2020 IL App (5th) 180514-U

NO. 5-18-0514

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CHERYL STAMPER, Individually and as Independent Administrator of the Estate of Steve Stamper, Deceased,	)	Appeal from the Circuit Court of Madison County.
Plaintiff-Appellant,	)	
v.	)	No. 17-L-1444
TURTLE WAX, INC.; SHELL OIL COMPANY; BP PRODUCTS NORTH AMERICA, INC.; and CONOCOPHILLIPS COMPANY,	)	Honorable Dennis R. Ruth,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Cates and Boie concurred in the judgment.

ORDER

¶ 1 *Held*: The order of the circuit court granting defendants' respective motions to dismiss is reversed where defendants failed to establish that plaintiff's complaint was barred by the statute of limitations. We decline to address defendants' claim of *res judicata* raised for the first time on appeal.

¶ 2 Plaintiff, Cheryl Stamper, individually and as independent administrator for the estate of her deceased husband, Steve Stamper (Steve), appeals from an order of the circuit court of Madison County granting defendants', Turtle Wax, Inc. (Turtle Wax), Shell Oil Company (Shell

Oil), BP Products North America, Inc. (BP), and ConocoPhillips Company (ConocoPhillips),[1] respective motions to dismiss plaintiff's complaint, pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2018)), based on the expiration of the two-year statute of limitations (*id.* § 13-202). For reasons that follow, we reverse the court's dismissal of plaintiff's complaint and remand for further proceedings.

¶ 3 I. Background

¶ 4 From 1977 until his death on January 31, 2014, Steve lived in Roxana, Illinois. Steve worked for the Village of Roxana as a firefighter, serving as fire chief from 1998 to 2001. Steve later worked for Roxana's public works street department from 2001 to 2010. While working for the street department, Steve performed street and sewer line repairs in residential areas near the local refinery, and he typically worked several hours each day in the public works yard abutting the refinery. In August 2010, Steve was diagnosed with glioblastoma multiforme (GBM), a rare form of brain cancer.

¶ 5 A. 2011: Steve Stamper v. Village of Roxana, No. 2011-WC-0285

¶ 6 On July 14, 2011, Steve filed an application for adjustment of claim with the Illinois Workers' Compensation Commission under the Workers' Occupational Diseases Act (820 ILCS 310/1 *et seq.* (West 2010)). Steve claimed that his cancer was caused by repeated exposure to benzene while working for the Village of Roxana. Attorney Katie Hubbard was retained as Steve's legal counsel. Following Steve's death in 2014, Hubbard withdrew Steve's workers' compensation claim without an award of benefits.

[1]WRB Refining, LLC and URS Corporation were named as respondents in discovery (see 735 ILCS 5/2-402 (West 2018)) but were subsequently "terminated" in the discovery action and not made parties to this appeal.

¶ 7 B. 2013: Patricia Ford, *et al.* v. Shell Oil Company, *et al.*

¶ 8 On November 8, 2013, Steve joined a pending lawsuit filed by multiple plaintiffs in Madison County against Shell Oil, BP, ConocoPhillips and other corporate entities (Patricia Ford, *et al.* v. Shell Oil Company, *et al.*, No. 2011-L-0524 (Cir. Ct. Madison County) (Ford lawsuit)). The Ford lawsuit alleged that the defendants, past, and present owners and operators of the local refinery in Roxana, had negligently caused an underground plume of toxic hydrocarbons (including benzene) that polluted ground water in certain areas of Roxana. The contaminated areas included the area where Steve resided and the public works yard where Steve worked. The Ford lawsuit sought economic damages for the permanent diminution of property values and the creation of a court-supervised monitoring trust fund for the early detection of diseases and cancers caused by exposure to benzene, gasoline, hydrocarbons, and other petroleum products and byproducts. The Ford lawsuit was pending at the time of Steve's death and later settled during the pendency of this appeal.

¶ 9 C. 2017: Wrongful Death and Survival Action

¶ 10 On October 18, 2017, after allegedly reading in medical articles that exposure to benzene could cause GBM, plaintiff, individually and as independent administrator for Steve's estate, filed a six-count complaint under the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2016)) and the Survival Act (755 ILCS 5/27-6 (West 2016)) against defendants. Plaintiff alleged that Steve's cancer-related death was proximately caused by exposure to benzene from products manufactured by Turtle Wax and from repeated environmental exposures to benzene emitted by the refinery operations of Shell Oil, BP, and ConocoPhillips. Concerning the environmental exposures, plaintiff alleged, *inter alia*, that Shell Oil, BP, and ConocoPhillips, in operating the local refinery complex, failed to: (1) exercise reasonable care and caution regarding Steve's

safety and welfare; (2) comply with state and federal regulations regarding the handling, storage, and/or removal of benzene and benzene-containing pollutants, as evidenced by the numerous citations for violating environmental protection laws for releases of benzene and other dangerous chemicals; (3) properly maintain their benzene storage facilities to prevent the release of benzene into the ground, ground water, and air in and around the refinery; and (4) clean up or otherwise address the leaks and spills of benzene or petrochemicals to prevent these substances from moving through the air, ground, and ground water in and around the refinery. Plaintiff further alleged that Shell Oil, BP, and ConocoPhillips had conspired to overtly suppress the health hazards of benzene, leaving Steve unknowingly exposed to sufficient amounts to cause his death. As such, plaintiff claimed that Shell Oil, BP, and ConocoPhillips should be "estopped from relying on any statute of limitations defense."

¶ 11 Additionally, plaintiff claimed the following:

> "No treating physician ever informed [Steve] nor Plaintiff that [Steve's] cancer was caused by benzene. Moreover, despite some suspicion and investigation into whether [Steve's] cancer may have been caused by benzene, Plaintiff was unable to determine and, in fact, received negative information, about whether [Steve's GBM] was likely to have been caused by benzene. At the earliest, plaintiff was given information that benzene was likely to have caused [Steve's GBM] when she became aware, in and around late October 2016, of medical articles indicating that benzene caused [GBM]."

The complaint contained no additional information regarding the referenced medical articles.

¶ 12 D. Motions to Dismiss

¶ 13 On January 16, 2018, Shell Oil filed a motion to dismiss, pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2018)), alleging that plaintiff's claims were barred by the two-year statute of limitations. Shell Oil contended that Steve knew more than six years

before plaintiff filed suit, as evidenced by Steve's 2011 application for adjustment of claim, that his cancer "might reasonably be linked to benzene exposure." Shell Oil also contended that Steve further demonstrated this knowledge in 2013 when he joined the Ford lawsuit, which claimed that "Shell Oil is not only responsible for a plume of benzene beneath the Village of Roxana, but that persons *** living and working in Roxana have experienced many health-related problems as a result of the benzene plume, including cancer and leukemia." In support of its motion to dismiss, Shell Oil attached a copy of Steve's application for adjustment of claim and the amended Ford complaint, which added additional plaintiffs, including plaintiff and Steve, to the initial complaint.

¶ 14 On February 23, 2018, plaintiff filed a motion in opposition to Shell Oil's motion to dismiss, contending that the discovery rule postponed the starting of the period of limitations and that a jury should decide the contested factual issue of when Steve "reasonably knew or should have known his brain cancer was wrongfully caused." In support, plaintiff asserted that Shell Oil had failed to present legal authority demonstrating that the filing of a workers' compensation case or "a property damage case" definitively established, as a matter of law, the necessary knowledge to start the limitation period. Plaintiff attached three affidavits in support of her opposition—two attested to by plaintiff and one attested to by Hubbard.

¶ 15 In her first affidavit, plaintiff stated that neither she nor Steve had been advised by medical providers that benzene was a cause, or potential cause, of Steve's brain cancer, and her own investigation that benzene could have caused Steve's brain cancer was met with "negative results." Additionally, Hubbard withdrew Steve's workers' compensation claim after she failed to find an expert to link Steve's brain cancer to benzene exposure.

¶ 16 In her second affidavit, plaintiff stated that she had attended all of Steve's medical appointments following his cancer diagnosis and that they were informed that "brain cancer is just something that some people get." In addition, no specific cause for Steve's brain cancer was known, and his doctors were unaware of any medical research linking benzene to brain cancer at that time.

¶ 17 In the third affidavit, Hubbard stated that she had advised Steve that a workers' compensation claim could be filed on his behalf while "[Hubbard] investigated whether [she] could obtain an expert opinion establishing a causal connection between his benzene exposure and his [GBM]." However, due to Hubbard's inability to obtain an expert opinion establishing a causal connection, Steve withdrew his claim without an award of compensation, and Hubbard withdrew from the case.

¶ 18 After plaintiff filed her opposition to Shell Oil's motion to dismiss, all other defendants filed motions to dismiss. Although filed separately, these motions to dismiss each adopted the same asserted facts, relief, and support as outlined in Shell Oil's motion to dismiss.

¶ 19 On April 6, 2018, the circuit court held a hearing on defendants' respective motions to dismiss. During the hearing, the following colloquy took place:

> "MR. DYSART [(PLAINTIFF'S COUNSEL)]: Your Honor, I think first I want to point out that the standard that Shell [Oil] has enunciated in front of you here today that it may be caused by benzene exposure is not the correct standard. In a situation where a party has a disease or illness that has unknown causes or can be caused by things that are not wrongfully caused, that is not the proper standard. The proper standard enunciated as [*sic*] when a party reasonably should have known that their injury or disease was wrongly caused.
>
> THE COURT: Yeah, but you look at the Application for Adjustment of Claim which is signed by [Steve] personally: Date of accident, 6-26-2010. How did the accident occur? Repeat exposure to benzene. What is the nature of the injury? Cancer. So if you talk about knew or should have known, [Steve] himself affirmatively signed a statement saying exactly that.
>
> MR. DYSART: That's correct, [Y]our Honor, he suspected it. His lawyer suspected it.

THE COURT: No, he signed it.

* * *

THE COURT: —but he signed it. I mean that's an affirmative statement by [Steve]. That's something different than—

MR. DYSART: Yeah, but at the same time, [Y]our Honor, he's being told by his treating physicians they don't know what caused it. He asked them did benzene cause it; and they said not to our understanding; and he hired a lawyer who—

THE COURT: But he said so, correct?

MR. DYSART: He said he thought it could have caused it, yes.

THE COURT: Doesn't that mean he's on notice?

MR. DYSART: Well, he's on notice that it may have caused it, but all the case law says that whether he's suspicious that it causes it is not enough. ***"

Additionally, following a brief discussion regarding the Ford lawsuit, plaintiff's counsel argued that, due to the experts telling Steve that his cancer was not causally related to the benzene exposure, it was unreasonable to conclude, as a matter of law, that Steve triggered the statute of limitations at that time. As such, plaintiff posited that this specific question should be presented to a jury.

¶ 20 In ruling on the motions to dismiss, the circuit court stated the following:

"THE COURT: I don't know whether you'd have a statute problem under the 2013 [Ford lawsuit] or not that's still pending; that's still two years after the workers' compensation claim was filed; but in my mind it seems pretty obvious that [Steve], quote/unquote, knew or should have known. That's when the clock starts ticking, and that's according to his own statement with his own signature ***."

The court then granted all of the motions to dismiss based on the statute of limitations.

¶ 21 On May 1, 2018, plaintiff filed a motion to vacate the circuit court's dismissal order, arguing that the court erred in viewing Steve's signed application for adjustment of claim as a binding judicial admission. Following further briefing and argument, the court denied the motion to vacate. Plaintiff appealed.

¶ 22 While this appeal was pending, defendants[2] filed a joint motion for this court to take judicial notice of certain pleadings regarding the Ford lawsuit. We ordered the motion taken with the case. Plaintiff did not file a response to the motion or address the motion in her initial brief on appeal. As defendants correctly assert, we note that the Ford lawsuit was heavily discussed during the hearing on the motion to dismiss, in the pleadings and subsequent dismissal orders. As such, the Ford lawsuit is relevant to the issues presented in this appeal. Moreover, it is well within this court's authority to take judicial notice of circuit court records. *In re N.G.*, 2018 IL 121939, ¶ 32; see also *City of Centralia v. Garland*, 2019 IL App (5th) 180439, ¶ 10 ("It is well established that this court can take judicial notice of matters that are readily verifiable from sources of indisputable accuracy, such as public records."). We therefore grant defendants' motion and take judicial notice of the Ford lawsuit, specifically, the second amended complaint, dated November 8, 2013. We now turn our attention to the issues presented on appeal.

¶ 23 II. Analysis

¶ 24 Plaintiff contends that the circuit court erred in finding her complaint time barred by the two-year statute of limitations (735 ILCS 5/13-202 (West 2018)), based solely on Steve's 2011 workers' compensation claim. In support, plaintiff asserts Steve filed his claim with only mere suspicion, rather than actual knowledge, that his cancer was wrongfully caused because there was a lack of medical documentation establishing causation at the time. As such, pursuant to the discovery rule, plaintiff argues that the present cause of action did not accrue until October 2016, when she learned from medical articles that exposure to benzene could cause GBM.

¶ 25 Defendants do not dispute that the discovery rule applies. However, defendants argue that the undisputed facts clearly demonstrate Steve knew or should have known that his cancer was

[2]Turtle Wax, Inc., did not participate in this motion.

caused by benzene exposure in 2011 and, then again, in 2013. First, defendants point out that Steve alleged in his 2011 workers' compensation claim that his cancer was caused by repeated exposure to benzene while employed by the Village of Roxana. Second, defendants note that Steve joined the Ford lawsuit in 2013, which repeatedly alleged that (1) "benzene causes cancer" and (2) the plaintiffs were put at an "increased risk of developing cancer" due to negligent refinery operations resulting in benzene contamination. Based on these facts, defendants assert that Steve demonstrated, in accordance with the discovery rule, that he "knew or reasonably should have known that he had been injured and that his injury was wrongfully caused." Consequently, defendants argue that Steve triggered the two-year statute of limitations period in either 2011 or 2013, thereby barring plaintiff's complaint. In the alternative, defendants allege that *res judicata* bars plaintiff's complaint because Steve was a party to the Ford lawsuit, which subsequently settled following the entry of the dismissal order in the present case.

¶ 26 A motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2018)) admits both the truth of the facts alleged in support of the claim and the legal sufficiency of the claim but asserts certain defects, defenses, or other affirmative matters which it asserts defeats the claim. *Barber-Colman Co. v. A&K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1075 (1992). Section 2-619(a)(5) allows dismissal when "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2018).

¶ 27 In ruling on a section 2-619 motion, all pleadings and supporting documents must be construed in a light most favorable to the nonmoving party, and the motion should be granted only where no material facts are in dispute and the defendant is entitled to dismissal as a matter of law. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. The relevant inquiry on appeal is " 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent

such an issue of fact, whether dismissal is proper as a matter of law.' " *Id.* (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). Appellate review of a dismissal pursuant to section 2-619 is *de novo* and, thus, a reviewing court need not afford deference to the circuit court's reasoning. *Spillyards v. Abboud*, 278 Ill. App. 3d 663, 668 (1996).

¶ 28 Generally, actions for personal injuries must be brought within two years (735 ILCS 5/13-202 (West 2018)), and a plaintiff's cause of action accrues at the time of the injury. *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 360 (1995). Under section 13-209(a)(1) of the Code (735 ILCS 5/13-209(a)(1) (West 2018)), if a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced by his or her representative before the expiration of that time, or within one year from his or her death whichever date is later. Moreover, "[a] survival action is a derivative action for the decedent's injury." *Janetis v. Christensen*, 200 Ill. App. 3d 581, 585 (1990).

¶ 29 Pursuant to the Survival Act (755 ILCS 5/27-6 (West 2016)), actions to recover damages for an injury to the person survive. The Act allows a representative of the decedent to maintain those statutory or common law actions that had already accrued to the decedent prior to his or her death. *Advincula v. United Blood Services*, 176 Ill. 2d 1, 42 (1996). Consequently, for purposes of triggering the statutory limitations period, it is the date the deceased discovered his action that is controlling. *Janetis*, 200 Ill. App. 3d at 585.

¶ 30 The discovery rule, however, was first announced by the Illinois Supreme Court in *Rozny v. Marnul*, 43 Ill. 2d 54, 72-73 (1969), and postponed the starting of the period of limitations. Under this rule, "the limitations period begins to run when the party seeking relief knows or reasonably should know of his injury and also knows or reasonably should know that it was

wrongfully caused." (Internal quotation marks omitted.) *Parks v. Kownacki*, 193 Ill. 2d 164, 176 (2000). The issue of whether an action was brought within the time allowed by the discovery rule generally presents a question of fact. *County of Du Page v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143, 153-54 (1985); *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981). The question may be determined as a matter of law, however, "[o]nly where the facts are not in dispute, and only one conclusion can be drawn from those facts." *Young v. McKiegue*, 303 Ill. App. 3d 380, 387 (1999).

¶ 31 Here, it is undisputed that Steve became aware he had suffered an injury when he was diagnosed with cancer in August 2010. The parties' dispute, instead, centers on whether Steve demonstrated sufficient knowledge that his injury was wrongfully caused when he filed a workers' compensation claim in 2011 and, then again, when he joined the Ford lawsuit in 2013. The circuit court answered this question in the affirmative, expressly finding that Steve's signed statement in his application for adjustment of claim that "repeat exposure to benzene" caused his "brain cancer" was definitive proof that Steve "knew or should have known" that his injury was wrongfully caused in 2011. We disagree.

¶ 32 "The relevant determination rests on what a *reasonable person should have known* under the circumstances, and not on what the particular party specifically suspected." (Emphasis added.) *Young*, 303 Ill. App. 3d at 390. "The trier of fact must examine the factual circumstances upon which the suspicions are predicated and determine if they would lead a reasonable person to believe that wrongful conduct was involved." *Id.* Evidence of suspicion of wrongful conduct, without examining the reasons underlying those suspicions, is not enough to constitute a plaintiff's constructive knowledge that an injury was wrongfully caused. *LaManna v. G.D. Searle & Co.*, 204 Ill. App. 3d 211, 219 (1990).

¶ 33 Wrongful cause, as embodied in the discovery rule, consists of two elements: (i) sufficient information to conclude that another's actions caused a plaintiff's injury and (ii) reasonable knowledge that the action was wrongful. *Mitsias v. I-Flow Corp*., 2011 IL App (1st) 101126, ¶¶ 22, 23. "The phrase 'wrongfully caused' does not mean knowledge of a *specific* defendant's negligent conduct or knowledge of the existence of a cause of action." (Emphasis in original.) *Castello v. Kalis*, 352 Ill. App. 3d 736, 744 (2004) (quoting *Young*, 303 Ill. App. 3d at 388). Once sufficient information becomes available, "the burden is upon the injured person to inquire further as to the existence of a cause of action." (Internal quotation marks omitted.) *Id.* at 745 (quoting *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981)).

¶ 34 Here, in making its determination, the circuit court should have examined the factual circumstances surrounding Steve's prior actions and then determined if those circumstances would had led a reasonable person to conclude that his injury was caused by exposure to benzene. Instead, the court simply determined that Steve's signed statement, made in the course of filing a workers' compensation claim, was definitive proof that he, "quote/unquote, knew or should have known." Because the court failed to consider the factual circumstances surrounding Steve's prior actions in making its determination, the court erred in granting the motions to dismiss.

¶ 35 Defendants do not dispute Steve's inability to establish causation at the time he filed his workers' compensation claim[3]—an admission we find significant. In fact, defendants continue to claim that there is insufficient evidence to establish causation in the instant action. Despite this claim, defendants maintain that Steve had the requisite knowledge to trigger the statute of

[3]Throughout these proceedings, defendants have maintained that benzene exposure does not cause GBM, and, therefore, plaintiff cannot prove causation.

limitations. In particular, defendants maintain that "causation-certainty" is not required under Illinois law to trigger the limitation period.

¶ 36 Moreover, defendants argue that plaintiff was not diligent in filing the present action because there is no evidence that Steve's benzene exposure was an "unknowable" cause of GBM before plaintiff read medical articles in 2016 suggesting a causal connection. However, we note that defendants offered no evidence to demonstrate a link between GBM and benzene exposure existed prior to 2016. Defendants cite *McDaniel v. Johns-Manville Sales Corp.*, 542 F. Supp. 716, 719 (1982), to support their contention that the 2011 workers' compensation claim and the 2013 Ford lawsuit demonstrate proof that Steve knew of the existence of a cause of action against the refinery. We find defendants' argument unpersuasive.

¶ 37 In *McDaniel* (*id.*), the federal district court for the Northern District of Illinois, in the context of a summary judgment motion regarding asbestos litigation, determined that a previous workers' compensation form "[u]nquestionably *** demonstrate[d] plaintiffs were aware they had been injured and such injury was wrongfully caused." The *McDaniel* court stated that the Illinois Supreme Court had clarified the nature of the discovery rule in the following manner:

> " '[W]hen a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed. In that way, an injured person is not held to a standard of knowing the inherently unknowable *** yet once it reasonably appears that an injury was wrongfully caused, the party may not slumber on his rights.' " *Id.* at 718 (quoting *Nolan*, 85 Ill. 2d at 171).

In concluding, the *McDaniel* court stated that "[p]laintiffs might be able to avoid summary judgment if they could demonstrate no one knew asbestos could cause such injuries at the time those claim forms were filed." *Id.* at 719. Because it was a motion for summary judgment, not a motion to dismiss, it was incumbent on the plaintiffs to create a fact issue by submitting

admissible evidence, which they failed to do. *Id.* Thus, the *McDaniel* court granted the defendants' summary judgment motions. *Id.* at 721.

¶ 38 We note, initially, that this court is not bound by the *McDaniel* decision, and, regardless, *McDaniel* is distinguishable because the present appeal follows from a ruling on a motion to dismiss, not a motion for summary judgment. As such, here, unlike *McDaniel*, the burden remained with defendants to show no material facts were in dispute regarding whether the action was timely commenced and, consequently, the complaint should be dismissed as a matter of law. *Sandholm*, 2012 IL 111443, ¶ 55. Additionally, as stated above, in resolving the question of whether the action was commenced within the time limited by law, "[o]nly where the facts are not in dispute, and only one conclusion can be drawn from those facts, may the question be determined by the court as a matter of law." *Young*, 303 Ill. App. 3d at 387.

¶ 39 After careful review of the record, we conclude that factual issues remain, and more than one conclusion can be drawn from the undisputed facts. Here, unlike *McDaniel*, plaintiff asserts that Steve's application for adjustment of claim was filed prior to the existence of medical evidence establishing causation, a necessary element of all workers' compensation claims. Moreover, plaintiff strengthened this assertion with an affidavit from Steve's workers' compensation attorney attesting that she had initially filed the claim, but the claim was subsequently withdrawn because she was unable to locate an expert who would confirm Steve's allegation that benzene exposure caused his cancer.

¶ 40 Furthermore, the allegations contained in the present complaint, along with the affidavits introduced by plaintiff, indicate that Steve made diligent, but unsuccessful, attempts to discover whether his cancer was wrongfully caused. Specifically, plaintiff alleges in the complaint and supporting affidavits that Steve consulted with his treating physicians about potential causes—

and, in particular, whether benzene exposure was a potential cause of his cancer—but the medical experts were unable to provide Steve with a definitive answer. Instead, his treating physicians informed Steve that he had developed GBM, a medically rare form of brain cancer, because it is "just something that some people get." Plaintiff also claims that "no specific cause for Steve's form of brain cancer was known," and the doctors were unaware of any medical research causally linking benzene to brain cancer at that time. Plaintiff asserts that the doctors even provided Steve with "negative information" about whether benzene caused his cancer.

¶ 41 In response, defendants failed to offer any evidence to rebut the affidavits or to show that evidence linking GBM to benzene exposure existed prior to 2016. Instead, defendants relied solely on Steve's workers' compensation claim and participation in the Ford lawsuit to establish the time that he knew his cancer was wrongfully caused. Moreover, even though the record establishes that Steve was a party to two prior legal actions against defendants involving benzene exposure, the record is devoid of any evidence to contradict plaintiff's affidavits and allegations set forth in her complaint. Under these circumstances, a finder of fact may view this particular factual issue in favor of plaintiff, concluding that, prior to reading the articles in 2016, plaintiff lacked sufficient information to reasonably know that Steve's cancer was wrongfully caused, a necessary prerequisite to trigger the start of the statute of limitations period under the discovery rule. See *Parks*, 193 Ill. 2d at 176 ("the limitations period begins to run when the party seeking relief knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused" (internal quotation marks omitted)).

¶ 42 Based on the foregoing, we conclude that the evidence was insufficient to *per se* establish that plaintiff's claims are barred by the statute of limitations. Here, the circumstances leading to the undisputed facts—the filing of Steve's 2011 workers' compensation case and the joining of

the 2013 Ford lawsuit—lend credence to plaintiff's contention that Steve's knowledge was limited to mere suspicion that his cancer was attributable to benzene exposure. Likewise, defendants failed to rebut plaintiff's assertion that she was unable to discover a connection between benzene and GBM until 2016, the date she first learned of the magazine article connecting benzene exposure to GBM. Therefore, the circuit court erred in granting defendants' motions to dismiss after finding as a matter of law that Steve knew or should have known that his brain cancer was wrongfully caused by exposure to benzene.

¶ 43 The next issue on appeal is whether *res judicata* bars plaintiff's complaint because Steve was a party to the Ford lawsuit, which was dismissed with prejudice upon the entry of a settlement agreement. We note, initially, that defendants did not raise this issue in the motions to dismiss and plaintiff did not address this issue in her reply brief. Nevertheless, defendants, as appellees, "may raise an issue on review that was not presented to the trial court to sustain the judgment, as long as the issue's factual basis was laid before the trial court." *U.S. Bank, National Ass'n v. Laskowski*, 2019 IL App (1st) 181627, ¶ 17.

¶ 44 The record reflects, and the circuit court acknowledged, that the second amended complaint filed in the Ford lawsuit was still pending at the time of the entry of the dismissal order in the present case. Thus, we conclude that the factual basis in which defendants' *res judicata* argument generally lies was not before the court at the time the motions to dismiss were heard. Likewise, even though the record contains the associated dismissal order, it does not contain the underlying settlement agreement and release, which may have some bearing on this issue. Consequently, we decline to address the merits of this issue raised for the first time on appeal. In doing so, we make no suggestion as to the propriety of this issue.

¶ 45 III. Conclusion

¶ 46 For the above-stated reasons, the order of the circuit court of Madison County granting the defendants' respective motions to dismiss is reversed and the cause is remanded for further proceedings consistent with this order. We decline to address the defendants' claim of *res judicata* raised for the first time on appeal where the factual basis was not before the circuit court.

¶ 47 Reversed and remanded.