

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

2017 IL App (1st) 160684-U

SIXTH DIVISION
March 10, 2017

No. 1-16-0684

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TAMEKIA JOHNSON,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	
)	No. 13 L 11213
ASHIRA JOHNSON, M.D.,)	
)	
Defendant-Appellee,)	Honorable John H. Ehrlich,
)	Judge Presiding.
(Amal Agarwal, D.O., Ltd., Midway Emergency)	
Physicians, LLC, ApolloMD, Inc., Waukegan Illinois)	
Hospital Company, LLC, Waukegan Hospital Corporation,)	
Amal Agarwal, D.O., Vista Imaging Associates, S.C.,)	
Steven Nydick, M.D., Soliman Manalo, R.N., and Kathleen)	
Teska, R.N.,)	
)	
Defendants).)	

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

- ¶ 1 **Held:** The circuit court erred by dismissing the plaintiff's medical malpractice claim as untimely because the plaintiff pled sufficient facts to invoke the discovery rule.
- ¶ 2 Plaintiff Tamekia Johnson appeals an order entered by the circuit court: (1) finding that she did not timely convert defendant Dr. Ashira Johnson from a respondent in discovery to a

defendant and (2) dismissing her medical malpractice claim against Dr. Johnson. We reverse and remand for further proceedings.

¶ 3

BACKGROUND

¶ 4 Tamekia's original complaint filed on October 9, 2013, alleged medical negligence against various health care professionals at Vista West Medical Center on November 1, 2011, resulting in her blindness. Dr. Johnson was named in that complaint as a respondent in discovery. Tamekia did not obtain service on Dr. Johnson until August 6, 2014. During the intervening time between when Tamekia filed her complaint and Dr. Johnson was served, the circuit court repeatedly extended Tamekia's deadline to convert Dr. Johnson from a respondent in discovery to a defendant.

¶ 5 On January 29, 2015, Tamekia filed an amended complaint in which she first named Dr. Johnson as a defendant. Thereafter, on June 26, 2015, with leave of court, Tamekia filed her four-count second amended complaint. Count 3 of that complaint asserted a claim for medical negligence against Dr. Johnson and alleged that Tamekia "did not know of her injuries and that they were wrongfully caused until no earlier than October 2, 2013, when her counsel received an oral report from the reviewing physician." The report indicated that Tamekia's blindness resulted from a failure to diagnose, and corresponding delay in treatment, of a sinus thrombosis that she suffered.

¶ 6 On July 28, 2015, Dr. Johnson filed a motion to strike and dismiss the second amended complaint, asserting that Tamekia's claim against her was time barred by reason of Tamekia's failure to join her as a defendant within the time period provided in section 2-402 of the Code of Civil Procedure. 735 ILCS 5/2-402 (West 2014). She also alleged that Tamekia was attempting to circumvent her right to dismissal by "trying to invoke application of the 'discovery rule'

provided in 735 ILCS 5/13-212 to try and avoid the limitations bar.” According to the motion, Tamekia “pled no facts to support application of the discovery rule.” On November 9, 2015, the circuit court denied Dr. Johnson’s motion to dismiss, but did strike the paragraph in count 3 of the second amended complaint in which Tamekia asserted a discovery date of October 2, 2013.

¶ 7 After the parties filed additional motions not relevant to this appeal, the circuit court reversed course and, in a written order, dismissed the first amended complaint with prejudice as to Dr. Johnson. The order was accompanied by a Rule 304(a) finding. Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). Tamekia filed a motion to reconsider, which the court denied. This appeal followed.

¶ 8

ANALYSIS

¶ 9 This case presents two issues for our review. First, whether an individual may be joined as a defendant within the applicable statute of limitations even if that individual had previously been named a respondent in discovery and was not joined as a defendant within the time provided in section 2-402 of the Code of Civil Procedure (Code) (735 ILCS 5/2-402 (West 2014)). Second, whether Tamekia sufficiently pled a discovery date of October 2, 2013, in her second amended complaint, precluding the dismissal of the count against Dr. Johnson as time barred.

¶ 10 The circuit court dismissed the count against Dr. Johnson pled in Tamekia’s second amended complaint as time barred by reason of her having failed to convert Dr. Johnson from a respondent in discovery to a defendant within the time prescribed in section 2-402 of the Code. However, if Dr. Johnson was joined as a defendant within the applicable statute of limitations, the issue of whether the plaintiff complied with section 2-402 in naming Dr. Johnson as a defendant is wholly irrelevant. *Flores v. St. Mary of Nazareth Hospital*, 149 Ill. App. 3d 371,

376 (1986) (compliance with “[s]ection 2-402 is irrelevant to motions to add defendants made within the limitations period for a cause of action, even if the plaintiff previously named a new defendant as a respondent in discovery”); see also *Allen v. Thorek Hospital*, 275 Ill. App. 3d 695, 700 (1995); *Arndt v. Resurrection Hospital*, 163 Ill. App. 3d 209, 215 (1987).

¶ 11 The next issue is whether it can be found, as a matter of law, that Tamekia failed to join Dr. Johnson as a defendant within the applicable statute of limitations. As noted, Tamekia’s second amended complaint alleged that she “did not know of her injuries and that they were wrongfully caused until no earlier than October 2, 2013, when her counsel received an oral report from the reviewing physician.” That allegation is one of fact which must be taken as true for purposes of ruling on a motion to dismiss pursuant to either section 2-615 or 2-619 of the Code. 735 ILCS 5/2-615, 2-619 (West 2014). *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 16 (as to section 2-615 motions); *Synder v. Heidelberger*, 2011 IL 111050, ¶ 8 (as to section 2-619 motions). Whether the allegation is true was not the issue before the circuit court; rather, it must have been taken as true for purposes of ruling on Dr. Johnson’s motion to dismiss. We find nothing in the record which could support striking the discovery allegation in Tamekia’s second amended complaint and conclude that the court erred as a matter of law in doing so.

¶ 12 Section 13-212(a) of the Code (735 ILCS 5/13-212(a) (West 2014)) provides that no action against a physician arising out of patient care “shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice *** of the injury *** for which damages are sought ***.” A statute of limitations begins to run “when a person knows or reasonably should know of his injury and knows or reasonably should know that it was wrongfully caused.” *Witherell v. Weimer*, 85 Ill.

2d 146, 156 (1981). The question of when a person knew or should have known that her injury was wrongfully caused is normally one of fact to be decided by the trier of fact unless the facts are undisputed and only one conclusion can be drawn. *Id.*

¶ 13 In this case, Tamekia alleged in the count against Dr. Johnson in her second amended complaint that she “did not know of her injuries and that they were wrongfully caused until no earlier than October 2, 2013, when her counsel received an oral report from the reviewing physician.” Taking that allegation as true, Tamekia would have until October 2, 2015 to file an action against Dr. Johnson. Tamekia filed her amended complaint naming Dr. Johnson as a party defendant on January 29, 2015, and filed her second amended complaint containing the allegation of a discovery date of October 2, 2013, on June 26, 2015, both dates well within the two-year limitations period set forth in section 13-212(a) of the Code.

¶ 14 Dr. Johnson relies upon the holding in *Ikenn v. Northwestern Memorial Hospital*, 73 Ill. App. 3d 694 (1979), in support of her argument that Tamekia failed to allege sufficient facts to avail herself of the discovery provisions of section 13-212(a) of the Code and, as a consequence, the complaint naming her as a defendant is time barred. Dr. Johnson’s reliance on *Ikenn* is misplaced.

¶ 15 The plaintiff in *Ikenn* suffered blindness as a result of the uncontrolled administration of oxygen while she was in an incubator following her premature birth. *Id.* at 694-95. The *Ikenn* court held that blindness occurring during treatment in a hospital after birth is a circumstance which a reasonable person should have known could have been caused by wrongful conduct. *Id.* at 699; see also *Allen*, 275 Ill. App. 3d at 702. According to Dr. Johnson, Tamekia’s blindness in this case was a sufficiently unusual condition so as to put her on constructive notice that it was wrongfully caused. We disagree.

¶ 16 When the cause of an injury is unknown or apparently innocent at the time it occurs, an injured party must be afforded an opportunity to discover the cause before her right of action is barred. *Kristina v. St. James Hospital*, 63 Ill. App. 3d 810, 813 (1978). In this case, Tamekia alleged that her blindness was the result of a failure to timely diagnose and treat a sinus thrombosis. Unlike the facts in *Ikenn*, there are no allegations in Tamekia's second amended complaint which could support the conclusion that blindness from a sinus thrombosis is a circumstance that would place a reasonable person on notice that the cause was wrongful as opposed to a natural result of the underlying condition. Although Tamekia obviously knew she was blind, she alleged that she did not know that her injuries were wrongfully caused until October 2, 2013, when her attorney received an oral report from the reviewing physician, an assertion which must be taken as true in ruling on Dr. Johnson's motion to dismiss.

¶ 17 In summary, the circuit court erred in granting Dr. Johnson's motion to dismiss the claim asserted against her in count 3 of Tamekia's second amended complaint. When Tamekia knew or should have known that her injury was wrongfully caused is a question of fact to be decided by the trier of fact. *Witherell*, 85 Ill. 2d at 156. Although Dr. Johnson's motion to dismiss must be denied based upon the discovery allegation in the second amended complaint, she is at liberty to raise a statute of limitations defense in her answer. See 735 ILCS 5/2-619(d) (West 2014).

¶ 18 CONCLUSION

¶ 19 We reverse the judgment of the circuit court and remand for further proceedings.

¶ 20 Reversed and remanded.