

No. 23-CV-0411 / No. 23-CV-0412

DISTRICT OF COLUMBIA COURT OF APPEALS

MARILYN KUBICHEK

Appellant (2022-CAB-006101)

AND

DOROTHY BALDWIN

Appellant (2022-CAB-006102)

v.

UNLIMITED BIKING WASHINGTON, DC, LLC, et al

Appellees

**Appeal from the Superior Court of the District of Columbia
Civil Action Nos. 2022-CAB-006101 and 2022-CAB-006102-B (Hon. Hiram
Puig-Lugo, presiding)**

BRIEF OF APPELLEE EDUARDO SAMONTE

January 8, 2024



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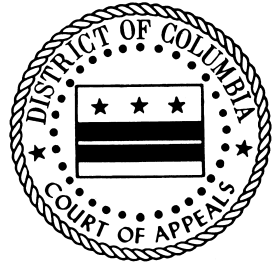
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D.C. COURT OF APPEALS RULE 28(a)(2)(A) STATEMENT

Pursuant to D.C. Ct. App. Rule 28(a)(2)(A), below is a list of the parties and their counsel in the lower court and in this appellate proceeding:

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Statement of Jurisdiction

This Court has jurisdiction to hear the appeal of Appellants Marilyn Kubichek and Dorothy Baldwin because on April 12, 2023 the Superior Court of the District of Columbia issued an Order disposing of the consolidated claims of Appellants Marilyn Kubichek and Dorothy Baldwin asserted against Eduardo Samonte and Unlimited Biking Washington D.C., LLC. Specifically, the lower court granted Appellee Samonte's motions to dismiss filed on limitations grounds and closed the case. (App'x at 76-78). Thus, the April 12, 2023 ruling from the lower court was a final order disposing of Appellants' claims.¹

Statement of Issues

1. Whether the lower court properly determined that the lawsuits filed by Appellants Kubichek and Baldwin on December 30, 2022 are barred by the statute of limitations because their personal injury claims accrued on October 11, 2019 and the deadline for filing their causes of actions was not tolled.

Standard of Review

An appeal from the granting of a motion to dismiss is reviewed *de novo*.

Papageorge v. Zucker, 169 A.3d 861, 863 (D.C. 2017).

¹ As will be briefly addressed *infra*, there is no clear record that either Kubichek or Baldwin perfected service on Unlimited Biking, Washington, D.C., LLC, prior to Judge Puig-Lugo granting Samonte's motions to dismiss. Nonetheless, the April 12, 2023 Order disposed of the entire matter. Appellants' claims against Samonte and Unlimited Biking arise out of the same October 11, 2019 incident and the claims asserted against each defendant are subject to a three-year statute of limitations.

A complaint “must present sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. More specifically, 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.” *Fourth Growth, LLC v. Wright*, 183 A.3d 1284, 1288 (D.C. 2018). At the Rule 12(b)(6) stage, a court should dismiss a complaint on statute of limitations grounds if the claim is time-barred on the face of the complaint. *Logan v. Lasalle Bank Nat’l Ass’n*, 80 A.3d 1014, 1020 (D.C. 2013).

Statement of the Case

Appellant, Marilyn Kubichek, filed a two-count Complaint for personal injury against Appellees, Unlimited Biking Washington, D.C., LLC d/b/a Bike and Roll, D.C. and Eduardo Samonte, on December 30, 2022 at 6:56 p.m. (App’x at 1-5). The Kubichek matter was assigned Civil Action No. 2002-CAB-006101. The Complaint is styled in negligence as to both named defendants. (App’x at 3-5). The gravamen of the lawsuit is that Mr. Samonte negligently operated a segway on a guided tour and that Unlimited Biking Washington, D.C., LLC d/b/a Bike and Roll, D.C. is liable for Mr. Samonte’s negligence because it failed to train and/or supervise Mr. Samonte. *Id.*

Appellant, Dorothy Baldwin, filed her Complaint for personal injury against Appellees, Unlimited Biking Washington, D.C., LLC d/b/a Bike N Roll, D.C. and

Eduardo Samonte, on December 30, 2022 at 6:38 p.m. (App'x at 38-42). The Baldwin matter was assigned Civil Action No. 2002-CAB-006102. As with the Kubichek matter, Ms. Baldwin's Complaint is styled in negligence as to both named defendants and avers Mr. Samonte negligently operated the segway on a guided tour and that Unlimited Biking Washington, D.C., LLC is liable for his conduct because it failed to train and/or supervise him. (App'x at 40-21).

Appellee Samonte filed a motion pursuant to Super. Ct. Civ. R. 12(b)(6) to dismiss the Kubichek matter on March 8, 2023. (App'x at 6-8). Appellee Samonte filed a similar motion to dismiss the Baldwin matter on March 8, 2023. (App'x at 43-44). Appellee Samonte's motions to dismiss were supported by Memorandums of Points and Authorities which were not included in the Appendix filed by Appellants. As such, they are included as an Appendix to this Brief. *See* (SApp'x9 and SApp'x156).

The basis for Appellee's motions to dismiss was that the tort claims asserted by Ms. Kubichek and Ms. Baldwin were required to be filed within three years of the date of loss or on or before October 11, 2022. Appellants missed the date for filing these tort actions by more than seventy-five (75) days.

Appellants Kubichek and Baldwin filed Oppositions to Appellee Samonte's Motion to Dismiss on March 22, 2023 (App'x at 9-12; 45-48). Appellants Kubichek and Baldwin argued that the COVID-19 Emergency Orders issued by the Superior

Court for the District of Columbia tolled the deadline for filing their lawsuits and therefore their lawsuits were not filed untimely. (App'x at 45-48).

Appellee Samonte filed a Reply Brief in response to both Oppositions on March 29, 2023. (App'x at 28-35 (Kubichek) and App'x at 56-70 (Baldwin)). On March 29, 2023, Judge Puig-Lugo *sua sponte* consolidated the Kubichek and Baldwin matters. (App'x at 73).

When Mr. Samonte filed his motions on March 8, 2023, Appellants had not produced clear evidence of service on Unlimited Biking Washington, D.C., LLC d/b/a Bike N Roll, D.C. in either matter; however, the lower court had granted motions to extend the time to perfect service in each case. Specifically, per the docket in *Baldwin*, 60-day summonses were issued on January 1, 2023. (SApp'x6). On February 28, 2023, Ms. Baldwin filed a Motion to Extend Time for Service on Unlimited Biking Washington, D.C. LLC d/b/a Bike and Roll, D.C. *Id.* This motion was granted on March 6, 2023. *Id.* On April 9, 2023, Appellant Baldwin filed an affidavit of service which purports to have attempted service via certified mail issued on March 1, 2023 and delivered at the DLCP P.O. Box on March 3, 2023. *See, generally*, Court Case Summary. In *Kubichek*, once again the 60-day summonses were issued on January 1, 2023. A motion to enlarge time for service was filed February 28, 2023, and this motion was granted on March 6, 2023. *See Kubichek* docket (SApp'x1).

Per the available dockets, no affidavit of service as to service of process of the Kubichek Summons and Complaint was ever filed. *See Kubichek* docket (SApp’x1) and *Baldwin* docket (SApp’x6).

On April 12, 2023 Judge Puig-Lugo entered an Order granting Appellee Samonte’s Motions to Dismiss and closed the case. (App’x at 76-79). This appeal followed.

Statement of Facts

Appellants’ lawsuits in both the Kubichek and Baldwin matters were filed on December 30, 2022 in the Superior Court of the District of Columbia. (App’x at 1-5 (Kubichek) and App’x at 38-42 (Baldwin)). The causes of action arise from an alleged incident which occurred on October 11, 2019. (App’x at 2-3, 39-40 *Compls.* at para 9.). Appellant Kubichek asserts in her lawsuit that Appellee Samonte was operating a motorized segway on 12th Street in N.W., Washington, D.C. when he collided with her causing her personal injuries. *Id.* Appellant Kubichek further asserts that Appellee Samonte was on a segway tour hosted by Unlimited Biking Washington, D.C., LLC d/b/a Bike N Roll, D.C. at the time of the subject incident. *Id.* The Complaints contain two counts – both styled in negligence. Appellant averred Samonte operated the segway negligently (Count I) and that Unlimited Biking of Washington, D.C., LLC d/b/a Bike N Roll, D.C. failed to properly train or supervise Mr. Samonte (Count II). (App’x at 2-3).

Similarly, Appellant Baldwin filed her Complaint for personal injuries on December 30, 2022 in the Superior Court of the District of Columbia. (App'x at 39-40). Ms. Baldwin alleges she sustained personal injuries in the same incident as described by Ms. Kubichek. That is, an incident which occurred on October 11, 2019, when Appellee Samonte allegedly collided with Ms. Baldwin causing her personal injuries. (App'x at 39-40).

Appellee Samonte filed Motions to Dismiss pursuant to Super. Ct. Civ. R. 12, because on the face of both complaints they were untimely. Both Appellants opposed the Motions to Dismiss alleging that the period for filing their lawsuits had been tolled by the Emergency Orders issued by the Superior Court. Appellants based their position on certain Emergency Orders that had been issued by the Superior Court for the District of Columbia, Maryland, and Virginia. However, in his Reply Briefs filed below, Appellee Samonte pointed out that the Emergency Orders issued by the Superior Court for the District of Columbia applied to matters where the deadline to file a lawsuit fell **within** the period of Emergency and they specifically tolled only the **deadline** for filing personal injury actions. The actual period of limitations was not tolled or paused, as Appellants wrongfully believed.

Judge Puig-Lugo consolidated the two matters on March 29, 2023. (App'x at 73). Judge Puig-Ludo granted Appellee's Motions to Dismiss on April 12, 2023

finding that the Kubichek and Baldwin matters were filed untimely and he dismissed the consolidated action at that time. (App'x at 76).

Summary of Argument

Appellants were required to file their lawsuits within three years of the alleged segway accident of October 11, 2019. Their lawsuits were filed on December 20, 2022, three-years and two months after the incident. The Emergency Orders issued by the Superior Court for the District of Columbia during the COVID period of emergency distinguished matters where the cause of action accrued before the beginning of the COVID period of Emergency from matters where the cause of action accrued during the period of Emergency. Appellants' causes of action accrued before the start of the Emergency period. In such cases, tolling applied only if the statutory deadline for filing a lawsuit fell within the period of the Emergency. The period of Emergency was March 13, 2020 through March 31, 2021. Here, the deadline for Appellants to file their lawsuits fell on October 11, 2022, eighteen months after the Emergency period had ended. As such, their deadline to file their lawsuits was not impacted by the Emergency Orders. Their deadlines to file their lawsuits were not tolled.

Argument

In the District of Columbia, a negligence action requesting damages for personal injury is governed by a three-year statute of limitations. *See* D.C. Code §

12-301(a)(3), *Stewart-Veal v. District of Columbia*, 896 A.2d 232, 236 (D.C. 2006).

As the date of Appellants' alleged injuries was October 11, 2019, Appellants were obligated to file their lawsuits no later than October 11, 2022.

1. The Three -Year Statute of Limitation Applies in This Matter.

Appellants allege in their lawsuits that the incident in question occurred on October 11, 2019. (App'x at 1-5). Appellants' lawsuits were filed on December 30, 2022. (App'x at 1-5). The applicable statute of limitations is three years. Appellants' lawsuits were filed two months beyond the statute of limitations. Thus, on their face the Complaints were filed untimely and Appellee's motions to dismiss were properly granted. *See* D.C. Code § 12-301(a)(3), *Logan v. Lasalle Bank Nat'l Ass'n*, *supra*.

2. The Statute of Limitations in This Case Was Not Suspended, Tolloed, Nor Extended by Any of The Emergency Orders Filed By The Superior Court For The District of Columbia During The COVID-19 Pandemic.

On March 18, 2020, the first Order addressing the suspension, tolling, extension of court operations and deadlines was released, indicating in general terms that certain time limits and deadlines would be extended by the Court. *See generally* Order Regarding Operation of the DC Courts During the Coronavirus Emergency (Mar. 18, 2020), *see* (SApp'x23). The Order further stated that “[o]rders setting forth the time limits that are extended will follow.” *Id.*

On March 19, 2020, the Chief Judge of the Superior Court for the District of Columbia ordered “all deadlines and time limits in statutes, court rules, and standing

and other orders issued by the court **that would otherwise expire before May 15, 2020 including statutes of limitations**, are suspended, tolled, and extended during the period of the current emergency.” Amended Order (Mar. 19, 2020)(emphasis added), *see* (SApp’x25).

On March 30, 2020, an Addendum to the General Order Concerning Civil Cases was issued by Presiding Judge, Laura A. Cordero. Judge Cordero reaffirmed the March 19, 2020, Order by the Chief Judge and laid out the method by which any “period of tolling” would be calculated. *See* Addendum to the General Order Concerning Civil Cases (Mar. 30, 2020), (SApp’x29). The Addendum indicated that “the new deadline will be determined by the date on which the period of tolling ends, which is May 15 under the March 19 Order. The new deadline depends in part on whether the event that triggers the deadline occurred before or after March 18, when the tolling period began.” *Id.* The “tolling period” was defined as March 18, 2020 through May 15, 2020 and appears from the various Orders to be coterminous with the “period of emergency,” at least until the statute of limitations “tolling period” ended on March 31, 2021.

In her March 30, 2020 Order, Judge Cordero further explained the two specific scenarios to which the Chief Judge’s March 19, 2020, Amended Order applied:

If an event before the start of the tolling period triggered a deadline that falls within the tolling period, the new deadline is extended by the length of the tolling period . . . If an event during the tolling period

triggered a deadline, the clock would start running on the date the tolling period ends.

See Addendum to the General Order Concerning Civil Cases (Mar. 30, 2020), (SApp’x29).

On May 14, 2020, the Chief Judge of the Superior Court for the District of Columbia ordered “all deadlines and time limits in statutes, court rules, and standing and other orders issued by the court **that would otherwise expire before May 15, 2020 including statutes of limitations**, are suspended, tolled, and extended during the **period of the current emergency**.” Subject to certain exceptions, of which statute of limitations deadlines were not included, the Chief Judge extended the “period of emergency” to June 19, 2020. Amended Order (May 14, 2020)(emphasis added), *see* (SApp’x30).

On June 19, 2020, the Chief Judge of the Superior Court for the District of Columbia ordered “all deadlines and time limits in statutes, court rules, and standing and other orders issued by the court **that would otherwise expire before June 19, 2020 including statutes of limitations**, are suspended, tolled, and extended during the **period of the current emergency**.” Once again, subject to certain exceptions that are not applicable to statute of limitations deadlines, the Chief Judge extended the “period of emergency” to August 14, 2020. Amended Order (June 19, 2020), *see* (SApp’x42).

The same language set forth in the above-referenced Amended Orders was used in subsequent Amended Orders released on: August 13, 2020, extending the “period of current emergency” through November 9, 2020; November 5, 2020, extending the “period of current emergency” through January 15, 2021; and January 13, 2021, extending the “period of current emergency” through March 31, 2021. *See* Amended Order (Aug. 13, 2020); Amended Order (Nov. 5, 2020); and Amended Order (Jan. 13, 2021), respectively. (SApp’x58; SApp’x77; and SApp’x98).

On January 21, 2021, Presiding Civil Judge Anthony C. Epstein issued an Addendum to the General Order Concerning Civil Cases which affirmed the method by which tolling deadlines would be calculated (*i.e.*, as originally set forth by Judge Cordero on March 30, 2020). *See* Addendum to the General Order Concerning Civil Cases (Jan. 21, 2021), (SApp’x120); *see also* Addendum to the General Order Concerning Civil Cases (Mar. 30, 2020), (SApp’x29).

Judge Epstein’s Order stated:

The new deadline will be determined by the date on which the period of tolling ends . . . the date on which the period of tolling ends is currently March 31, 2021 under the January 13 order . . . The new deadline depends in part on whether the event that triggers the deadline occurred before or after March 18, when the tolling period began under the chief judge’s initial order. If an event before the start of the tolling period triggered **a deadline that falls within** the tolling period, the number of days remaining before the original deadline on March 18 are added to the end of the tolling period.

Id. (emphasis added).

On March 30, 2021, the Chief Judge ended the tolling of limitations periods in all civil cases except those subject to a statutory moratorium. *See* Amended Order (Mar. 30, 2021), *see* (SApp’x127).

As indicated by the plain language set forth in Judge Epstein’s Addendum of Jan. 21, 2021, the “suspension, tolling, and extension” of limitations was enacted specifically to address deadlines that **expired within** the judicial emergency from March 18, 2020, through March 31, 2021.

As such, the numerous administrative Orders simply do not apply to a scenario such as the matters herein at issue – *i.e.*, where the triggering event occurred before the start of the “period of emergency” (here October 11, 2019) and where the statutory deadline did not expire within the “period of emergency” but rather expired more than 18 months after the end of the “period of emergency” (here October 11, 2022.)

3. There Is No Binding Precedent on This Topic In This Jurisdiction.

a.) District of Columbia trial level opinions are inapposite.

The Honorable Shana Frost Matini in *Berg v. Hickson*. Case No. 2021 CA 001977 V (D.C. Superior Court Aug. 19, 2021), the court denied defendant’s motion to dismiss/summary judgment on statute of limitations grounds where the plaintiff filed a negligence claim against the defendant on June 11, 2021, for personal injury

damages stemming from an April 5, 2018, incident. In explaining its rationale, the court stated:

the language cited by the Defendant from the [Jan. 21, 2021] Addendum is not an exclusive list of the applications of the tolling period, rather just an example. **There is also no language in the Chief Judge's Order which indicates that the tolling period does not apply to deadlines that occurred after March 30, 2021.**

See (SApp'x152), *Order, Berg v. Hickson* (Aug. 19, 2021)(emphasis added).

Respectfully, Appellee submits the holding in *Berg* does not withstand scrutiny. There is certainly no language in the numerous Administrative Orders that states tolling applies to deadlines that expire **after** the period of emergency has ended (as contrasted with deadlines that expired within the “period of emergency”) in cases where the triggering event occurred prior to the period of emergency. In fact, in each and every one of the Chief Judge's Orders, the Chief Judge used the exact same language cited in Judge Epstein's January 21, 2021 Addendum which **limits** the tolling of the expiration of deadlines or time limits to scenarios where the deadline expires **within or during** the “period of emergency.” Specifically, the Addendum states:

all deadlines and time limits in statutes, court rules, and standing and other orders issued by the court that would **otherwise expire before** [*the last day of the period of emergency at the time of the specific Order*] including statutes of limitations, are suspended, tolled, and extended during the period of the current emergency,

See (SApp'x120).

It follows from the plain language contained in each and every Order and Addendum released by the Chief Judge and Presiding Judges that the “suspension, tolling, and extension” of statute of limitations deadlines applies only to circumstances where the deadline or time limits expires during the “period of emergency.” Had the Chief Judge of the Superior Court intended for the tolling of the expiration of deadlines or time limit to include scenarios where the triggering even occurred before March 18, 2020 **but** the deadline expired after March 31, 2021, such language would have been included in the numerous Orders issued by the Court. And certainly, the Court would not have included the limiting language to the contrary in all of its Orders as set forth in detail above.

The holding in *Berg* renders this limiting language unnecessary or surplusage. An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage. *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995). Where the plain language of the statute is clear, the court generally will not inquire further into its meaning, at least in the absence of a clearly expressed legislative intent to the contrary. *Id.* at 140.

At best it can be said that the Orders are silent on the issue of “tolling” of deadlines that expire after the period of emergency where the triggering event occurs prior to the period of emergency. But it is equally accurate to state the court in *Berg*

“read into” the Orders that the tolling applies to all deadlines in all cases regardless of when the deadline or time limit expired *and* the court “read out” the express limitation that the Court did include in its Orders.

Moreover, the Addendums which set forth, in significant detail, the formula for calculating the “tolling period” addressed only deadlines falling within the “period of emergency” from March 18, 2020 through March 31, 2021. Judge Cordero’s Addendum addressed how to calculate the “tolling period” when: (1) the triggering event occurred before the period of emergency began on March 18, 2020, and had a deadline before March 31, 2021 and (2) the triggering event occurred between March 18, 2020, and March 31, 2021 and had a deadline that fell during that time-period. *See* Addendum to the General Order Concerning Civil Cases (Mar. 30, 2020) (emphasis added), (SApp’x29).

This was the same language adopted by Judge Epstein in the January 21, 2021, Addendum. *See* (SApp’x120). Throughout the multitude of Orders and Addendums filed between March 18, 2020 and March 31, 2021, there was no mention of how to calculate the “tolling period” of any scenario where the deadline expired after the “period of emergency” ended. Such a scenario was never mentioned because such a scenario was not intended to be affected by the Court’s numerous Administrative Orders. There was no need to provide guidance on calculating a statute of limitation whose deadline was not tolled.

Further, the rationale in *Berg* appears to be predicated on a legal fiction not supported by the language of the Administrative Orders. In *Berg*, the court writes:

... however, the Court did mean to toll all statutes of limitations from March 18, 2020 to March 30, 2021. ... Accordingly, the statute of limitations as to Plaintiff's claim in the instant case was paused during the tolling period, meaning that the proper deadline for Plaintiff to bring her claim can be found by adding 388 days between March 18, 2020 and March 30, 2020 to Plaintiff's original deadline of May 5, 2021.

Berg, *supra*, at p. 3.

Critically, this analysis would require that the Court by its Orders paused or "tolled" the entire period of limitations during the "period of emergency" for matters where the triggering event occurred prior to the commencement of the "period of emergency." The Court did not do so. For pre-March 18, 2020 triggering events, the Court limited the pausing or tolling of **deadlines** or time limits in statutes or rules to those that **would expire within** the "period of emergency." In direct contrast, for post-March 18, 2020 triggering events, the Court through its Orders **did** pause or toll in full the deadline or time limit for taking action until the "period of emergency" ended. That is, in such cases, once the "period of emergency" ended, then "the clock starts ticking." So, the entirety of the obligation is paused. That language simply does not appear in the Administrative Orders or Addendums when they address deadlines or time limits for events that were triggered before the "period of emergency." In those scenarios, deadlines that expired during the "period of

emergency” were tolled or paused. In those scenarios, it was not the entire time for taking action that was paused or tolled.

A second basis of the ruling in *Berg* appears to include the trial court’s opinion as to the intent of the Administrative Orders, in the setting of the specific facts of the *Berg* case. There, the plaintiff’s three-year limitation deadline fell less than one month after the March 30, 2021 Order ending the suspension, extension, and tolling of limitation deadlines. The trial court considered the prejudice a plaintiff under such circumstances would suffer. However, such an argument seems more akin to an “equitable tolling” argument.²

Further, it is axiomatic that statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and unjust claim, or the voidable and unavoidable delay. They have come into law

² A litigant is entitled to equitable tolling if she shows (1) that she has pursued her rights diligently, and (2) that some that some extraordinary circumstances stood in her way. *Holland v. Florida*, 560 U.S. 631, 649 (2010). This lawsuit was filed 18 months after the “period of emergency ended.”

not through the judicial process but through legislation. *Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 314 (1945).

Moreover, while such an argument or discussion of prejudice may have been warranted in *Berg* the facts in the instant case are quite different. Here, the alleged segway accident occurred on October 11, 2019, creating a statute of limitations deadline of October 11, 2022. Unlike in *Berg* where the plaintiff had less than one month to file her case (although Appellee maintains that no tolling period should be applied where the triggering event occurred before March 18, 2020 and the expiration of a deadline falls after March 31, 2021), Appellants in this case had approximately 18 months after March 31, 2021 to file their cases within the standard three-year statute of limitations period without relying on the interpretation of the Court's Administrative Orders. Instead, Appellants waited until December 30, 2022 to file suit against Appellee, which does nothing more than prejudice Mr. Samonte and violated the purpose under which the statute of limitations was enacted.

On appeal, Appellants discuss the Court's Administrative Emergency Orders issued during the COVID-19 Emergency. Appellants argue the rationale set forth in *Berg*, is applicable and that Appellee's reading of the Court's Administrative Emergency Orders is flawed. However, Appellants ignore the plain language in the Emergency Orders indicating that with respect to causes of action accruing **prior** to the commencement of the COVID-19 Emergency, tolling applies **only** to a deadline

that expires **within** the tolling period. Rather than addressing how or why this language in the Administrative Emergency Orders can be ignored, Appellants aver the lower court and Appellee have misinterpreted the Emergency Orders and stretch the meaning of the term ‘tolling’ yield nonsensical results. *See* Appellants’ Brief at pp. 14-15. In fact, it is Appellants who reinvent the definition of tolling.

Respectfully, Appellee’s argument set forth in his motions to dismiss does not stretch the word “tolling”, but fully embraces the plain meaning of the term “tolling.” Appellee’s legal argument is predicated on the actual wording set forth in the Emergency Orders, to wit, “deadlines and time limits in statutes (including statutes of limitations) ... that would otherwise expire during the period of emergency are suspended, tolled and extended during the period of emergency. ...” (*Emphasis added*). Appellant completely ignores this underscored language. The Court’s Emergency Orders simply do not state that all statutes of limitations are tolled. The Court’s Orders limit the tolling to certain situations, *i.e.*, to those causes of action whose “deadline **in** statutes [including statutes of limitation]” that “would otherwise expire during the period of emergency.”

Similarly, Appellants reliance on a footnote written by Judge Park in his June 2, 2021 Order in *Benitez, et al. v. Ingram, et al.*, Case Nos. 2018 CA 007957 V and 2021 CA 000323 V, is misplaced and the footnote in *Benitez v. Ingram* provides no support for Appellants’ position. The relevant motion at issue in Judge Park’s June

2, 2021 Order, was defendant Benitez's motion to dismiss Ingram's complaint for failure to state a claim. At a hearing held on May 28, 2021, counsel for Ingram argued to the trial court that Ingram would suffer hardship should the motion to dismiss be granted because counsel anticipated having a limitations issue if Ingram needed to refile her lawsuit. Judge Park rejected the hardship plea noting in Footnote 1 of his Order that plaintiff would have ample time to refile her lawsuit, if needed, pointing out that the incident at issue occurred on March 8, 2018, and that therefore the statute of limitations at issue expired on March 5, 2021, **during** the period of emergency and that therefore the 388-day tolling applied.

Appellee consistently acknowledged below that if, hypothetically, Appellants' statute of limitations had "**expired**" during the period of emergency, then the deadline or time limit in the statute of limitations would have been tolled for three hundred and eighty-eight (388) days and those 388 days would have been added to the deadline for filing. This is what the express language of the Emergency Orders provides. However, the hypothetical is inapplicable herein because the **deadline** established by the Appellants' three-year statute of limitations did not "**otherwise expire**" during the "period of emergency", and in fact expired almost 18 months after the "period of emergency" ended, the Emergency Orders relating to statutes of limitations simply have no impact on the computation of the deadline for

filing Appellants' claims. Judge Park's footnote in *Benitez v. Ingram* simply does not address the scenario at issue herein.

b.) Maryland trial level opinions support Appellee's position.

Below Appellants argued broadly and inaccurately that the surrounding jurisdictions of Virginia and Maryland have come to the same conclusion regarding the meaning of "tolling" during the COVID pandemic. While these arguments are not set forth in Appellants' principal Brief on appeal, Appellee briefly addresses the same.

Not only are these Maryland and Virginia trial court orders not binding on this Court, in actuality they do not support Appellants' position herein. Turning first to Maryland, Appellants cite to *Ruzicka-Napier v. Jersey City Transfer Inc., et al.*, Case No. C-07-CV-22-000146, as authority for their suggestion that Maryland approached the period of limitations consistently with the approach advocated by Appellants herein. In fact, the Circuit Court for Cecil County when reviewing a motion to dismiss a complaint on the basis of statute of limitations, held that the tolling of the statute of limitations by 121 days plus 15 days for a total of 146 days applied **only** to cases where the statute of limitations would have expired during the period of emergency. In reaching his decision, Judge Davis expressly held:

Subsection (d) of the Final Administrative Order sets forth parameters for when tolling applies for the initiation of a matter. The provision asserts tolling applies to matters "for which the statute of limitations and other deadlines related to initiation **would have expired between**

March 16, 2020, through the termination date of COVID-19 emergency operations in the Judiciary ... through April 3, 2022.”

Id.

The purpose of subsection (d) of the Final Administrative Order is strictly to set parameters for what cases tolling should apply. Tolling applies if the statute of limitations for the initiation of a matter would have expired between March 16, 2022 and April 3, 2022; the period the Maryland Judiciary was in emergency operations.

Ruzicka-Napier, November 21, 2022 Order at p. 3. (Emphasis added.)

Nothing in Judge Davis’ Order in *Ruzicka-Napier* indicates that the tolling of the statute of limitations for 146 days is applicable to all matters with a triggering event prior to the period of COVID-19 Emergency. Rather, the tolling of 146 days is limited to such matters with a statute of limitations deadline **that expired during the period of emergency**, which pursuant to Judge Davis’ Order, extended from March 16, 2020, to April 3, 2022. In fact, because Appellants’ deadline for filing this negligence action expired on October 11, 2022, Maryland would have applied no tolling. Said another way, if, for whatever reason, Appellants filed their lawsuits in Maryland, Appellee’s Motions to Dismiss would have been granted because Appellants’ deadline for filing did not expire during Maryland’s full period of emergency.

Similarly, in another Maryland case, *Lyons v. Conley*, Circuit Court for Talbot County, Maryland Case No. C-20-CV-20-00100, the trial court found that the statute of limitations was not tolled because the relevant statute of limitation was set to

expire outside the period when the clerk's office was closed and therefore efforts to amend the subject Complaint to add additional causes of action which did not "relate back" to the original Complaint were barred by limitations. Judge Kehoe, sitting in the Circuit Court for Talbot County, indicated the Administrative Orders tolling of the statute of limitations do not apply to plaintiff Lyons' claims because September 8, 2020, occurred *after* the Maryland Courts reopened and the tolling of 146 days did not apply. Judge Kehoe found the tolling did not apply to claims whose deadlines did not expire during the timeframe which the courts were closed. *Id.* The court in *Lyons* reasoned that the additional 146 days should not be added to causes of action where the statute of limitations did not expire during the period of emergency.³

Again, whether the adding of the 146 days applies to cases whose statute of limitations expired only when the clerk's office was closed as the court found in *Lyons*, or whether it applies to cases whose statute expired at some point during the entire two-year period of emergency through April 3, 2022 as the court found in *Napier*, a prerequisite to "receiving" the additional 146 days is that the ordinary relevant statute of limitation must have **expired during** the period of emergency.

³ Judge Davis in *Ruzicka-Napier* and Judge Kehoe in *Lyons* appear to have a different interpretation of the Maryland Court's definition of the "period of emergency" but both rulings are consistent in that the "tolling" applies only to cases with a deadline for filing which expired within the period of emergency. Ms. Kubichek's lawsuit would be time barred if filed in Maryland by the analysis set forth by both Judge Davis and Judge Kehoe in their respective orders.

Thus, Maryland's approach to tolling of the statute of limitations is not consistent with Appellants' position asserted below and on appeal; in fact, the approach taken by trial level courts in Maryland supports Appellee's position herein.

c.) Virginia trial level opinions are consistent with Appellee's position.

In *English v. Quinn*, Record No. 0420-22-3 Va, Ct. App. Nov. 29, 2022, a Virginia judge has interpreted the Virginia Courts' Emergency Orders to "toll" the statute of limitations for all causes of action that accrued prior to the period of emergency but where the statute had not yet expired. Importantly, though, the Virginia Orders include language distinguishable from the verbiage in this Court's Emergency Orders. The Virginia Orders "tolled and extended all applicable deadlines, time schedules and filing requirements including any applicable statute of limitations which would otherwise run during the period the [emergency] Order was in effect." (*Emphasis added.*) In its motion to dismiss on limitations grounds, the defense in *English v. Quinn, supra*, argued that the term "which would otherwise run" means "which would expire." The court in *English v. Quinn*, however, interpreted the word "run" in the relevant Emergency Orders to mean "that ran through the period of emergency." The court noted if the Virginia Orders meant for "run" to mean "expire" then the Virginia Orders would have included the word "expire" and would have not used the word "run." In sum, had the Virginia Orders

used only the term “expire” and had they not included the term “run,” a different outcome would have occurred in *English v. Quinn*.

Here, the Superior Court’s Emergency Orders do in fact use the word “expire.” The Orders do not use the word “run.” Appellants simply do not address this important difference between the language of the Virginia Emergency Orders and the Superior Court’s Emergency Orders. Appellants offer no justification for 1.) adding-in words or for 2.) ignoring whole phrases within the Emergency Orders, as the court did in *Berg, supra*, to support a position that the tolling provided for by the Emergency Orders applies not only “to deadlines and time limits in statutes (including statutes of limitations) ... that would otherwise expire during the period of emergency,” as the Emergency Orders do state, but also applies to all statutes of limitations in all cases, which the Emergency Orders do not state. The court in *Berg, supra*, acknowledged the Emergency Orders do not expressly include deadlines that expire outside the period of emergency. Yet, the court in *Berg* concluded the statute of limitations were nonetheless tolled in all cases. If this was the intent of the Emergency Orders, then Query: Why did the Emergency Orders not simply state all statutes of limitations are tolled during the period of emergency? Why include the limiting language “to deadlines and time limits in statutes (including statutes of limitations) ... that would otherwise expire during the period of emergency”? A construction or interpretation of the Emergency Orders that ignores the plain

language thereof is simply not permitted by the rules and canons related to interpretation of such documents.

Finally, Appellants point out, as the court did in *Berg*, that tolling the statute only for cases that have a deadline that expires during the period of emergency would potentially lead to inconsistent treatment depending on whether a deadline expired on March 30, 2021 (barely within the period of emergency) or on April 1, 2021 (barely outside the period of emergency.) One could make the same argument about discovery and other deadlines that were “tolled” for months from March 2020 to January 13, 2021. For example, if one litigant was served discovery on March 15, 2020, that litigant would benefit from a windfall of close to ten months to prepare discovery responses. Yet, if this same hypothetical litigant propounded discovery on the opposing party on January 13, 2021, the opposing party would have only 30 days to prepare a response. The point being, we can cherry-pick hypotheticals to support or critique lines in the sand established by the Emergency Orders. As matters returned to normalcy, there are bound to be some litigants who had a windfall of extra time and others who had little to no extra time. There will be litigants who need extra time and those that did not. No litigant, though, was afforded less time than they would have had absent the Emergency.

Appellants also suggest that Appellee’s interpretation of the Emergency Orders would lead to hardship for a person whose deadline expired after but in close

proximity to March 30, 2021. Fortunately, such is not the case herein as Appellants' deadline to file expired almost 18 months after the period of emergency ended.

In conclusion, and for the reasons set forth above, Appellants were obligated to bring any personal injury claims against Appellee resulting from the alleged October 11, 2019, segway incident by October 11, 2022. Because the deadline established by the relevant statute of limitation did not "otherwise expire during" the Court's 388-day Period of Emergency there was no tolling of Appellants' statute of limitations and no tolling of their deadline to file suit. As Appellants did not file suit until December 30, 2022, all claims against Appellee Samonte are time-barred and were properly dismissed with prejudice by the lower court.

4. Appellants' Claims against Unlimited Biking Washington D.C., LLC d/b/a Bike and Roll, D.C.

Appellants state in their Brief at page 18, that they obtained service on Unlimited Biking Washington DC, LLC d/b/a Bike and Roll, D.C., but that Unlimited "never answered or filed a Motion of any type nor did an attorney enter an appearance for the entity. Technically, it was in default at the time of Judge Puig-Lugo's decision." *Brief* at 18. There is no definitive evidence to support Appellants' contention that it perfected service on Unlimited Biking in either the Baldwin or Kubichek case. Rather, the record shows a 60-day summonses were issued on January 1, 2023 in each case. No new summonses were ever issued. Per Appellants' affidavit filed April 9, 2023 service was mailed via certified mail to DLCP from a

post office on March 1, 2023 and delivered to DLCP's P.O. Box on March 3, 2023 in the *Baldwin* case. There is no clear record of the details of service of process in the *Kubichek* matter. Facially, there are questions as to whether there was valid service of process as the summonses may or may not have expired at the time of the purported service.

Regardless of whether there was proper service on Unlimited Biking Washington D.C., LLC d/b/a Bike and Roll, D.C. or not, the lower court properly dismissed the actions on limitations grounds and this is a final judgment. As the three-year statute of limitations applies equally to the Appellants' claims asserted against Samonte and Unlimited Biking Washington D.C., LLC, at a minimum the doctrine of defensive non-mutual collateral estoppel would apply and Appellants' claims asserted against Unlimited Biking Washington D.C., LLC/b/a Bike and Roll, D.C., are equally time-barred. Collateral estoppel may be invoked defensively by a defendant who was not a party to the original proceedings, to prevent a plaintiff from relitigating an issue that the plaintiff had previously litigated unsuccessfully. *See, e.g., United States v. Mendoza*, 464 U.S. 154, 159 n.4, 104 S. Ct. 568, 78 L.Ed. 2d 379 (1984); *Carr v. Rose*, 701 A.2d 1065, 1076 (D.C. 1997). A stranger to the first action may invoke issue preclusion against a party to that action. Hence the defendants, while not privy to the prior dispute, are not thereby necessarily prevented

from asserting defensive 'non-mutual' collateral estoppel. *See Walker v. FedEx Office & Print Servs.*, 123 A. 3d 160, 165 (2015).

Conclusion

On the foregoing basis, the Appellee Samonte respectfully requests that the judgment of the Superior Court be affirmed.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of January, 2024, the foregoing Brief of Appellee Samonte was e-filed and e-served, and 1 copy was mailed via First Class Mail, postage prepaid to the following counsel:

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
 - An individual’s social-security number
 - Taxpayer-identification number
 - Driver’s license or non-driver’s’ license identification card number
 - Birth date
 - The name of an individual known to be a minor
 - Financial account numbers, except that a party or nonparty making the filing may include the following:
 - (1) the acronym “SS#” where the individual’s social-security number would have been included;
 - (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
 - (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
 - (4) the year of the individual’s birth;
 - (5) the minor’s initials; and
 - (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.



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23-CV-411 and 23-CV-412

Case Number(s)

1/08/2024

Date