

SUPREME JUDICIAL COURT

**Michael Cuddy, Special Personal Representative and
Grace Fabiano, Personal Representative
of the Estate of Ralph Fabiano**

V.

Philip Morris USA, Inc. and Shaw's Supermarkets, Inc.

Docket No. 2022-P-0158

APPLICATION FOR DIRECT APPELLATE REVIEW

Appellants, Michael Cuddy, Special Personal Representative and Grace Fabiano, Personal Representative of the Estate of Ralph Fabiano, ask the Court to exercise direct review of this appeal. The issue presented is whether wrongful death actions are barred by the statute of limitations when the decedent did not file a personal injury action and the injury causing death occurred three or more years before the death. Direct review is warranted because this is an important issue that impacts many cases, and it is an issue of first impression. Judicial economy and the interests of the public would both be served by this Court considering the issue now. Plus, this Court is in the best position to address the issue. The Superior Court relied on this Court’s 2020 decision in *GGNSC Administrative Services, LLP v. Schrader*, 484 Mass. 181 (2020), to dismiss Appellants’ wrongful death action. But *GGNSC* did not address the statute of limitations in a wrongful death action.

On appeal, this Court is best suited to determine whether *GGNSC* applies the statute of limitations to bar wrongful death actions in this circumstance.

Relevant Facts

The wrongful death complaint asserts that the decedent Ralph Fabiano began smoking Philip Morris's cigarettes in 1960 at the age of 15, starting with a free sample pack. Decision and Order (Exhibit A), at 1, citing Amended Complaint ¶24-30. Like most children smokers, Mr. Fabiano quickly became addicted. *Id.* He was an addicted smoker for 50 years, ultimately developing Chronic Obstructive Pulmonary Disease ("COPD"). His COPD was diagnosed in 2004, and COPD killed him ten years later in 2014. *Id.* Mr. Fabiano knew in 2004 that cigarettes caused his COPD, and Appellants' wrongful death complaint alleges that COPD caused Mr. Fabiano's COPD and death. *Id.*

Prior Proceedings in This Case

Appellant Michael Cuddy, Personal Representative of the Estate of Ralph Fabiano, filed suit against Appellees, Philip Morris USA, Inc. and Shaw's Supermarkets, Inc., for causing the decedent Ralph Fabiano's death from cigarette smoking. The complaint alleges negligence and breaches of warranty by both Appellees. As to Philip Morris, the complaint also alleges fraud based on Philip Morris's lead role in a 40-year conspiracy with other cigarette manufacturers to

hide and deny that cigarettes are addictive, and that addictive smoking causes many fatal illnesses.

Appellees moved to dismiss the complaint, asserting that the wrongful death action is barred by the statute of limitations. Appellees argued that this Court's decision in *GGNSC* requires dismissal of the wrongful death action because Mr. Fabiano did not bring a personal injury action within three years of his diagnosis in 2004. Appellant responded that both the plain text and the legislative history of the statute of limitations found in the wrongful death statute allows suit to be filed up to three years after the death occurs, with no limitation. *GGNSC* did not address the statute of limitations in wrongful death actions and therefore does not support Appellees' position.

The Superior Court applied *GGNSC* to dismiss the case. *See* Decision and Order Regarding Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Docket Entry 18) (Exhibit A). The Superior Court ruled that, because Mr. Fabiano could no longer bring a personal injury claim against the Appellees at his time of death, his survivors could not bring a wrongful death claim for the injuries they suffered when he died.

The Superior Court entered final judgment dismissing the case on December 20, 2021, after the Appellants voluntarily dismissed their claims against a third

party, Garber Bros, Inc., that had gone into bankruptcy proceedings. Appellants timely filed a notice of appeal on January 10, 2022 (Docket Entry 28).

Issue of Law Raised by this Appeal

The issue raised by this appeal is whether the Massachusetts wrongful death statute, G.L. c. 229, §2, is governed by one statute of limitations or two. Put another way, can a claim under the wrongful death statute always be brought if it is asserted by a survivor within three years of the decedent's death, as the statute itself states? Or is such a claim *also* time-barred, as a result of judicial construction, if the decedent had three years from the date of his injury to bring a personal injury action, but failed to do so?

Appellants argued that only the three-years statute of limitations in the wrongful death statute should apply. Appellees argued that, under *GGNSC*, the wrongful death claim was barred because the decedent did not file a personal injury suit within three years of his COPD diagnosis.

Argument

The Massachusetts wrongful death statute previously imposed two limitation periods for filing a wrongful death action. One of those periods is a lot like the one applied by the Superior Court here. Since 1958, Massachusetts' wrongful death statute had provided: "No recovery shall be had under this section for a death

which does not occur within two years after the injury which caused the death.”

Acts of 1958, c. 238 (Exhibit B).

In “An Act Increasing the Time Limitation on Certain Actions for Wrongful Death.” Acts of 1981, c. 493 (Exhibit C), the Legislature eliminated this limitation on the period for filing a wrongful death action. That was in 1981. Since then, Massachusetts wrongful death statute has simply read: “An action to recover damages under this section shall be commenced within three years from the date of death. . . .” G.L. c. 229, §2.

This Court can take judicial notice of the fact that, for the last 41 years, the statute has been interpreted to provide exactly that—survivors may file a wrongful death action so long as the action is filed within three years of the decedent’s death, irrespective of the date of the injury causing death. The plain language of the wrongful death statute is that clear, and it is that plain and ordinary meaning that controls. *Com. v. Mendes*, 457 Mass. 805, 810 (2010); *Pobieglo v. Monsanto Co.*, 402 Mass. 112, 116, 521 N.E.2d 728 (1988).

This Court’s 2020 decision in *GGNSC* did not change that. The issue in *GGNSC* was whether a survivor’s claim for wrongful death against a nursing home had to be submitted to arbitration because the decedent signed an arbitration agreement. An appellate decision decides only those issues presented to it for decision. Anything else is non-binding dicta, at best.

GGNSC's comments are not even dicta. The *GGNSC* decision did not address, or even mention, the statute of limitations for wrongful death actions. Instead, it mentioned the wrongful death statute generally, and noted "In 1958, the Legislature enacted the language [of the wrongful death statute] more or less as it stands today."

GGNSC would not have said this if it had been addressing the statute of limitations portion of the wrongful death statute. It would have at least acknowledged the 1981 amendment of the statute of limitations that eliminated the requirement that wrongful death actions be filed within two years of the injury causing death.

Statement of Reasons Supporting Direct Appellate Review

There are at least three reasons why this appeal should be considered directly by the Supreme Judicial Court:

First, the issue presented in this appeal is a question of important public interest for two reasons. *See Mass. R. App. P. 11(a)(3)*. The issue raised in this appeal impacts many cases. The undersigned counsel believes that the issue was first raised in June 2021. It was raised by a cigarette company in *Sinopoli v. R.J. Reynolds Tobacco Co., et al.*, Berkshire Superior Court Docket No. 2176CV087. (Exhibit D). In only nine months, the cigarette companies have raised the same argument in two more cases—this one and *Fuller v. R.J. Reynolds Tobacco Co.*,

Barnstable Superior Court Docket No. 1672CV0154 (Exhibit E). The issue is also anticipated in at least two other cigarette cases. *See Gormley v. Philip Morris USA, Inc.*, Middlesex Superior Ct. Docket No. 2081CV0809; *Devine v. R.J. Reynolds Tobacco Co.*, Suffolk Superior Court Docket No. 2184CV02510. The undersigned counsel has also been advised that the issue is anticipated in many cases on the statewide asbestos litigation docket.

The issue presented here is also of great public importance because it denies families their statutory right to bring suit for the most catastrophic of injuries—death. An issue as important as this and as prevalent as this requires this Court's review and decision.

Second, the issue requires this Court's determination because it is a question of first impression. *See Mass. R. App. P. 11(a)(1)*. The undersigned counsel is aware of no appellate decisions addressing this issue. Given the importance of this question and the number of cases impacted by it, the issue will be presented to this Court eventually. A decision by this Court now will preserve judicial resources in both the appellate court and in the Superior Court.

Third, this Court is in the best position to address the issue. The Superior Court relied on this Court's 2020 decision in *GGNSC Administrative Services, LLP v. Schrader*, 484 Mass. 181 (2020), to dismiss Appellants' wrongful death action. The same is true of the other cases that have been dismissed, *Fuller* and *Sinopoli*.

But *GGNSC* did not address the statute of limitations in a wrongful death action.

On appeal, this Court is best suited to determine whether *GGNSC* applies the statute of limitations to bar wrongful death actions in this circumstance.

Conclusion

For these reasons, Appellants request that the Supreme Judicial Court take direct review of the appeal in this case.

For the Appellants,

/s/ Paula S. Bliss

Paula S. Bliss, BBO #652361
Justice Law Collaborative, LLC
19 Belmont Street
South Easton, MA 02375
(508) 230 – 2700
paula@justicelc.com

Walter Kelley, BBO #670525
Bernheim Kelley Battista Bliss, LLC
4 Court Street
Plymouth, MA 02360
(617) 420-0715
wkelley@realjustice.com

and,

Chad Ihrig (*Pro Hac Vice*)
Nix Patterson, LLP
3600 N. Capital of Texas Hwy.
Building B, Suite 350
Austin, TX 78746
Telephone: 512.328.5333
Facsimile: 512.328.5335
cihrig@nixlaw.com

CERTIFICATE OF SERVICE

I, Paula S. Bliss, hereby certify that on April 8, 2022, a true and accurate copy of the foregoing document was served via electronic mail upon all counsel of record.

/s/ Paula S. Bliss
Paula S. Bliss, Esq.

Certificate of Compliance Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Paula S. Bliss, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14, and contains 1,862, total non-excluded words as counted using the word count feature of Word 365 MSO.

/s/ Paula S. Bliss
Paula S. Bliss, Esq.

Exhibit A

Fabiano v. Philip Morris USA Inc., et al.

Suffolk County Superior Court Action No. 1784CV02213-BLS1

Decision and Order Regarding Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Docket Entry No. 18):

Procedural and Factual Background

This is a wrongful death action brought by plaintiff Grace Fabiano ("Plaintiff"), as the personal representative of the estate of Ralph Fabiano ("Mr. Fabiano"), against defendant Philip Morris USA Inc., the manufacturer of "L&M" brand cigarettes, and certain sellers of L&M cigarettes (collectively, "Defendants"). According to Plaintiff's First Amended Complaint (the "Complaint," Docket Entry No. 16), Mr. Fabiano first began smoking at the age of fifteen when he received free samples of cigarettes, including L&M cigarettes. Complaint, ¶ 24. Mr. Fabiano became addicted to smoking and continued to buy and smoke L&M cigarettes for the next fifty years. *Id.*, ¶¶ 26-29. He was diagnosed with emphysema, a form of Chronic Obstructive Pulmonary Disease ("COPD"), in 2004, and eventually died of COPD in July 2014. *Id.*, ¶ 30. Plaintiff alleges that Mr. Fabiano's death was caused by his cigarette smoking and his smoking addiction. *Id.* Plaintiff also concedes that Mr. Fabiano was aware, at or around the time of his initial diagnosis in 2004, that his emphysema and COPD were linked to his smoking.

Plaintiff's Complaint in this action contains three counts: Count I, alleging "Wrongful Death predicated on Breach of Warranty"; Count II, alleging "Wrongful Death predicated on Negligence"; and Count III, "Wrongful Death predicated on Conspiracy." Each of the theories underlying Plaintiff's wrongful death claims is either a tort or an action of contract to recover for personal injuries that, if independently pled, would be subject to a three-year statute of limitations pursuant to G.L. c. 260, § 2A ("Except as otherwise provided, actions of tort, [and] actions of contract to recover for personal injuries ... shall be commenced only within three years next after the cause of action accrues.").

Defendants now have moved to dismiss Plaintiff's Complaint, in its entirety, based on the Massachusetts Supreme Judicial Court's ("SJC") recent decision in *GGNSC Administrative Services, LLC v. Schrader*, 484 Mass. 181 (2020) ("GGNSC"). The SJC held in GGNSC that claims asserted under the Commonwealth's wrongful death statute, G.L. c. 229, § 2 (the "Wrongful Death Statute"), are "derivative of the decedent's action." GGNSC, 484 Mass. at 182. According to the SJC, "[t]his means that the beneficiaries of the death action can sue only if the decedent would still be in a position to sue." *Id.* at 185 (internal quotation marks and citations omitted). Or, put another way, Massachusetts law, as explained by the SJC in GGNSC, "precludes wrongful death actions unless [the]

decedents could have brought an action for the injuries that caused their death.” *Id.* at 191.

Citing GGNSC, Defendants argue that the statute of limitations ran out on Mr. Fabiano’s potential claims for breach of warranty, negligence, and conspiracy associated with his cigarette smoking no later than 2007 (i.e., three years after the date of his initial diagnosis in 2004), and that Plaintiff, therefore, is barred from bringing this wrongful death action on effectively the same grounds because Mr. Fabiano would not “still be in a position to sue” on his own behalf if he were alive. *Id.* at 185.

Plaintiff, not surprisingly, disagrees. She asserts that the Wrongful Death Statute expressly provides that “[a]n action to recover damages under this section shall be commenced *within three years from the date of death*” (G.L. c. 229, § 2 (emphasis added)), which Plaintiff interprets to mean that the statute of limitations on her wrongful death claims did not expire until July 2017 (i.e., three years after Mr. Fabiano’s death in July 2014), and that this action -- which was commenced less than three years after Mr. Fabiano’s death -- was timely filed. Plaintiff further argues that the SJC’s decision in GGNSC does not preclude wrongful death claims in circumstances where the decedent never brought a personal injury action on his or her own behalf that went to judgment.

The Court conducted an in-person hearing on Defendants’ Motion to Dismiss on September 28, 2021. Both sides attended and participated. Upon consideration of the written materials submitted by the parties, the information provided at the motion hearing, and the oral arguments of counsel, Defendants’ Motion to Dismiss will be **ALLOWED** for the reasons stated on the record at the motion hearing and summarized, briefly, below.

Discussion

The standard for resolving a motion to dismiss filed pursuant to Mass. R. Civ. P. 12(b)(6) is well-established. In order to “state a claim upon which relief can be granted,” a party’s pleading must include “[f]actual allegations [sufficient] … to raise a right to relief above the speculative level … [based] on the assumption that all the allegations in the … [pleading] are true (even if doubtful in fact)....” *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (“*Iannacchino*”) (internal quotation marks and citation omitted). The information the court may consider in evaluating a Rule 12(b)(6) motion generally is limited to “the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account.” *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000) (internal quotation marks and citation omitted). The court also must take as true “such inferences that may be drawn [from the allegations of the claim or counterclaim] … in the [claimant’s] … favor....” *Nader v. Citron*, 372 Mass. 96, 98 (1977). Where the relevant facts are clear, “[a] motion to

dismiss under Rule 12(b)(6) is an appropriate vehicle for raising ... [a statute of limitations] defense." *Epstein v. Seigel*, 396 Mass. 278, 278-279 (1985).

Plaintiff alleges in this case that Mr. Fabiano died from COPD, brought on by his long-term use of Defendants' cigarette products, and that he first was diagnosed with emphysema, a form COPD, in 2004. Complaint, ¶ 30. Plaintiff further conceded at the hearing on Defendants' Motion to Dismiss that Mr. Fabiano was aware of the link between his smoking history and his COPD at or around the time of his diagnosis. These facts establish that the statute of limitations on any breach of warranty or tort claim that Mr. Fabiano may have had against Defendants on account of his smoking-related injuries began to run in 2004, and expired three years later, in 2007. See *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 449 (2013) ("Generally, ... a claim accrues and the statute of limitations clock commences when a plaintiff knows, or reasonably should have known, that she has been harmed or may have been harmed by the defendant's conduct.") (internal quotations and citation omitted). See also *Anderson v. Froderman*, 361 Mass. 890, 890 (1972) (affirming dismissal of action based, in part, on facts admitted by plaintiff at motion hearing). Thus, after 2007, Mr. Fabiano no longer was "in a position to sue" Defendants for his smoking-related injuries. GGNSC, 484 Mass. at 185.

The effect of the SJC's holding in GGNSC in the present circumstances is clear. Because Plaintiff's current wrongful death claims against Defendants are derivative of Mr. Fabiano's claims, and because Mr. Fabiano could not "have brought an action for the injuries that caused [his] death" at the time he died, Plaintiff's wrongful death claims are "preclude[d]." *Id.* at 191. This is true even though the Wrongful Death Act contains its own internal, three-year limitations period. See G.L. c. 229, § 2. That limitations period establishes the timeframe within which a *viable* wrongful death action must be commenced. It does nothing, however, to revive -- in the guise of a wrongful death suit -- personal injury claims that are not otherwise *viable*, including claims that are barred because the decedent no longer was "in a position to sue" when he or she passed. GGNSC, 484 Mass. at 185.

There is, admittedly, logic in this outcome. Plaintiff does not dispute that Mr. Fabiano's right to sue Defendants for his smoking-related injuries lapsed in 2007 with the running of the statute of limitations on his breach of warranty and tort claims. Thus, were the Court to accept Plaintiff's argument that the Wrongful Death Statute gives Plaintiff the right to sue for the same injuries immediately following Mr. Fabiano's death in 2014, the result would be to expose Defendants to liability for the harm allegedly suffered by Mr. Fabiano on a staccato "on again, off again, on again" basis. The irrationality and inefficiency of such an approach is obvious. See *ROPT Ltd. Partnership v. Katin*, 431 Mass. 601, 603 (2000) (recognizing that courts must not interpret statutes to "produce an illogical result").

There is, at the same time, also a potential for unfairness in this outcome. The SJC's decision in *GGNSC* arguably changes the law governing wrongful death actions in a way that could deprive actual or potential litigants -- who reasonably believed that such an action could be brought, in all instances, within three years after the decedent's death -- of the right to sue.¹ "Where a decision does not announce new common-law rules or rights but rather construes a statute," however, "no analysis of retroactive or prospective effect is required because at issue is the meaning of the statute since its enactment."² *In re McIntire*, 458 Mass. 257, 261 (2010) ("*McIntire*"). In such cases, the Court's newly-announced construction is given retroactive effect because the statute is deemed to "have had the same meaning since the effective date of the statute[]." See *Shawmut Worcester County Bank, N.A. v. Miller*, 398 Mass. 273, 281 (1986). Plaintiff therefore is bound by the SJC's decision in *GGNSC* irrespective of whether that decision may work some unfairness in the circumstances of this case.

Order

For the foregoing reasons, Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Docket Entry No. 18) is **ALLOWED**. Plaintiff's First Amended Complaint is **DISMISSED**, in its entirety, with prejudice.



Brian A. Davis
Associate Justice of the Superior Court

Date: October 5, 2021

¹ It is conceivable, for example, that Mr. Fabiano chose not to sue Defendants for his smoking-related injuries during his lifetime because he understood that his family would have that right after he was gone.

² The SJC has stated that, where "a new rule announced in a case is constitutionally required, principles of retroactivity operate differently...." *McIntire*, 458 Mass. at 262 n.7. Plaintiff has not argued, however, that her right to pursue the wrongful death claims asserted in this action assumes constitutional proportions, and the Court agrees. See *Owen v. Meserve*, 381 Mass. 273, 275 (1980) ("A limitation on the recovery of damages for wrongful death does not impinge on a constitutionally protected substantive right and is not predicated on a constitutionally suspect classification."). See also *Fowles v. Lingos*, 30 Mass. App. Ct. 435, 437-438 (1991) (rejecting plaintiff's constitutional challenge to court's application of discovery rule to toll statute of limitations in personal injury actions, but not in wrongful death actions).

Exhibit B

CHAP. 238. AN ACT CONSOLIDATING AND MAKING UNIFORM THE PROVISIONS OF LAW RELATIVE TO ACTIONS FOR DEATH AND THE AMOUNT OF DAMAGES RECOVERABLE THEREFOR EXCEPT IN ACTIONS FOR DEATH RESULTING FROM A DEFECTIVE WAY, AND MAKING SUNDY OTHER CHANGES IN SAID LAW.

Be it enacted, etc., as follows:

SECTION 1. Chapter 229 of the General Laws is hereby amended by striking out section 2, as most recently amended by section 2 of chapter 427 of the acts of 1949, and inserting in place thereof the following section:—*Section 2.* A person who (1) by his negligence causes the death of a person in the exercise of due care, or (2) by wilful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his wilful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability and distributed as provided in section one; except that (1) the liability of an employer to a person in his employment shall not be governed by this section, (2) a person operating a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and regulations of the carrier, and (3) a person operating a street railway or electric railroad shall not be liable for negligence for causing the death of a person while walking or being upon that part of the street railway or electric railroad not within the limits of a highway. A person shall be liable for the negligence or the wilful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act, except that the damages shall be assessed with reference to the degree of culpability of his agents or servants. Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased. No recovery shall be had under this section for a death which does not occur within two years after the injury which caused the death. An action to recover damages under this section shall be commenced within one year from the date of death or within such time thereafter as is provided by sections four, four B, nine or ten of chapter two hundred and sixty.

SECTION 2. Section 2A of said chapter 229, inserted by section 3 of said chapter 427, is hereby repealed.

SECTION 3. Section 2C of said chapter 229 is hereby repealed.

SECTION 4. Said chapter 229 is hereby further amended by striking out section 5A, as most recently amended by section 4 of chapter 427 of the acts of 1949, and inserting in place thereof the following section:—*Section 5A.* The causing of a death under such circumstances as would create liability under section one, two or two B on the part of a person, if alive at the time of such death, shall create a like liability on

his part if such death occurs after his own death and such liability may be enforced against the executor or administrator of his estate, subject to all provisions of law otherwise applicable.

SECTION 5. Said chapter 229 is hereby further amended by striking out section 6, as most recently amended by section 5 of said chapter 427, and inserting in place thereof the following section: — *Section 6.* In any civil action brought under section two or five A, damages may be recovered under a separate count at common law for conscious suffering resulting from the same injury, but any sum so recovered shall be held and disposed of by the executors or administrators as assets of the estate of the deceased.

SECTION 6. Said chapter 229 is hereby further amended by striking out sections 6A and 6B, as most recently amended by section 6 of said chapter 427, and inserting in place thereof the two following sections: — *Section 6A.* All sums recovered under section one, two, two B or five A shall, if and to the extent that the assets of the estate of the deceased shall be insufficient to satisfy the same, be subject to the charges of administration and funeral expenses of said estate, to all medical and hospital expenses necessitated by the injury which caused the death, and to reasonable attorneys' fees incurred in such recovery.

Section 6B. In the event that any sum recovered under section one, two, five A or six comes into the hands of the executor or administrator of the deceased after the expiration of one year from the time of his giving bond, such sum shall be treated as new assets of the estate of the deceased within the meaning of section eleven of chapter one hundred and ninety-seven.

SECTION 7. Section 6E of said chapter 229, inserted by section 7 of said chapter 427, is hereby amended by striking out the second paragraph and inserting in place thereof the following paragraph: —

The amount of damages which may be awarded in an action brought under section two B shall not be less than two thousand nor more than twenty thousand dollars.

SECTION 8. Said chapter 229 is hereby further amended by striking out section 6F, as so inserted, and inserting in place thereof the following section: — *Section 6F.* An action under section two B or section six C shall be subject to all the provisions of section six of chapter one hundred and fifty-three relative to notice to the employer of the time, place and cause of injury, and the time within which the action shall be commenced; provided, however, that the time for bringing an action under either of said sections to recover for the death of an employee who dies within two years after the injury which caused the death shall never be less than one year from the date of death, or such period thereafter as is provided by sections four, four B, nine or ten of chapter two hundred and sixty.

SECTION 9. Chapter 160 of the General Laws is hereby amended by striking out section 232, as most recently amended by section 10 of said chapter 427, and inserting in place thereof the following section: — *Section 232.* If a person is injured in his person or property by collision with the engines or cars or rail-borne motor cars of a railroad corporation at a crossing such as is described in section one hundred and thirty-eight, and it appears that the corporation neglected to give the signals required by said section or to give signals by such means or in such manner as may be prescribed by orders of the department, and that such

neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or, if the life of a person so injured is lost, to damages recoverable in tort, as provided in section two of chapter two hundred and twenty-nine, unless it is shown that, in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury.

SECTION 10. This act shall take effect on January first, nineteen hundred and fifty-nine, and shall apply only to actions for death resulting from injuries sustained or accidents occurring on or after said date. The provisions of law applicable to actions for death, as in effect from time to time prior to the effective date of this act, shall continue to be applicable to such actions resulting from injuries which were sustained or accidents which occurred prior to the effective date of this act, in accordance with such provisions as in effect at the time the injury was sustained or the accident occurred.

Approved April 7, 1958.

CHAP. 239. AN ACT RELATIVE TO THE JURISDICTION AND ENFORCEMENT OF SUPPORT ORDERS AND THE TRANSFER OF PROCEEDINGS UNDER THE UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT.

Be it enacted, etc., as follows:

SECTION 1. Chapter 273A of the General Laws is hereby amended by striking out section 6, as appearing in section 1 of chapter 556 of the acts of 1954, and inserting in place thereof the following section:—*Section 6.* The duty of support shall be enforceable by petition filed in a district court, irrespective of the relationship between the obligor and the obligee. Any proceeding hereunder shall be commenced in a district court within whose judicial district the obligee is an inhabitant or a resident. The court shall enforce all duties of support under this chapter notwithstanding that another court in the commonwealth or in any other state has made a support order and has continuing jurisdiction.

SECTION 2. Said chapter 273A is hereby further amended by striking out section 10, as so appearing, and inserting in place thereof the following section:—*Section 10.* When the commonwealth is a responding state, and the court finds a duty of support, it may order the respondent to furnish support or reimbursement therefor in a reasonable amount, and subject the property of the respondent to such order. All other courts of the commonwealth shall likewise enforce the order and upon doing so shall inform the court first making the order.

SECTION 3. Said chapter 273A is hereby further amended by striking out section 12, as so appearing, and inserting in place thereof the following section:—*Section 12.* In addition to the foregoing powers, the court, when the commonwealth is a responding state, may subject the respondent to such terms and conditions as it deems proper to assure compliance with its orders, and may require the respondent to make payments at specified intervals to a probation officer assigned by the court, and punish a respondent who violates any order of the court to

Exhibit C

ACTS, 1981. - Chaps. 493, 494.

answer to said question is in the affirmative, this act shall take full effect, but not otherwise.

Approved October 29, 1981.

Chap. 493. AN ACT INCREASING THE TIME LIMITATION ON CERTAIN ACTIONS FOR WRONGFUL DEATH.

Be it enacted, etc., as follows:

SECTION 1. Section 2 of chapter 229 of the General Laws is hereby amended by striking out the fourth sentence, as appearing in section 1 of chapter 699 of the acts of 1973.

SECTION 2. This act shall apply to causes of action arising on and after January first, nineteen hundred and eighty-two.

Approved October 29, 1981.

EMERGENCY LETTER - October 29, 1981 @ 11:06 A.M.

Chap. 494. AN ACT PROVIDING FOR RECALL ELECTIONS IN THE TOWN OF HUBBARDSTON.

Be it enacted, etc., as follows:

SECTION 1. Any holder of an elective office in the town of Hubbardston may be recalled and removed therefrom by the qualified voters of the town as herein provided.

SECTION 2. Ten qualified voters of the town may make and file with the town clerk an affidavit containing the name of the officer sought to be recalled and removed and a statement of the grounds of removal. The town clerk shall thereupon deliver to the voters making such affidavit a sufficient number of copies of petition blanks for such recall and removal. Said blanks shall be issued by the town clerk with his signature and official seal attached thereto; and shall be dated and addressed to the selectmen. Said blanks shall contain the name of the persons to whom issued, the number of blanks so issued, the name of the person sought to be removed, the office from which removal is sought, the grounds of removal as stated in said affidavit, and shall demand the election of a successor to such office. A copy of the petition shall be entered in a record book to be kept in the office of the town clerk. Said recall petition shall be returned and filed with the town clerk within fourteen days after the filing of the affidavit. Said petition before being returned and filed shall be signed by qualified voters of the town, equal in

Exhibit D

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2176 CV 87

BELINDA SINOPOLI, Personal Representative of the Estate of BEVERLY SILVERNAIL

vs.

**R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS, USA INC., and
CUMBERLAND FARMS, INC.**

**DECISION AND ORDER ON DEFENDANTS' PARTIAL MOTION TO DISMISS
COMPLAINT**

R.J. Reynolds Tobacco Company (Reynolds), Phillip Morris USA, Inc. (Phillip Morris), and Cumberland Farms, Inc. (Cumberland Farms) (collectively defendants) have filed a partial motion to dismiss all claims in the complaint to the extent they are predicated on the Chronic Obstructive Pulmonary Disease (COPD) of the decedent, Beverly Silvermail (decedent). Plaintiff alleges in her complaint that decedent was diagnosed with COPD in 2006. She passed away on May 30, 2018. This complaint was filed on May 11, 2021. Defendants argue, citing GGNSC Administrative Services, LLC v. Schrader, 484 Mass. 181 (2020) (GGNSC), that, because decedent's personal injury claims based on her COPD were time-barred at the time of her death, any derivative survival or wrongful death claims based on plaintiff's COPD are also time-barred under Massachusetts law. A hearing was held on this motion on August 18, 2021. Upon consideration of the parties' submissions, oral argument of counsel, and relevant case law, the motion is ALLOWED.

DISCUSSION

To survive a motion to dismiss, the complaint must make "factual 'allegations plausibly

suggesting (not merely consistent with) an entitlement to relief.” Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). In considering such a motion, the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor, are to be taken as true. Nader v. Cintron, 372 Mass. 96, 98 (1977).

Plaintiff asserts six substantive claims against defendants for decedent’s injuries: Breach of Warranty -Defective Design (Count I); Negligence (Count II); Civil Conspiracy (Count III); Fraud and Misrepresentation (Count IV);¹ Failure to Warn (Count V);² and violations of G.L. c. 93A, §§ 2 & 9 (Count VI). Count VII asserts a claim for wrongful death pursuant to G.L. c. 229, § 2 et seq., which is derivative of (and incorporates by reference) Counts I through VI.³ Pursuant to G.L. c. 228, § 1, plaintiff pleads an alternative survival claim on behalf of decedent for damages resulting from “[d]ecedent’s illnesses or diseases” in the event that decedent “did not die of a smoking-related illness or disease as a result of smoking defendant’s cigarettes.” Complaint ¶ 14. Plaintiff seeks wrongful death and alternative survival damages for both decedent’s COPD and congestive heart failure.⁴

“Dismissal pursuant to rule 12(b)(6) based upon the expiration of a statute of limitations is appropriate where it is undisputed from the face of the complaint that the action was commenced beyond the applicable deadline.” Commonwealth v. Tradition (N. Am.) Inc., 91 Mass. App. Ct. 63, 70 (2017).

¹ Counts III and IV are alleged solely against Philip Morris and Reynolds.

² Count V is alleged solely against Reynolds.

³ Plaintiff incorporates all her prior claims in Count VII, with the exception of the failure to warn claim alleged in Count V. See Complaint ¶ 94 (“As a direct and proximate result of defendant’s aforesaid breach of warranty, negligence, violations of c. 93A, conspiracy and fraud, [decedent] developed smoking related illnesses or diseases, resulting in her ultimate death”).

⁴ The defendant does not move to dismiss plaintiff’s claims based on congestive heart failure, which was diagnosed in 2016.

Each of the plaintiff's tort and breach of warranty claims (Counts I through V) is subject to a three-year statute of limitations.⁵ Plaintiff alleges that decedent died from her smoking related illnesses, COPD (diagnosed in 2006) and congestive heart failure (diagnosed in 2016). Complaint ¶1. She specifically alleges that in "approximately 2006, [decedent] was diagnosed with COPD that was caused by smoking defendant's cigarettes." Complaint ¶ 25. In a case such as this, when a person alleges that toxic substances caused death from a particular disease, the claim accrues when "that particular disease is manifested," and when a person "knows or reasonably should have known, 'that she had been harmed or may have been harmed by the defendant's conduct.'" Evans v. Lorillard Tobacco Company, 465 Mass. 411, 449 (2013) quoting Bowen v. Eli Lilly & Co., 408 Mass. 204, 205-206 (1990). Here, decedent's COPD manifested, and she knew it was caused by smoking, upon her diagnosis in 2006. Accordingly, at the time of the decedent's death on May 30, 2018, the statute of limitations had expired.

In GGNSC, the Supreme Judicial Court (SJC) expressly held that an action for wrongful death is derivative in nature. Therefore, a wrongful death claim is only viable, "under circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted." G.L. c. 229, §2. "This means that 'the beneficiaries of the death action can sue only if the decedent would still be in a position to sue.'" GGNSC, 484 Mass. at 185, quoting Ellis v. Ford Motor Co., 628 F. Supp. 849, 858 (D. Mass. 1986). The effect of the SJC's holding in GGNCS in the instant case is clear. As the plaintiff's wrongful death claims are derivative of the decedent's claims, and because the decedent could not "have brought an action for the injuries that caused [her] death" at the time she died, plaintiff's claims based on COPD are precluded. Id. at 191. This is the result even though the Wrongful Death Act contains its

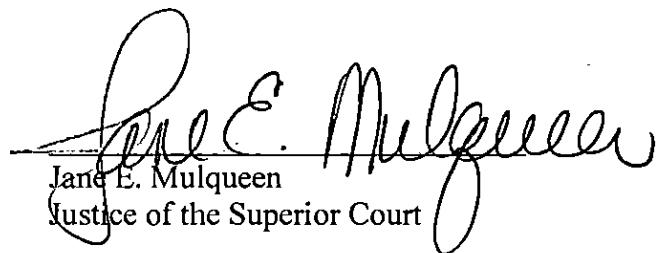
⁵ Plaintiff's 93A claim is subject to a four-year statute of limitations. G.L. c. 260, §5A.

own internal, three-year limitations period. See G.L. c. 229, § 2. That limitations period establishes the timeframe within which a *viable* wrongful death action must be commenced. It does not operate to revive – as a wrongful death action – personal injury claims that are not otherwise viable, including claims that are barred because the decedent was no longer “in a position to sue” when he or she passed. GGNSC, 484 Mass. at 185.

Plaintiff’s alternative survival claim based on decedent’s COPD is likewise derivative. G.L. c. 228, § 1 “provides for the survival of enumerated tort actions,” including personal injury claims. Kraft Power Corp. v. Merrill, 464 Mass. 145, 149-150 (2013). Though the survival statute was enacted to allow for certain tort claims to survive the death of the injured person, the survival action is only viable if the injured party would have been able to bring the action in her lifetime. See G.L. c. 260, § 10 (“If a person entitled to bring or liable to any action before mentioned dies before the expiration of the time hereinbefore limited, or within thirty days after the expiration of said time, and the cause of action by law survives, the action may be commenced by the executor or administrator at any time within the period within which the deceased might have brought the action” Here, because decedent’s COPD claims were time-barred when decedent died, plaintiff is barred from bringing the alternative survival claim to recover damages for decedent’s COPD.

ORDER

For the foregoing reasons, Defendant's Partial Motion to Dismiss Plaintiff's Complaint is **ALLOWED**. To the extent the claims are predicated on decedent's COPD, those claims are **DISMISSED**.



Jane E. Mulqueen
Justice of the Superior Court

DATE: October 13, 2021

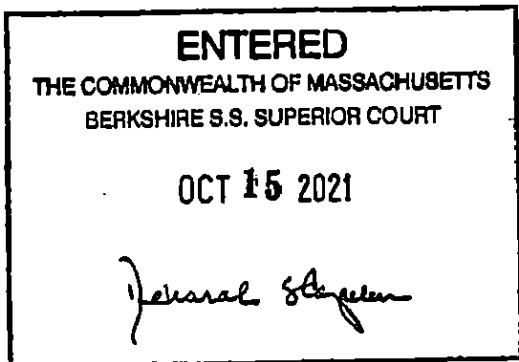


Exhibit E

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

TRIAL COURT DEPARTMENT
SUPERIOR COURT
DOCKET NO. 1784-CV-02213-BLS1

GRACE FABIANO, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
RALPH FABIANO,

Plaintiff,

vs.

PHILIP MORRIS USA INC., GARBER
BROS., INC. AND SHAW'S
SUPERMARKETS, INC.,

Defendants.

**DEFENDANTS' NOTICE OF FILING SUPPLEMENTAL AUTHORITY
IN SUPPORT OF THEIR MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Defendants Philip Morris USA Inc. and Shaw's Supermarkets, Inc. (collectively, "Defendants"), respectfully submit this Notice of Supplemental Authority to bring to the Court's attention the August 30, 2021, Decision and Order entered by Judge Thomas Perrino in *Fuller v. R.J. Reynolds Tobacco Co., et al.*, No. 1672-cv-00154 (Aug. 30, 2021) (Ex. A). In this Decision and Order, Judge Perrino resolved the same legal question that is presented by Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (the 9A package was filed on Aug. 30, 2021).

Dated: August 31, 2021

Respectfully submitted,

PHILIP MORRIS USA INC.

By its attorneys,

Melissa Nott Davis

Melissa Nott Davis (BBO# 654546)
SHOOK, HARDY & BACON L.L.P.
125 Summer St., Suite 1220
Boston, Massachusetts 02110
Telephone: (617) 531-1411
mndavis@shb.com

SHAW'S SUPERMARKETS, INC.

By its attorneys,

Melissa Nott Davis

Melissa Nott Davis (BBO# 654546)
SHOOK, HARDY & BACON L.L.P.
125 Summer St., Suite 1220
Boston, Massachusetts 02110
Telephone: (617) 531-1411
mndavis@shb.com

CERTIFICATE OF SERVICE

I, Melissa Nott Davis, hereby certify that on August 31, 2021, a true and accurate copy of the foregoing document was served by agreement by electronic mail upon all counsel of record in the above-captioned matter.

Melissa Nott Davis

Melissa Nott Davis, Esq.

Exhibit A

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1672CV00154

MARY FULLER¹

vs.

R.J. REYHOLDS TOBACCO COMPANY & others²

MEMORANDUM OF DECISION AND ORDER
ON THE DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

The instant action was filed by the decedent, John Fuller (the “decedent” or “Mr. Fuller”), on March 21, 2016. Mr. Fuller had been diagnosed with lung cancer in March of 2012, from which he died. His complaint asserted a single count for a violation of G. L. c. 93A against the defendant, R.J. Reynolds Tobacco Company (“R.J. Reynolds”), for unfair and deceptive business practices related to the sale of Camel cigarettes, which Mr. Fuller smoked. He also named Cumberland Farms, Inc, a convenience store from which he purchased the cigarettes, as well as Garber Bros., Inc., who distributed Camel cigarettes to Tedeschi Food Shops, another convenience store from which Mr. Fuller purchased cigarettes.

After Mr. Fuller’s passing in November 2016, on September 11, 2017, Mr. Fuller’s wife, Mary Fuller (“Mrs. Fuller”) filed her amended complaint, dated August 7, 2016, pursuing Mr. Fuller’s G. L. c. 93A claim on behalf of his estate as its Personal Representative. She added a claim from wrongful death under theories of breach of warranty, civil conspiracy, and negligence. Mrs. Fuller also brought her own claim for loss of consortium.³

¹ Individually and as Personal Representative of the Estate of John Fuller.

² Garber Bros., Inc., and Cumberland Farms, Inc.

³ Although the original complaint seeks damages for “Mary Fuller’s loss of companionship and earnings” in the relief sought, Mrs. Fuller did not allege a separate count for her loss of consortium.

The case is scheduled for trial on September 7, 2021; however, the matter is currently before the court on the defendants' motion for partial judgment on the pleadings as to the plaintiff's claim brought pursuant to the wrongful death statute for breach of warranty, civil conspiracy, and negligence.⁴ For the following reasons, the motion is **ALLOWED**.

DISCUSSION

Standard of Review

A motion to dismiss or for judgment on the pleadings, by its nature, "argues that the complaint fails to state a claim upon which relief can be granted." *Jarosz v. Palmer*, 436 Mass. 526, 529 (2002). In considering such a motion, the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true. *Nader v. Citron*, 372 Mass. 96, 98 (1977).

Analysis

The Supreme Judicial Court recently conclusively answered what previously had been somewhat of an open question by expressly holding that an action for wrongful death is derivative in nature. See *GGNSC Administrative Services, LLC v. Schrader*, 484 Mass. 181, 188-189 (2020) (discussion of derivative nature of wrongful death statute). To that end, a wrongful death claim is only viable "under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted." G. L. c. 229, § 2. Thus, the Supreme Judicial Court concluded that a wrongful death claim is not an independent cause of action, but rather is based on claims the decedent could bring. *GGNSC Administrative Services, LLC*, 484 Mass. at 188-189. Here, Mrs. Fuller as personal representative, concedes that although

⁴ While certainly late in the game, the substantive nature of the issues raised outweighs any untimeliness and warrants the exercise of discretion to reach the issue presented.

Mr. Fuller could have timely filed such claims, he did not bring claims for breach of warranty, civil conspiracy, and negligence when he brought his original complaint because those claims were barred by the respective statutes of limitations. See G. L. c. 260, §2A (three-year statute of limitation for actions in tort); G. L. c. 106, §2-318 (three-year statute of limitation for actions for breach of warranty and negligence). Therefore, the claims being derivative, the plaintiff's wrongful death action is barred.

However, the plaintiff argues that actions for wrongful death have a clear statute of limitations that begins to run for three years from the date of death, and therefore, she argues, the wrongful death statute "revives" the decedent's otherwise-barred claims. This interpretation, however, ignores the derivative nature of the statute; although Mrs. Fuller had three years from Mr. Fuller's passing to file a claim for wrongful death, the wrongful death action must be based on a claim for which Mr. Fuller could have brought himself. G. L. c. 229, § 2. Her wrongful death action asserts claims that she correctly conceded Mr. Fuller did not timely assert himself. Since, at the time Mr. Fuller filed the original complaint he was time-barred from bringing claims for breach of warranty, civil conspiracy, and negligence, Mrs. Fuller is also unable to assert those claims under the wrongful death statute.

Likewise, Mrs. Fuller's claim for loss of consortium fails. *GGNSC Administrative Services, LLC*, 484 Mass. at 188 (claims based on personal injury, wrongful death, or loss of consortium not distinct when derived from same constellation of facts). Furthermore, in so much as Mrs. Fuller's amended complaint specifically alleges a loss of consortium for the time prior to Mr. Fuller's passing, that claim is individual to her and is also barred by the three-year statute of limitations.

ORDER

For the foregoing reasons, it is hereby **ORDERED** by the court that the defendants' motion for partial judgment on the pleadings be **ALLOWED** and the claims brought pursuant to the wrongful death statute as well as Mrs. Fuller's independent claims for loss of consortium are hereby dismissed.

So ordered,

Thomas J. Perrino
Thomas J. Perrino
Justice of the Superior Court

DATED: August 30, 2021