2016 IL App (1st) 153297-U

No. 1-15-3297

Third Division
December 14, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

TERRY MCEWEN and MICHAEL VITEK,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 2014 L 013341
	)	
ULMER & BERNE LLP, KENNETH BERG,	)	Honorable
and SUZANNE RITZLER,	)	Margaret A. Brennan,
	)	Judge, presiding.
Defendants-Appellees.	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Plaintiffs waived any challenge to the applicability of section 13-214.3 of the Code of Civil Procedure (735 ILCS 5/13-214.3 (West 2014)) where they failed to raise the issue before their motion for reconsideration. The limitations period for plaintiffs' claims began when they should have reasonably known that their injuries were wrongfully caused, despite not knowing the specific defendants responsible.

¶ 2 Plaintiffs Terry McEwen and Michael Vitek filed a complaint against Ulmer & Berne LLP, a law firm, and two of its attorneys, Kenneth Berg and Suzanne Ritzler, alleging, *inter alia*, that the attorneys had aided and abetted plaintiffs' former business partners in a

conspiracy to remove plaintiffs from a joint venture. Defendants filed a motion to dismiss the complaint on statute of limitations grounds pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)), which the trial court granted. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This appeal arises from the dismissal of plaintiffs' complaint against defendants. Before considering the issues raised on appeal, we first set forth the relevant facts as alleged in the complaint.

¶ 5 A. The Formation of Three Bridges

¶ 6 In early 2011, Vitek was the president and chief operating officer of X-Change Financial Access, LLC ("XFA"). Vitek and Robert Aaron, the chairman of XFA's advisory board, developed a business concept for a securities trading firm, Three Bridges Securities, Inc. ("TBS"), that would act as a wholly owned-subsidiary of Three Bridges Capital, LLC ("Three Bridges"). Vitek and Aaron then recruited McEwen to be Three Bridges' largest investor, its senior officer, and TBS's chairman. In the summer of 2011, Vitek, Aaron, and McEwen offered an opportunity to invest in Three Bridges to several individuals who worked or had worked for XFA. These individuals included Bill Ellington and Pete Scheffler, both managing members of XFA, and Fred Bethon, Tom Raimondi, and Vincent Favaro (hereafter collectively referred to as XFA members).

¶ 7 Three Bridges operating agreement established that the company would be managed by all of its members, typically requiring a simple majority vote to approve actions. However, for significant actions like an amendment to the agreement or the removal of a member, the agreement of at least 60% of the members was required. Additionally, the agreement

indicated that members could only be removed "for cause." Vitek, Aaron, and McEwen served as the company's advisory board, which gave "high-level guidance to Three Bridges."

¶ 8 In December 2011, Three Bridges caused its subsidiary TBS to acquire a securities broker with a dormant Financial Institutions Regulatory Authority ("FINRA") broker-dealer license in order to allow TBS to begin trading securities. Favaro, having previous experience with FINRA licensing, assumed responsibility for gaining approval for the acquisition of the broker and the transfer of its license. Although he told plaintiffs that he submitted the necessary application to FINRA in January 2012, he did not actually do so until March of 2012. He repeatedly assured plaintiffs that the licensing approval was imminent, including at times before the application had been submitted.

¶ 9 B. Initial Conflict

¶ 10 In February 2012, Ellington approached Vitek and asked to be added to Three Bridges' advisory board. Vitek gained the consent of the other members and circulated a resolution approving Ellington's addition to the board on February 8. On February 10, Vitek's employment at XFA was terminated. Subsequently, Ellington and Scheffler called McEwen and falsely informed him that Vitek had engaged in improper conduct at XFA. McEwen replied that he did not believe the accusations. The XFA members made similar accusations against Vitek to Aaron.

¶ 11 According to the complaint, the XFA members then began to take multiple steps[1] to distance plaintiffs from Three Bridges and prevent their participation in the management of the company. Ellington also threatened and eventually brought a lawsuit against Vitek

[1] Plaintiffs' complaint lists numerous allegations of financial and managerial misconduct by the XFA members; however, as all of the actions took place prior to the hiring of defendants, the details of these actions are not relevant to the current appeal.

regarding a large loan he claimed to have given to Vitek. Ellington alleged that he had provided Vitek's share of the start-up investment for Three Bridges and demanded that Vitek surrender his membership to satisfy the loan.

¶ 12 In the weeks after Vitek's termination from XFA, plaintiffs "began to realize that they were being excluded from the management and decision-making process of Three Bridges" and sent numerous emails raising questions about the company's operation. On April 17, 2012, the XFA members responded by demanding that plaintiffs provide numerous documents within two days. They claimed that the documents were required for the FINRA application and that the agency was threatening to deny Three Bridges' application. On the following day, plaintiffs again emailed the XFA members demanding explanations about Three Bridges' operation and the FINRA application. After receiving plaintiffs' emails, the XFA members exchanged emails amongst themselves. Ellington emailed that they should "shut it down and move to XFA" in order to exclude Vitek, McEwen, and Aaron. Raimondi agreed and indicated that he and Favaro had already developed a plan to establish a similar venture at XFA.

¶ 13 C. XFA Members Retain Defendants and Dissolution

¶ 14 The XFA members then retained Ulmer Berne as counsel to assist them in their plan to remove plaintiffs from Three Bridges. The firm was hired by Three Bridges, rather than by the XFA members personally, so that the firm could be paid from Three Bridges' funds. Berg drafted a retention letter stating that Ulmer Berne would represent Three Bridges in amending its operating agreement, and sent it to Scheffler indicating that it needed to be signed by an authorized manager of the company and asking "Is that a problem?" Scheffler signed the retention letter on behalf of Three Bridges, despite lacking the authority to do so.

Scheffler and Ellington then caused Three Bridges to send a retainer check to the law firm without any authorization by the members of Three Bridges. Berg and Ritzler began to research ways to amend the operating agreement to allow removal without cause. Although Ritzler indicated to Berg that the amendment could not occur without a meeting with all of Three Bridges' members, Berg insisted that it could. Berg remained in communication with the XFA members and did not include Vitek and McEwen in the discussions. He informed the XFA members to mark their emails with "Attorney-Client Privilege" to protect them from discovery.

¶ 15 Eventually Ritzler and Berg concluded that the operating agreement could not be amended without notice to Vitek and McEwen. In a conference call on the morning of April 30, 2012, defendants and the XFA members discussed a new plan to shut down Three Bridges, sell TBS to XFA, and then have XFA start its own broker-dealer venture.

¶ 16 A Three Bridges' members meeting was scheduled for that afternoon, but Vitek and McEwen had requested a rescheduling due to conflicts. Berg counseled the XFA members to have the meeting anyway. The XFA members went forward with the meeting, despite the absence of Vitek and McEwen. They voted to retain Ulmer Berne as Three Bridges' counsel. Bethon later prepared minutes for the meeting that stated that the law firm had been retained to handle the "Broker Dealer from a FINRA perspective." It also stated that Scheffler was directed to sign a retainer agreement "ASAP" despite having already done so a week before. The minutes were approved by Berg and then sent to Vitek and McEwen.

¶ 17 On April 30, 2012, Berg and Ritzler also prepared an email to McEwen on behalf of Bethon, responding to one of McEwen's emails requesting, *inter alia*, the additional information allegedly requested by FINRA. The prepared email stated that McEwen's

requests were unclear, and that if he did not provide clarification it would be viewed as a voluntary withdrawal from Three Bridges under its operating agreement.

¶ 18 On May 1, 2012, Berg emailed Scheffler, Bethon, and Ritzler instructing the XFA members to (1) inform FINRA that Three Bridges cannot obtain the required information, (2) check with Three Bridges' accountant about the consequences of dissolution, and (3) notice a meeting to dissolve the company. He also instructed them to consult with him before taking steps to acquire another broker-dealer. Finally, Berg acknowledged that the steps the XFA members had already taken in preparing to acquire another broker-dealer were a breach of fiduciary duty. However, Berg and Ulmer Berne never informed Vitek or McEwen of the XFA members' actions.

¶ 19 Berg and Ritzler prepared a request for a special meeting on May 4, 2012, and a notice of the meeting. Both indicated that the meeting was intended "to discuss the status of discussions with FINRA *** and the appropriate response to the negative feedback received from FINRA regarding such licensing, including voting to approve a response." On May 3, the attorneys prepared an agenda for the meeting, which included discussion of the steps necessary to dissolve Three Bridges and potential consequences.

¶ 20 On May 3, Vitek informed the other members of Three Bridges that he would not attend the meeting because he believed he had provided all the information necessary to respond to FINRA and because he was travelling. The meeting was held at 9:30 a.m. on May 4, 2012 with McEwen, defendants, and all of the XFA members present except for Ellington. The members present voted to reconvene the meeting an hour later to await Ellington's arrival. When the meeting reconvened Bethon, Raimondi, and Favaro were the only members present, along with the attorneys. Despite lacking a quorum, the three members voted to

reconvene that afternoon. That afternoon, the XFA members again met with the attorneys present and voted to withdraw the FINRA application. They did not vote on the dissolution of Three Bridges. Following the meeting, Berg emailed all Three Bridges' members a draft of the resolution to withdraw the application. Favaro instructed a consultant working on the application to notify FINRA of the withdrawal.

¶ 21 After learning of the resolution to withdraw the application, Vitek emailed Bethon and Favaro protesting the special meeting's notice and stating that all necessary information had been provided. He demanded copies of all communications with FINRA. Both Vitek and McEwen claimed that the vote to withdraw the application was ineffective.

¶ 22 Berg and Ritzler informed the XFA members that another special meeting was required and prepared a new request for a special meeting to ratify the actions taken at the May 4 meeting and to dissolve Three Bridges and TBS. Ritzler drafted a resolution to dissolve Three Bridges.

¶ 23 On May 16, 2012, Vitek's attorney sent a letter to the XFA members protesting the May 4 meeting and the proposed items in the notice for the next meeting. Vitek and Berg both received a copy of the letter.

¶ 24 On May 17, 2012, the final meeting of Three Bridges' members was attended by all members as well as Berg and Ritzler. Over Vitek's objection, the XFA members voted to ratify the withdrawal of the FINRA application and to dissolve Three Bridges. Following the meeting, the XFA members, with the assistance of defendants, moved Three Bridges' operations, equipment, and other assets to XFA.

¶ 25 D. Plaintiff's Complaint

¶ 26 Subsequently, in Ellington's lawsuit regarding the alleged loan to Vitek, Vitek filed counterclaims against Ellington and third-party claims against the other XFA members regarding Three Bridges. During discovery in August 2014, plaintiffs obtained Ulmer Berne's documents regarding Three Bridges.

¶ 27 On December 29, 2014, plaintiffs filed a 10-count complaint against defendants alleging: (1) breach of fiduciary duty; (2) aiding and abetting breach of fiduciary duties; (3) fraudulent concealment; (4) fraud; (5) conspiracy to defraud; (6) aiding and abetting conspiracy to defraud; (7) conspiracy to breach fiduciary duties; (8) aiding and abetting breach of good faith and fair dealing; (9) malpractice to plaintiffs personally; and (10) derivative malpractice to Three Bridges.

¶ 28 Defendants filed a motion to dismiss plaintiffs' complaint pursuant to section 2-619 of the Code. 735 ILCS 5/2-619 (West 2014). They argued that plaintiffs had filed their complaint outside of the two-year statute of limitations applicable to claims against attorneys. They asserted that plaintiffs had actual knowledge of any alleged injury by May 17, 2012. Defendants specifically argued that the discovery rule and fraudulent concealment doctrines were inapplicable. Plaintiffs' response argued that the limitation period did not begin running until they received defendants' files in August 2014. They did not raise any issue of fraudulent concealment and did not argue that the two-year limitation period set forth in section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 2014)) was inapplicable. After oral arguments, the trial court granted defendants' motion and dismissed the complaint.

¶ 29 Plaintiffs subsequently filed a motion for reconsideration arguing for the first time that the two-year limitation period set forth in section 13-214.3 was inapplicable. They also

argued that fraudulent concealment and equitable tolling should delay the start of the limitation period. The trial court denied plaintiffs' motion.

¶ 30 II. ANALYSIS

¶ 31 A. Standard of Review

¶ 32 Defendants brought their motion to dismiss plaintiffs' complaint pursuant to subsection 2-619(a)(5) of the Code (735 ILCS 2-619(a)(5) (West 2014)), which provides for the dismissal of an action that was not commenced within the time limited by law. *Caywood v. Gossett*, 382 Ill. App. 3d 124, 128 (2008). A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint, but asserts affirmative matters outside of the complaint. *Hoover v. Country Mutual Insurance Co.*, 2012 IL App (1st) 110939, ¶ 31. When ruling on a section 2-619 motion to dismiss, the court must view all pleadings in the light most favorable to the non-moving party (*Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8), and accept all well-pleaded facts as true (*Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31). The court should grant a section 2-619 motion if, "after construing the documents in support of and in opposition to the motion in the light most favorable to the nonmoving party, there are no disputed issues of material fact." *Hoover*, 2012 IL App (1st) 110939, ¶ 31 (citing *Whetstone v. Sooter*, 325 Ill. App. 3d 225, 229 (2001)). We review the dismissal of a cause of action pursuant to section 2-619 *de novo*. *Id.* In reviewing the circuit court's decisions on appeal, we "review[] the judgment, not the reasoning, of the trial court, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24.

¶ 33 B. The Applicable Statute

¶ 34 Plaintiffs first contend that the trial court erred in applying the two-year limitation period set forth in section 13-214.3 of the Code, which applies to actions arising against an attorney regarding the "performance of professional services." See 735 ILCS 5/13-214.3(b) (West 2014). They argue that defendants fraudulently concealed the alleged conspiracy and therefore the five-year period set forth in section 13-215 of the Code (735 ILCS 5/13-215 (West 2014)) is the applicable limitations period. Alternatively, they argue that several counts in their complaint allege that defendants "created a sham attorney-client relationship" to aid the XFA members in "defrauding" plaintiffs and thus do not arise from the performance of professional services. As such, plaintiffs assert that section 13-214.3 of the Code is inapplicable to some of their claims, and that the trial court should have applied the general five-year limitation period set forth in section 13-205. See 735 ILCS 5/13-205 (West 2014).

¶ 35 Defendants respond that plaintiffs did not raise the applicability of section 13-214.3 in their response to the motion to dismiss or during oral arguments on the motion, instead challenging the statute's application for the first time in their motion to reconsider. Defendants argue that plaintiffs have consequently waived any such challenge on appeal.

¶ 36 The "purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law." *Pence v. Northeast Illinois Regional Commuter Railroad Corp.*, 398 Ill. App. 3d 13, 16 (2010). There are a number of decisions holding that arguments raised for the first time in a motion to reconsider are deemed forfeited. See, *e.g.*, *American Chartered Bank v. USMDS, Inc*., 2013 IL App (3d) 120397, ¶ 13 ("Issues cannot be raised for the first time in the trial court in a motion to

reconsider and issues raised for the first time in a motion to reconsider cannot be raised on appeal."); see also *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶¶ 35-37. Still, there is also authority for the proposition that a circuit court has discretion to consider a new issue raised for the first time in a motion to reconsider, but only when a party has a reasonable explanation for why it did not raise the issue earlier in the proceedings. *In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶ 41; *Delgatto v. Brandon Associates, Ltd.*, 131 Ill. 2d 183, 195 (1989). Here, defendants have not provided a reasonable explanation for why they did not raise this issue earlier in the proceedings. Accordingly, they have waived any argument that section 13-214.3 was inapplicable on appeal.

¶ 37 Plaintiffs argue that the trial court addressed the merits of their arguments when it ruled on their motion to reconsider, and thus the arguments should not be forfeited. They cite *In re Marriage of Ostrander*, 2015 IL App (3d) 130755, ¶ 18, for the proposition that we should presume that the trial court found a reasonable explanation for why plaintiffs failed to raise the applicability of section 13-214.3 prior to their motion for reconsideration. We disagree. The appellate court in *Ostrander* made no mention of a presumption. Instead, the court reviewed the record before it and "assume[d] the court found there to be a reasonable explanation for why the issue was not raised earlier." *Id.* Having reviewed the record in this case, we find no reason to make the same assumption. Plaintiffs have offered no explanation for their failure to contest the applicability of section 13-214.3's two-year limitations period until their motion to reconsider. Accordingly, they have waived any such challenge.

¶ 38 C. The Discovery Rule

¶ 39 Plaintiffs next contend that even under the application of section 13-214.3's limitation period their complaint was timely because under the discovery rule, the two-year period did not begin to run until August 2014, when they discovered defendants' role in the alleged conspiracy. Defendants respond that the trial court correctly found that plaintiffs had or should have had knowledge of the any wrongfully caused injury on May 17, 2012.

¶ 40 Subsection 13-214.3(b) requires lawsuits "against an attorney arising out of an act or omission in the performance of professional services" to be brought "within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2014). The subsection limits lawsuits pertaining to any attorney's professional services, not just lawsuits brought by the attorney's own clients. See *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 19.

¶ 41 The rigid bar imposed by a statute of limitations is balanced by the discovery rule, which tolls the beginning of a limitation period "until the plaintiff knew or reasonably should have known of the injury and that it may have been wrongfully caused." *Dancor International, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 672 (1997). Notably, the discovery rule does not rely solely on a potential plaintiff's actual knowledge, but rather, it asks whether the individual reasonably should have known of a wrongfully caused injury. *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (2011). Once the facts are such that a reasonable party should have known that an injury was wrongfully caused, an obligation arises "to inquire further on that issue." *Dancor*, 288 Ill. App. 3d at 673. A party knows or reasonably should know that an injury is "wrongfully caused" when he or she obtains sufficient information to put any reasonable person on inquiry to resolve whether legally actionable conduct occurred. *Hoffman v. Orthopedic Systems, Inc.*, 327 Ill. App. 3d

1004, 1011 (2002). Importantly, under the discovery rule, our concern is not whether the plaintiff should have known that a specific defendant wrongfully caused an injury or that such an injury was legally actionable. *Castello v. Kalis*, 352 Ill. App. 3d 736, 744 (2004). Typically, when a party knew or reasonably should have known that an injury was wrongfully caused is a question of fact; however, if only one conclusion can be reasonably reached from the undisputed facts then the determination may be viewed as a question of law. See *Steinmetz v. Wolgamot*, 2013 IL App (1st) 121375, ¶ 39.

¶ 42 We find several prior cases to be instructive for the case at bar. In *Janousek v. Katten Muchin Rosenman, LLP*, 2015 IL App (1st) 142989, the plaintiff alleged that his former partners fired him and subsequently blocked him out of future opportunities. *Id.* ¶ 3. He sued the former partners and, three years later, sued the company's attorneys, alleging that those attorneys had (1) advised the former partners on freezing the plaintiff out of the management and ownership of the company, (2) advised them to form a competing company, (3) assisted the partners in forming the new company, and (4) advised and permitted them to allow the original company to pay for their representation and advice. *Id.* ¶ 6. This court held that the plaintiff had waited too long to sue the attorneys because he knew that he had been injured, "even though he may not yet have known that [the attorneys'] representation was partly responsible and that their conduct gave rise to a cause of action." *Id.* ¶ 21. We reasoned that the plaintiff's claim that his partners had defrauded him "cannot be separated" from the claim that the attorneys had failed to protect him from that fraud. *Id.*

¶ 43 In *Carlson v. Fish*, the plaintiff settled a dispute with his two business partners but later determined that the settlement was inadequate and that the other partners had defrauded him. *Carlson*, 2015 IL App (1st) 140526, ¶¶ 9, 17. More than two years later, the plaintiff filed a

malpractice complaint against his attorneys for their representation during the settlement negotiations. *Id.* ¶ 17. The circuit court dismissed the complaint on statute of limitations grounds, finding that the cause of action accrued when the plaintiff knew he had been injured and identified his former partners as the cause, an event more than two years before he filed his malpractice claim. *Id.* ¶ 19. On appeal, the plaintiff argued the discovery rule suspended the statute of limitations during his investigation of any claims against the former partners. *Id.* ¶ 24. This court disagreed, holding that the plaintiff's knowledge that he had been injured and that the injury was wrongfully caused, even if he did not know that his lawyers' representation was partially responsible or gave rise to a legal malpractice claim, started the statute of limitations against them. *Id.* ¶ 39. We reasoned, "In short, [the plaintiff's] identification of one wrongful cause of his injuries initiates his limitations period as to all other causes, particularly when, as here, he claims his partners engaged in fraud and the defendants failed to protect him from fraud, those claims are inseparable." *Id.*

¶ 44 Taking the allegations of plaintiffs' complaint to be true, plaintiffs "began to realize that they were being excluded from the management and decision-making process of Three Bridges" as early as March 2012. With plaintiffs' suspicions aroused, they later received the minutes of the April 30 meeting that indicated that defendants' had been retained despite plaintiffs' absence from the meeting. Following the contested May 4 meeting, plaintiffs received a draft resolution for withdrawing the FINRA application that was critical to Three Bridges' successful operation. Both plaintiffs contested the vote to withdraw the application as ineffective. Finally, on May 17, 2012, plaintiffs, the XFA members, and defendants were all present at the meeting in which the XFA members voted to ratify the application's withdrawal and to dissolve Three Bridges and complete the alleged conspiracy which caused

plaintiffs' asserted injuries. As plaintiffs were present at the meeting at which Three Bridges was dissolved based on the XFA members' votes, clearly they had actual knowledge that the XFA members were the cause of the company's dissolution and the alleged resulting injuries. Given their suspicions of the XFA member's actions as well as their claims that the members' vote to withdraw the FINRA application was ineffective, the only reasonable conclusion is that plaintiffs at the very least should have known that the injuries might be wrongfully caused.

¶ 45 We note that one could very well make the argument that the retention of defendants' representation without plaintiffs' knowledge and their silent, acquiescing presence at the meeting in which Three Bridges was dismantled would have put a reasonable individual on inquiry notice that the attorneys may have been a part of the XFA members' wrongful actions. However, we need not determine whether that evidence was sufficient as a matter of law to commence the statute of limitations. As explained in *Janousek* and *Carlson*, the identification of one cause of a wrongful injury commences the statute of limitations as to all other causes the identified injuries. *Janousek*, 2015 IL App (1st) 142989, ¶ 21; *Carlson*, 2015 IL App (1st) 140526, ¶ 39. As in those cases, plaintiffs' claims that defendants assisted their former partners or failed to protect them against the partners' actions are inseparable from plaintiffs' claims against the partners themselves. Accordingly, when plaintiffs had actual knowledge that the XFA members may have wrongfully injured them on May 17, 2012, they had an obligation to inquire into the injuries and determine whether other causes, including defendants' actions or inaction, existed. We therefore find, as the trial court found, that the two-year limitation period began on May 17, 2012. Plaintiffs did not file their complaint until

December 29, 2014, over two years and seven months later. Consequently, the trial court correctly dismissed the complaint as time-barred.

¶ 46 Plaintiffs cite *Mitsias v. I-Flow Corp.*, 2011 IL APP (1st) 101126, for the proposition that they were not obliged to "know the unknowable." In *Mitsias*, following shoulder surgery, the plaintiff experienced severe shoulder pain and doctors diagnosed a condition that caused the destruction of cartilage. *Id.* ¶ 6. The plaintiff sued the surgeon and the hospital where the surgery occurred, alleging medical malpractice. *Id.* ¶ 7. During the deposition of a physician, the plaintiff learned, six years after her surgery, that research had uncovered a link between the pain pump used during her surgery and cartilage destruction. *Id.* ¶ 8. Plaintiff voluntarily dismissed her complaint and refiled, adding product liability claims against the pain pump's manufacturer. *Id.* ¶ 10. The trial court granted the product liability defendants' motions to dismiss plaintiff's complaint as untimely, finding that the statute of limitations on the medical malpractice claim and the products liability claim started at the same time, when plaintiff knew she had been injured and that the injury had been wrongfully caused. *Id.* ¶ 14. The appellate court reversed, finding that "there is no question that plaintiff could not have known of any potential products liability cause of action against the pain pump manufacturers while the causal link between her injury and the pain pump used upon her was not scientifically discoverable." It continued noting, "[O]ur supreme court has expressed concern that plaintiffs should not be 'held to a standard of knowing the inherently unknowable.' " *Id.* ¶ 29 (quoting *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171(1981)).

¶ 47 Unlike in *Mitsias* where scientific research revealed a claim otherwise unknown, plaintiffs' claims were not "unknowable." Plaintiffs do not claim that defendants were discovered as the cause of their injuries as a result of some newly discovered scientific

technique. As we stated in *Heredia v. O'Brien*, 2015 IL App (1st) 141952, ¶ 35, the holding in *Mitsias* is limited to where the potential wrongful cause was "inherently unknowable," not where the discovery was merely difficult. Plaintiffs do not allege that it was scientifically impossible in May 2012 to discover that defendants were responsible for their injury. Hence, we find *Mitsias* to be inapposite to the case at bar.

¶ 48 III. CONCLUSION

¶ 49 For the foregoing reasons, we find that plaintiffs' have waived any challenge to the application of subsection 13-214.3(b)'s two-year statute of limitations and that the limitation period began to run on May 17, 2012, when plaintiffs should reasonably have known that their injuries were wrongfully caused. Accordingly, we affirm the decision of the circuit court of Cook County granting defendant's motion to dismiss.

¶ 50 Affirmed.