2017 IL App (2d) 161106-U
No. 2-16-1106
Order filed September 14, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MICHELLE TUCSEK,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 16-LA-294
	)	
MONICA GAVRAN and MERCY	)	
HEALTH SYSTEM CORPORATION,	)	Honorable
	)	Thomas A. Meyer,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed as untimely plaintiff's medical-malpractice claim as to defendants' original failure to inform her of a test result, as that failure did not occur within the repose period and did not constitute part of a continuing course of negligent treatment, but the court improperly dismissed her claim as to defendants' subsequent and distinct failure to consult that test result in response to her complaint of symptoms.

¶ 2 Plaintiff, Michelle Tucsek, appeals from the judgment of the circuit court of McHenry County dismissing her medical malpractice complaint as barred by the applicable statute of repose. Because plaintiff failed to allege a continuous course of negligent medical treatment sufficient to bring her entire claim within the statute of repose, but did allege a

separate and distinct claim of negligence that fell within the statute of repose, we affirm in part and reverse in part.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed a one-count complaint against defendants, Dr. Monica Gavran and Mercy Health System Corporation (Mercy). Defendants moved to dismiss the complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2014)), asserting that plaintiff's cause of action was barred by the four-year statute of repose in section 13-212(a) of the Code (735 ILCS 13-212(a) (West 2014)).

¶ 5 The following facts are taken from the allegations in plaintiff's August 29, 2016, complaint. From before February 23, 2010, through October 14, 2015, Dr. Gavran, who was Mercy's agent, provided plaintiff with a "continuous course of primary medical care." During that time, Dr. Gavran saw and treated plaintiff several times.

¶ 6 On February 23, 2010, plaintiff underwent a CT scan of her brain. The CT scan revealed a brain tumor.

¶ 7 Although the results of the CT scan were conveyed to Dr. Gavran, she failed to inform plaintiff of the brain tumor. It was not until October 14, 2015, that plaintiff underwent a second CT scan, which revealed that the tumor had doubled in size.

¶ 8 The complaint also stated that a physician's certificate (see 735 ILCS 5/2-622 (West 2014)) was attached as an exhibit. The certificate asserted that, among other things, the standard of care required Dr. Gavran to review plaintiff's CT scan when, in May 2014, plaintiff developed and reported to Dr. Gavran symptoms of "drop foot syndrome."

¶ 9 According to the complaint, Dr. Gavran was negligent for failing to review the February 23, 2010, CT scan, failing to inform plaintiff of the brain tumor, failing to timely refer plaintiff to

a neurologist, failing to monitor the tumor, failing to order radiological assessments of plaintiff's brain, and failing to treat plaintiff's tumor.

¶ 10 Relying on the four-year statute of repose applicable to medical negligence claims (see 735 ILCS 5/13-212(a) (West 2014)), defendants moved to dismiss the complaint. In doing so, defendants contended that Dr. Gavran's alleged negligence regarding the CT scan occurred more than four years before plaintiff filed her complaint. Plaintiff responded that, because Dr. Gavran's negligent failure to inform her of the brain tumor occurred during the course of continuous negligent medical treatment, up to and including October 14, 2015, the complaint was filed within the four-year repose period.

¶ 11 On November 29, 2016, the trial court granted defendants' motion to dismiss. In its written order, the court dismissed with prejudice plaintiff's cause of action "based on and/or arising out of the February 23, 2010, CT scan." The court otherwise dismissed the complaint without prejudice, granting plaintiff leave to file an amended complaint.

¶ 12 Plaintiff, in turn, filed a motion to modify the November 29, 2016, order. Plaintiff requested that the trial court modify its order to state that the dismissal of the claim based on the CT scan was without prejudice.

¶ 13 At the hearing on the motion to modify, plaintiff stated that she was not asking the trial court to reconsider its earlier ruling. Rather, plaintiff explained that she wanted an opportunity to include allegations regarding the "numerous subsequent comprehensive physical examinations" that Dr. Gavran performed between February 23, 2010, and October 14, 2015. Plaintiff added that she was confused by what the court had meant when it used the language pertaining to a claim arising out of the CT scan. Plaintiff further explained that she wanted to

file an amended complaint alleging that, during subsequent comprehensive physical exams, Dr. Gavran negligently failed to review plaintiff's original CT scan.

¶ 14 The trial court noted that it would not change its original dismissal with prejudice of the CT-scan claim. Following a break, plaintiff's attorney told the court that the parties had worked out an agreement to dismiss the entire complaint with prejudice. The court entered a written order modifying its November 29, 2016, order, stating that the complaint was dismissed with prejudice, finding that the cause of action based on and/or arising out of the CT scan was time-barred, and striking the remainder of the November 29, 2016, order. Plaintiff then filed a timely notice of appeal.

¶ 15 II. ANALYSIS

¶ 16 On appeal, plaintiff contends that she alleged a continuous course of negligent medical treatment, because at each office visit from February 23, 2010, through October 14, 2015, Dr. Gavran negligently failed to inform her of the CT-scan results and failed to treat her brain tumor. She further maintains that Dr. Gavran's acts of negligence related to the CT-scan results were so related as to constitute one continuous course of treatment.

¶ 17 Defendants respond that: (1) plaintiff failed to allege any facts pertaining to a continuous course of negligent medical treatment; and (2) plaintiff, by agreeing to a dismissal of her entire complaint with prejudice, forfeited her right to complain of any error in the dismissal of her complaint.

¶ 18 Section 2-619(a)(5) of the Code allows for an involuntary dismissal of an action that was not commenced within the time limited by law. *Prate Installations, Inc. v. Thomas*, 363 Ill. App. 3d 216, 217-18 (2006). Such a dismissal is reviewed *de novo*. *Prate Installations, Inc.*, 363 Ill. App. 3d at 218. A motion under section 2-619 admits all well-pleaded allegations, but not

conclusions of law or conclusions of fact unsupported by specific factual allegations. *Melko v. Dionisio*, 219 Ill. App. 3d 1048, 1057 (1991).

¶ 19 We begin with the language of section 13-212(a) of the Code. Section 13-212(a) provides, in pertinent part, that no action for damages against any physician shall be brought more than four years after the date "on which occurred the act or omission or occurrence alleged in such action." 735 ILCS 5/13-212(a) (West 2014). Under the plain language of section 13-212(a), plaintiff's August 29, 2016, claim based on the failure to review, or inform her of, the February 23, 2010, CT-scan results is outside the repose period.

¶ 20 However, our supreme court has interpreted the term "occurrence" in section 13-212(a) to include a continuing course of negligent medical treatment for a specific condition. *Cunningham v. Huffman*, 154 Ill. 2d 398, 405 (1993). To prevail under the doctrine, a plaintiff must demonstrate that: (1) there was a continuous and unbroken course of *negligent* medical treatment; and (2) the treatment was so related as to constitute one continuous wrong. *Cunningham*, 154 Ill. 2d at 406. The supreme court emphasized that the negligent act, omission, or occurrence "necessarily only encompasses the continuum where the physician was negligent." *Cunningham*, 154 Ill. 2d at 407.

¶ 21 Subsequently, the appellate court applied the ruling of *Cunningham* in the context of a physician's negligent failure to notify a patient of a positive test for cancer. See *Turner v. Nama*, 294 Ill. App. 3d 19 (1997). In *Turner*, the defendant performed a Pap smear on the plaintiff on September 18, 1990. *Turner*, 294 Ill. App. 3d at 22. Sometime after September 25, 1990, the defendant received the test results, which showed an advanced stage of cervical cancer. *Turner*, 294 Ill. App. 3d at 22. The defendant never informed the plaintiff of the original Pap smear results until over three years later, after the plaintiff had been diagnosed with metastatic cervical

cancer. *Turner*, 294 Ill. App. 3d at 23. The plaintiff claimed that, because she was under the defendant's continuous care from 1982 until December 1993, the defendant had a continuing duty to notify her of the test results. *Turner*, 294 Ill. App. 3d at 23. Accordingly, the plaintiff contended that the defendant breached that duty by failing to notify her of the test results from September 1990 to December 1993. *Turner*, 294 Ill. App. 3d at 23. Thus, the plaintiff argued that the defendant's continuing failure to notify her of the Pap smear results was a continuous course of negligent medical treatment. *Turner*, 294 Ill. App. 3d at 28.

¶ 22 In rejecting the plaintiff's contention, the court reasoned that the failure to notify the plaintiff of the test results did not constitute medical treatment within the meaning of a continuous course of negligent medical treatment. *Turner*, 294 Ill. App. 3d at 30. Noting that medical treatment involves an "affirmative event involving the application of medical expertise," the court ruled that the negligent failure to advise of the test results occurred subsequent to the affirmative act of treatment, that being the administration and assessment of the Pap smear. *Turner*, 294 Ill. App. 3d at 30-32. Further, the court concluded that, although the fulfillment of the duty to inform the plaintiff of the test results was gravely important, that obligation required ordinary, as opposed to medical, judgment. *Turner*, 294 Ill. App. 3d at 32. Thus, the negligent failure to notify did not constitute a continuous course of negligent medical treatment. *Turner*, 294 Ill. App. 3d at 32.

¶ 23 More recently, this court addressed whether the doctrine applied to a claim that the plaintiff's doctor negligently failed to inform him of an abnormally high prostate-specific antigen (PSA) test. *Ferrara v. Wall*, 323 Ill. App. 3d 751 (2001). In that case, the plaintiff underwent the PSA test in June 1993, and the defendant received the results about a week later. *Ferrara*, 323 Ill. App. 3d at 753. Over two years later, the defendant directed the plaintiff to take a second

PSA test, the abnormally high results of which the defendant informed the plaintiff. *Ferrara*, 323 Ill. App. 3d at 753. About that same time, the plaintiff first learned of the abnormal results of the first PSA test. *Ferrara*, 323 Ill. App. 3d at 753. About a month later, the plaintiff was diagnosed with prostate cancer. *Ferrara*, 323 Ill. App. 3d at 753.

¶ 24 The plaintiff filed suit in June 1998, alleging that the defendant had breached the duty to timely inform him of the June 1993 test results and failed to provide the appropriate medical care in response to the test results. *Ferrara*, 323 Ill. App. 3d at 753. The defendant moved to dismiss pursuant to section 13-212(a). *Ferrara*, 323 Ill. App. 3d at 753. Relying on *Cunningham*, the plaintiff contended that the defendant's failure to notify him of the PSA results constituted a continuous course of negligent medical treatment, and thus, the repose period did not begin until the defendant finally informed him of the test results. *Ferrara*, 323 Ill. App. 3d at 754.

¶ 25 In rejecting the plaintiff's contention, this court found *Turner* to be "directly on point." *Ferrara*, 323 Ill. App. 3d at 757. In applying the reasoning of *Turner*, we concluded that the omission that resulted in the plaintiff's injury was the defendant's failure to communicate the test results after he had received them in June 1993. Agreeing with *Turner*, we observed that the failure to notify a patient of abnormal test results, without any subsequent affirmative medical treatment, cannot constitute a continuing course of negligent medical treatment as set forth in *Cunningham*. *Ferrara*, 323 Ill. App. 3d at 757. Accordingly, we concluded that the repose period was triggered when the defendant received the abnormal test results and failed to inform the plaintiff. *Ferrara*, 323 Ill. App. 3d at 757. Thus, we rejected the plaintiff's argument that the repose period did not commence until the defendant finally informed him of the test results in October 1995. *Ferrara*, 323 Ill. App. 3d at 757; see also *Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶ 36.

¶ 26 Applying the foregoing law, we must decide whether plaintiff alleged a continuous course of negligent medical treatment such that the duty to inform her of the February 23, 2010, CT-scan results continued to a time less than four years before she filed her complaint. She did not.

¶ 27 Although plaintiff alleged that Dr. Gavran saw and treated her multiple times from February 23, 2010, through October 14, 2015, those allegations alone do not establish an affirmative case of medical treatment related to assessing and revealing to plaintiff the CT-scan results. As we explained in *Ferrara*, the omission that allegedly resulted in plaintiff's injury was Dr. Gavran's failure to communicate the test results after she received them. See *Ferrara*, 323 Ill. App. 3d at 757. As we held in *Ferrara*, the repose period for plaintiff's claim based on the original failure to report the CT-scan results was triggered when Dr. Gavran received the abnormal test results and failed to communicate them to plaintiff. See *Ferrara*, 323 Ill. App. 3d at 757.

¶ 28 Further, we note that the mere allegations of a continuous course of medical treatment are insufficient to invoke the doctrine. Indeed, such a rule was expressly rejected by the supreme court in *Cunningham*. *Cunningham*, 154 Ill. 2d at 406-07. Plaintiff cannot extend the repose period by merely alleging that she received medical treatment after February 23, 2010. Thus, because the four-year repose period began to run on February 23, 2010, the August 29, 2016, claim based on the failure to initially inform plaintiff of the CT-scan results was barred by the statute of repose.

¶ 29 Plaintiff contends that, because Dr. Gavran, upon learning of her drop-foot symptoms,[1] had a duty to review her medical records, which would have revealed the February 2010 CT

[1] Drop-foot syndrome is associated with, among other possible causes, brain disorders.

scan, Dr. Gavran's negligent failure to do so constituted a continuing course of negligent medical treatment. We disagree.

¶ 30 Plaintiff's argument fails for two reasons. First, there was not a continuous and unbroken course of negligent medical treatment between Dr. Gavran's failure to inform plaintiff in February 2010 of the CT scan and her failure to review plaintiff's medical records upon learning of the drop-foot symptoms in May 2014. As discussed, the continuation of medical treatment between February 2010 and May 2014, without any allegations of negligence related to the original failure to inform plaintiff, did not constitute a continuous course of negligent treatment.

¶ 31 Second, the failure to review the medical records in May 2014 was not so related to the original failure to inform plaintiff of the CT scan that it was part of one continuous wrong. See *Cunningham*, 154 Ill. 2d at 406. Rather, the duty to examine the medical records, including the CT scan, was triggered by an entirely distinct event, plaintiff's report of the drop-foot symptoms. That being the case, Dr. Gavran's alleged negligence in May 2014 was separate and distinct from her February 2010 failure to inform plaintiff of the CT scan. Thus, the alleged negligence in May 2014 was not related to the alleged negligence in February 2010 for purposes of the statute of repose.

¶ 32 That, however, does not dispose of this appeal. Because plaintiff alleged a distinct act of negligence, that being the failure to review her medical records in May 2014,[2] that claim was

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See http://www.webmd.com/a-to-z-guides/foot-drop-causes-symptoms-treatments (last visited Sept. 11, 2017).

[2] As noted, plaintiff stated in her complaint that she had attached as an exhibit thereto a physician's certificate. See 735 ILCS 5/2-622 (West 2014). As such, the certificate became part of the complaint. See *Collins v. Superior Air-Ground Ambulance Service, Inc.*, 338 Ill. App. 3d

within the statute of repose. Therefore, the trial court erred in dismissing plaintiff's entire complaint with prejudice. Thus, although we affirm the dismissal as to any claim based on Dr. Gavran's negligent failure to notify plaintiff of the CT scan between February 2010 and May 2014, we reverse as to the claim of negligence based on Dr. Gavran's failure in May 2014 to review plaintiff's medical records and inform her of the February 2010, CT scan.

¶ 33 Finally, we reject defendants' contention that plaintiff forfeited any error by opting to stand on her original complaint and seek a dismissal with prejudice. She was entitled to do so for purposes of appeal. See *Falls v. Silver Cross Hospital & Medical Centers*, 2016 IL App (2d) 150319, ¶ 23.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm in part and reverse in part the judgment of the circuit court of McHenry County and remand for further proceedings.

¶ 36 Affirmed in part and reversed in part; cause remanded.

812, 817 (2003); see also *Garrison v. Choh*, 308 Ill. App. 3d 48, 53 (1999) (any document attached to a pleading and specifically referred to therein is treated as part of the pleading).