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

Daniel and Leah Kolcz,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 22 L 3139
	)	
Edward T. Lee, M.D., Northshore University Healthsystem, Northshore University Healthsystem Faculty Practice Associates, and Northshore University Healthsystem Medical Group,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Statutes of limitations govern the time within which a lawsuit must be filed while statutes of repose extinguish causes of action after a fixed period. Differing limitations and repose periods may apply to differing causes of action depending, in part, on whether the causes of action are derivative or independent. In this case, the plaintiffs' cause of action under the Rights of Married Persons Act is independent of a cause of action for medical negligence and is subject to a separate triggering date. For that reason, the defendants' motion to dismiss must be denied.

Facts

On July 22, 2016, Dr. Edward Lee met with Leah Kolcz to confirm her pregnancy. Lee did, in fact, confirm Leah's pregnancy, and ordered a series of genetic tests, including the Northshore Jewish Panel V3. On August 2, 2016, Counsyl, Inc. analyzed the genetic test. The analysis indicated that Leah carried the genetic marker for Gaucher disease, an enzyme-deficiency condition common most often among descendants of Ashkenazi Jews.

Given Leah's results, Lee recommended that Daniel also undergo the NorthShore Jewish Panel V3 test. On August 15, 2016, Counsyl, Inc. provided a report indicating that Daniel was negative for the conditions tested, but the report did not document any results for the Northshore Jewish Panel V3. On August 26, 2016, Lee notified Daniel that he did not carry a marker for any genetic disease, including Gaucher. On February 22, 2017, Leah and Daniel's first child was born. That child did not have Gaucher disease.

On September 25, 2018, Lee met with Leah to confirm her second pregnancy. Lee noted that there were no high-risk factors for Leah's pregnancy, and he did not order any additional genetic testing. On May 5, 2019, Leah and Daniel's second child was born. On June 17, 2019, the child was diagnosed with Gaucher disease.[1]

On June 18, 2019, Lee informed Leah about an error with the genetic test results. Daniel followed up with Lee, and Lee responded as follows:

> This is going to undergo a major review. This cannot happen again. Ever as far as I am concerned.
>
> It seems that there were 3 points where we could have picked up this error:
>
> 1. Your husband had this [*sic*] blood drawn and we were using paper forms. The paper forms may not have been filled out for the Ash[k]enazi panel and so the basic one was done. The company who ran the test should not have assumed that we just wanted the fundamental panel - they should have called and asked us if the form was not filled out with the information that they needed.
> 2. The results were scanned into the wrong category. Even though only a fundamental panel was done - the results were scanned into the "Ashkenazi panel" - this is done by our genetics department.
> 3. I only looked at the top line of the results which said that there were "No genetic conditions found"[.] However, the details of the results would have indicated that only a fundamental panel was done. Now that I know that this error can occur - we will have everyone in the office look at all the papers and to make sure the correct test was done.
>
> I am so sorry that this error happened to you guys. And I am somewhat shaken with the results. We will not let such an error happen again.

On October 1, 2021, Leah and Daniel's second child underwent an MRI and X rays at Lurie Children's Hospital to screen for Gaucher disease

[1] Both parents must have the genetic marker for a child to be born with Gaucher disease. If both parents carry the genetic marker, the chances are one in four that the child will be born with Gaucher disease.

symptoms.[2] On October 8, 2021, doctors informed Dan and Leah that the blood panel showed their second child had reduced hemoglobin and a low platelet count. The Lurie doctors recommended that the child begin enzyme replacement therapy. Leah and Daniel also learned for the first time that such therapy would have to continue every two weeks for the rest of their child's life.

On April 4, 2022, Leah and Daniel filed a three-count complaint against the defendants. Count one is pleaded in negligence, and alleges that Lee and the other defendants had a duty to provide Leah and Daniel with complete and accurate counseling. Leah and Daniel claim that the defendants breached their duty by, among other things, failing to: (1) read Daniel's genetic testing results; (2) confirm that the Northshore Jewish Panel V3 test had been performed; (3) inform Leah and Daniel that he carried the genetic marker for Gaucher disease; (4) give Leah and Daniel the opportunity to assess the probability of their child being born with Gaucher disease; (5) indicate the risk that their second child could be born with Gaucher disease; and (6) provide Leah and Daniel the opportunity to make an informed decision regarding whether or not to have children. Count two is a cause of action for negligent infliction of emotional distress. Leah and Daniel allege that the defendants' failures will result in the need for constant monitoring of their child's condition, frequents tests and evaluations, and will subject them to, among other things, emotional pain and suffering resulting from the time and money expended in treating a child with Gaucher disease. Count three is a negligence cause of action pleaded under the *res ipsa loquitor* doctrine. Leah and Daniel allege that had they been informed that they both carried the genetic marker for Gaucher disease, they would not have conceived children so as to avoid the risk of having a child born with Gaucher disease.

The defendants filed a motion to dismiss the complaint in its entirety. The defendants argue that Leah and Daniel's causes of action are barred by both the applicable statutes of limitations and repose for medical malpractice actions. Leah and Daniel filed a response, the defendants replied, and both parties filed supplemental briefs.

Analysis

The defendants bring their motion to dismiss pursuant to the Code of Civil Procedure. 735 ILCS 5/2-619. A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the

[2] A person diagnosed with Gaucher disease may remain asymptomatic for months or years, or even for their entire life.

pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369. The defendants argue specifically that Leah and Daniel failed to file their complaint "within the time limited by law." 735 ILCS 5/2-619(a)(5). The running of a statute of limitations or repose is a defense that serves to bar a claim from proceeding. *See Ciolino v. Simon*, 2021 IL 126024, § 20.

This dispute lies at the intersection of various statutory provisions, the first of which is the Rights of Married Persons Act, commonly referred to as the Family Expense Act (FEA). The FEA provides, in part, that:

> The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately.

750 ILCS 65/15(a)(1). The phrase "expenses of the family" has been interpreted to include medical expenses of minor children. *Pirrello v. Maryville Acad., Inc.*, 2014 IL App (1st) 133964, ¶ 11 (citing *Graul v. Adrian*, 32 Ill. 2d 345, 347 (1965); *Bauer v. Memorial Hosp.*, 377 Ill. App. 3d 895, 922 (5th Dist. 2007)). The plain language of the FEA provides a cause of action by creditors against parents, but the common law, in turn, "gives parents a cause of action against a tortfeasor who, by injuring their child, caused them to incur the medical expenses." *Bauer*, 377 Ill. App. 3d at 922 (citing *Phillips v. Dodds*, 371 Ill. App. 3d 549, 554 (4th Dist. 2007)). The statute has consistently been read to provide a cause of action by parents for expenses incurred because their cause of action arises out of an injury to their minor. *Dewey v. Zack*, 272 Ill. App. 3d 742, 746 (2d Dist. 1995); *Beck v. Yatvin*, 235 Ill. App. 3d 1085, 1087 (1st Dist. 1992); *Janetis v. Christensen*, 200 Ill. App. 3d 581, 588 (1st Dist. 1990). "Any cause of action to recover the medical expenses is that of the parents, and if the parents are not entitled to recover, neither is the child." *Bauer*, 377 Ill. App. 3d at 922 (citing *Roberts v. Sisters of Saint Francis Health Servs., Inc.*, 198 Ill. App. 3d 891, 904 (1st Dist.1990)).

Also at issue are the limitations and repose periods provided for medical malpractice claims. As provided in the Code:

> no action for damages for injury or death against any physician . . . or hospital duly licensed under the laws of this State, whether

> based upon tort, or breach of contract, or otherwise, 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 . . . whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.

735 ILCS 5/13-212(a). It is plain that the section contains both a two-year limitations period and a four-year repose period. *Orlak v. Loyola Univ. Health Sys.*, 228 Ill. 2d 1, 7 (2007). As the court in *Orlak* explained:

> The two-year limitations period is triggered by the plaintiff's discovery of the injury; in contrast, the four-year repose period is triggered by the occurrence of the act or omission that caused the injury. The only exception to the four-year statute of repose is the fraudulent-concealment exception contained in section 13-215 of the Code. The statute of repose sometimes bars actions even before the plaintiff has discovered the injury. While this may result in harsh consequences, the legislature enacted the statute of repose for the specific purpose of curtailing the "long tail" exposure to medical malpractice claims brought about by the advent of the discovery rule.

Id. at 7-8 (citations omitted).

Also relevant here are the statutes of limitations and repose periods applicable to claims under the FEA. Those time periods normally mirror the time periods applicable to the underlying tort. As provided:

> Actions for . . . the medical expenses of minors . . . shall be commenced within the same period of time as actions for damages for injury to such other person. Where the time in which the cause of action of the injured person whose injuries give rise to the cause of action brought under this Section is tolled or otherwise extended by any other Section of this Act, including Sections 13-211, 13-212 and 13-215, the time in which the cause of action must be brought under this Section is also tolled or extended to coincide with the period of time in which the injured person must commence his or her cause of action.

735 ILCS 13-203.

As provided in section 13-203, the statutory periods applicable to causes of action involving minors is subject to an exception contained in section 13-212. That section states:

> no action for damages for injury or death against any physician . . . or hospital . . . whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 8 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death where the person entitled to bring the action was, at the time the cause of action accrued, under the age of 18 years; provided however, that in no event may the cause of action be brought after the person's 22nd birthday.

735 ILCS 13-212(b).

The defendants argue that Leah and Daniel's causes of action under the FEA and for negligent infliction of emotional distress and *res ipsa loquitor* are barred because each arises from Lee's allegedly negligent medical care and genetic counseling in August 2016. Section 13-212(a) statute of repose provides that a cause of action for medical negligence must be filed no later than four years after the alleged act or omission. According to the defendants, Leah and Daniel had only until August 2020 to file suit; their April 2022 filing is, therefore, 20 months too late.

The defendants also argue that Leah and Daniel's causes of action are barred by the two-year statute of limitations contained in section 13-212(a). Again, because Lee's alleged malpractice occurred in August 2016, Leah and Daniel had only until August 2018 to file suit. Their April 2022 filing is nearly six years too late.

The defendants go further to argue that, even with the application of the discovery rule, Leah and Daniel's complaint is late filed. "The discovery rule provides that the statute of limitations 'starts to run when a person knows or reasonably should know of his injury and also knows or reasonably knows that it was wrongfully caused. At that point the burden is upon the injured person to inquire further as to the existence of a cause of action.'" *Hertel v. Sullivan*, 261 Ill. App. 3d 156, 162 (4th Dist. 1994) (quoting *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981)). The phrase "wrongfully caused" refers to a point in time at which an injured person has sufficient information concerning the injury and its cause to put a reasonable person on notice to determine whether there exists a cause of action. *Id.*

According to the defendants, the application of the discovery rule in this instance means that Leah and Daniel learned of the injury to their second child on June 18, 2019, the day after its birth, and the day Lee explained to Leah and Daniel how the error regarding the test results had occurred. The April 2022 filing is 34 months after the discovery of the child's injury and, therefore, even the discovery rule does not alter the bar imposed by the two-year statute of limitations.

The defendants' last argument is that Leah and Daniel have no support for the position that the discovery rule was triggered on October 8, 2021 when they learned that their second child would need enzyme replacement therapy every two weeks for the rest of the child's life. The argument relies on the line of cases holding that the statute of limitations begins to run when a person learns of the injury and that it was wrongfully caused, not when the plaintiff learns the extent of the injury. *See Clay v. Kuhl*, 189 Ill. 2d 603, 611-12 (2000). As explained:

> This court has never suggested that plaintiffs must know the full extent of their injuries before the statute of limitations is triggered. Rather, our cases adhere to the general rule that the limitations period commences when the plaintiff is injured, rather than when the plaintiff realizes the consequences of the injury or the full extent of her injuries.

Golla v. General Motors Corp., 167 Ill. 2d 353, 364 (1995). Even under the forgiving standard of the discovery rule, according to the defendants, Leah and Daniel had at most until June 18, 2021 to file their complaint. Their learning of the extraordinary nature of the child's damages four months later does not extend the time for filing.

In response to the defendants' motion, Leah and Daniel present three related arguments. First, they argue that a cause of action under the FEA is not an action for damages based on injuries, but is a derivative claim arising from parents' liability for a minor's extraordinary medical expenses. *See Janetis v. Christensen*, 200 Ill. App. 3d 581, 588 (1st Dist. 1990). Second, Leah and Daniel argue that their claim is one for wrongful birth. As defined, "'[w]rongful birth' refers to the claim for relief of parents who allege they would have avoided conception or terminated the pregnancy by abortion but for the negligence of those charged with prenatal testing, genetic prognosticating, or counseling parents as to the likelihood of giving birth to a physically or mentally impaired child." *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 235 (1987). In *Siemieniec*, the court permitted parent to recover the "extraordinary expenses—medical, hospital, institutional, educational and otherwise—which are necessary to properly manage and

treat the congenital or genetic disorder" because they had been provided incorrect information regarding the likelihood that their child would have hemophilia. *Id.* at 260. Third, Leah and Daniel argue that Illinois recognizes a cause of action for wrongful birth brought by parents under the FEA for the extraordinary cost of caring for a child during its minority. *Id.* at 262; *Clark v. Children's Mem'l Hosp.*, 2011 IL 108656, ¶ 22 (2011).

Each of these arguments depend on the application of the discovery rule. Leah and Daniel posit that their cause of action under the FEA, in addition to negligent infliction of emotional distress and *res ipsa loquitor*, could only arise after doctors told them for the first time on October 8, 2021 that their second child would require enzyme replacement therapy every two weeks for the remainder of its life. Given that trigger date, the filing of the complaint only six months later is well within the two-year statute of limitations for medical malpractice provided by section 13-212(a).

This court's analysis of the parties' various arguments begins from a different starting point than the parties. To this court, the fundamental issue is not what statute of limitations or repose applies, but what constitutes a derivative claim. The starting point of this analysis is that Leah and Daniel's FEA claim is derivative in fact, but not in law. In other words, Leah and Daniel are not bringing their FEA claim as the personal representatives of their second child; indeed, they could not do so because the FEA makes only parents liable for a child's medical expenses. Thus, the proper way to view the FEA claim is to see it as deriving from a prior tort to another person, but legally independent as a cause of action. *See Page v. Hibbard,* 119 Ill. 2d 41, 48 (1987) (loss of consortium benefits under the Workers' Compensation Act).

Illinois case law supports the conclusion that there exists no requirement that a separate cause of action must have been filed arising from a previously negligent act or omission. For example, in *Brown v. Metzger*, a husband injured in a vehicle collision sued the driver for negligence while his wife sued the driver for a loss of consortium. 104 Ill. 2d 30, 33 (1984). While the suit was pending, the wife filed for divorce. *Id.* The husband later settled his claim with the driver and executed a release of claims. *Id.* After a divorce court granted the marriage dissolution, the judge in the personal injury matter dismissed the now ex-wife's consortium claim. *Id.* The appellate court reversed, holding that the husband's release did not bar the ex-wife's loss of consortium action. *Id.* On review, the Supreme Court agreed, indicating that derivative loss-of-consortium actions should be joined whenever possible, but that the ex-wife had, nonetheless, a valid independent cause of action. *Id.* at 38-39; *see also Dini v. Naiditch*, 20 Ill. 2d 406, 427

(1960) ("The 'double recovery' bogey is merely a convenient cliché for denying the wife's action for loss of consortium.").

The conclusion that Leah and Daniel's FEA claim is independent also supports the conclusion that October 8, 2021, is the triggering date for the applicable statutes of limitations and repose. It was only on that date that Leah and Daniel learned of the exceptional costs they would face under the FEA for their second child's enzyme replacement therapy. That conclusion must be correct because it is entirely possible that Leah and Daniel's second child could have been born without Gaucher disease (as was their first child), in which case they would have had no basis for an FEA claim at all despite the defendants' previous and allegedly negligent reading of the genetic test results. As section 13-203 provides for the application of a two-year statute of limitations based on an underlying injury, Leah and Daniel had two years from October 8, 2021—the day they learned they had a cause of action under the FEA—to file suit. Their filing of the complaint in April 2022 is well within that two-year period for filing.

This dissection of what constitutes a derivative claim also puts to rest the defendants' argument that the statutes of limitations and repose began to run on June 18, 2019, the day Leah and Daniel learned their second child had Gaucher disease. If Leah and Daniel's FEA cause of action depended on a medical negligence cause of action on behalf of their child, then the defendants' argument is defeated as premature. The Supreme Court has made plain that, "[t]he effect of section 13-212(b) of the Code 'is to establish an absolute limit for bringing suit of 8 years or until age 22 *for minors* injured by medical malpractice, regardless of the plaintiff's lack of knowledge of the cause of action." *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001) (quoting *Franklin v. Cernovich*, 287 Ill. App. 3d 776, 779 (3d Dist. 1997) (emphasis added)). Given the tolling provision contained in section 13-212(b), Leah and Daniel's child has until its twenty-second birthday to bring a suit for personal injuries, a date that remains quite far off. In contrast, their FEA claim could not survive that long; it must be brought now and is, in fact and law, timely.

Conclusion

For the reasons presented above, it is ordered that:

The defendants' motion to dismiss is denied.

Judge John H. Ehrlich

FEB 15 2023

Circuit Court 2075

John H. Ehrlich, Circuit Court Judge