2020 IL App (2d) 190794-U
No. 2-19-0794
Order filed April 28, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KIRSTEN THURMOND, Plaintiff-Appellant, v. WEXFORD HEALTH SOURCES, INC.; YOUNG KIM, Individually and as an Employee and/or Agent of Wexford Health Sources, Inc.; KATHERINE SHAW BETHEA HOSPITAL; and KRISTINE PULTORAK, Individually and as an Employee and/or Agent of Katherine Shaw Bethea Hospital Defendants (Wexford Health Sources, Inc., and Young Kim, Defendants-Appellees).	)	Appeal from the Circuit Court of Lee County. No. 15-L-22 Honorable Jacquelyn D. Ackert, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Bridges concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting summary judgment in favor of defendants where plaintiff's sworn depositional testimony demonstrated that he believed defendants were not providing adequate medical treatment on July 4, 2013, making the filing of his initial complaint, filed on July 17, 2015, time barred by the statute of limitations.

¶ 2 Plaintiff, Kirsten Thurmond, appeals the trial court's order granting summary judgment in favor of defendants, Dr. Young Kim and Wexford Health Sources, Inc. (collectively, defendants). Thurmond contends that the trial court erred in finding there was no issue of fact regarding the date in which he was aware of defendants' alleged negligent care and that he filed his initial complaint within the applicable two-year statute of limitations.

¶ 3 I. BACKGROUND

¶ 4 Despite the lengthy history of this case, the relevant facts, as taken from the pleadings, affidavits, and deposition in the record, are quite simple. In July 2013, Thurmond was incarcerated at the Dixon Correctional Center (DCC). At the same time, Kim was employed by Wexford, which had a contract with the Illinois Department of Corrections to provide medical care to the inmates at the DCC.

¶ 5 At approximately 5:00 p.m. on July 2, 2013, Thurmond slipped on a pool of water in the prison's cafeteria and fell "real hard" on his lower back. Thurmond was transported to the healthcare unit on a backboard, where he saw Kim and an unspecified nurse. At that time, Thurmond complained that his back hurt and was given a muscle relaxer and acetaminophen to help with the pain. He went back to his room to rest. Waking up a few hours later with "the most excruciating pain" he had ever felt, Thurmond returned to the healthcare unit, was seen by a nurse, and given more pain medication and an ice pack. Thurmond returned to the healthcare unit the next two days, complaining of back pain.

¶ 6 At that time, Thurmond felt that he was not "being treated right" and was not being taken seriously by the healthcare unit's medical staff. Because he felt they were "not looking after [him] the way [he] thought they should," Thurmond filed a grievance on July 4, 2013, identifying the nature of the grievance as both "staff conduct" and "medical treatment." He requested that the

DCC "let [him] see a back specialist or at least give [him] an x-ray." We include below, in its entirety, the narrative of Thurmond's grievance:

> "To whom it may concern, on July 2 around 5:00 p.m., I had just receive my tray in the chow hall when I went to get some water there was water on the floor by the water fountain and the next thing I knew was my feet came from under me and food and water went everywhere. I landed on my back when LT. Justice came to give me an order to stay down and don't move. He called for a nurse and one of those pieces for your back when their been an injury.
>
> They took me to the H.C.U. where I seen a doctor and I was complaining that my back was killing me when he gave me something to eat and some medicine and sent me back to the unit. Later on that night I woke up from the pain in my back and press the button in my cell until an officer came. I told her that I couldn't sleep because all the pain I was suffering in my sleep and she sent me to the H.C.U. The nurse working that night gave me an ice pack and some Tylenol and told me to try and sleep with a pillow between my legs, but I still didn't get any sleep from the pain I was suffering. So on July 3rd I went over to the H.C.U. complaining that I was not sleeping well and my back is getting worser and they told me it aint nothing they could do for me. I mean I suffered a serious back injury because there was no safety cones by the water fountain or wet floor signs to let me know that the floor is slippere and now that I'm hurt real bad that I think I need X-rays don't nobody want to help me. They should send me to a back specialis or something because the pain medication is just working temporarily. Please respond because there is something seriously wrong with my back."

¶ 7 Between July 4 and July 12, 2013, Thurmond returned to the healthcare unit seven times, complaining primarily of back pain. On July 10, he received an x-ray of his back. According to the x-ray report, there was no convincing evidence of a compression fracture. On July 12, he was admitted to the infirmary, where he remained until July 23. According to his later deposition, Thurmond stated they put him in the infirmary because he did not "let up" informing the healthcare unit that he was in pain and that something was wrong with his back: "Every day I'm pounding it to these people that my back, something is wrong with my back, I need to see a back specialist. I need to see somebody. Something is wrong with my back."

¶ 8 While in the infirmary, Thurmond felt that Kim was "brushing [him] off." Thurmond "kept trying to pound it into [Kim] that [he was] in pain" and that "something [was] seriously wrong with [him]." Thurmond believed that Kim thought he was lying about his pain. He also received a CT scan of his chest, abdomen, and pelvis, which were "unremarkable."

¶ 9 Thurmond returned to his unit for a brief time, but was readmitted to the infirmary on August 3, 2013, when he was no longer able to walk on his own. On August 7, Thurmond received a CT scan on his back. The scan revealed a "marked narrowing" of the joint space and the appearance of fragmentation of the articulating surfaces between the L5 and S1 vertebrae. The report noted that it appeared to be from "an inflammation type process rather than a neoplastic type process," but given Thurmond's history of trauma, "this could represent injury with subsequent demineralization and fragmentation of the articulating surfaces."

¶ 10 On August 16, 2013, while still in the infirmary, Wexford requested a neurosurgery evaluation for Thurmond's "worsening lumbosacral radiculopathy" with a history of a slip and fall. Thurmond received an MRI on September 27, which showed a suspected "inflammatory

discitis" at the L5-S1 joint. The MRI report noted "similar findings were seen" on the August 7 CT scan results and "the findings clearly remain suspicious for an inflammatory process."

¶ 11 Thurmond was transferred and admitted into the University of Illinois Chicago Medical Center (UIC) for the requested neurosurgical evaluation on October 2, 2013. There, he was diagnosed with an MSSA Epidural Abscess and vertebral osteomyelitis and underwent multiple spinal surgeries and treatments. He remained hospitalized for several weeks before being transported back to the DCC infirmary, where he spent the remainder of his incarceration. He was released in April 2014.

¶ 12 On July 17, 2015, Thurmond filed his initial complaint against defendants, in which he alleged both Kim and Wexford committed medical negligence, identifying eight acts or omissions:

> "a. *** negligently failed to possess and exercise, in diagnosis, treatment, and care that reasonable degree of knowledge, care, and skill that is ordinarily possessed and exercised by other physicians in the same or similar locality in similar circumstances;
>
> b. Failed to properly diagnose, manage, and treat [Thurmond's] injuries and the complications that arose therefrom;
>
> c. Ignored multiple complaints of severe back pain, numbness, tingling, and/or difficulty walking due to lower extremity weakness, and *** failed to follow up on these complaints in any meaningful way;
>
> d. Failed to adequately investigate [Thurmond's] complaints of severe back pain, numbness, tingling and/or difficulty walking due to lower extremity weakness in order to prevent further injury to [him];

e. Failed to ensure that [Thurmond] received a timely neurosurgical consultation despite numerous complaints of severe back pain, numbness, tingling, and/or difficultly walking due to lower extremity weakness over a three (3) month span;

f. Failed to follow *** written protocol for referring patients for testing, evaluation, and treatment for outside providers.

g. *** deviated from the standard of care with respect to the State's failure to ensure that [Thurmond] received a timely neurosurgical consultation;

h. was otherwise negligent."

Thurmond was granted leave to file two amended complaints and did so, maintaining that defendants were liable to him due to all but the first allegation from the initial complaint. On April 15, 2016, defendants filed a motion to dismiss the second amended complaint, arguing, in part, that the claims were barred by the two-year statute of limitations on healing art malpractice. Their motion was denied on August 4, 2016.

¶ 13 After a year of no progress, the case was dismissed without prejudice for want of prosecution on September 5, 2017. Thurmond then filed a motion to vacate the dismissal, which was granted on December 5, 2017, on the condition that Thurmond fully comply with discovery requests. After a slew of continuances, Thurmond's deposition was taken on April 24, 2019. Defendants filed the motion for summary judgment at issue here on May 2, 2019, arguing again that the two-year statute of limitations for medical negligence began running, at the latest, on July 4, 2013, making the filing of Thurmond's initial complaint two weeks too late.

¶ 14 On August 12, 2019, after hearing argument on the motion, the trial court granted defendants' motion for summary judgment. In its order, the court found

> "as of July 2, 2013, Plaintiff was on notice of the purported medical negligence committed by the Defendants, Dr. Kim and Wexford Health Sources, Inc. Nothing about his subsequent treatment changed his belief that his medical treatment at the Dixon Correctional Center was inadequate and actionable. From as early as July 2, 2013, [Thurmond] believed that Dr. Kim and Wexford's employees had failed to properly diagnose or treat his back injury. [Thurmond] did not file his complaint until July 17, 2015, fifteen days after the two-year statute of limitations expired."

The order also provided that "there is no just reason to delay the enforcement or appeal of this final Order pursuant to Supreme Court Rule 304(a)." Thurmond timely filed an appeal.

¶ 15 II. ANALYSIS

¶ 16 Thurmond contends that the trial court erred in granting defendants' motion for summary judgment because a question of fact exists as to the timeliness of his complaint. Pursuant to section 2-1005(c) of the Code of Civil Procedure (Code), a party is entitled to summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2018). In determining whether a genuine issue of material fact exists, the trial court must construe the pleadings, depositions, and affidavits strictly against the moving party and liberally in favor of the opponent. *Rahic v. Satellite Air-Land Motor Service, Inc.*, 2014 IL App (1st) 132899, ¶ 18. Although it can aid in an expeditious disposition of a lawsuit, summary judgment is a drastic measure and should only be allowed when the moving party's right to it is clear and free of doubt. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). We review a trial court's granting of a motion for summary judgment *de novo*. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008).

¶ 17 The Code provides that a negligence claim against a physician arising out of patient care shall not be brought more than two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, of the existence of the injury for which damages are sought. 735 ILCS 5/13-212(a) (West 2018). Under this "discovery rule," the limitations period starts to run when a person (1) knows, or reasonably should know, of his injury and (2) knows, or reasonably should know, that it was wrongfully caused. *Hill v. Pedapati*, 326 Ill. App. 3d 58, 61 (2001). Generally, the issue of when a party should have known of both the injury and that it was wrongfully caused is one of fact for a jury to decide. *Young v. McKiegue*, 303 Ill. App. 3d 380, 387 (1999). Only when the facts are not in dispute, and only one conclusion can be drawn from those facts, may the question be determined as a matter of law. *Id.*

¶ 18 Thurmond initially argues that defendants maintained a continuous course of negligent treatment from July 2 until October 2, 2013, when he was correctly diagnosed at UIC with an MSSA Epidural Abscess and vertebral osteomyelitis; thus, his July 2015 initial complaint was timely. Defendants respond that when a plaintiff suffers from a sudden, traumatic injury, the statute of limitations begins to run on the date the injury occurs, citing *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548 (1974). Thus, they argue, the statute of limitations began to run on July 2, 2013, and the trial court did not err in granting their motion for summary judgment.

¶ 19 However, contrary to defendants' assertion, Thurmond's injury was not from his sudden, traumatic slip-and-fall in the prison's cafeteria, but rather defendants' alleged negligent treatment thereafter. When a plaintiff allegedly receives negligent medical care following a traumatic injury, he has two years from the *discovery* of the negligent care, not two years from the date of the injury, to file a medical malpractice action. *Snyder v. Judar*, 132 Ill. App. 3d 116, 118-19 (1985). A plaintiff is held to have discovered the existence of such a cause of action when he knew of his

injury and should have realized that he "may not have been receiving proper diagnosis and treatment." *Witherell v. Weimer*, 85 Ill. 2d 146, 157 (1981). Thus, the question we must answer is whether Thurmond discovered the defendants' alleged negligent care before July 17, 2013.

¶ 20 Thurmond avers that the case at hand is analogous to *Dockery v. Ortiz,* 185 Ill. App. 3d 296 (1989). In *Dockery*, a plaintiff filed a medical negligence complaint on October 10, 1986, alleging that the doctor defendants were negligent in providing care leading to the double amputations of both his legs at the hip. *Id.* at 299. The trial court granted defendants' motion for summary judgment, finding that plaintiff reasonably should have known as of the first amputation of one leg on May 11, 1984, that a connection existed between his injury and the defendants' medical treatment. *Id.* at 304. The appellate court disagreed. Because the plaintiff had a history of vascular disease and diabetes, which in the past had particularly affected his legs, and had been told that he may lose his leg as a result his illnesses, the appellate court determined that an issue of fact existed as to when plaintiff should have known that his injury was due to the wrongful acts of the defendants and not a natural progression of his diabetes. *Id.*at 312.

¶ 21 Unlike the plaintiff in *Dockery*, who claimed to only have discovered the defendants' negligence in February 1985, Thurmond unequivocally believed that he was being mistreated on July 4, 2013. In his own words:

> "I suffered a serious back injury *** and now that I'm hurt real bad that I think I need X-rays don't nobody want to help me. They should send me to a back specialis or something because the pain medication is just working temporarily. Please respond because there is something seriously wrong with my back."

Thurmond's deposition testimony further clarifies that he filed the July 4 grievance because he felt that he was not being treated right, that something was seriously wrong with him, that defendants

were not looking after him the way he thought they should be, and that he should have been taken more seriously by defendants.

¶ 22 Further, at Thurmond's deposition, the following exchange took place:

> "Q: Was there something about the treatment at UIC that made you think something had gone array at the prison or was it your thinking all along that there was something gone wrong at the prison?
>
> A: Well, at the prison, I mean, I keep pounding it into them that I'm in pain and they keep turning me down. They keep sending me back. So all the time I'm feeling some kind of way about the way the medical staff treated me at the prison. They didn't treat me right. All the time I felt like that.
>
> Q: This was before you went to UIC?
>
> A: This is before I went to UIC.
>
> Q: Did anything happen at UIC that reinforced your prior thinking?
>
> A: Nothing particular."

Thurmond's own statements that he knew something was wrong and he did not believe that defendants were treating him properly demonstrate that he was on notice that he may not have been receiving a proper diagnosis and treatment for his injury on July 4, 2013.

¶ 23 Despite his own identification that he was being mistreated in July, Thurmond asserts that defendants maintained a continuous course of negligent treatment until October 2, 2013, citing *Cunningham v. Huffman*, 154 Ill. 2d 398 (1993), for the proposition that the limitations period only begins to run once the treatment is discontinued. In *Cunningham*, our supreme court stated: "once treatment by the negligent physician is discontinued, the statute of *repose* begins to run, regardless of whether or not the patient is aware of the negligence at termination of treatment." (Emphasis

added.) *Cunningham*, 154 Ill. 2d at 406. Courts have since clarified that while the statute of repose is tolled by the continuous course of medical treatment, the statute of limitations is not. See *e.g.*, *Johnson v. Core-Vent Corp.*, 264 Ill. App. 3d 833, 838-39 (1993) ("The doctrine tolls the four-year statute of repose but does not toll the two-year statute of limitations if the plaintiff knows of her injury at issue."); *Kanne v. Bulkey*, 306 Ill. App. 3d 1036, 1040 (1999) ("the distinction between the repose period and the limitations period is that the repose period is triggered by defendant's wrongful act or omission that causes the injury, while the limitations period is triggered by the patient's discovery of the injury."). Because the issue at hand is whether Thurmond's complaint was time-barred by the statute of limitations, not repose, his argument for tolling the time until after defendants stopped treating him is inapposite.

¶ 24 Thurmond next argues that he had no reason to know that the injury was wrongfully caused by defendants until, at the earliest, August 7, 2013, when the initial CT scan showed marked narrowing at the L5-S1 joint. Defendants respond that Thurmond's argument on appeal is disingenuous, as he admitted in his deposition that he believed "the entire time" defendants were not treating him properly and he had no recollection or knowledge about what the off-site medical treatment revealed. We agree with defendants.

¶ 25 A plaintiff should reasonably know that his injury is wrongfully caused as soon as he has sufficient information about his injury and its cause to spark inquiry in a reasonable person as to whether the conduct of the party who caused his injury might be legally actionable. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415-16 (1982)). At that time, it is his burden to investigate whether he has a cause of action. *Id.* at 416. "Wrongful cause" does not require the plaintiff to know that the defendants' conduct fits the technical, legal definition of negligence or that all the legal elements of a particular cause of action are otherwise satisfied, but does require that plaintiff be

aware of some possible fault on the defendants' part. *Mitsias v. I-Flow Corp.*, 2011 IL App (1st) 101126, ¶ 24. Reasonable knowledge of wrongful cause requires more than mere suspicion that wrongdoing might have occurred. *Young v. McKiegue*, 303 Ill. App. 3d 380, 390 (1999).

¶ 26 Here Thurmond relies on *Young* and *Paige-Myatt v. Mount Sinai Hosp. Medical Center*, 313 Ill. App. 3d 482 (2000), for the proposition that trial courts cannot "charge a plaintiff with the requisite medical knowledge to self-diagnose his condition at the time of the" alleged negligent treatment. In *Young*, a wrongful death case, the court held that the two-year statute of limitations did not begin when decedent died, but rather when the plaintiff received an initial physician report, which stated the defendants caring for the decedent deviated from the standard of care. *Young*, 303 Ill. App. 3d at 389. Thus, plaintiff's causes of action against two of the defendants, filed more than two years after she received the physician report, were properly dismissed. *Id.* However, with respect to the complaint against a third defendant, which was filed within two years of receiving the physicians report, a question of fact existed to determine if plaintiff knew, or should have known, of the potential causes of action against him earlier. *Id.* The case was remanded for the trier of fact to make such a determination. *Id.* at 390.

¶ 27 In *Paige-Myatt*, a plaintiff suffered a femoral nerve injury following a hysterectomy, which led to pain throughout her lower back, right hip and leg pain. *Paige-Myatt*, 313 Ill. App. 3d at 483. She was informed by her doctor that her pain was a common post-operative problem, and when the pain did not improve, she sought help for over 18 months until the femoral nerve injury, likely due to the surgery, was diagnosed. *Id.* at 485. The trial court dismissed her complaint against the defendant hospital for failing to serve it within two years of her surgery. *Id.* Because the plaintiff received reassurances that her pain in the anatomical area of the procedure was normal, and tried to find the answer to her pain for 18 months before a doctor discovered its likely cause from the

surgery, the appellate court dismissed the court's order dismissing the cause with prejudice and amended the court's order of dismissal to be without prejudice to the plaintiff's right to refile. *Id.* at 490.

¶ 28 Thurmond argues that like the plaintiffs in *Young* and *Paige-Myatt*, he did not know the wrongful cause of his injuries until at least August 7, 2013. However, unlike *Young* and *Paige-Myatt* plaintiffs, who were unaware of the alleged negligent medical treatment they received for some time, Thurmond knew "all the time" that defendants were not treating him appropriately. In his July 4, 2013, grievance he stated that "something is seriously wrong with [him] and don't nobody want to take [him] seriously." His deposition testimony belies his assertion that the grievance was expressing mere dissatisfaction, asserting he was only placed in the infirmary on July 12 because he kept "pounding it to [defendants] that *** something [was] wrong with [his] back" and that he "need[ed] to see a back specialist." "Nothing particular" occurred at UIC, where he received the MSSA Epidural Abscess and vertebral osteomyelitis diagnoses and treatments, to alter that belief. This statement directly contradicts his argument that he was unaware that the condition of his back was wrongfully caused until he was seen by off-site providers.

¶ 29 It is well-settled that once a party knows or reasonably should have known both of the injury and that it was wrongfully caused, the burden is upon him to inquire further as to the existence of a cause of action. See *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981) ("once it reasonably appears that an injury was wrongfully caused, the party may not slumber on his rights."). While we sympathize with Thurmond's injuries and current physical maladies, this serves as a potent reminder to attorneys and litigants about the importance of complying with statutes of limitations and that a proper application of a limitations period may produce results that seem harsh or undesirable.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the circuit court's order granting summary judgment to defendants, Dr. Young Kim and Wexford Health Sources, Inc.

¶ 32 Affirmed