2014 IL App (1st) 141149-U

No. 1-14-1149

Filed December 29, 2014

FIFTH DIVISION

IN THE APPELLATE COURT

OF ILLINOIS

FIRST JUDICIAL DISTRICT

FIRST AMERICAN BANK, Plaintiff-Appellant, v. BLACKMAN KALLICK LLP, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County No. 13 L 1954 Honorable Ronald F. Bartkowicz, Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

Held: Trial court's order granting defendant's motion to dismiss plaintiff's accounting malpractice action as time barred is affirmed. Court did not err in reconsidering its initial denial of the motion to dismiss.

¶ 1 Plaintiff First American Bank filed an accounting malpractice action against defendant accounting firm Blackman Kallick LLP. On defendant's motion to reconsider, the court granted defendant's motion to dismiss the action as barred by the statute of

limitations. Plaintiff appeals, arguing (1) the court erred in granting the motion to reconsider as defendant presented no new facts or change in the law and failed to establish an error in the court's original ruling and (2) the court erred in granting the motion to dismiss as it improperly determined the accrual date of the statute of limitations and questions of fact exist regarding that accrual date. We affirm.

¶ 2 BACKGROUND

¶ 3 From 2004 to 2010, Kenneth and Jeri Sisson engaged defendant as their accountant to prepare tax returns for themselves and their businesses. The final federal tax return defendant prepared for the Sissons was for tax year 2009. The 2009 return contained the Sissons' election for a "five-year carryback adjustment" that would result in a tax refund to the Sissons of approximately $400,000. It is uncontested that, as a result of an extended due date granted for the filing of the 2009 return, the deadline for filing the election for the carryback adjustment was October 15, 2010. The return was filed in late December 2010.

¶ 4 On February 24, 2011, the IRS sent the Sissons a letter stating it could not approve the Sissons' Form 1045 Application for Tentative Refund "requesting a tentative refund from a carryback adjustment for the loss or credit year ended Dec. 31, 2009" The IRS informed the Sissons that it had received the application on January 4, 2011, but was returning the application because its records showed the Sissons' "election was not filed by the required date" and the deadline for filing Form 1045 had elapsed.

¶ 5 On May 11, 2011, Kenneth assigned to plaintiff "all of [his] rights, title and interest in, under and to any and all federal and state tax refunds due (that remain unpaid)" to

him for tax years 2004 through 2010. The assignment included "any and all rights, rights to payment, claims and causes of action against" defendant relating to the additional tax refund that would have been available if a timely election had been made for the carryback loss. In exchange, in a covenant not to sue, plaintiff agreed it would not pursue Kenneth for defaulting as the guarantor on outstanding loans made by plaintiff to one of Kenneth's businesses, Mid-Way Supply.

¶ 6 In September 2011, the Sissons filed an accounting malpractice action against defendant. They asserted defendant was negligent and breached its contract with them by failing to timely file the 2009 tax return and Form 1045 Application for Tentative Refund prior to the October 15, 2010, deadline, failing to properly advise the Sissons regarding the ability to file a tax return after October 15, 2010, and being otherwise negligent and careless in representing the Sissons' interests. The Sissons asserted Kenneth spoke with Amanda Zhong, an accountant with defendant's firm, four or five days prior to October 15, 2010, and, although he discussed with her the adverse consequences that could result if the 2009 return was filed late, she did not inform him of the October 15, 2010, deadline for filing the carryback adjustment election. The Sissons asserted that defendant completed the 2009 tax return on December 20, 2010, and on December 29, 2010, Kenneth learned of the October 15, 2010, deadline after reviewing the IRS website and speaking to Zhong. They claimed Zhong told Kenneth that she was aware of the deadline but that she was hopeful the Sissons' carryback election would be accepted even though she was aware other individuals that filed carryback elections after the deadline had been rejected. The Sissons alleged that the IRS received the Sissons' 2009 tax return and application for tentative refund on

January 4, 2011, and, on February 24, 2011, issued a letter denying the Sisson's carryback adjustment because the tax return and application were filed after October 15, 2010.

¶ 7 In January 2013, defendant moved for summary judgment on the Sissons' claims, arguing the Sissons did not have standing to bring the claims against defendant as they had assigned all of their rights to those claims to a third party, plaintiff, four months prior to the filing of their action. Defendant asserted it had learned of the assignment during the course of written discovery.[1]

¶ 8 On February 22, 2013, plaintiff filed its own accounting malpractice action against defendant pursuant to the assignment. That action is the subject of this appeal. It claimed defendant was negligent and breached its contract with the Sissons by failing to file the Sissons 2009 tax return and Form 1045 [Application for Tentative Refund] until December 28, 2010, by failing to properly advise relating to the ability to file a tax return after October 15, 2010, and by being otherwise negligent and careless in representing the Sisson's interests.

¶ 9 On May 16, 2013, the court granted summary judgment to defendant in the Sissons' action, finding "no difference of material facts" and that defendant was entitled to judgment as a matter of law.

¶ 10 Defendant moved to dismiss plaintiff's accounting malpractice action under section 2-619(a)(5) of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-619(a)(5) (West 2012)) as time barred, asserting plaintiff failed to file the action within

[1] While the motion for summary judgment was pending, the Sissons requested leave to amend their complaint to add plaintiff as a party. The court initially granted the motion for leave to amend but subsequently vacated that order and denied the motion.

the two-year statute of limitations for accounting malpractice actions set forth in section 13-214.2 of the Code (735 ILCS 5/13-214.2 (West 2012)).[2] Defendant argued that the cause of action accrued on December 29, 2010, when, by Kenneth's own testimony and plaintiff's admission in its complaint, Kenneth learned of the October 15, 2010, deadline, spoke with Zhong about the missed deadline and was told by Zhong that she was aware of the deadline and hopeful the Sissons' carryback election would be accepted even though she knew of other individuals who had filed carryback elections after the deadline and had been rejected by the IRS. Defendant asserted that plaintiff stood in the Sisson's shoes as a result of the assignment agreement, plaintiff therefore had two years, until December 29, 2012, to file its action against defendant and plaintiff's action filed on February 22, 2013, was untimely.

¶ 11 Plaintiff responded, arguing its February 22, 2013, action was timely filed as the statute of limitations did not start to run on December 29, 2010, but rather on February 24, 2011, the date of the IRS letter notifying the Sissons that their request for a refund was rejected because the tax return and refund application were not timely filed. Citing *Khan v. Deutsche Bank*, 2012 IL 112219, and *Federated Industries, Inc. v. Reisin*, 402 Ill. App. 3d 23 (2010), plaintiff asserted that, in accounting malpractice actions involving

---

[2] Under section 2-619(a)(5), an action may be involuntarily dismissed if it is not filed "commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2012). Section 13-214.2 provides, in relevant part:

> "(a) Actions based upon tort, contract or otherwise against any person, partnership or corporation registered pursuant to the Illinois Public Accounting Act, as amended, or any of its employees, partners, members, officers or shareholders, for an act or omission in the performance of professional services shall be commenced within 2 years from the time the person bringing an action knew or should reasonably have known of such act or omission." 735 ILCS 5/13-214.2(a) (West 2012).

adverse decisions from the IRS, the limitations period begins to run when the taxpayer receives a formal notice issued by the IRS of that adverse decision as this is when a plaintiff knows that he has been injured and the injury was wrongfully caused. Therefore, as the IRS letter denying the Sissons' untimely request for a refund was dated February 24, 2011, plaintiff had two years from that date, until February 24, 2013, to file its action against defendant and its February 22, 2013, action was, therefore, timely.

¶ 12 In the alternative, plaintiff argued that, if defendant was correct that the claim accrued when Kenneth became aware of the missed deadline, the motion should still be denied as a question of fact existed regarding when Kenneth knew he was injured and that defendant caused the injury. In support of its response, plaintiff attached a portion of Zhong's discovery deposition, in which she testified that she first became aware that October 15, 2010, was the deadline for the Sissons' election to carryback the loss for five years in late December 2010. She stated she learned of the deadline from Kenneth, who had "recently" watched a television program mentioning that the election needed to be made by October 15. Prior to Kenneth telling her about the deadline, it was Zhong's belief that, even though the Sisson's tax returns were going to be filed late, they could still use the carryback election up to five years. She stated she did not realize that "you have to make the election with a timely filed tax return to be a valid election." Once she learned of the missed deadline from Kenneth, Zhong and another firm member investigated whether relief for the late filing was available under any IRS regulations. Zhong testified that she told Kenneth "there's a huge -- there's a big chance that ***the IRS will reject his carryback claim because we missed the filing deadline." Zhong stated

that she and Kenneth discussed filing the carryback claim "anyway [to] see if the IRS [would] accept it" and Kenneth "said go ahead. Let's file it and see if we get the refund."

¶ 13 Defendant filed a reply in support of its motion to dismiss, distinguishing *Khan* and *Federated Industries*. It argued that, unlike in those two cases where the plaintiffs did not know that know there was a problem with the tax returns and that the IRS would issues notices of deficiencies, here plaintiff [as assignee of Kenneth's rights] knew there was a problem with the return as the deadline for making the election for the carryback loss had passed when the return was filed. It asserted plaintiff, by way of assignment, was injured as of October 16, 2010, when defendant missed the deadline for claiming the tax election that would have entitled the Sissons to a five-year carryback of net operating losses and the Sissons lost that right as a matter of law for missing the filing deadline. It argued that the Sissons' and defendant's hope that the IRS might accept the untimely application did not toll the accrual of the statute of limitations. Instead, when Kenneth discovered the negligence on December 29, 2010, that injury had already occurred and the statute of limitations started to run.

¶ 14 In October 2013, the court denied the motion the motion to dismiss. Citing *Khan* and *Federated Industries*, it agreed with plaintiff that the statute of limitations for the Sissons' accounting malpractice claims began to run on February 24, 2011, when the Sissons learned the IRS rejected their application for the carryback election. The court held that plaintiff, having been assigned the Sissons' claims against defendant, timely filed its complaint on February 22, 2013, within two years of the IRS denial of the claim and it, therefore, denied defendant's motion to dismiss.

¶ 15 Defendant moved to reconsider, arguing that, unlike in *Khan* and *Federated*

Industries, where the plaintiff was unaware of a hidden deficiency in his or her tax return until the deficiency was discovered and pointed out by the IRS, plaintiff/Kenneth here knew exactly what had happened and what the penalty would be before the IRS notified the Sissons that their application for a refund carryback loss was denied. Defendant asserted the recent decision in *Kadlec v. Sumner*, 2013 IL App. (1st) 122802, was on point. In *Kadlec*, in the context of a late-filed estate tax return, the court considered when the accounting malpractice statute of limitations begins to run when a tax deadline is missed. It held that the cause of action for the late-filed estate tax return at issue began to run on the date the tax return was due rather than on the date of the IRS notice notifying the estate that penalties and interest were being assessed on the estate for its failure to timely file the return. The *Kadlec* court distinguished *Khan* and *Federated Industries* on the basis that, in *Khan* and *Federated Industries*, the plaintiffs were not aware of the accountant's negligence until the IRS reviewed the faulty tax returns and issued the plaintiffs a deficiency notice while the *Kadlec* plaintiff knew the deadline was missed and penalties would accrue before they received the IRS letter denying the refund request.

¶ 16 Pointing out that *Kadlec* was decided subsequent to the trial court's order denying the motion to dismiss, defendant argued that the decision clarified that, in cases of missed tax filing deadlines, the injury and damages occur on the date of the missed deadline and accrual is not delayed until the IRS issues an actual notice of deficiency as held in *Khan* and *Federated Industries.* It argued that, "[t]hus, the only relevant inquiry as to the accrual date is when the plaintiff had knowledge that the deadline was missed" because, once the plaintiff obtains such knowledge the statute of

limitations starts to run. Defendant asserted that plaintiff admitted in its complaint that Kenneth knew of defendant's negligence in missing the deadline as of December 29, 2010, the two-year statute of limitations started to run on that date and plaintiff's complaint filed on February 22, 2013, was, therefore, untimely.

¶ 17 Defendant attached a portion of Kenneth's discovery deposition, in which he testified that, in the latter half of December 2010, defendant sent him the Sissons' 2009 tax return and he filed it. On December 28, 2010, he received other documents from Zhong and, in the course of reviewing them, he went to the IRS website, where he saw a statement that his request for the carryback loss had had to be filed by October 15, 2010. He called Zhong the next day and told her what he'd found. Kenneth thought Zhong told him that "some other people had missed that deadline and had submitted tax returns and that they had been rejected, but that she was hopeful that ours would go through without a problem or something like that." He stated that, either during that conversation or a second conversation later in the week, Zhong told him she was aware of the deadline. He had already filed the tax return by that point and he and Zhong agreed to "just go forward and see what the IRS does."

¶ 18 On April 1, 2014, the court granted the motion to reconsider. It stated it would follow *Kadlec* "in finding that a filing deadline is different than a 'tax deficiency in a negligently prepared tax return and first discovered by the IRS.' *Kadlec*, [2013 IL App. (1st) 122802,] ¶ 29." The court found the Sissons and defendant knew that October 15, 2010, was the deadline for filing the election for the five-year carryback "by late December 2010" and "[a]t that time, the Sissons contacted [defendant] and Zhong relayed the hope that the IRS would grant exception to the missed election deadline."

The court stated that "[i]t was December 29, 2010[,] when Mr. Sisson had 'constructive knowledge' of the missed deadline that his cause of action accrued."

¶ 19 On April 15, 2014, the court amended its April 1, 2014, order to explicitly grant defendant's motion to dismiss plaintiff's action. Plaintiff filed a timely notice of appeal and on April 25, 2014, filed an amended notice of appeal challenging the court's orders granting the motion to reconsider and the motion to dismiss.

¶ 20 ANALYSIS

¶ 21 On appeal, plaintiff argues that we should reverse the trial court's orders granting defendant's motions to reconsider and to dismiss. It argues: (1) the court erred in granting the motion to reconsider and (2) the court erred in granting the motion to dismiss It is uncontested that the Sissons' 2009 tax return with their election for the carryback loss refund was prepared and filed after the October 15, 2010, deadline.

¶ 22 1. Motion to Reconsider

¶ 23 Plaintiff first challenges the court's order granting defendant's motion to reconsider the October 16, 2013 order denying defendant's motion to dismiss. The purpose of a motion to reconsider " 'is to bring to the trial court's attention newly discovered evidence not available at the time of the first hearing, changes in the law, or errors in the previous application of existing law to the facts at hand.' " *In re Marriage of Heinrich*, 2014 IL App (2d) 121333, ¶ 55 (quoting *River Village I, LLC v. Central Insurance Cos.,* 396 Ill.App.3d 480, 492 (2009)). Where, as here, a motion to reconsider was based only on the trial court's application or purported misapplication of existing law, rather than on new facts or legal theories not presented at trial, we review *de novo* the trial court's decision to grant or deny the motion. *Marriage of Heinrich*, 2014 IL App

(2d) 121333, ¶ 55.

¶ 24 In defendant's motion to dismiss, it had argued that plaintiff's complaint was untimely as the statute of limitations for the accountant malpractice claims started to run on December 29, 2010, when Kenneth learned that the deadline had been missed, more than two years before plaintiff filed its February 22, 2013, complaint. The trial court denied the motion to dismiss on the basis of the *Khan* and *Federated Industries* decisions, finding the statute of limitations in an accounting malpractice case involving a negligently prepared tax return accrued when the plaintiffs received notice from the IRS that it had found deficiencies in the tax returns. Applying this maxim, the court found plaintiff's cause of action accrued on February 24, 2011, when the IRS notified the Sissons that their application for the carryback loss refund had been rejected and plaintiff's complaint filed less than two years thereafter was timely. The court rejected defendant's attempt to distinguish *Khan* and *Federated Industries*.

¶ 25 In defendant's motion to reconsider, it again distinguished Khan and *Federated Industries* and asserted that the statute of limitations started to run when Kenneth discovered the missed deadline. It supported its argument with the *Kadlec* decision, which had been issued a month after the court's denial of the motion to dismiss and distinguished *Khan* and *Federated Industries* as defendant had in its motion to dismiss. Pointing out that *Kadlec* was filed after the court denied its motion to dismiss, defendant argued the decision clarified that, as defendant had argued in the motion to dismiss, in cases of missed tax filing deadlines such as the case at bar, the injury and damages occur on the date of the missed deadline and accrual is not delayed until the IRS issues an actual notice of deficiency as held in *Khan* and *Federated Industries*.

¶ 26 The crux of defendant's argument on reconsideration was that the trial court misapplied the *Khan* and *Federated Industries* decisions in failing to recognize that, as defendant had asserted in its motion to dismiss, the case of a missed tax filing deadline is fundamentally different from the situations addressed in *Khan* and *Federated Industries.* In *Khan* and *Federated Industries*, the plaintiffs did not know of the deficiencies in their tax returns and resulting injuries until the IRS analyzed the returns, discovered the deficiencies and notified the plaintiffs thereof. In contrast here, the impact of the missed tax deadline was an immediate injury to taxpayer that accrued as soon as the taxpayer discovered the missed deadline.

¶ 27 As plaintiff points out, *Kadlec* does not "change" the law with respect to when the statute of limitations accrues for purposes of malpractice claims involving preparation of tax returns as it applied the same discovery rule set forth in *Khan* and *Federated Industries*. *Kadlec* does, however, as defendant asserts, clarify that the application of *Khan* and *Federated Industries* in cases of missed tax filing deadlines is fundamentally different than its application in cases involving hidden tax deficiencies discovered by the IRS. It clarifies that there are situations, such as the one at bar, where the statute of limitations begins to accrue prior to the issuance of an IRS Notice of Deficiency. Citing *Kadlec* for this purpose, *i.e.*, to convince the trial court that its earlier legal conclusion/application of existing law was wrong and requesting it to reexamine its earlier decision, is an appropriate purpose for a motion to reconsider. The court, therefore, properly granted the motion to reconsider.

¶ 28 2. Motion to Dismiss

¶ 29 Turning to the substantive issue, the question is whether the court erred in

granting defendant's section 2-619(a)(5) motion to dismiss on the basis that plaintiff's accounting malpractice claims were time barred.

> "A section 2-619 motion to dismiss 'admits the legal sufficiency of the complaint and raises defects, defenses or other affirmative matters, such as the untimeliness of the complaint, which appear on the face of the complaint or are established by external submissions which act to defeat the plaintiff's claim, thus enabling the court to dismiss the complaint after considering issues of law or easily proved issues of fact.' " *Federated Industries*, 402 Ill. App. 3d at 27 (quoting *Lipinski v. Martin J. Kelly Oldsmobile, Inc.,* 325 Ill.App.3d 1139, 1144 (2001)).

Interpreting all pleadings and supporting documents in the light most favorable to the nonmoving party, the defect, defense or affirmative matter must be apparent on the face of the pleading attacked or be supported by affidavit. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004). If a complaint is filed after the running of the applicable statute of limitations, this is a valid reason for dismissal pursuant to section 2-619(a)(5). *Id*. "Defendants have the burden of proving the affirmative defense relied upon in a section 2–619 motion, and such a motion should only be granted if the record establishes that no genuine issue of material fact exists." *Id*. We review the court's order granting defendant's section 2-619(a)(5) motion to dismiss *de novo. Id.*

¶ 30 The core of the question here is the date on which the statute of limitations for the claims began to run. Following *Kadlec* and distinguishing *Khan* and *Federated Industries*, the court determined that plaintiff's cause of action accrued on December 29, 2010, when Kenneth learned of the missed deadline. As a result, it found plaintiff's

complaint filed more than two years later on February 22, 2013, was untimely. Plaintiff argues that, as held in *Khan*, "the discovery rule does not apply before actionable injury occurs" (*Khan*, 2012 IL 112219, ¶¶ 41-42) and, on December 29, 2010, Kenneth did not know if there was an actionable injury, only that there had been potential wrongful conduct. It argues that, until the IRS denied the refund, Kenneth/plaintiff could not prove the elements of his claim as he could not establish injury.

¶ 31 It is uncontested that the statute of limitations for an accounting malpractice action is two years. As set forth in section 13-214.2 of the Code, such a claim "shall be commenced within 2 years from the time the person bringing an action knew or should reasonably have known of such act or omission." 735 ILCS 5/13-214.2(a) (West 2012). It is also uncontested that, under Illinois law, the "discovery rule" governs statutes of limitations such as section 13-214(2)(a). See *Federated Industries,* 402 Ill. App. 3d at 28.

¶ 32 The effect of the discovery rule "is to postpone the start of the period of limitations until the injured party knows or reasonably should know of the injury and knows or reasonably should know that the injury was wrongfully caused." *Khan*, 2012 IL 112219, ¶ 20. "At that point, the burden is on the injured person to inquire further as to the possible existence of a cause of action." *Id*. In this way, " 'an injured person is not held to a standard of knowing the inherently unknowable [citation], yet once it reasonably appears that an injury was wrongfully caused, the party may not slumber on his rights.' " *Id*. (quoting *Nolan v. Johns–Manville Asbestos,* 85 Ill.2d 161, 170-71 (1981)).

¶ 33 Our supreme court has explained that "the term 'wrongfully caused' as used in

the discovery rule does not connote knowledge of negligent conduct or knowledge of the existence of a cause of action." *Khan*, 2012 IL 112219, ¶ 22. Instead, "[t]hat term must be viewed as a general or generic term and not as a term of art." *Id*. The court explained:

> "[T]his court has 'never suggested that plaintiffs must know the full extent of their injuries before the statute of limitations is triggered. Rather, our cases adhere to the general rule that the limitations period commences when the plaintiff is injured, rather than when the plaintiff realizes the consequences of the injury or the full extent of her injuries.' " *Id*. (quoting *Golla v. General Motors Corp.,* 167 Ill.2d 353, 364 (1995)).

" 'The question of when a party knew or reasonably should have known both of an injury and its wrongful cause is one of fact, unless the facts are undisputed and only one conclusion may be drawn from them.' " *Id*. ¶ 21 (quoting *Nolan,* 85 Ill.2d at 170-71)).

¶ 34 In *Federated* Industries, the court held that the limitations period for an accounting malpractice action based on a negligently prepared tax return begins to run when the IRS issues a notice of deficiency or when the taxpayer agrees with the IRS's proposed adjustments. *Khan*, 2012 IL 112219, ¶ 31 (citing *Federated Industries,* 402 Ill. App. 3d at 36.) In *Khan*, the supreme court held similarly, finding that the limitations period for an accounting malpractice action involving increased tax liability began to run when the IRS issued a notice of deficiency to the taxpayer. *Id*. at ¶ 45. The court explained "[r]eceipt of the notice of deficiency puts the taxpayer on notice that he has suffered an injury and that the injury was wrongfully caused." *Id*. It found that, although an IRS notice of deficiency is not a final determination of the taxpayer's damages and a

taxpayer is not fully informed as to the full extent of his injuries until he or she receives a formal assessment by the IRS, under the discovery rule, a plaintiff "may not sit on his rights, but must investigate further once alerted to an injury that may have been caused by wrongful conduct." *Id*. The court explained " 'our cases adhere to the general rule that the limitations period commences when the plaintiff is injured, rather than when the plaintiff realizes the consequences of the injury or the full extent of her injuries' [*Golla,* 167 Ill. 2d at 364]" and "[t]o permit plaintiffs to wait until the full extent of their injuries are known would read the discovery rule out of this case." *Id*.

¶ 35 In *Khan* and *Federated Industries*, the plaintiff did not know that their tax returns had been negligently prepared or that they had been misled until the IRS examined the faulty returns, discovered the deficiencies therein and notified the taxpayers/plaintiffs. Here, in contrast, the Sissons knew that they had been injured well before they received the letter from the IRS. Kenneth learned of the October 2010 deadline for filing the carryback loss election in late December 2010. He had just filed the tax return and, therefore, knew that the deadline had been missed by more than two months. The impact of missing the deadline was instantaneous as, if the election for the five year carryback loss was not filed by the deadline, it would not be accepted by the IRS. Kenneth would not know the full extent of the injury until notified of such by the IRS but, under the discovery rule, the statute of limitations is triggered when the plaintiff is injured, not when he realizes the full extent of those injuries. *Khan*, 2012 IL 112219, ¶ 22. "[W]hen a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed."

Khan, 2012 IL 112219, ¶ 21 (quoting *Nolan,* 85 Ill.2d at 171). Here, Kenneth knew or reasonably should have known on December 29, 2010, that an injury had occurred on October 16, 2010, when the deadline was missed by his accountant. The fact that the injury was wrongfully caused is obvious given that defendant, the accounting firm Kenneth had hired and relied on to prepare the tax return and carryback refund request, had not prepared the return in time to meet the filing deadline, let alone warned him of the deadline.

¶ 36 To paraphrase the court in *Kadlec*, 2013 IL App (1st) 122802, the pertinent issue in establishing the starting date for the statute of limitations in this case is the determination of when defendant's negligent conduct for failing to timely file the 2009 tax return and election for carryback loss was sufficiently discoverable such that Kenneth/plaintiff had a " 'reasonable belief that the injury was caused by wrongful conduct, thereby creating an obligation to inquire further on that issue.' " *Kadlec*, 2013 IL App (1st) 122802, ¶ 28 (quoting *SK Partners 1, LP v. Metro Consultants, Inc.*, 408 Ill. App 3d 127, 132 (2011)). Here, Kenneth's accountant arguably should have been aware of and complied with the deadline date. At the point in time when the deadline was missed, the Sissons were damaged as their request for the five-year carryback loss would no longer be accepted by the IRS. When, on December 29, 2010, Kenneth learned of the deadline date and that defendant had failed to timely file the 2009 return and application for refund before the deadline, he had knowledge that he and his wife had been injured and, at that point, he had an obligation under the discovery rule to inquire further, starting the clock on the applicable statute of limitations. Accordingly, Kenneth/plaintiff had a two-year window starting on December 29, 2010, in which to file

suit.

¶ 37 Lastly, plaintiff argues that a question of fact exists regarding the date on which Kenneth's knowledge satisfied both elements of the discovery rule, *i.e.*, that he knew he had been injured and that the injury resulted from defendant's negligent conduct. It asserts that neither Kenneth nor defendant had knowledge of the injury on December 29, 2010, as Kenneth, as a layman, is presumptively unable to discern malpractice and defendant itself did not know whether its negligence had caused injury until the IRS denied the refund request. We disagree. No question of fact exists regarding when Kenneth/plaintiff learned of the injury and that it was wrongfully caused. Both Kenneth and defendant had knowledge of the injury before the IRS issued its denial letter, albeit perhaps not of the actual extent of the loss. Plaintiff's own complaint states Kenneth learned of the deadline on December 29, 2010, after the tax return had already been filed, and as Kenneth stated in his deposition, Zhong subsequently verified to him that the deadline had passed. Zhong also told Kenneth that other applications filed after the deadline had already been rejected by the IRS. Although she was "hopeful" that the Sisson's application would be accepted, she did not suggest that it would be.

¶ 38 We find the attorney malpractice cases cited by the appellant to be inapposite. See *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240 (1994); *Butler v. Mayer, Brown & Platt*, 301 Ill. App. 3d 919 (1998). This is clearly not a case where the injured party was unaware of his injury and that his injury was the result of malpractice. Nor is this a case where the injured party would need to hire an expert witness to ascertain that malpractice occurred or who committed malpractice. To the contrary, this is a matter involving the failure to meet a clearly defined deadline by an accounting firm

entrusted with doing so. Everything Kenneth needed to know in order to be placed under constructive knowledge with the accompanying duty to investigate, he knew on December 29, 2010.

¶ 39 Accordingly, as the statute of limitations began to run on December 29, 2010, plaintiff's complaint filed more than two years thereafter on February 22, 1013, was untimely. The trial court did not err in granting defendant's motion to dismiss plaintiff's action.

¶ 40 CONCLUSION

¶ 41 For the reasons stated above, we affirm the decisions of the trial court granting defendant's motion to consider and, on reconsideration, granting defendant's motion to dismiss plaintiff' action as time barred.

¶ 42 Affirmed.