, 187 (4th Cir. 1972); Walker v. Winchester Mem'l Hosp., 585 F. Supp. 1328, 1329 (W.D. Va. 1984). In Watson v. Daniel, 165 Va. 564, 183 S.E. 183 (1936), the Supreme Court of Virginia stated that a parent's cause of action for medical expenses accrued on the date that the parent incurred or paid them; or, stated another way, when the parent became liable to pay those expenses. Id. at 569, 183 S.E. at 185. Since that decision, however, that court has held that the parents' cause of action for expenses sustained as the result of an injury to their infant is a derivative action. See Mahony v. Becker, 246 Va. 209, 212, 435 S.E.2d 139, 141 (1993) (citing Norfolk S. Ry. v. Fincham, 213 Va. 122, 128, 189 S.E.2d 380, 384 (1972)). A derivative action

“is one having no origin in itself, but one owing its existence to a preceding claim.” Id., 435 S.E.2d at 141.

Accordingly, the Millers’ claim for expenses is wholly derivative of Cody’s personal injury claim. Any damages that the Millers have suffered are secondary to and arise from the alleged tortious acts committed against Cody. See id., 435 S.E.2d at 141. Because the Millers’ claim for expenses is derivative of Cody’s claim, it accrued on the same date as Cody’s claim. See id. at 213, 435 S.E.2d at 141. Cody’s claim accrued on the date that he sustained injury; namely, January 30, 1993. See Va. Code. § 8.01-230 (stating that “the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person”). Thus, the Millers’ claim also accrued on January 30, 1993, the date that Cody was injured. Consequently, because they filed their complaint more than five years after that date, the court concludes that the five-year statute of limitations in Virginia Code § 8.01-243(B) bars the Millers’ claim.²

Finally, the court notes that its conclusion holds true to the purposes of statutes of limitations. Statutes of limitations are designed “to compel the exercise of a right to sue within a reasonable time, to suppress fraudulent and stale claims, to prevent surprise, to guard against lost evidence, to keep facts from becoming obscure, and to prevent witnesses from disappearing.” Lavery v. Automation Management Consultants, 234 Va. 145, 148, 360 S.E.2d 336, 338 (1987). Here, if the Millers’ argument were credited, then a separate cause of action would accrue

² In addition, the court notes that the Millers’ claim is not saved by the disability tolling provisions of Virginia Code § 8.01-229(A)(2)(a) because that provision does not apply to claims for expenses by parents. See Hutto v. BIC Corp., 800 F. Supp. 1367, 1372 (E.D. Va. 1992); Perez by Perez v. Espinola, 749 F. Supp. 732, 733 (E.D. Va. 1990).

whenever the Millers incurred or paid expenses for Cody's treatment and care, up to the date that Cody reached majority. That result would defeat the statutes of limitations' purpose of fostering reasonably prompt actions. Accordingly, the court will grant the defendants' motion to dismiss.

III.

For the reasons stated, the court grants the defendants' motion to dismiss based on the statute of limitations. An appropriate order will be entered this day.

ENTER this ____ day of February, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

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)	<u>FINAL ORDER</u>
v.)	
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R. E. SEDWICK, M.D., et al.,)	By: Samuel G. Wilson
)	Chief United States District Judge
Defendants.)	

In accordance with the court's Memorandum Opinion entered this day, it is **ORDERED** and **ADJUDGED** that Defendants' motion to dismiss based on the statute of limitations is **GRANTED**. It is further **ORDERED** that this action be stricken from the docket of the court.

ENTER this ____ day of February, 2001.

CHIEF UNITED STATES DISTRICT JUDGE