THIRD DIVISION
September 28, 2018

No. 1-18-0335

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEBRA LYNN ROSS, as the Special Representative of the Estate of Sherwin P. Ross, Plaintiff-Appellant, v. JEFFREY B. STOLBERG, NICHOLAS FRISONE, RONALD G. PESTINE, and MARC D. SHERMAN, Defendants-Appellees (Jay Hesdorffer, Marietta Hesdorffer, and Morgan Stanley, Defendants).	)	Appeal from the Circuit Court of Cook County. No. 16 L 3677 Honorable John C. Griffin, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County granting defendants' motions to dismiss is affirmed; plaintiff's complaint filed as power of attorney for plaintiff's decedent was not timely filed where complaint was filed beyond statutes of limitations and repose, and the limitations periods were not tolled despite any alleged disability of the decedent because pursuant to statute plaintiff's actions under power of attorney had same effect and bound decedent as if he were under no disability.

¶ 2 Plaintiff, Debra L. Ross, "on behalf of and through the power of attorney for" Sherwin P. Ross, filed a complaint in the circuit court of Cook County against defendants Jeffrey B. Stolberg, Nicholas Frisone[1], Marc D. Sherman, and Ronald G. Pestine. Ross's complaint also raised claims against Jay Hesdorffer, Marietta Hesdorffer, and Morgan Stanley, who are not parties to this appeal. The complaint arises from defendants' professional services. Stolberg is an accountant and Sherman, Pestine, and Frisone are attorneys. Sherwin died in August 2016, and the trial court granted a motion to substitute Debra L. Ross as special representative of the estate of Sherwin P. Ross as plaintiff and plaintiff's motion to file an amended complaint. Defendants filed motions to dismiss the complaint based on the expiration of the statutes of limitations and repose. Following a hearing, the circuit court of Cook County granted defendants' motions to dismiss. Plaintiff filed a motion to reconsider, which the court denied.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 Plaintiff filed her original complaint on April 12, 2016 and filed an amended complaint on September 20, 2016. The following are taken from plaintiff's complaint. Sherwin's father, Samuel Ross, provided in his will that upon his death (Samuel died in November 1985) the residue of Samuel's estate was to pour over into the Samuel Ross Living Trust (Samuel Ross Trust) which was then to be divided into two shares for the benefit of Shirley Ross, who was Samuel's wife and Sherwin's mother. The income from those two shares was to be distributed to Shirley, and upon Shirley's death the trust assets were to be equally distributed in trust for the

---

[1] Defendant Frisone, after requesting an extension of time in which to do so, never filed a brief in this court. "We may consider the merits of the appeal even in the absence of appellee's brief, pursuant to the principles articulated in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976)." *In re Estate of Rosinski*, 2012 IL App (3d) 110942, ¶ 19.

benefit of Sherwin and Samuel's other son Eliyahu Ross. Stolberg was the successor trustee of the Samuel Ross Trust.

¶ 6 Plaintiff's complaint further alleged as follows:

> "Sherwin had a confirmed diagnosis of a mental impairment resulting from a congenital condition that impairs his mental ability, as well as other congenital physical conditions, which impaired his ability to independently manage his financial resources. Sherwin resided nearly his entire adult life with his mother until her death on October 13, 1998. His basic needs and housing expenses were provided by his mother. He was residing in an assisted living format in Chicago. Due to their long-term relationships with the Ross family, the Defendants knew about Sherwin's impairments and did not offer any independent representation in his Trust Account matters, nor provide guidance to their client's family as to the need to have such independent representation."

¶ 7 Shirley's will provided that upon her death (Shirley died in October 1998) the residue of her estate would be conveyed to the Shirley Ross Living Trust (Shirley Ross Trust). The assets of the Shirley Ross Trust were to be distributed equally in trust, for the benefit of Sherwin and Eliyahu, no later than six months after her death. Stolberg was also the successor trustee of the Shirley Ross Trust. The complaint alleged the Shirley Ross Trust was not distributed by April 3, 1999. The complaint alleged that the account for the Samuel Ross Trust remained active as of February 2000 and the assets were never moved into the Shirley Ross Living Trust. The complaint alleged several transactions occurred on the account for the Samuel Ross Trust after Samuel Ross's death, and Stolberg wrote checks for the benefit of Eliyahu from both the Samuel Ross Trust and the Shirley Ross Trust after the death of Samuel and Shirley.

¶ 8 In November 1999, Sherwin executed the Sherwin P. Ross Revocable Trust (Sherwin Ross Revocable Trust). The complaint alleged Sherwin executed the Sherwin Ross Revocable Trust "without the benefit of legal counsel or an independent third-party." Sherman prepared the trust document and Stolberg is the successor trustee of the Sherwin Ross Revocable Trust. An account was established at Morgan Stanley for the Sherwin Ross Revocable Trust with Sherwin as trustee and Stolberg as successor trustee. The complaint alleged this account was established "without Sherwin's understanding the need for this account." The complaint also alleged that Stolberg became the successor trustee of successive accounts established at Morgan Stanley for Sherwin's benefit and Stolberg remained the successor trustee through the closure of those accounts. The complaint alleged checks were written from Sherwin's accounts to Sherwin, without Sherwin's authorization, that Sherwin did not receive, and transfers were made from Sherwin's accounts to Eliyahu's accounts without Sherwin's authorization.

¶ 9 The complaint alleged that in July 2014 the current trust administrator informed Sherwin's family that Sherwin's funds were running low. The complaint further alleged that "[a]fter this comment, a review of the records by family members found discrepancies." Sherwin and his representatives requested the right to inspect, or to receive copies of the records of the trusts, but Stolberg allegedly failed or refused to provide the records.

¶ 10 Plaintiff alleged claims against Stolberg in Counts I (breach of fiduciary duty), II (fraud), III (dissipation of trust assets), IV (demand for accounting), V (failure to provide annual accountings), VIII (fraud), X (conspiracy). All the allegations in the complaint against Stolberg are based on Stolberg's alleged acts or omissions related to the Ross family trusts. Plaintiff also named Frisone in Count VIII. As to Frisone, Count VIII alleged that checks were issued to and negotiated by Frisone from the Shirley Ross Trust "after the date upon which the assets of the Shirley Ross Living Trust were to have been distributed to her two sons in trust." Count VIII

alleges the "checks were issued for legal services provided by Frisone to Eliyahu Ross, personally, and not for the benefit of the Shirley Ross Living Trust or for the benefit of Sherwin."

¶ 11 Plaintiff alleged a claim against Pestine in Count XII (breach of fiduciary duty).[2] Count XII alleged Pestine drafted the trust documents for the Shirley Ross Trust. Count XII of the complaint also alleged the last amendment to the Shirley Ross Trust was signed on April 1, 1998. Plaintiff alleged Pestine breached his duty of care and loyalty to his client Shirley Ross by allowing Shirley to sign trust documents and amendments when she was no longer mentally or physically competent and/or by issuing and negotiating checks from the account of the Shirley Ross Trust to himself after the assets of the Shirley Ross Trust were directed to be distributed to Sherwin and Eliyahu in trust. The last such check alleged in the complaint was written in July 1999. Count XII alleged Sherwin was damaged by one or more of Pestine's alleged breaches of duty.

¶ 12 Plaintiff alleged a claim against Sherman in Count XIII (breach of fiduciary duty). Count XIII alleged Sherman drafted the trust documents for the Sherwin Ross Trust and, due to his relationship with the Ross family, he "knew about Sherwin's disabilities." Count XIII alleged Sherman was Sherwin's attorney and therefore owed Sherwin a duty of care and loyalty. Count XIII alleged Sherman breached his duty to Sherwin by allowing Sherwin to sign the trust documents without determining if Sherwin was competent to do so and/or by issuing and negotiating checks from the account of the Shirley Ross Living Trust to himself after the assets of the Shirley Ross Living Trust were directed to be distributed to Sherwin and Eliyahu in trust.

---

[2] Counts VI, IX, and XI are stated against only Jay Hesdorffer and Marietta Hesdorffer or Morgan Stanley.

The last such check alleged in the complaint was written in January 2000. Count XIII alleged Sherwin was damaged by one or more of Sherman's alleged breaches of duty.

¶ 13 In July 2016 Stolberg filed a motion to dismiss Counts I through V, VII, VIII and X of the complaint.[3] Stolberg's motion to dismiss noted that the "last complained of transaction occurred in 2001—15 years prior to the filing of this action." Stolberg asserted that in October 2010 an attorney contacted him on plaintiff's behalf and inquired about Stolberg's involvement with the management of the Ross family estates and trust accounts. The attorney informed Stolberg he represented Sherwin Ross, plaintiff, and Barry Ross. The attorney requested information from Stolberg and stated that his clients would pursue appropriate legal action if the information was not received. The attorney further informed Stolberg his clients would be pursuing all available options to get resolution of the matter. According to Stolberg's motion to dismiss this was allegedly "the first of several communications between [the attorney,] or members of the Ross family, and Stolberg." Stolberg asserted the attorney continued to threaten litigation in subsequent communications. Stolberg attached to his motion to dismiss a December 27, 2010 email from Sherwin in which Sherwin observed that certain pages appeared to be missing from documents Stolberg provided the attorney and requested "further documentation regarding several trust accounts." (Plaintiff later admitted drafting that email.) On February 15, 2011, Stolberg received the final correspondence from the attorney for the Ross family Stolberg would receive prior to the filing of the complaint.

¶ 14 In his motion to dismiss Stolberg argued the complaint is time barred by the applicable statute of limitations because plaintiff acquired sufficient knowledge to trigger the beginning of

---

[3] Defendants were not required to re-file the motions to dismiss filed against the original complaint and after plaintiff filed the amended complaint, the trial court ordered plaintiff to respond to the pending motions to dismiss.

the limitations period by October 22, 2010, when the attorney contacted Stolberg and "levied accusations of Stolberg's wrongdoing; demanded from Stolberg the provision of documents; and repeatedly threatened litigation." Stolberg also argued that plaintiff's claim of fraudulent concealment, in which she alleged that in July 2014 the current trust administrator notified the Ross family that Sherwin's funds were running low, prompting a review of the records, cannot toll the statute of limitations. Stolberg asserted that this count is meant to "insinuate that the Ross family was precluded from learning about the cause of action until July of 2014." Stolberg argued that because the statute of limitations began to run on October 22, 2010 when the attorney contacted him, plaintiff had 15 months from July 2014 to file her complaint thereby precluding the tolling effect of any alleged fraudulent concealment. Stolberg further argued there is no tolling because plaintiff could have discovered the alleged concealment with ordinary diligence when Stolberg provided documents to the attorney upon request in 2010 and 2011. Finally, Stolberg also argued the complaint should be dismissed because "there is no allegation that Sherwin relinquished his duties as Trustee, or transferred such duties—via formal means, or otherwise—such that Stolberg's appointment as successor trustee would vest."

¶ 15 In July 2016 Sherman filed a combined motion to dismiss Count XIII of the complaint. Sherman argued, in part, that Count XIII should be dismissed as barred by both the statute of limitations and the statute of repose for attorneys and that the complaint fails to allege sufficient facts to state a claim for breach of fiduciary duty. Sherman argued the complaint does not contain factual allegations or attach documents showing that Sherwin was legally disabled at any relevant time. Sherman's motion to dismiss states that on October 22, 2010, he received a correspondence from an attorney who stated he represented Sherwin, plaintiff, and Barry Ross relative to their interests in the Samuel Ross Trust and the Shirley Ross Trust. Sherman attached the letter to his motion to dismiss. The letter stated the attorney's clients were concerned about

"the administration, distribution and accounting of assets belonging to their family's estates and trusts," requested information, and threatened legal action if they did not receive the information. Sherman received a second letter on October 27, 2010 containing similar language. Sherman's motion to dismiss stated plaintiff filed the complaint nearly five and one-half years after his attorney requested information and documents from Sherman "and advised Sherman of his intent to pursue 'appropriate legal action' on behalf of the plaintiff and Sherwin Ross." Sherman argued the complaint is barred by the statute of repose because it is based on conduct that occurred more than six years prior to the date of filing of the complaint. Sherman also argued the complaint became barred by the statute of limitations in October 2012 because plaintiff was on notice of the claims in the complaint in October 2010 when her and Sherwin's attorney wrote to Sherman with concerns about the administration and accounting of assets in the trusts and expressed his intention to pursue all available legal remedies against Sherman on behalf of his clients. Sherman argued the allegations in the complaint were insufficient to establish the legal conclusion Sherwin was legally disabled or that he was under a legal disability when he retained Sherman as counsel and executed the Sherwin Ross Trust in 1999.

¶ 16 In July 2016 Pestine also filed a combined motion to dismiss Count XII against him on the grounds the claims are barred under the statute of repose and the statute of limitations. Pestine incorporated the facts and arguments of Sherman and Stolberg with regard to the October 2010 correspondence from plaintiff and Sherwin's attorney. Pestine asserted that the conduct and allegations against him took place on or before April 1, 1998, "more than seventeen years before [plaintiff] filed suit." Pestine also asserted that Sherwin's attorney waited five and one-half years after requesting information from Sherman and Stolberg and advising them of an intent to pursue legal action on behalf of plaintiff and Sherwin relating to the administration, accounting, and distribution of the trusts' assets before filing the original complaint on April 12,

2016. Pestine argued Sherwin and plaintiff's attorney's concerns and expressed intentions are chargeable to Sherwin, and plaintiff triggered the statute of limitations against all the attorney defendants, including Pestine. Pestine argued plaintiff cannot argue that the repose and limitations periods were tolled because plaintiff failed to allege facts or attach documents showing that Sherwin was legally disabled at any relevant time, including "at any time Defendant Pestine performed any of the conduct alleged in Count XII in 1998." Pestine also argued the complaint failed to allege sufficient facts to state a claim for breach of fiduciary duty by Pestine.

¶ 17 In October 2016 Frisone filed a combined motion to dismiss the complaint with prejudice on the affirmative grounds, among others, that the complaint failed to comply with the applicable statute of limitations and failed to state a cause of action. Frisone argued plaintiff filed the complaint "nearly seventeen years after the alleged wrongful conduct described in support of Plaintiff's claims against Frisone in Count VIII" and, therefore, Count VIII should be dismissed with prejudice. Frisone stated he was not involved in any transactions involving any of the trust accounts. Frisone also stated the two checks he received in 1999 were in connection with Frisone's representation of Eliyahu in a wrongful death case. Frisone asserted that one check was tendered to counsel for the plaintiff in a wrongful death case pursuant to a settlement, and the second check "represented payment for the legal services provided by Frisone in the wrongful death case."

¶ 18 Following full briefing by the parties and a hearing, the trial court granted defendants' motions to dismiss with prejudice. The court also found there was no just reason to delay enforcement or appeal of its order. Plaintiff filed a motion to reconsider the order granting defendants' motions to dismiss. In her motion to reconsider plaintiff asserted, among other things, that Sherwin was under a disability at the time the causes of action accrued and prior to

the expiration of the period of limitation, "so that the period of limitations to file suit was tolled during the period of disability, pursuant to 735 ILCS 5/13-211." Plaintiff stated the trial court rejected that position on the ground Sherwin was "protected because he was represented by an attorney and the Plaintiff held his power of attorney." Plaintiff's motion to reconsider argued the trial court misapplied the law, "as the time to file suit is tolled during the period of disability, whether or not the disabled person is 'represented' or 'protected' by an attorney, conservator, guardian, or any other person." Plaintiff argued the "fact that Sherwin had an attorney, or someone held power of attorney, does not excuse the application of [section] 13-211. Sherwin's disability continued until his death, so that this action was obviously timely."

¶ 19 The parties fully briefed plaintiff's motion to reconsider and, following a hearing, the trial court entered a written order denying the motion. The trial court's written order found, in part, that plaintiff "never previously raised [section 13-211] and only argued the legal malpractice tolling provision in response to all prior Motions to Dismiss." Nonetheless the court found that "[e]ven considering Plaintiff's arguments in light of section 13-211, the Court still denies Plaintiff's Motion for Reconsideration ***." The court distinguished plaintiff's cited authorities on the grounds that "none of Plaintiff's cited cases were decided in light of the Durable Power of Attorney Act." The court noted plaintiff's exhibits indicating she held Sherwin's durable power of attorney. The court declined to make any finding as to whether Sherwin was disabled but found that if "Sherwin was disabled *** under the Durable Power of Attorney Act, Debra Ross' actions are binding on Sherwin Ross as if he was not disabled. [Citation.] If Sherwin was not disabled, however, the statute of limitations and statute of repose would not be tolled to begin with. Thus, whether or not Sherwin Ross was disabled, Sherwin Ross' claim would not be tolled because of the Durable Power of Attorney." The court found that plaintiff "specifically admitted that on December 27, 2010, she drafted, and Sherwin signed,

an email regarding Sherwin Ross' current claims '[a]s Sherwin's agent under his Power of Attorney.' Thus, the statute of limitations began, at the latest, on December 27, 2010." The court found plaintiff could not assert Sherwin's alleged disability as a means of tolling the statute of limitations after she acknowledged Sherwin's claims in 2010. The court held the complaint was untimely "whether the two-year or five-year statute of limitations applies" and denied the motion to reconsider.

¶ 20 This appeal followed.

¶ 21 ANALYSIS

¶ 22 The trial court granted defendants' motions to dismiss on the grounds plaintiff filed the complaint after the expiration of the applicable periods of limitations and repose, and those periods would not have been tolled even if Sherwin was disabled because plaintiff held his durable power of attorney (POA). On appeal plaintiff argues the trial court erred by failing to apply the tolling provisions that apply when a party is under a period of disability, and the trial court erroneously relied on the fact she held a POA for Sherwin to find the tolling provisions did not apply. Plaintiff also argues the trial court abused its discretion in failing to grant her motion to reconsider.[4]

¶ 23 A motion to dismiss under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2016)) admits the legal sufficiency of the complaint but asserts affirmative matters outside of the complaint that defeat the cause of action. *Watkins v. Ingalls*

---

[4] We note plaintiff has not argued Sherwin lacked capacity to appoint her as his power of attorney or contested the validity of the power of attorney as grounds for reversal. On the contrary, as defendant Sherman specifically points out, "[i]n resisting the motions to dismiss, Plaintiff heavily relied upon the May 15, 2008 durable power of attorney executed by Sherwin Ross." (Emphasis omitted.) Therefore, we do not reach the question of Sherwin's capacity to execute the power of attorney and make no judgment thereon.

Memorial Hospital, 2018 IL App (1st) 163275, ¶ 30. "When ruling on a section 2-619 motion to dismiss, the court must view all pleadings in a light most favorable to the non-moving party [citation], and accept as true all well-pleaded facts [citation]. We review the dismissal of a cause of action pursuant to section 2-619 of the Code *de novo*. [Citation.]" *Watkins*, 2018 IL App (1st) 163275, ¶ 30. Specifically, section 2-619(a)(5) permits a party to seek dismissal of a complaint on the grounds "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2016).

¶ 24 Plaintiff's claims against Stolberg are governed by the statute of limitations stated in section 13-205 of the Code (735 ILCS 5/13-205 (West 2016)).[5] Section 13-205 states that "all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205 (West 2016). "A cause of action 'accrues' when facts exist that authorize the bringing of the cause of action. [Citation.]" *Henderson Square Condo. Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 52. Plaintiff's claims against Frisone, Pestine, and Sherman arise out of an alleged act or omission in the performance of their professional services as attorneys; therefore, the applicable statute of limitations is stated in section 13-214.3 of the Code, which reads, in pertinent part, as follows:

> "(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services *** must be commenced within 2 years from the time the person

---

[5] "[T]he statute of limitations for breach of fiduciary duty is five years." *Luminall Paints, Inc. v. La Salle National Bank*, 220 Ill. App. 3d 796, 803 (1991). This provision also applies to actions for fraud and deceit and other actions for tortious misrepresentations. *Chicago Park District v. Kenroy, Inc.*, 78 Ill. 2d 555, 560-61 (1980). Further, a conspiracy claim is governed by the statute of limitations for the underlying tort. *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, ¶ 110.

bringing the action knew or reasonably should have known of the injury for which damages are sought.

(c) Except as provided in subsection (d), an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.

* * *

(e) If the person entitled to bring the action is under the age of majority or under other legal disability at the time the cause of action accrues, the period of limitations shall not begin to run until majority is attained or the disability is removed." 735 ILCS 5/13-214.3 (West 2016).

"At the point when the party knows or reasonably should know that the injury was wrongfully caused, the party is under obligation to inquire further to determine whether an actionable wrong has been committed. [Citation.] 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. [Citation.]" *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶ 52.

¶ 25 Section 13-214.3(c) represents a statute of repose. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 10. Section 13-205 has no period of repose. *Henderson Square Condominium Ass'n*, 2015 IL 118139, ¶ 24. A statute of repose differs from a statute of limitations in that, while a statute of limitations governs the time in which a lawsuit may be filed after a cause of action accrues, a statute of repose extinguishes the cause of action itself after a fixed period of time. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 61 (2006). "A statute of repose begins to run when a specific event occurs, regardless of whether an action has accrued. [Citation.] Thus, a statute of repose is not tied to the existence of any injury, but rather it extinguishes liability after a fixed

period of time. [Citation.] The statute of repose applicable in the case at bar prohibits the commencement of an action more than six years 'after the date on which the act or omission occurred.' [Citation.]" *Heidelberger*, 2011 IL 111052, ¶ 10. However, "subsection (e) of section 13-214.3 tolls the statutes of limitations and repose set forth in subsections (b) and (c)." *DeLuna*, 223 Ill. 2d at 65. Similarly, "[s]ection 13-211 of the Code of Civil Procedure tolls the statute of limitations for minors and persons who are under a legal disability. The statute reads in pertinent part: 'If the person entitled to bring an action, specified in Sections 13-201 through 13-210 of this Act, at the time the cause of action accrued, is under the age of 18 years, or under legal disability *** he or she may bring action within 2 years after the *** disability is removed.' 735 ILCS 5/13-211 (West 1996)." *In re Doe*, 301 Ill. App. 3d 123, 126 (1998).

> "A person suffers from a 'legal disability' where he or she is 'entirely without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his [or her] estate or financial affairs.' [Citation.] In a case where a legal disability is alleged, the record must contain sufficient allegations of fact from which one could conclude that the person seeking to be found legally disabled was incompetent or suffered from serious mental disorder which made that person entirely without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his estate or financial affairs. [Citation.]" *In re Doe*, 301 Ill. App. 3d 123, 126-27 (1998).

¶ 26 In this case, plaintiff does not argue that neither the attorney's October 2010 correspondence to defendants nor Sherwin's December 2010 email demonstrate the requisite knowledge to trigger the running of the statute of limitations, or that the attorneys' "act or omission" did not occur outside the statute of repose, absent any tolling based on Sherwin's

alleged disability. Plaintiff argues the trial court erred in relying on the POA to find disability was not an issue because Sherwin was represented by an agent under a POA and an attorney, and consequently failing to determine whether plaintiff pleaded sufficient facts to establish Sherwin's disability or that a question of fact existed as to Sherwin's disability precluding the granting of defendants' motions to dismiss. Plaintiff argues courts have rejected the assertion that tolling does not apply because a disabled person can be adequately protected by another, "even if another person is statutorily appointed on the disabled person's behalf." In support of that assertion, plaintiff relies on cases involving conservators, guardians, and next friends, but not an agent under a POA. Plaintiff attempts to analogize those situations to one, like this, where the person allegedly under a legal disability is represented by both an agent under a POA and an attorney.[6]

¶ 27 Defendants each respond the cases relied upon have no application here, where the cases did not involve a POA and were not decided under the Illinois Power of Attorney Act (Act) (755 ILCS 45/1-1 *et seq*. (West 2016)). Defendants further argue an agent under a POA is not like a conservator, guardian, or next friend. Defendants argue that under the plain language of section 2-6 of the Act, plaintiff's conduct that triggered the running of the statute of limitations is binding on Sherwin despite any alleged disability. Section 2-6 of the Act reads, in pertinent part:

> "All acts of the agent within the scope of the agency during any period of disability, incapacity or incompetency of the principal have the same effect and

---

[6] Defendants argue plaintiff failed to raise section 13-211 of the Code in the trial court, therefore the issue is waived. Plaintiff asserted she raised the issue of tolling based on Sherwin's alleged disability, therefore the issue is not waived even if she failed to cite the specific statutory section. We have no need to resolve that dispute because it will make no difference in our disposition. *Barth v. Reagan*, 139 Ill. 2d 399, 419 (1990) ("Courts of review also ordinarily will not consider issues where they are not essential to the disposition of the cause or where the result will not be affected regardless of how the issues are decided.").

> inure to the benefit of and bind the principal and his or her successors in interest as if the principal were competent and not a person with a disability." 755 ILCS 45/2-6(a) (West 2016).

¶ 28 Turning first to the line of authority on which plaintiff relies, it is clear none of them involved a POA or had occasion to apply the language in section 2-6(a) of the Act. Plaintiff first argues this court rejected the same analysis the trial court employed in this case in *Mazikoske v. Firestone Tire & Rubber Co.*, 149 Ill. App. 3d 166 (1986). In *Mazikoske*, one of the defendants argued the plaintiff's claim against it was time barred because the cause of action accrued on the date of the accident and the plaintiff's disability resulting from the accident was removed when the court appointed a conservator of the plaintiff's estate, thus the tolling provision in section 13-211 did not apply to save the plaintiff's claim. *Mazikoske*, 149 Ill. App. 3d at 177. The court rejected the defendant's argument that "any legal disability was removed when the court appointed [a] conservator of [the plaintiff's] estate and person." *Id.* at 178. The court noted that the defendant failed to cite any Illinois authority to support its position. *Id.* The *Mazikoske* court stated it relied on the decision in *Haas v. Westlake Community Hospital*, 82 Ill. App. 3d 347 (1980). The *Mazikoske* court also noted that similar arguments had "been rejected with respect to minors' claims where the courts have said that, despite the appointment of a guardian *ad litem*, a minor still had until two years after reaching majority, to file suit on a cause of action arising during his or her minority." *Mazikoske*, 149 Ill. App. 3d at 178 (citing *Eiseman v. Lerner*, 64 Ill. App. 3d 185 (1978)). The court held that the situation in *Mazikoske* fell "within the statutory exceptions to the statute of limitations" because the plaintiff was adjudicated incompetent, and there was evidence presented that the plaintiff's injuries rendered him incompetent to manage either his estate or person and such condition was permanent. *Id.*

¶ 29 The *Mazikoske* court relied on the holding in *Haas* that "if it could be established that [the plaintiff in *Haas*] was under [a] disability when the cause of action arose, he could not be 'held accountable for any apparent delay, negligence, or *laches* in seeking redress through the courts, and he is not affected by the limitations period in the statute.' [Citation.]" *Id.* at 178. In *Haas*, the defendant did not argue that the tolling statute did not apply because the plaintiff had a conservator (which he did) but because the plaintiff has "not alleged in [the] complaint that he has been *** mentally ill since birth." *Haas*, 82 Ill. App. 3d at 349.[7] The *Haas* court rejected the "defendants' argument that the suit should be dismissed because the wording in the complaint does not mirror the terminology found in the applicable exception to the limitations statute." *Id.* Instead, the pleading should be liberally construed and found sufficient so long as it reasonably informed the opposing party of the nature of the claim or defense. *Id.* Separately, the *Haas* court considered whether the plaintiff's claim should be barred by *laches*. *Id.* The *Haas* court did not discuss the existence of the conservator at all. See *id.* at 348-49. The court simply held that "[i]f the plaintiff can prove that at the time the cause of action occurred [he] was insane or mentally ill, the period of limitations for filing the suit does not begin to run until the disability is removed. During that relevant time, [the plaintiff] cannot be held accountable for any apparent delay, negligence, or *laches* in seeking redress through the courts, and he is not affected by the limitations period in the statute." *Id.* at 349.

¶ 30 In *Eiseman*, the court applied a prior court's holding that "a minor's claim is not barred by limitations until 2 years after obtaining majority, even though a guardian *ad litem* has been appointed." *Eiseman*, 64 Ill. App. 3d at 188 (citing *In re Estate of Sheehan*, 290 Ill. App. 551,

---

[7] The plaintiff in *Haas* was the conservator of the estate and person of the incompetent person; but for clarity we will refer to the incompetent person as the plaintiff, as the defendants in *Haas* did.

554-55 (1937)). The defendants in *Eiseman* argued the complaint was barred by *laches*. *Id*. The plaintiffs filed a complaint to impose a constructive trust and other relief related to the administration of an estate. *Id.* at 186. The defendants argued the complaint was barred by *laches* because the complaint was filed six years after the estate was closed, and "a guardian *ad litem* represented [the] plaintiffs during the probate proceedings so the judgment should be binding and *res judicata* as to the plaintiffs for all purposes." *Id.* at 188. The court noted that when the complaint was filed one plaintiff was still a minor and one had reached majority less than two years earlier. *Id.* The court held that under the then applicable statute "two of the plaintiffs still had the right to bring an action against defendants when the complaint was filed ***, since one plaintiff was a minor and another had reached majority only a year earlier." *Id.*

¶ 31 Plaintiff also relies on *Passmore v. Walther Memorial Hospital*, 152 Ill. App. 3d 554 (1987) to support her position. In *Passmore*, the plaintiff, who was the guardian of his son's estate, filed suit to recover for his son's injuries more than four years after his son, who was injured as an infant, reached majority. The plaintiff alleged in the complaint that when his son was injured as an infant he "became and continues to be disabled, totally without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his estate or financial affairs." (Internal quotation marks omitted.) *Passmore*, 152 Ill. App. 3d at 555. However, the son was not legally adjudicated disabled until shortly before the plaintiff filed suit, more than four years after the son reached majority. *Id.* The defendants moved to dismiss the complaint as untimely. *Id.* The defendants argued the plaintiff failed to file the complaint within two years of the son reaching majority and that since the son "was not legally adjudicated disabled during this two-year period, the statute of limitations was not tolled." *Id.* at 555-56. Thus, the issue was "whether the facts alleged in [the] plaintiff's complaint are sufficient to meet the requirement of 'legal disability' *** to toll the statute of limitations, or whether a formal

legal adjudication is necessary during minority or the two-year period after the minor reaches his majority." *Id.* at 556. The court held the complaint alleged sufficient facts to invoke the tolling statute by alleging the son was under a legal disability continuously from the age of eight months until the action was filed. *Id.* The court rejected the argument that the right to a tolling of the statute of limitations is contingent upon a formal adjudication of a legal disability. *Id.* The court reasoned that if that were true, then "the real possibility would exist that plaintiff's rights were contingent upon the actions of his guardian. Since [the son] was incapable of taking the necessary steps to have himself adjudicated as legally disabled until such time as his disability is removed, he must depend upon the diligence or competence of his guardian." *Id.* at 557. The *Passmore* court held such an interpretation would be contrary to the purpose of the tolling statute.

> "The public policy which underlies the tolling provision *** has been clearly stated by this and other courts on numerous occasions. This section *** was designed to ensure that 'statutes of limitation [were] generally tolled during a plaintiff's infancy, mental incompetency, or imprisonment.' [Citation.] The tolling provision was intended to protect the rights of those who were not 'legally competent to bring actions directly' since the courts recognized that the enforcement of their rights should not be 'left to the whim or mercy of some self-constituted next friend.' [Citations.]" *Id.* at 558.

The court rejected the defendants' argument in *Passmore* because the court found that if this "self-constituted next friend" failed to seek an adjudication of legal disability within the time allotted, "the provisions of the tolling statute will have been rendered meaningless and the protection afforded to the otherwise incompetent person destroyed." *Id.*

¶ 32 Next, plaintiff cites *Estate of Riha v. Christ Hospital*, 187 Ill. App. 3d 752 (1989), in which a party filed a suit for medical malpractice and product liability and subsequently voluntarily dismissed certain defendants. Later, that party was found to be a "disabled person" by the probate court. *Estate of Riha*, 187 Ill. App. 3d at 753. The plaintiff was appointed guardian of the estate of the disabled person, and the plaintiff filed an amended complaint which renamed some of the previously voluntarily dismissed defendants. *Id.* Those previously voluntarily dismissed defendants moved to dismiss the amended complaint as untimely. *Id.* at 754. The plaintiff argued the limitations period was tolled since the original party was legally disabled at the time the cause of action accrued and the disability had not been removed at the time the plaintiff filed. *Id.* The *Estate of Riha* court held the plaintiff did not need to establish the injured party was legally adjudicated disabled at the time the cause of action accrued since the intent of the legislature was "to protect the rights of incompetent persons, whether or not they are adjudicated as such." *Id.* at 755. Although a guardian had been appointed, and the court found that the tolling statute could apply, the *Riha* court did not discuss directly the appointment of a guardian with respect to the application of the tolling statute.

¶ 33 Finally, in *Valdovinos v. Tomita*, 394 Ill. App. 3d 14 (2009), also cited by plaintiff, the trial court held that the plaintiff's complaint was barred by *laches* because the plaintiff "waited nine years after the discovery of the alleged fraud *** and over 24 years after the allegedly fraudulent act itself, to file the *** action." *Tomita*, 394 Ill. App. 3d at 17. The plaintiff, who was suing as the parent, guardian, and next friend of her son, argued *laches* could not be asserted against a mentally incompetent person such as her son. *Id.* The court noted that "[i]t is well established that an individual under a legal disability cannot be held accountable for any apparent delay, negligence, or *laches* in seeking redress through the courts." *Id.* at 18. The court found because "the record *** contains sufficient facts to support the contention [Daniel, the plaintiff's

son] is under a legal disability, we cannot say, as a matter of law, that [his] claims are barred by the defense of *laches*." *Id.* at 19. The court further noted as follows:

> "We reach this conclusion notwithstanding the fact that, during the last 18 years, Daniel's representatives have filed other lawsuits on his behalf and, therefore, could have brought the current action sooner. Any delay in filing a lawsuit cannot be imputed to an individual under a legal disability, even if the next friend who brings the suit is clearly guilty of *laches*. [Citation.] To hold otherwise, would require that the enforcement of an incompetent person's rights be left to the whim or mercy of some self-constituted next friend. [Citations.]" (Internal quotation marks omitted.) *Id.* (citing *Luebke v. Browning*, 18 Ill. App. 2d 427, 440-41 (1958) (finding plaintiff was guilty of *laches* as conservator of estate was improper; party who was "incompetent at the time of the filing of this suit, cannot have her rights defeated by the defense of *laches*"); *Bruso v. Alexian Brothers Hospital*, 178 Ill. 2d 445, 454 (1997)).

¶ 34 In *Bruso*, our supreme court held "that where a plaintiff in a medical malpractice action is a minor and also under another legal disability such as mental incompetency, the plaintiff's action is subject to the tolling provision of section 13-2l2(c) and not the eight-year repose period of section 13-212(b)." *Bruso by Bruso*, 178 Ill. 2d at 461. In that case, the defendants argued that all minors, including those with a legal disability for purposes of the tolling statute, were subject to "an absolute eight-year repose period." *Id.* at 455. In finding that the plain language of the tolling statute at issue in that case "demonstrates that the legislature intended to include minors who also suffer from another legal disability within the purview of the *** tolling provision" (*id*. at 453), our supreme court wrote as follows:

> "Illinois law has long recognized that incompetents are favored persons in the eyes of the law and courts have a special duty to protect their rights. [Citations.] The purpose of tolling provisions for legal disability, such as that contained in section 13-212(c), is to protect the rights of those who are not competent to do so themselves. These provisions recognize that the enforcement of an incompetent person's rights should not be left to the whim or mercy of some self-constituted next friend. [Citations.]" (Internal quotation marks omitted.) *Id*. at 454 (citing *Passmore,* 152 Ill. App. 3d at 558, quoting *Girman v. County of Cook*, 103 Ill. App. 3d 897, 898 (1981)).

¶ 35 In *McDonald v. City of Spring Valley*, 285 Ill. 52, 56 (1918), the issue was whether a minor was excused from giving the notice of an injury to an incorporated city required by statute in the time allotted during her minority. *McDonald v. City of Spring Valley*, 285 Ill. 52, 53-54 (1918). The plaintiff in that case argued "that under a proper construction of this statute "one in her condition is excepted from its operation, and that because of her mental incapacity the statute does not apply to her and she is not required to give the statutory notice within six months after receiving the injury." *Id*. at 54. Our supreme court found as follows:

> "It cannot be controverted that *a minor is incapable of appointing an agent or an attorney*, and it cannot be successfully contended that the statute can be complied with by the filing of the required notice by the father, mother, or some friend of the child as next friend. While the parent of a minor is its natural guardian, *he cannot be said to be the agent or attorney for the child*. A child with a meritorious cause of action but incapable of initiating any proceeding for its enforcement will not be left to the whim or mercy of some self-constituted next friend to enforce its rights." (Emphases added.) *McDonald*, 285 Ill. at 56.

¶ 36 Plaintiff argues the Act is "no different than the statutory provisions which allowed for the appointment of the conservator or guardian in *Mazikoske*, *Haas*, *Passmore*, and *Estate of Riha*" because those statutes "also grant authority to act on behalf of the disabled person or the minor." Defendant Stolberg argues plaintiff exercised the powers bestowed to her under the POA "when she retained counsel, inquired as to the estates and trusts at issue, and threatened litigation—all on Sherwin's behalf." Stolberg argues that under section 2-6(a) of the Act, plaintiff's exercise of these powers bind Sherwin and have the same effect as if Sherwin was competent and not a person with a disability. Sherman similarly argues that plaintiff's "conduct in engaging counsel on behalf of Sherwin Ross to investigate (and threaten) claims was entirely within the scope of her agency under the durable power of attorney" and, plaintiff's actions bound Sherwin "as if he were not a person with a disability."

¶ 37 Contrary to plaintiff's argument, the Act does create a different situation from the statutes and authorities plaintiff cited because under section 2-6(a) of the Act, the acts of the agent have the same effect and bind the principal as if the principal were competent and not a person with a legal disability. None of the cited authorities address any statutory language remotely approximating section 2-6(a) of the Act, which states that plaintiff's act of pursuing Sherwin's rights under the same claims stated in the complaint—a fact plaintiff does not refute—has "the same effect" and is binding on Sherwin as if he "were competent and not a person with a disability." 755 ILCS 45/2-6(a) (West 2016). Plaintiff argues there is nothing in the Act stating an intention by the legislature to abrogate the intent of the tolling statute to toll the limitations period until the disability is removed or to reverse the court's holdings that have applied the tolling statute to persons under a legal disability who had a conservator or guardian. The plain and unambiguous language of the statute is the most reliable indicator of the legislature's intent. *Manago By and Through Pritchett v. County of Cook*, 2017 IL 121078, ¶ 10.

¶ 38 Here, the plain language of section 2-6 states that the act of an agent acting under a POA has the same effect and binds the principal as if the principal was not a person with a disability. We find this language to be a clear indication of the legislature's intent to treat persons under a legal disability who have an agent with a POA differently from persons under a legal disability who do not have an agent with a POA, even if the latter have a conservator, guardian, or next friend, based on certain acts by the agent. The guardianship statute (755 ILCS 5/11a-1 *et seq.* (West 2016)) does not contain any provision analogous to section 2-6 of the Act, giving a guardian the ability to bind the ward as if the ward was not a person with a disability[8], despite language in the guardianship statute directing the guardian of the estate of a ward to appear for and represent the ward in all legal proceedings unless another person is appointed for that purpose. See 755 ILCS 5/11a-18 (West 2016). The plain language of the statute indicates the legislature's intent to treat the principal as "competent and not a person with a disability" with regard to acts by the agent under a POA within the scope of the agency, and for those acts to have the same effect as if the principal was not a person with a disability. We find no indication that this treatment was not intended to extend to acts by the agent that would trigger the running of the statute of limitations. In other words, the acts of an agent acting under a POA with regard to a statute of limitations have the same effect and are binding on the principal as if the principal was not a person with a disability. Plainly, if the principal is not a person with a disability, then the tolling statute does not apply.

---

[8] On the contrary, the guardianship statute states "[g]uardianship shall be utilized only as is necessary to promote the well-being of the person with a disability, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence. Guardianship shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations." 755 ILCS 5/11a-3 (West 2016).

¶ 39 Plaintiff argues "the issue here does not involve an action by the principal, *which may be binding*, but involves inaction (not filing suit)." (Emphasis added.) Plaintiff argues that the "key distinction is that the disabled principal cannot be bound by the inaction of the agent." Plaintiff argues the trial court failed to provide an explanation of why a POA "replaces and supplants the legislature's intent *** to toll the statute of limitations 'until the disability is removed.' " This position, that the appointment of an agent under a POA cannot lift the toll on the statute of limitations, overstates the holding necessary to find the statute of limitations was not tolled in this case (as does some of defendants' arguments). We are not required to find and make no findings as to whether the appointment of an agent under a POA itself removes the protection of the tolling statutes. Instead, in this case it was the act of the agent under a POA and of Sherwin's attorney in both acquiring knowledge that Sherwin's rights might have been violated and pursuing redress of those rights that triggered the running of the statute of limitations. Plaintiff's argument section 26(a) does not obligate or require the agent to act on behalf of the principal is inapposite. Plaintiff's acts in this case have the same effect and are binding on Sherwin as if he were not a person under a legal disability (assuming, *arguendo*, he is). Again, if Sherwin was not a person under a legal disability when the statute of limitations was triggered, which, under section 2-6 of the Act, he was not, the tolling statute does not apply. Plaintiff argues the tolling provisions should have been applied even if Sherwin has an agent acting on his behalf. Plaintiff's view would require us to find that the plain language of section 2-6 of the Act does not apply in this situation. Stated differently, plaintiff would have this court find that plaintiff's acts on behalf of Sherwin under the POA do *not* have the same effect and are *not* binding on Sherwin as if he were competent. Absent an express intent by the legislature for section 2-6 of the Act not to apply to the Code's limitations provisions, we find that the plain language of section 2-6 evinces the legislature's intent to treat persons under a legal disability as if they "were competent

and not a person with a disability" based on certain acts by an agent under a POA for purposes of the limitations provisions including for purposes of the tolling statute.

¶ 40 Even if the trial court relied solely on the existence of the POA, "we may affirm on any basis that is supported by the record, regardless of whether that basis was the reason for the circuit court's judgment." *Kowal v. Westchester Wheels, Inc.*, 2017 IL App (1st) 152293, ¶ 14. The distinguishing characteristics of this case that differentiates it from the authorities on which plaintiff relies are the clear legislative intent behind section 2-6(a) of the Act and plaintiff's acts under the POA with regard to Sherwin's claims against defendants. We cannot ignore the plain language of section 2-6(a) by permitting plaintiff to perform acts in the scope of her agency, acts that have effects related to the statute of limitations, while continuing to treat Sherwin as a person under a legal disability. The trial court did not need to reach the question of whether plaintiff sufficiently alleged Sherwin was under a legal disability. Plaintiff's acts have the same effect as if Sherwin was competent. Absent tolling, there is no dispute plaintiff's complaint was not timely. Accordingly, the judgment is affirmed.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 43 Affirmed.