

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Joyce Charlene Berg,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18 L 8476
	)	
Diamond Headache Clinic, Ltd., and	)	
Bradley Torphy, M.D.,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

A court may determine as a matter of law that the two-year statute of limitations in a medical malpractice case expired before the plaintiff filed suit if the undisputed facts lead to only one conclusion. Here, the undisputed facts establish convincingly that the plaintiff knew of her traumatic injury and that it was wrongfully caused for more than two years before she filed her complaint. For those reasons, the defendants' summary judgment motion must be granted and the case dismissed with prejudice.

**Facts**

In 2011, Joyce Berg began treatment for her headaches with Dr. Bradley Torphy at the Diamond Headache Clinic ("DHC"). In 2012, Berg began receiving Botox injections for her headaches. Each time Berg received a Botox injection she also received an intramuscular injection of Methadone in her buttocks. Berg received the intramuscular injections every three months for approximately four years, from 2012 to 2016. Berg requested that the injections always be made in her left buttocks.

On July 22, 2016, Berg presented to DHC for her Botox and intramuscular injection. The intramuscular injection was very painful and caused Berg to scream. No previous injection had felt like that, but the pain went away by the time she left DHC. On her way home, however, Berg began to feel paralyzed from her hip down, a sensation she never experienced before. By the time she arrived home, Berg felt completely paralyzed from the hip down, and her husband had to carry her from the car into their house. The feeling of paralysis lasted a couple of days, after which Berg began to experience a really bad charley horse feeling that did not go away.

On July 25, 2016, Berg presented to her primary care physician, Dr. Catherine Thomas, and saw Amy Fraser, a physician's assistant, who worked under Dr. Thomas's supervision. Berg complained to Fraser that since the July 22, 2016, injection, Berg had fallen and was having problems with her left leg. Fraser conducted a physical exam, and informed Berg that the last injection had hit her sciatic nerve and caused her left leg symptoms. Fraser wrote in the medical record: "I feel that she has inflammation from the injection site hitting her sciatic nerve—[patient] is very thin and so it could have easily been irritated by the injection." Fraser told Berg that because she was very thin, her sciatic nerve could easily have been irritated by the injection. Fraser prescribed a Medrol Dosepak for Berg's sciatic nerve inflammation.

On July 29, 2016, Berg returned to Thomas's office and, again, saw Fraser. Berg reported worsening left leg pain and a constant charley horse. Berg had finished the Medrol Dosepak, but was still experiencing pain and could not stretch her left toes. Fraser repeated her belief that the July 22, 2016, injection had irritated Berg's sciatic nerve. In her patient notes, Fraser wrote of Berg:

I still believe irritation to Sciatic Nerve from the injection. I called neurology and [discussed with] them her case, they did feel it was the same and that NCT (Nerve Conduction Testing) would not show change for 2-3 weeks so to make an [appointment] for [follow up] for next week or so. Patient to keep me posted on how [she is] doing.

On July 31, 2016, Berg presented to the Delnor Hospital emergency room. She complained of leg pain and a migraine headache, and doctors at Delnor diagnosed Berg with sciatica.

On August 2, 2016, Berg e-mailed Lana Tymouch, a physician's assistant at DHC. Berg wrote:

[I had] a horrible experience at Diamond Headache Clinic on July 22nd, 2016. I had Botox done, which was fine, but afterward I took at [sic] pain shot by an apparently inexperienced nurse who put the needle in the sciatic nerve. I was aware that the shot was more painful than usual as soon as the shot was administered but I didn't connect that the pain was coming from the sciatic nerve until we got home an hour later and my husband had to literally carry me out of the car and into the house because by [sic] foot and leg were paralyzed on the left side (which is where I received the shot).

I also feel that Diamond Headache Clinic should be responsible for paying any part of my doctors visits, ultrasound, emergency room visit, and missed workdays due to negligence.

On August 4, 2016, Berg presented to Delnor Hospital, again, this time complaining of severe left leg pain, paresthesia, and difficulty walking. Thomas admitted Berg. A magnetic resonance imaging of Berg's left hip taken the same day revealed left sciatic nerve inflammation and fluid and edema in the fascial plane containing the sciatic nerve. Thomas shared those findings with Berg. On August 7, 2016, Thomas discharged Berg and ordered Prednisone for her sciatic neuritis.

On August 9, 2016, Berg forwarded to Konrad Kothmann, DHC's chief financial officer, her August 2, 2016, e-mail to Tymouch. She added:

I was just released after 4 days in the hospital after another ER visit which included two MRIs and I have physical therapy and will miss a total of 14 days of work. This is a huge financial loss for me and since it was caused by negligence I was hoping to have some form of resolution.

Berg alleges that on August 11, 2016, Kothmann spoke with her and told her that any involvement with the sciatic nerve was impossible and her symptoms could not be from the injection. Also on August 11, 2016, Tymouch noted in Berg's medical records:

I explained to Joyce, that mechanical injury to peripheral nerves can happen with IM injections; usually heal without any permanent damage or residual symptoms within a few weeks. To minimize the risk of nerve injury, IM injection is administered in upper outer quadrant of right or left buttock (a common practice at our clinic). With this technique, it is highly unlikely that sciatic nerve can be injured; however slight anatomic variations of human body are possible and not uncommon. Unfortunately, there is no way to see/feel the nerves to completely avoid mechanical injury of peripheral nerve while administering IM injections.

Berg continued to treat at DHC until October 31, 2017.

On August 6, 2018, Berg filed a complaint against DHC, Torphy, and Tymouch. The complaint alleged that the defendants owed Berg a duty of care and breached that duty by, among other things, injecting into her sciatic nerve and allowing an unidentified medical care provider to conduct the

injection. On December 19, 2019, Berg filed a second amended complaint that named Shenay Watkins as an additional defendant.<sup>1</sup>

The case proceeded to discovery. At her November 6, 2019, deposition, Berg provided greater detail to the sequence of events related to the injection she received. The following colloquy occurred on direct examination:

Q: In this August 2, 2016 email, did you tell Lana that when you got home an hour after the injection, you connected that the pain was coming from the sciatic nerve?

A: That was my guess.

Q: Did you tell her – that when you got home an hour after the injection, you connected that the pain was coming from the sciatic nerve?

A: Yes.

Q: And you've told me that that was your guess at that time, correct?

A: Yeah. That's my best guess of what happened.

Q: And why was that your best guess at that time?

A: Because I don't know. It was just like weird. Because I got the shot and then suddenly I'm paralyzed. I mean, I think most normal human beings would put the two together.

\* \* \*

Q: But in any event, in this email, did you tell Konrad that the injection was caused by negligence?

A: I did. That's what I was surmising at the time.

\* \* \*

Q: Before you had that discussion with Konrad, did you have concern that the pain and paralyzation you were feeling was related to the methadone injection you received on July 22?

A: I had no idea. I just know I was in a lot of pain.

The following colloquy occurred on cross examination by Berg's attorney:

Q: Do you agree with me that you have no understanding as to in the personal injury, tort, or especially medical malpractice context, what negligence means?

A: Correct. I really don't.

Q: Okay. Do you agree with me as to what was in your state of mind that you were reporting and reducing to writing in e-mail communications with Diamond Head Clinic amounted to you guessing at what was going on?

A: Absolutely.

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<sup>1</sup> On September 3, 2020, Berg voluntarily dismissed Tymouch and Watkins.

Q: Okay.

A: I had no idea.

The parties also deposed Kothmann. He testified that he has no medical training or medical license and, as DHC's chief financial officer, speaks with patients only about billing and collection issues. Kothmann did not recall speaking to Berg about her medical condition.

### Analysis

Dr. Bradley Torphy and DHC argue that summary judgment is appropriate because Berg filed her original complaint beyond the two-year statute of limitations provided in the Code of Civil Procedure for medical malpractice actions. 735 ILCS 5/13-212(a). The Code authorizes the issuance of 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. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). A defendant moving for summary judgment may disprove a plaintiff's case by showing that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action; this is the so-called "Celotex test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), followed *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only when the record indicates the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33.

Section 13-212(a) sets out the limitation period applicable to medical malpractice causes of action. As provided:

no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort . . . 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 in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first . . . .

735 ILCS 5/13-212(a). The common law gloss on section 13-212(a) provides that the two-year limitations period begins starts to run, “when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused.” *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981). “At that point the burden is upon the injured person to inquire further as to the existence of a cause of action.” *Id.* “In many, if not most, cases the time at which an injured party knows or reasonably should have known both of his injury and that it was wrongfully caused will be a disputed question to be resolved by the finder of fact. Where it is apparent from the undisputed facts, however, that only one conclusion can be drawn, the question becomes one for the court.” *Id.*

The Supreme Court later explained that the term “wrongfully caused” does not mean knowledge of a specific defendant’s negligent conduct or knowledge of the existence of a cause of action. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981). Rather, the term refers to the time at which “the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.” *Id.* At that point, the plaintiff has the burden to inquire further as to the existence of a cause of the injury. *Id.*; *Scottsdale Ins. Co. v. Lakeside Cmty. Comm.*, 2016 IL App (1st) 141845, ¶ 25. The duty to conduct a reasonable inquiry into the cause of the injury applies even if the plaintiff is unaware of a specific defendant’s tortious act. *See, e.g., Castello v. Kalis*, 352 Ill. App. 3d 736, 749 (1st Dist. 2004); *Young v. McKiege*, 303 Ill. App. 3d 380, 388 (1st Dist. 1999). Such an inquiry is an objective one, based on the essential facts of injury and causation. *Axe v. Norfolk Southern Ry. Co.*, 2012 IL App (5th) 110277, ¶ 11 (quoting *Fries v. Chicago & Nw. Transp. Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990)). Thus, “[w]hen a plaintiff is ‘armed with the facts about the harm done to him,’ he can protect himself against the running of the statute of limitations by seeking advice in the medical and legal community about possible causes.” *Id.* (quoting *United States v. Kubrick*, 444 U.S. 111, 123 (1979)).

The essential facts of injury and causation in the record establish that this is one of the exceptional instances in which determining the expiration of the statute of limitations is a question of law. This is an inexorable conclusion based on the timeline of events and Berg’s own testimony. In short, the questions of fact this court previously had when it considered the defendants’ motion to dismiss have been answered.

It is plain from the record that Berg knew of her injury and that it was wrongfully caused on the date of the occurrence. Berg testified that the intramuscular injection she received on July 22, 2016 was very painful and caused her to scream. No previous injection had felt like that. Berg’s

description of the pain she felt from the injection makes plain that her injury was traumatic. A traumatic injury is “one where the damage is caused by external violence or which is immediate and caused by an external force.” *Clark v. Galen Hosp. Ill., Inc.*, 322 Ill. App. 3d 64, 69 (1st Dist. 2001). “If an injury is traumatic, that is, immediate and caused by external force or violence, the plaintiff knows or should know of his right to sue when injured.” *Warren v. Burris*, 325 Ill. App. 3d 599, 604 (4th Dist. 2001). The existence of a traumatic event imposes on a plaintiff “an immediate duty to inquire as to whether a physician’s acts or omissions may have caused the injury.” *Bradtke v. Reotutar*, 214 Ill. App. 3d 611, 615 (1st Dist. 1981). A traumatic injury is, therefore, far different than an “aggravation of a physical problem that may develop naturally,” in which case, “a plaintiff is not expected to immediately know of either its existence or potential wrongful cause.” *Warren*, 325 Ill. App. 3d at 604 (citing *Saunders v. Klungboonkrong*, 150 Ill. App. 3d 56, 60 (5th Dist. 1986)).

The conclusion that Berg immediately knew of her traumatic injury and its wrongful cause is further supported by her description of what occurred over the next few hours. Berg testified that the pain had subsided by the time she left DHC. On her way home, however, Berg began to feel paralyzed from her left hip down, a sensation she had never experienced before. By the time she arrived home, Berg felt completely paralyzed from the hip down, and her husband had to carry her from the car into the house. At her deposition, Berg said it was her best guess at the time that her pain was emanating from the sciatic nerve. When asked why she had reached that conclusion, Berg answered that: “Because I got the shot and then suddenly I’m paralyzed. I mean, I think most normal human beings would put the two together.” There is nothing in the record suggesting that Berg is anything other than a “normal human being,” or that that she reached an unreasonable conclusion based on her reaction to the painful injection and the subsequent paralysis.

This court’s conclusion is bolstered further based on what occurred three days later. On July 25, 2016, Berg presented to her primary care physician, Dr. Catherine Thomas, and saw Amy Fraser, a physician’s assistant, who worked under Thomas’s supervision. Berg complained to Fraser of falling and having problems with her left leg and reported having difficulty with her left lower extremity following the July 22, 2016 injection. Fraser performed a physical exam, and told Berg that the last injection had hit her sciatic nerve and caused her left lower leg symptoms. Fraser memorialized her conclusion in Berg’s medical notes: “I feel that she has inflammation from the injection site hitting her sciatic nerve—[patient] is very thin and so it could have easily been irritated by the injection.” Fraser also told Berg directly that because she was very thin, her sciatic nerve could

easily have been irritated by the injection. Fraser's oral and written statements constitute a medical conclusion based on a physical examination, and it would have been entirely reasonable for Berg to rely on Fraser's conclusion. This point is further emphasized by Berg's subsequent medical treatment. Only four days later, on July 29, 2016, Berg returned to Thomas's office and, again, saw Fraser. Berg reported worsening left leg pain and a constant charley horse. Fraser repeated her belief that the July 22, 2016, injection had irritated Berg's sciatic nerve.

Berg continued to receive confirmatory medical diagnoses. On July 31, 2016, she presented to the Delnor Hospital emergency room. There, Berg complained of leg pain and a migraine headache. Doctors diagnosed Berg with sciatica. Berg posits in her response brief that sciatica is pain originating in the lower lumbar spine. There is, however, nothing in the medical record suggesting that doctors at Delnor Hospital found any condition in Berg's lower lumbar spine that caused her leg pain. Rather, it is apparent that the sciatica diagnosis is entirely consistent with Fraser's conclusion that the injection had injured Berg's sciatic nerve.

On August 2, 2016, Berg, in her own words, understood that her traumatic injury and its wrongful cause had occurred on July 22, 2016. On August 2, Berg sent an e-mail to Tymouch explaining that: "I didn't connect that the pain was coming from the sciatic nerve until we got home an hour later and my husband had to literally carry me out of the car and into the house because by [*sic*] foot and leg were paralyzed on the left side (which is where I received the shot)." Berg's e-mail is also significant because she explicitly faults DHC for her traumatic injury and seeks compensation. As Berg wrote: "I also feel that Diamond Headache Clinic should be responsible for paying any part of my doctors visits, ultrasound, emergency room visit, and missed workdays due to negligence." In her response brief to the defendants' motion, Berg backpedals from her written statement and points to deposition testimony in which she stated that she did not understand "negligence" in the legal sense. That explanation is irrelevant since the proper inquiry is whether Berg knew enough to inquire further as to the existence of a cause of the traumatic injury. Her e-mail unquestionably indicates she had already understood the cause.

From August 4-7, 2016, Delnor Hospital admitted Berg based on her complaints of severe left leg pain, paresthesia, and difficulty walking. On August 4, Thomas ordered a magnetic resonance imaging of Berg's left hip. The MRI provided objective findings of left sciatic nerve inflammation and fluid and edema in the fascial plane containing the sciatic nerve. Thomas shared those findings with Berg. Berg cannot avoid the conclusion that these



objective findings confirm that Berg's traumatic injury occurred on July 22, 2016.

On August 9, 2016, Berg forwarded to Konrad Kothmann, DHC's chief financial officer, her August 2, 2016, e-mail to Tymouch. Berg added that:

I was just released after 4 days in the hospital after another ER visit which included two MRIs and I have physical therapy and will miss a total of 14 days of work. This is a huge financial loss for me and since it was caused by negligence I was hoping to have some form of resolution.

Once again, Berg's own statement provides irrefutable evidence that she understood the link between the July 22, 2016, injection and her sequelae and that she blamed DHC for causing her symptoms.

Berg alleges that on August 11, 2016, Kothmann spoke with her and told her that any involvement with the sciatic nerve was impossible and her symptoms could not be from the injection. This disputed statement, even if true, misses the legal point. The issue is not whether Kothmann's statement provided Berg with a sense of reassurance that would toll the running of the two-year statute of limitations; rather, the point is that Kothmann's statement does not absolve Berg from her duty to seek out the cause of her traumatic injury. Indeed, even if Kothmann told Berg the injection had nothing to do with her symptoms, Berg still had the burden of inquiry based on her previous objective belief that the July 22, 2016 injection had caused her continuing pain. As a side note, Kothmann testified that he has no recollection of speaking with Berg and that, as a non-medical provider, does not speak with patients other than as to billing and collection issues.

Berg argues that the statute of limitations was tolled because she received two assurances that her pain was not caused by the injection. First, she points to Tymouch's statement that injection injuries "usually heal without any permanent damage . . . within a few weeks." That statement does not provide reassurance but, rather, confirms Berg's suspicion that she had been injured by the July 22, 2016, injection. In other words, Tymouch's alleged reassurance that her traumatic injury would heal implicitly acknowledges that she had been injured. Second, Berg relies on Kothmann's alleged statement that it was impossible for the injection to have caused her symptoms. As previously noted, Kothmann has no medical training and, as a routine matter, speaks to patients only about billing or collections issues. Berg's reliance on Kothmann's statement, even if true, is wholly unreasonable given Kothmann's lack of medical training and the litany of

confirmatory information she had received indicating that she had been traumatically injured on July 22, 2016.

No irony is lost that Berg objects to summary judgment despite her doing the right thing. On July 22, 2016, Berg reasonably linked her traumatic injury to the injection she had received. After that, Berg had a duty to inquire as to the cause of her traumatic injury. Berg fulfilled that duty. By receiving physical examinations from her physician and objective findings from Delnor Hospital, Berg received multiple confirmations that her initial suspicions were correct. The inescapable fact is that Berg received a traumatic injury that she nearly immediately identified as the source of her continuing symptoms. To allow Berg to file her complaint after the running of the two-year statute of limitations would run directly counter to the statute and the common law. That cannot be the correct result.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendants' summary judgment motion is granted; and
2. This case is dismissed with prejudice.



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John H. Ehrlich, Circuit Court Judge

**Judge John H. Ehrlich**

**DEC 30 2022**

**Circuit Court 2075**