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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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LILLIAN GOERING, as Guardian of the Estate )	Appeal from the Circuit Court
Of LAURA MARTINEZ, a disabled person, )	of Kane County.
)	
Plaintiff-Appellant, )	
)	
v. )	No. 2016-L-501
)	
MIDWEST NEUROLOGY, LTD. and )	
ANDREW D. TA, M.D., )	Honorable
)	Mark A. Pheanis,
Defendants-Appellees. )	Judge, Presiding.

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JUSTICE McLAREN delivered the judgment of the court.  
Justices Jorgensen and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the plaintiff filed an amended complaint that did not refer to or incorporate the prior pleadings, the amended complaint was the operative pleading for purposes of the defendants' motion for summary judgment; because prior pleadings were not verified, the allegations contained therein were not judicial admissions; the trial court erred by granting summary judgment in the defendants' favor where a genuine issue of material fact existed regarding when the disability occurred; judgment is vacated and cause is remanded.

¶ 2 Plaintiff, Lillian Goering, as guardian of the estate of Laura Martinez, a disabled person, filed an amended complaint against defendants, Andrew D. Ta, M.D., and his employer, Midwest Neurology, Ltd., alleging that Dr. Ta was negligent in treating Martinez. The trial

court determined that the amended complaint was barred by the two-year statute of limitations pursuant to section 13-212 of the Code of Civil Procedure (Code) (735 ILCS 5/13-212 (West 2018)) and granted summary judgment to defendants. On appeal, plaintiff argues that the trial court erred by granting summary judgment because (1) it failed to treat the amended complaint as the operative pleading, (2) it erred by ruling that Martinez was barred from claiming that her legal disability tolled the statute of limitations, and (3) there were questions of fact for a factfinder to determine. For the following reasons, we vacate and remand for further proceedings.

¶ 3

### I. BACKGROUND

¶ 4 Prior to 2007 Martinez was diagnosed with multiple sclerosis (MS). MS is an autoimmune disease that attacks the white matter in the brain and spinal cord. It is a progressive and debilitating condition for which there is no cure. In 2007 Martinez began treatment with Dr. Ta, an employee of Midwest Neurology. Dr. Ta is a board certified neurologist who treats patients with MS.

¶ 5 From March 2008 until October 2012, Dr. Ta treated Martinez with Tysabri, a medication used to treat MS. Tysabri cannot cure MS but it can slow the progression of the disease. Dr. Ta participates in a research program offered by the manufacturer of Tysabri, Biogen, to collect data from patients to learn how to best monitor them over the course of the disease. Dr. Ta knew that treating patients with Tysabri for longer than two years placed them at increased risk for developing progressive multifocal leukoencephalopathy (PML). PML is a rare infection of the brain that causes severe disability. Dr. Ta also knew that Martinez had multiple risk factors, including being positive for the JC virus, that placed her at a higher risk for developing PML with Tysabri treatment. In November 2012 Martinez was diagnosed with PML.

¶ 6 On July 15, 2015, Martinez, through her attorneys, filed a two-count medical negligence complaint (case no. 15 L 334) against defendants. Counts I and II were directed against Midwest Neurology and Dr. Ta, respectively, and contained the same allegations of negligence. The complaint was filed with an affidavit of her attorney stating that he had been unable to obtain a consultant's report as required by section 2-622(a)(1) of the Code of Civil Procedure (Code) (735 ILCS 5/2-622(a)(1) (West 2014)). The complaint alleged that Martinez was diagnosed with PML on approximately November 1, 2012, and that the defendants were negligent in failing to monitor her for new signs and symptoms of PML and in failing to follow the boxed warning of the medication Tysabri. The complaint also alleged that Martinez did not know and could not have known that defendants failed to comply with the applicable standards of care until after she discovered the medication warnings of Tysabri in June 2015.

¶ 7 On October 13, 2015, the action was voluntarily dismissed. On October 6, 2016, Martinez's new counsel refiled the complaint (case no 16 L 501). The refiled complaint was essentially the same as the original complaint but included a section 2-622 attorney's affidavit and physician's report specifically referencing the FDA published boxed warning and the standard of care requiring that patients be closely monitored for changes in the brain with frequent magnetic resonance imaging (MRI). The report also stated that Martinez suffered from severe aphasia as a result of PML and that her current disabling condition was due to PML caused by Dr. Ta's deviations from the standard of care.

¶ 8 In April 2017 defendants answered the refiled complaint in the form of a general denial and an affirmative defense that the action was barred by the two-year statute of limitations pursuant to section 13-212 of the Code. See 735 ILCS 5/13-212(a) (West 2016). Thereafter the parties engaged in discovery.

¶ 9 On April 6, 2018, the LaSalle County circuit court sitting in probate, found that Martinez was legally disabled and appointed her mother, plaintiff, as guardian of her estate and person.

¶ 10 On April 10, 2018, plaintiff filed a motion for leave to file a “First Amended Complaint” (amended complaint), to substitute plaintiff as guardian of the estate and person of Martinez and to conform the pleadings to the anticipated proofs. The motion was noticed for hearing on April 17, 2018. Defendants objected to plaintiff’s motion.

¶ 11 On April 13, 2018, defendants filed a combined motion to dismiss and motion for summary judgment on statute of limitations grounds directed to the October 2016 refiled complaint. Defendants noticed their motions for April 17, 2018.

¶ 12 On April 17, 2018, a hearing was held to determine whether Martinez was competent to give a deposition. After listening to and observing Martinez attempt to answer questions, the trial court ruled that there was no reason to depose her and that the court would not allow her to testify in her current condition. Following the competency hearing the trial court entered and continued plaintiff’s motion for leave to file an amended complaint and the court set a briefing schedule on defendants’ combined motion to dismiss and for summary judgment. Subsequently, plaintiff filed a motion for reconsideration.

¶ 13 On May 1, 2018, after a hearing on plaintiff’s motion for reconsideration, the trial court, Judge James R. Murphy, presiding, granted plaintiff’s motion for leave to file an amended complaint, *instanter*. The trial court ordered that “[d]efendants shall have until 5/22/18 to file any motion directed against the \*\*\* Amended Complaint.” The trial court set a briefing schedule and a hearing date for June 21, 2018. Plaintiff filed an amended complaint on that day, May 1, 2018.

¶ 14 Plaintiff’s amended complaint alleged the following:

“[Plaintiff] is the duly appointed guardian of the estate of [Martinez], a legally disabled person;

\* \* \*

That on or about November 15, 2012, [Martinez], was diagnosed with PML, and from that point forward was legally disabled because of the injury which rendered her entirely without capacity to make or communicate decisions regarding her person and totally unable to manage her estate or affairs.

That at various times during the period of approximately March 2008 through November 15, 2012, [Martinez] exhibited signs and symptoms of PML that were known or should have been known by [defendants].

Contrary to their [duties, defendants] \*\*\* [were] guilty of one or more of the following careless and negligent acts and/or omissions:

a) Failed to adequately monitor [Martinez] for new signs and symptoms of PML, \*\*\* during the period of approximately March 2008 through November 15, 2012;

\* \* \*

c) Failed to perform adequate diagnostic testing of [Martinez] during the period of approximately March 2008 through November 15, 2012;

\* \* \*

That from November 15, 2012 until the filing of the original complaint, and all times thereafter, [Martinez] did not know, nor could she have known, the [defendants] \*\*\* had failed to comply with the applicable standards of care, or that she had been injured as a result of wrongful conduct, because of her mental impairment, incapacity and disability.”

¶ 15 On May 22, 2018, defendants filed a motion for summary judgment which incorporated their previously filed combined motion to dismiss and for summary judgment. Defendants argued that the statute of limitations expired on November 15, 2014, two years after Martinez was diagnosed with PML and that the statute of repose expired on November 15, 2016, pursuant to section 13-212(a) of the Code. Referring to Martinez's original and refiled complaints, defendants noted that Martinez recognized the statute of limitations violation of filing a cause of action on July 2015 and October 2015 relating to an injury sustained on November 15, 2012, and therefore, Martinez alleged that she did not discover the wrongful cause of her injury until June 2015 when she "discovered" the medication warnings of Tysabri.

¶ 16 Defendants argued that, contrary to Martinez's discovery allegation, the "facts are undisputed that [Martinez] was advised and aware of the medication warning of Tysabri while she was being treated by the defendants and before the diagnosis of PML on November 15, 2012." Defendants attached to its motion the deposition testimony of Dr. Ta who testified that Martinez was advised, both orally and in writing, about the medication warnings, including the risk of developing PML. Defendants also attached to its motion copies of certain consent forms and medication warning about Tysabri signed by Martinez. Therefore, defendants contended that, in light of Martinez's November 15, 2012 diagnosis of PML, she had a duty to timely inquire about the potential wrongful cause of her PML and knew or should have known about the potential wrongful cause more than two years before she filed suit. Because the statute of limitations expired on November 15, 2014, summary judgment must be entered in favor of defendants.

¶ 17 Regarding plaintiff's amended complaint, defendants argued that Martinez's alleged disability was belied by the fact that Martinez filed her original and refiled complaints in her own

name. Martinez has waived the right to claim that she has a legal disability before the expiration of the statute of limitations on November 15, 2014. Further, Martinez is “bound by the allegations contained in her prior Complaints [because her] allegations constitute admissions. Martinez is bound by her allegation that she did not know that the defendants failed to comply with applicable standards of care until after she discovered the medication warning of Tysabri in June 2015. Even if Martinez was legally disabled prior to the expiration of the limitations period, her legal disability was removed and the tolling of the limitations period ceased when counsel filed suit on behalf of [Martinez] on July 15, 2015.” In addition, since Martinez’s original complaint was not timely filed, plaintiff’s amended complaint cannot relate back to it.

¶ 18 Plaintiff responded to defendants’ motion asserting that the amended complaint was the controlling pleading and that there existed genuine issues of material fact as to whether Martinez was under a legal disability at the time she was diagnosed with PML. Plaintiff attached the sworn affidavit of her subsequent treating physician, Dusan Stefoski, M.D., a neurologist who specializes in patients with MS. Dr. Stefoski opined that at the time Martinez was diagnosed with PML in November 2012, she:

“[S]uffered from a brain injury cause by PML [that] rendered her totally and permanently mentally disabled due to her severely impaired functions of communication, including the ability to understand others and communicate her thoughts to others, and, as such, she has been unable to make or communicate decisions regarding her person and has been totally unable to manage her estate or the ordinary affairs of life.”

¶ 19 A hearing was held on defendants’ motion. On July 17, 2018, the trial court issued a written order granting summary judgment in favor of defendants and against plaintiff. The trial court cited certain paragraphs from Martinez’s refiled complaint and relied on Dr. Ta’s

deposition testimony and the consent forms and medical warnings of Tysabri to determine the following.

“[T]here is no genuine issue of material fact that [Martinez] know of her injury, PML, on November 15, 2012. \*\*\* [T]here is no genuine issue of material fact that [Martinez] was aware of and had discovered the medication warning of Tysabri, the information which was the basis for her knowledge of the alleged wrongful cause of her injury, before November 15, 2012. \*\*\* [B]ecause [Martinez] was aware of her injury and its potential wrongful cause as of November 15, 2012, statute of limitations, 735 ILCS 5/13-212, required [Martinez to] file her cause of action no later than November 15, 2014.”

Therefore, Martinez’s original cause of action, “filed on July 15, 2015 was not timely in violation of the statute of limitations [and Martinez’s] cause of action refiled on October 6, 2016 was not timely in violation of the statute of limitations.” The trial court also stated that neither the original nor the refiled complaints “allege that [Martinez] was legally disabled or mentally incompetent. \*\*\* [Thus,] as a matter of law, [Martinez’s] newly alleged legal disability, which was alleged for the first time on May 1, 2018, may not properly serve as a basis for tolling the state of limitations and not defeat Defendants’ right to summary judgment.”

¶ 20 On August 13, 2018, plaintiff filed a motion for reconsideration, which, after a hearing, the trial court denied on October 18, 2018. Plaintiff filed her notice of appeal on October 23, 2018, and an amended notice of appeal on October 25, 2018.

¶ 21

## II. ANALYSIS

¶ 22 The parties dispute which complaint was the operative pleading for purposes of the trial court’s summary judgment. Plaintiff argues that the trial court erred by refusing to treat the amended complaint as the operative pleading. Defendants counter that the trial court permitted

plaintiff to file her amended complaint for the sole purpose of substituting the guardian's name for plaintiff's name.

¶ 23 However, when plaintiff filed her motion for leave to file her amended complaint, she attached the amended complaint. Further, after a hearing for defense counsel's failed attempt to take plaintiff's deposition in open court, the parties argued their positions regarding the amended complaint, which informed the trial court of the essential new allegation: that plaintiff was disabled in November 2012 when she was diagnosed with PML. Defense counsel argued against allowing the amended complaint because "there's an allegation that because she's legally disabled and mentally incompetent she never would have known – she never knew she had a cause of action." Plaintiff's counsel responded, "so it's my position that – once she developed PML \*\*\* once she suffered brain damage, which is manifested by aphasia and other issues, that at that point, you know, she cannot appreciate whether she was injured as a result of wrongful conduct."

¶ 24 Thus, the trial court was informed of the allegations contained in the amended complaint, most importantly, that "on or about November 15, 2012, [plaintiff] was diagnosed with PML, and from that point forward was legally disabled because of the injury to her brain that rendered her entirely without capacity to make or communicate decisions regarding her person and totally unable to manage her affairs." The trial court initially denied the motion for leave to amend and set it for briefing on plaintiff's motion to reconsider. Judge Murphy, however, granted plaintiff's motion after conferring with Judge Pheanis, stating, "[w]hat [Judge Pheanis] said in discussing it with me was he was ruling plaintiff can file the amended complaint[.]"

¶ 25 Defendants contend that the trial court "subsequently made it clear that its intention in allowing" the filing of the amended complaint was solely for the purpose of allowing the

guardian to substitute in as the plaintiff. Defendants cite the trial court's comments during argument on plaintiff's motion to reconsider the grant of summary judgment, wherein the court stated:

“At the time defendant appeared on the motion for summary judgment \*\*\* plaintiff appeared requesting time to amend the complaint. It was presented that there was not a guardianship and that this change needed to be made. Over objection due to pendency of the motion for summary judgment the court allowed leave to amend for the purpose of properly designating the amended real party in interest. Not for the purpose of contradicting the allegations of the prior complaint so as to provide a basis for defeating the motion for summary judgment.”

¶ 26 Regardless of the trial court's statements above, it allowed the amended complaint to be filed without limitation, knowing its contents. Thus, the trial court was obligated to accept the allegations in the amended complaint as they were pleaded.

¶ 27 Next, defendants argue that the trial court abused its discretion by allowing the plaintiff to file her amended complaint. Section 2-1005(g) of the Code states that “[b]efore or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms.” 735 ILCS 5/2-1005(g) (West 2018). See also section 2-616(a) of the Code (providing that “At any time before final judgment amendments may be allowed on just and reasonable terms \*\*\* changing the cause of action \*\*\* or adding new causes of action \*\*\* and in any matter, either form or substance, \*\*\* which may enable the plaintiff to sustain the claim for which it was intended to be brought”). *Id.* at 2-616(a).

¶ 28 The decision to allow an amendment to a pleading rests within the sound discretion of the trial court, and absent an abuse of discretion, we will not disturb the trial court's decision.

*Hanmi Bank v. Chuhak & Tecson, P.C.*, 2018 IL App (1st) 180089, ¶ 21. A trial court abuses its discretion when no reasonable person would take the view adopted by the trial court. *Id.* Any doubt as to whether a plaintiff should be granted leave to file an amended complaint should be decided in favor of allowance of the amendment. *Id.*

¶ 29 In *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 236 (1992), our supreme court set forth four factors to determine whether a trial court abused its discretion by allowing an amendment to a pleading.

“These factors are: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.” *Loyola Academy*, 146 Ill. 2d at 273.

¶ 30 Defendants argue that each of the *Loyola* factors weigh strongly against the trial court’s decision to grant plaintiff leave to file her amended complaint. “Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. [Citation.]” *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15. “This court may deem any arguments not raised in the trial court as waived or forfeit[ed] on appeal.” *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 59. Because defendants raise the *Loyola* factors for the first time on appeal, the record does not contain cited facts upon which the trial court could have opined. Raising these factors for the first time on appeal with a thin record places this court in the position of not reviewing the factors *de novo* but hearing the factors *de novo*. The defendant has committed a procedural default that precluded the trial court from considering these factors and prevented plaintiff from responding to the factors. However, even if

defendants had raised the factors set forth in *Loyola*, we determine that the trial court did not abuse its discretion by allowing plaintiff leave to file her amended complaint.

¶ 31 Regarding the first factor, the amended complaint would cure the purported original and refiled complaints relative to the statute of limitations defense because the amended complaint alleged that Martinez was disabled in November 2012 when she was diagnosed with PML. Defendants' argue that Martinez waived any assertion of legal disability during the operative limitations period because she is bound by her original assertion that she discovered her cause of action against defendants in June 2015. However, "[w]aiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right." *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007). Thus, if, as alleged in plaintiff's amended complaint, Martinez was legally disabled in November of 2012, she could not have waived anything. Therefore, the amendment cured the alleged pleading defect.

¶ 32 As to the second factor, defendants claim that they were prejudiced by the amended complaint and had they known earlier of Martinez's alleged legal disability, they could have requested an independent examination of her. However, when deposed, Dr. Ta testified that a diagnosis of PML meant either death or severe disability. Dr. Ta diagnosed Martinez with PML in November 2012. Thus, defendants were on notice, based upon personal knowledge, that Martinez could have been disabled in November 2012.

¶ 33 As to the third factor, the amendment was timely filed during the early stages of discovery and long before the setting of a trial date. Regarding the fourth factor, while there may have been prior opportunities to amend, plaintiff amended her complaint as soon as the probate court adjudicated Martinez to be legally disabled. Accordingly, based on the *Loyola*

*Academy* factors and this underdeveloped record, it cannot be said that the trial court abused its discretion in granting the motion to amend.

¶ 34 Further, defendants contend that Martinez is bound by the allegations contained in her original and refiled complaints. Defendants argue that in those complaints Martinez made binding admissions that negate the allegation contained in the amended complaint that she was legally disabled in November 2012. Defendants note that in the first two complaints Martinez alleged that she was capable of discovering her cause of action when she learned of Tysabri's warnings in June 2015 and that Martinez did not allege that she was legally disabled. Defendants argue, therefore, that due to Martinez's prior allegations, plaintiff cannot now allege that Martinez was unaware of the accrual of her cause action due to legal disability.

¶ 35 Generally, an amended pleading that is complete in itself, and does not refer to, or adopt, the prior pleadings, ordinarily supersedes it and the prior pleading ceases to be part of the record, being in effect abandoned or withdrawn. *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153-54 (1983); *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912, 926 (2007). Allegations in a pleading are formal conclusive judicial admissions withdrawing a fact from issue, providing the pleading has not been amended, abandoned, or withdrawn. *Farmers Auto Ass'n v. Danner*, 394 Ill. App. 3d 403, 412 (2009). Further, an admission in an unverified, unamended pleading signed by an attorney is binding on the party as a judicial admission. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 558 (2005). However, once an unverified pleading is amended, an admission in a prior pleading can then only be used as an evidentiary admission and not as a judicial admission. *Id.* In contrast to judicial admissions, evidentiary admissions must be offered into evidence and are always subject to contradiction or explanation. *Id.*

¶ 36 Here, the amended complaint was complete in itself and did not refer to or adopt the prior pleadings. Thus, the earlier pleadings ceased to be a part of the record. See *Foxcroft*, 96 Ill. 2d at 154. Further, the original and refiled complaints were not verified. Thus, the allegations contained therein are not judicial admission, but may be used only as evidentiary admissions directed toward a finder of fact. See, e.g., *Chavez v. Watts*, 161 Ill. App. 3d 664, 673 (1987) (the defendant's unverified amended answer was properly used as evidentiary admission during cross-examination). Accordingly, Martinez is not bound by the allegations contained in her original and refiled complaints, and plaintiff's amended complaint was the operative pleading. Defendants' argument, that plaintiff cannot now allege that Martinez was unaware of the accrual of her cause action due to legal disability is unavailing.

¶ 37 Plaintiff argues that the trial court erred by granting summary judgment in defendants' favor. Summary judgment motions are governed by section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005) (West 2018)). Summary judgment is proper, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Id.*; *Perry v. Department of Financial & Professional Regulation*, 2018 IL 122349, ¶ 30. A genuine issue of material fact exists when the material facts are disputed, or when the material facts are undisputed but reasonable persons might draw different inferences from those undisputed facts. *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 25. "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Seymour v. Collins*, 2015 IL 118432, ¶ 42. Our review of a trial court's grant of summary judgment is *de novo*. *Perry*, 2018 IL 122349, ¶ 30.

¶ 38 Plaintiff argues that the evidence is uncontroverted that Martinez was under a legal disability as of November 15, 2012. Defendants argue, and the trial court determined, that plaintiff's allegations of legal disability do not relate back so as to toll the statute of limitations, because the original complaint was not timely filed. Plaintiff counters that the limitations period was tolled by Martinez's legal disability pursuant to section 13-212(c) of the Code. 735 ILCS 5/13-212(c) (West 2018).

¶ 39 Section 13-212 of the Code applies to any actions "whether based upon tort, or breach of contract, or otherwise, arising out of patient care." *Id.* at 13-212(a), (b) (West 2018). The statute of limitations period is "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." *Id.* at 13-212(a). The statute of repose is four 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." *Id.* However, section 13-212(c) provides:

"If the person entitled to bring an action described in this Section is, at the time the cause of action accrued, under a legal disability other than being under the age of 18 years, then the period of limitations does not begin to run until the disability is removed." *Id.* at 13-212(c).

¶ 40 Plaintiff supported her allegation of legal disability with the sworn affidavit of Dr. Stefoski stating that, "From November of 2012 through the present, [Martinez] has suffered from a brain injury caused by PML which has rendered her totally and permanently mentally disabled[.]" Defendants filed nothing refuting Dr. Stefoski's sworn affidavit. Instead, defendants argue that Martinez waived any assertion of legal disability during the operative limitations period because she is bound by the allegations contained in her original and refiled

complaints that she discovered her cause of action against defendants in June 2015. However, as stated above, “[w]aiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right.” *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007). Thus, if, as alleged in plaintiff’s amended complaint, Martinez was legally disabled in November of 2012, she could not have waived anything.

¶ 41 Defendants cite *Giles v. Parks*, 2018 IL App (1st) 163152, to support their argument. In *Giles*, the plaintiff’s brother was killed when he was struck by a tow truck as he walked through a crosswalk. *Id.* ¶ 3. Two years and two days after the collision, the plaintiff filed a “survival claim.” *Id.* ¶ 4. The case was dismissed for want of prosecution and the plaintiff filed a petition for relief from judgment pursuant to section 2-1401 of the Code. *Id.* ¶ 5. The defendant asserted that the complaint was filed more than two years after the cause of action accrued and was therefore, barred by the statute of limitations. *Id.* ¶ 7. The plaintiff contended that the claim was timely because the statute of limitations period was tolled for one day by his brother’s legal disability from the time he was struck until he died the next day. The plaintiff also sought leave to file a claim under the wrongful death statute, where the statute of limitations accrues at the time of the death rather than at the time of the injury, arguing that his new claim should relate back to his original claim. *Id.* The trial court denied the plaintiff’s motion.

¶ 42 The appellate court affirmed holding that the plaintiff could not benefit from the tolling provision regarding legal disability, citing section 13-211 of the Code (section 13-211 applies to *inter alia*, actions for damages for an injury to the person). *Id.* ¶ 15. The court stated that [t]he statutory scheme simply does not allow for plaintiff to use [his brother’s] legal disability as an excuse for not filing *his own claim* within two years of the collision.” (Emphasis added.)

*Id.* ¶ 18. However, here, plaintiff did not file a claim on her own behalf; rather plaintiff filed a claim on behalf of Martinez. Thus, this case is distinguishable from *Giles*.

¶ 43 Defendants also cite *Watkins v. United States*, 854 F. 3d 947 (7th Cir. 2017), to support their argument that Martinez was aware of the cause of her injuries in 2015 as alleged in her original and refiled 2015 and 2016 complaints. In *Watkins*, the plaintiff, Johnnie Watkins, filed a complaint in federal court on behalf of Johnnice Ford, a disabled person, in 2015. *Id.* at 948. The plaintiff alleged that a physician failed to properly diagnose and treat Ford, who was eventually diagnosed with Wernicke’s encephalopathy and who sustained neurological injuries including permanent disability. *Id.* The district court dismissed the complaint as filed beyond the relevant statute of limitations.

¶ 44 On appeal, the court of appeals affirmed after holding that the lower court properly took judicial notice of Ford’s state court medical malpractice claim filed in August 2010. *Id.* at 949. The court reasoned, “[b]ecause the complaint reflects an awareness that her injuries were caused by the defendant (through its agents), at a minimum the claim accrued as of August 2010.” *Id.* The court put the burden on the plaintiff to establish that the 2010 complaint should not be accepted as established fact. *Id.* at 950. Illinois courts, however, distinguish between pleadings that are verified and those that are not. In this case plaintiff filed unverified pleadings and then an amended complaint. Thus, any admission in her prior pleadings can be used only as an evidentiary admission and not as a judicial admission. See *Knauerhaze*, 361 Ill. App. 3d at 558. As such, evidentiary admissions must be offered into evidence and are always subject to contradiction or explanation. *Id.* Thus, whether an admission contained in a prior unverified pleading is a fact is an issue for the fact finder. In any event, generally, federal

circuit court decisions are not binding on Illinois courts and we decline to follow *Watkins*. See *Byrd v. Aetna Casualty & Surety Co.*, 152 Ill. App. 3d 292 (1987).

¶ 45 Accordingly, it is clear that a material issue of genuine fact exists at this stage of the proceedings. Defendants motion for summary judgment failed to address plaintiff's amended complaint. Further, the trial court erred by failing to recognize plaintiff's amended complaint as the operative complaint and by acknowledging that there was a genuine issue of material fact regarding when Martinez became legally disabled.

¶ 46 Generally, a formal legal adjudication of disability is not required to show that a person was "under a legal disability." *Estate of Riha v. Christ Hospital*, 187 Ill. App. 3d 752, 754 (1989). The question of whether a person adjudicated disabled was under a legal disability at the time her cause of action accrued is a question for the trier of fact to determine. *Id.* at 756. Here, Martinez was not adjudicated legally disabled until 2018. However, plaintiff's amended complaint sufficiently alleged facts that Martinez was under a legal disability at the time her cause of action accrued. Plaintiff alleged "that on or about November 15, 2012, [Martinez], was diagnosed with PML, and from that point forward was legally disabled because of the injury which rendered her entirely without capacity to make or communicate decisions regarding her person and totally unable to manage her estate or affairs."

¶ 47 In *Passmore v. Walter Memorial Hospital*, 152 Ill. App. 3d 554 (1987), the appellate court similarly found the complaint sufficiently alleged facts that the claimant was "under legal disability" to invoke section 13-212's tolling provision where the complaint alleged that from the date of the acts of malpractice the claimant was entirely without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his estate or financial affairs. *Id.* at 557. Here, in opposition to defendants' motion for summary judgment,

plaintiff presented the affidavit of Dr. Stefoski who opined, *inter alia*, that “[f]rom November of 2012 through the present, [Martinez] has suffered from a brain injury caused by PML which has rendered her totally and permanently mentally disabled[.]” This is sufficient to raise a genuine issue of material fact regarding when Martinez became legally disabled.

¶ 48 For the foregoing reasons, the judgment of the trial court is vacated and the cause is remanded for further proceedings.

¶ 49

### III. CONCLUSION

¶ 50 The judgment of the circuit court of Kane County is vacated, and the cause is remanded.

¶ 51 Vacated and remanded.