2015 IL App (1st) 143603-U

FIRST DIVISION
November 23, 2015

No. 1-14-3603

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ADRIAN CRUZ, Plaintiff-Appellant, v. COOK COUNTY HEALTH & HOSPITAL SYSTEM; JOHN H. STROGER HOSPITAL; JORDAN C. CARQUEVILLE, M.D.; GEORGE ENGEL, M.D.; and WARREN PIETTE, M.D., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 14 L 2403 Honorable John P. Callahan, Jr., Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Liu and Justice Connors concurred in the judgment.

ORDER

Held: The circuit court's dismissal of plaintiff's negligence complaint against defendants is affirmed where the Tort Immunity Act's two-year statute of limitations began to run when plaintiff turned 18 years old, and he did not file his complaint until almost three years later.

¶ 1 Plaintiff, Adrian Cruz, appeals the order of the circuit court dismissing his negligence complaint against defendants, Cook County Health & Hospital System, John H. Stroger Hospital, Jordan C. Carqueville, M.D., George Engel, M.D., and Warren Piette, M.D., pursuant to section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)). On appeal, plaintiff contends that the trial court erred in dismissing his complaint on the basis that his complaint was time-barred by section 8-101 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/8-101 (West 2012)). For the following reasons, we affirm.

¶ 2 JURISDICTION

¶ 3 The trial court granted defendants' motion to dismiss with prejudice on October 27, 2014. Plaintiffs filed their notice of appeal on November 24, 2014. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 4 BACKGROUND

¶ 5 Plaintiff was born on March 15, 1992. In 2008, he went to Stroger Hospital to have a lump on his forehead examined. The lump was excised on March 19, 2009, and plaintiff returned for follow-up care and suture removal on March 24, 2009, and March 31, 2009. An undated physician's progress notes (possibly from March 31, 2009) states that plaintiff will be evaluated in a couple months. In her affidavit, Dr. Carqueville states that she excised the mass and reviewed plaintiff's medical chart during follow-up visits. She further states that when plaintiff returned to the clinic for follow-up and suture removal on March 24, 2009, and March 31, 2009, Dr. Carqueville was unaware of a pathological diagnosis. She asked plaintiff to return in 2 to 3 months, but the medical records indicate that plaintiff did not return to the clinic

until March 2013. Plaintiff contends in his complaint that the hospital's pathology lab found the lesion was cancerous and this diagnosis was confirmed by a conference committee on March 25, 2009. However, none of the defendants informed him of the pathological diagnosis.

¶ 6 Plaintiff did not return to the clinic until March 19, 2013, when he went to get a mass on the right side of his head examined. The mass was removed and subsequently found to be cancerous. Plaintiff also discovered at this time that the lesion removed in 2009 was cancerous. He filed a medical malpractice complaint against defendants on March 4, 2014, about two weeks before his twenty-second birthday. In his complaint, plaintiff alleged that defendants owed him a duty of care to inform him of his cancer diagnosis in 2009, which they breached. As a result of defendants' breach, plaintiff was unable "to control, stop, or reverse [the tumor's] growth, recurrence and spread until April of 2013, by which time he was faced with extensive treatment and surgeries ***."

¶ 7 Defendants filed a section 2-619 motion to dismiss, contending that plaintiff's action was not filed within the two-year statute of limitations or the four-year statute of repose contained in the Tort Immunity Act for claims against local public entities. Plaintiff argued that in his case, the Tort Immunity Act did not apply but rather section 13-212(b) of the Code of Civil Procedure (Code) (735 ILCS 5/13-212(b) (West 2012)), which allows injured minors until their 22nd birthday to file a medical malpractice claim, applied. The trial court granted defendants' motion to dismiss with prejudice, finding that section 8-101 of the Tort Immunity Act controlled over section 13-212(b) of the Code pursuant to the supreme court's decision in *Ferguson v. McKenzie*, 202 Ill. 2d 304 (2001). Plaintiff filed this timely appeal.

¶ 8 ANALYSIS

¶ 9 Plaintiff argues that the trial court erred in granting defendants' section 2-619 motion to dismiss. A section 2-619 motion to dismiss "admits the legal sufficiency of the plaintiff['s] complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff['s] claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). In ruling on a section 2-619 motion to dismiss, a court must view all pleadings and supporting materials in the light most favorable to the nonmoving party. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). The trial court's dismissal of a claim pursuant to section 2-619 is reviewed *de novo*. *In re Parentage of M.J.*, 203 Ill. 2d 526, 533 (2003).

¶ 10 In dismissing plaintiff's claim, the trial court determined that the two-year limitations period in the Tort Immunity Act took precedence over the eight-year repose period contained in section 13-212(b) of the Code. Section 8-101 provides in pertinent part:

> "(a) No civil action may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued."
>
> (b) No action for damages for injury or death against any local public entity or public employee, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, which of those dates occurs first but, in no event shall such an action be brought more than 4 years after the date on which occurred the act or omission or occurrence

> alleged in the action to have been the cause of the injury or death." 745 ILCS 10/8-101(a), (b) (West 2012).

The parties do not dispute that the defendants fall within the provisions of section 8-101. Section 13-212(b) of the Code provides:

> "(b) Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician *** arising out of patient care shall be brought more than 8 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death where the person entitled to bring the action was, at the time the cause of action accrued, under the age of 18 years; provided, however, that in no event may the cause of action be brought after the person's 22nd birthday." 735 ILCS 5/13-212(b) (West 2012).

In making this determination, the trial court relied on our supreme court's decision in *Ferguson*.

¶ 11 In *Ferguson*, our supreme court addressed whether a medical malpractice claim brought by a minor against a local governmental entity was subject to the one-year limitations period of the Tort Immunity Act[1] or the eight-year repose period contained in section 13-212(b) of the Code. *Ferguson*, 202 Ill. 2d at 307-08. It recognized that when there is a conflict between two statutes, the court has a duty to interpret those statutes in a consistent manner and give effect to both statutes if reasonably possible. *Id.* at 311-12. "However, legislative intent remains the primary inquiry and controls the court's interpretation of a statute. Traditional rules of statutory interpretation are merely aids in determining legislative intent, and those rules must yield to such intent." *Id.* at 312.

[1] The version of the Tort Immunity Act in effect at the time of *Ferguson* provided for a one-year statute of limitations period and no repose period.

¶ 12 Citing to its plurality decision in *Tosado v. Miller*, 188 Ill. 2d 186, 199 (1999), the supreme court found that the legislature intended section 8-101 of the Tort Immunity Act to apply "broadly to any possible claim against a local governmental entity and its employees." *Id*. at 312. The purpose of section 8-101 is to encourage investigation of a claim against a local governmental entity while the matter is still fresh, and permit prompt settlement of meritorious claims which allows governmental bodies to plan budgets in light of potential liabilities. *Id*. at 313. In this circumstance, "an abridged limitations period is reasonable" because the number of claims made against local governmental entities "will far exceed those brought against a private individual." *Id*. The *Ferguson* court also acknowledged section 13-212(b)'s policy to protect the right of minors to bring suit so that a child who is "incapable of initiating any proceeding for its enforcement will not be left to the whim or mercy of some self-constituted next friend to enforce [his] rights." [Internal quotation marks omitted.] *Id*.

¶ 13 The supreme court in *Ferguson* court found that section 13-212(b) applied insofar as the plaintiff was a minor when the cause of action accrued. *Id*. at 312. However, the Tort Immunity Act also applied since defendants were local governmental entities. Giving effect to the legislative purpose of both statutes, the supreme court held that the Tort Immunity Act's one-year statute of limitations began to run when the minor plaintiff reached 18 years of age. *Id*. Since the plaintiff did not file her claim within one year of turning 18 years old, her claim was time-barred. *Id*. at 313. The *Ferguson* court reiterated that "a party must comply with *both* section 13-212(b) of the Code and section 8-101 of the Tort Immunity Act." (Emphasis in the original.) *Id*.

¶ 14 In the case before us, plaintiff alleged in his complaint that defendants were careless and negligent in failing to inform him of the results of the biopsy performed on March 19, 2009,

when he was 17 years old. Like *Ferguson*, our case concerns the interplay between the limitation period of the Tort Immunity Act and the eight-year repose period contained in section 13-212(b) of the Code when both statutes apply to a plaintiff in a medical malpractice action. Giving effect to the legislative purpose of both statutes, the supreme court in *Ferguson* held that the Tort Immunity Act's one-year statute of limitations began to run when the minor plaintiff reached 18 years of age. 202 Ill. 2d at 312.

¶ 15 The legislature, however, amended section 8-101 in 2003, and section 8-101(b) now provides for a two-year statute of limitations period in place of the one-year limitation period applicable in *Ferguson*. See 745 ILCS 10/8-101(b) (West 2012). The two-year limitation period applies to plaintiff's case here. Pursuant to *Ferguson*, then, once plaintiff turned 18 years old he had two years to file his complaint. Plaintiff turned 18 years old on March 15, 2010. He filed his complaint, however, almost three years later on March 4, 2013. Therefore, plaintiff's claim is time-barred.

¶ 16 Plaintiff urges this court to limit *Tosado* and *Ferguson* to the facts of their respective cases. He argues that *Tosado* is a plurality opinion with little precedential value, and *Ferguson* is on "shaky ground" with three dissenting justices. Instead, he contends this court should interpret section 8-101 of the Tort Immunity Act and section 13-212(b) of the Code together to provide additional protection for minors. Plaintiff argues both statutes can be interpreted in a manner that allows plaintiffs who are minors at the time of their injury until their 22nd birthday to file their claims.

¶ 17 Contrary to plaintiff's contentions, *Ferguson* is not on "shaky ground." Although three justices dissented in *Ferguson*, the majority's determination was subsequently upheld in *Paszkowski v. Metropolitan Water Reclamation District of Greater Chicago*, 213 Ill. 2d 1

(2004). In *Paszkowski*, the supreme court determined whether section 8-101 or the limitation period in section 13-214(a) of the Code (735 ILCS 5/13-214(a) (West 1998)) applied. *Id*. at 3. The majority in *Paszkowski* affirmed *Ferguson*'s holding that section 8-101 applies " 'broadly to any possible claim against a local governmental entity and its employees[,]' " and found that section 8-101 provides a "comprehensive protection [that] *** necessarily controls over other statutes of limitation or repose." [Internal citations omitted.] *Id*. at 12-13. Although three justices dissented in *Paszkowski*, they did not disagree with *Ferguson*'s determination. Rather, the dissent believed that the majority's decision "unjustifiably expands [*Ferguson*'s] rationale into a universal statement applicable to every claim against a local government or its employee." *Id*. at 14 (Fitzgerald, J., dissenting). *Ferguson* remains the law at present and when "our supreme court has declared the law with respect to an issue, this court must follow that law, as only the supreme court has authority to overrule or modify its own decisions." *Merkertichian v. Mercedes-Benz U.S.A., LLC*, 347 Ill. App. 3d 828, 836 (2004).

¶ 18 Furthermore, as discussed above, the legislature amended the Tort Immunity Act in 2003, specifically adding subsection (b) to section 8-101, which addresses the limitation and repose period applicable to actions arising out of patient care. The amendment, however, is silent as to additional protections for minors under the Tort Immunity Act despite our supreme court's prior decision in *Ferguson*. "[W]here the legislature chooses not to amend terms of a statute after judicial construction, it will be presumed that it has acquiesced in the court's statement of legislative intent." *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 404 (2005).

¶ 19 Alternatively, plaintiff contends that the trial court erred in failing to apply the doctrine of estoppel when defendants raised the statute of limitations defense. Initially, plaintiff argues that the running of the statute of limitations is an affirmative defense that can be waived if not

properly raised, and implies that since defendants raised the defense for the first time in their motion to dismiss, it is waived. The statute of limitations defense, however, may be raised for the first time in a motion to dismiss. See *Boonstra v. City of Chicago*, 214 Ill. App. 3d 379, 389 (1991).

¶ 20 Also, plaintiff did not specifically plead equitable estoppel in his complaint and although he briefly raised the issue before the trial court, the parties did not substantially argue the merits and no objection was entered when the trial court did not rule on the issue. The parties, however, did brief the issue on appeal so we choose to address the merits. See *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 518 (2000) (waiver rule is a limitation on the parties, not the courts).

¶ 21 The use of estoppel against public bodies is not favored and is allowed only when necessary to prevent fraud or injustice. *Jack Bradley, Inc. v. Department of Employment Security*, 146 Ill. 2d 61, 81 (1991). Therefore, to invoke estoppel against a public body one must show an affirmative act on the part of the public body and the inducement of substantial reliance by the affirmative act. *Halleck v. County of Cook*, 264 Ill. App. 3d 887, 893 (1994).

¶ 22 In his complaint, plaintiff alleged that defendants knew of the results on March 25, 2009, when the pathology department consensus committee agreed on the cancer diagnosis, and should have informed him of the results on March 31, 2009, when he was at the clinic for the last time for follow-up care. Defendants did not do so and "failed to do so in any manner whatsoever until the recurrence of April, 2013." Plaintiff does not allege any affirmative acts of defendants which induced his substantial reliance, only that they should have informed him of the results but failed to do so in a timely manner. We find that the facts alleged in plaintiff's complaint do not support the application of estoppel.

¶ 23 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.