2012 IL App (2d) 110752-U
No. 2-11-0752
Order filed April 30, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

VIOLET RADWILL, as Administrator of the Estate of Richard Radwill,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 11-L-185
MANOR CARE OF WESTMONT, IL, LLC,	)	Honorable Kenneth L. Popejoy,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment.

ORDER

Held: The trial court properly dismissed plaintiff's complaint as time-barred: the complaint was filed beyond the two-year limitations period that began when the decedent died (not when plaintiff later obtained a doctor's opinion that negligence occurred), and the fact that an earlier complaint was dismissed without prejudice did not mean that any new complaint would be timely if filed within the four-year repose period.

¶ 1 Plaintiff, Violet Radwill, as the administrator of the estate of her husband, Richard Radwill, filed a three-count complaint against defendant, Manor Care of Westmont, IL, LLC, after Richard died while under defendant's care. Defendant moved to dismiss the complaint, arguing that the complaint was barred by the applicable two-year statute of limitations. The trial court granted the

motion as to the first two counts and entered a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Plaintiff timely appeals from that dismissal. We affirm.

¶ 2 According to plaintiff's complaint, which was filed February 18, 2011, Richard was placed in defendant's care on December 29, 2006. Defendant failed to treat Richard for pneumonia, and he died on February 19, 2007.

¶ 3 In the first count of her three-count complaint, plaintiff brought a claim for Richard's injuries under the Survival Act (755 ILCS 5/art. 27-6 (West 2010)). Plaintiff contended that, while Richard was in defendant's care, defendant failed to properly monitor Richard, order an x-ray and start antibiotics to treat pneumonia, obtain sufficient and properly trained professionals who could attend to Richard's needs, and adhere to regulations of the United States Department of Health and Human Services and the Illinois Department of Public Health that concerned the assessment and treatment of patients within defendant's care. Because of these negligent acts and/or omissions, Richard suffered with untreated pneumonia. On January 26, 2007, Richard was discharged from defendant's care and went home, where plaintiff continued to care for him. The very next day Richard was taken by ambulance to the hospital, where he underwent aggressive treatment for pneumonia. Given defendant's failure to properly care for Richard, this treatment proved unsuccessful, and Richard died. But for the negligent treatment Richard received from defendant, he would have survived.

¶ 4 In the second count of her complaint, plaintiff brought a claim under the Wrongful Death Act (740 ILCS 180/arts. 1, 2 (West 2010)). Plaintiff alleged that, because of Richard's death, both she and Richard's two sons have suffered a loss of companionship and loss of society.

¶ 5 In the third count of her complaint, plaintiff alleged that defendant breached their agreement to provide Richard high quality care. In fact, plaintiff alleged that defendant failed to give Richard basic care and treatment.

¶ 6 Attached to plaintiff's complaint was a letter from Dr. Ralph W. Everson. In this letter, which is dated July 16, 2009, Everson stated that defendant's primary care physician failed to timely diagnose and treat Richard for pneumonia, that the failure to order a chest x-ray and start antibiotics deviated from the standard of care, and that, because of defendant's negligence, Richard was so ill that the hospital could not treat him.

¶ 7 Also attached to plaintiff's complaint was a trial court order entered on July 16, 2009. In that order the trial court dismissed plaintiff's complaint in case No. 09-L-176, which pertained to the same events.[1] That order stated:

> "1) The *pro se* complaints filed by [plaintiff] are void and therefore dismissed but dismissed without prejudice to the estate of Richard Radwill to file a complaint against the defendants in the future.
>
> 2) The motions of [defendants] are moot based on the dismissal of the *pro se* complaint."

¶ 8 Defendant filed an answer to the third count and filed a motion to dismiss the first and second counts (see 735 ILCS 5/2-619(a)(5) (West 2010)). In the motion to dismiss, defendant argued that plaintiff's original complaint was a nullity, as she was not authorized to represent the legal interests of Richard's estate. Given that the original complaint was a nullity, there was no suit on file when

[1]In that complaint, plaintiff sued defendant in addition to Advocate Good Samaritan Hospital and Dr. Jerrold Simon.

plaintiff filed the February 18, 2011, complaint. Thus, defendant claimed, the February 18, 2011, complaint was untimely, as it was filed after the applicable two-year limitations period expired. See 735 ILCS 5/13-212(a) (West 2010).

¶ 9 In response, plaintiff claimed that, because the original complaint was dismissed after the two-year limitations period had expired, and because the court dismissed the original complaint without prejudice, she could, pursuant to section 13-212(a) of the Code of Civil Procedure (Code) (735 ILCS 5/13-212(a) (West 2010)), file suit within the four-year period of repose. Accordingly, because plaintiff's second complaint was filed within four years after Richard's death, plaintiff claimed that it was timely.

¶ 10 The trial court dismissed with prejudice the first and second counts of plaintiff's February 18, 2011, complaint, finding, among other things, that the complaint was not filed within the two-year limitations period. Because the third count of plaintiff's complaint had not been dismissed, the trial court entered a finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 11 At issue in this appeal is whether the dismissal of the first and second counts of plaintiff's complaint was proper. Section 13-212(a) of the Code, which delineates the applicable periods of limitations and repose at issue here, provides:

> "[N]o action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall

such action be brought more than 4 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."[2] 735 ILCS 5/13-212(a) (West 2010).

¶ 12 Section 2-619(a)(5) of the Code authorizes a court to dismiss a complaint if the complaint was "not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2010). A motion to dismiss a complaint under section 2-619(a)(5) admits the legal sufficiency of the complaint, along with all well-pleaded facts and the inferences drawn therefrom. *Sorce v. Armstrong*, 399 Ill. App. 3d 1097, 1098 (2010). If there is a genuine issue of material fact, the court should deny the motion. *Goran v. Glieberman*, 276 Ill. App. 3d 590, 592 (1995). We review *de novo* dismissals under section 2-619(a)(5). *Alvarez v. Pappas*, 229 Ill. 2d 217, 220 (2008).

¶ 13 Here, as noted above, plaintiff had two years to file claims against defendant that concerned Richard's wrongful death and the injuries Richard suffered while in defendant's care. The question is when did those two years begin to run. Under the "discovery rule," the limitations period starts when a person knows or reasonably should know of his injury and also knows or reasonably should

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[2]Although courts have construed section 13-212(a) of the Code as applying to only physicians, dentists, registered nurses, or hospitals, and, thus, it may appear as if the periods of limitation and repose in section 13-212(a) do not apply to defendant, an assisted living facility (see *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill. 2d 76, 82 (1994)), plaintiff alleged in her complaint that defendant "individually and through its agents, servants, and employees" was guilty of the specified negligently performed medical acts. Given that and the fact that the parties do not dispute that section 13-212(a) applies, we resolve the issue raised based on the periods of limitation and repose in section 13-212(a).

know that it was wrongfully caused. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981); *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981). However, to be on notice that an injury was wrongfully caused, a person need not know that negligence occurred. *Knox College*, 88 Ill. 2d at 415. All that is needed is "sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Id.* at 416. When a plaintiff acquired such notice is ordinarily a question of fact, but it becomes one of law if the undisputed facts lead to a single conclusion. *Wells v. Travis*, 284 Ill. App. 3d 282, 286 (1996).

¶ 14 Here, plaintiff's claims arose on February 19, 2007, when Richard died as a result of the delayed diagnosis of and treatment for pneumonia. Thus, plaintiff's present complaint, which was filed in February 2011, more than two years after the injury itself, is untimely.

¶ 15 Plaintiff nevertheless argues that her complaint is timely because, given the trial court's July 16, 2009, order, which dismissed plaintiff's original complaint without prejudice, she claims that she could file her complaint within the four-year period of repose. We disagree.

¶ 16 As defendant notes on appeal, nothing in the trial court's July 16, 2009, order indicates that the statute of repose applied in this case and that plaintiff would have four years from Richard's death to file a complaint. Rather, a fair reading of the trial court's order indicates that, from the court's perspective, plaintiff could file another complaint in the future if she wished. The mere fact that plaintiff could file a complaint in the future does not mean that any complaint she would file would be viable and not subject to dismissal. Indeed, the trial court would have overstepped its authority if, when it dismissed plaintiff's complaint without prejudice, the court meant that any subsequent complaint plaintiff filed would not be subject to dismissal for being barred by the statute of limitations; the bar of the statute of limitations does not go to the trial court's jurisdiction but,

rather, is an affirmative defense that a defendant may raise or waive. *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 413 (2009).

¶ 17 Plaintiff next argues that under our opinion in *Neade v. Engel*, 277 Ill. App. 3d 1004 (1996), the limitations period did not start until she received the letter from Everson on July 16, 2009. Thus, because her February 18, 2011, complaint was filed within two years after she received that letter, plaintiff claims that her February 18, 2011, complaint is timely.

¶ 18 In *Neade*, the plaintiff sued one physician less than two years after the decedent's death. She did not sue the defendant, another physician, until she learned the results of an expert's discovery deposition more than two years after the decedent died. The trial court dismissed the amended complaint against the defendant, holding that the limitations period started to run with the decedent's death. *Id.* at 1007.

¶ 19 In reversing, we observed that the defendant himself had obstructed the plaintiff's attempts to ascertain whether she had a cause of action against him. The defendant had been subpoenaed for a deposition scheduled less than two years after the decedent's death, but he refused to appear until after the two years expired. Also, according to the plaintiff, the defendant provided inaccurate information at the deposition in order to prevent her from discovering a claim against him. *Id.* at 1006.

¶ 20 *Neade* does not apply here. First, unlike in *Neade*, a case where a particular defendant's "misstatement, concealment, or fraud" caused the plaintiff to fail to discover that the defendant may have wrongfully caused the injury (*Wells*, 284 Ill. App. 3d at 286 (citing *Neade*, 277 Ill. App. 3d at 1005-06)), nothing in the record before us indicates that defendant did anything to prevent plaintiff from discovering what purported negligent acts performed by defendant led to Richard's death.

¶ 21 Moreover, we find unfounded plaintiff's claim based on *Neade* that the limitations period should run from the date of Everson's letter, when she allegedly knew for certain that defendant engaged in negligent acts, and not the date of Richard's death. Plaintiff seems to overstate what is needed to start the limitations period running. Courts regularly speak of when a party "knows" that his injury "was wrongfully caused" (*Knox College*, 88 Ill. 2d at 415), but they caution that these terms of art must not be taken too literally. Thus, to know that one's injury has been wrongfully caused, one need only have sufficient information about the injury and its cause to be put on inquiry to determine whether actionable conduct is involved. *Id.* at 416; *Wells*, 284 Ill. App. 3d at 288-89; *Saunders v. Klungboonkrong*, 150 Ill. App. 3d 56, 60 (1986). Certainty that negligence occurred is not required. *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 170-71 (1981). Thus, a cause of action may accrue before any expert has concluded that someone did breach the applicable standard of care.

¶ 22 From these principles, it follows that plaintiff may not avoid the statute of limitations merely by pointing out that it was not until July 16, 2009, that she had an authoritative statement from an expert that negligence caused Richard's death. The duty to inquire started on February 19, 2007, when Richard died. By this time, given the circumstances of Richard's death, plaintiff already had sufficient information to put a reasonable person on notice that Richard's death may have been wrongfully caused. Indeed, plaintiff admits as much in her brief when she states that "[a]t the time the matter was dismissed, the two year statute of limitations would have necessarily run because [Richard] died on February 19, 2007, twenty-nine months prior to the dismissal." Given all of the above, plaintiff's February 18, 2011, complaint, filed more than two years after Richard's death, is untimely as a matter of law, and the trial court properly dismissed it.

¶ 23 For these reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 24 Affirmed.