2017 IL App (2d) 160918-U
No. 2-16-0918
Order filed August 9, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHRISTOPHER DIX,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 15-L-495
	)	
RUSH-COPLEY MEDICAL CENTER, INC., DR. DONALD P. PRENTIS JR., DR. CORNELIUS K. SMITH, M.D., ANDREA SILVER, M.D., DREYER CLINIC INC., GUARDIAN ANESTHESIA ASSOCIATES, S.C., DR. JAMES A. McGUIRE D.O., TARATIP THUPVONG, JAMIE STAMPER, RONALD NERI, And DOES 1 through 4, INCLUSIVE,	)	Honorable
	)	Edward Schreiber,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed medical negligence count of plaintiff's complaint for failing to support it with an affidavit of merit (735 ILCS 5/2-622 (West 2016)); trial court properly dismissed medical battery claim alleging use of anesthesia exceeded scope of consent for failing to support it with an affidavit of merit; trial court erred in dismissing battery claim alleging use of catheter exceeded plaintiff's express direction not to do so; trial court properly dismissed

fraud claim where plaintiff failed to allege reliance on purportedly fraudulent assertion; trial court properly dismissed fraudulent concealment claim which required medical knowledge to assess and plaintiff failed to support it with an affidavit of merit; trial court properly dismissed spoliation of evidence claim where it was filed outside applicable limitations period; and trial court did not abuse its discretion in dismissing various defendants based on plaintiff's failure to effect service of process.

¶ 2 I. INTRODUCTION

¶ 3 Plaintiff, Christopher Dix, appeals a judgment of the circuit court of Kane County dismissing his complaint, with prejudice, against defendants, Copley Medical Center, Inc., Dr. Donald P. Prentis Jr., Dr. Cornelius K. Smith, M.D., Andrea Silver, M.D., Dreyer Clinic Inc., Guardian Anesthesia Associates, S.C., Dr. James A. McGuire D.O., Taratip Thupvong, Jamie Stamper, Ronald Neri, and Does 1 through 4, Inclusive. In support of its decision, the trial court cited sections 2-615, 2-619, and 2-622 of the Civil Practice Law (735 ILCS 5/2-615, 619, 622 (West 2016)). For the reasons that follow, we affirm in part, reverse in part, and remand.

¶ 4 II. BACKGROUND

¶ 5 We set forth the following summary to facilitate an understanding of this appeal. Additional detail will be provided as we discuss the issues presented by the parties. This case concerns defendants' alleged failure to remove a surgical needle from plaintiff's body following an appendectomy and defendants' purported subsequent acts designed to cover up this failure.

¶ 6 On March 19, 2012, plaintiff underwent an appendectomy. Plaintiff alleges that a surgical needle was left in his body following the procedure and that the needle subsequently moved around throughout his abdomen, causing him pain. Plaintiff was discharged, not knowing a needle had been lost during the surgical procedure.

¶ 7 Plaintiff further alleges that defendants McGuire and Thupvong "render[ed] him unconscious by administering a controlled substance." Neither met with plaintiff prior to the

surgery to determine whether he had any conditions (*i.e.*, dentures, retainers) that would be problematic or cause him harm relative to his breathing. They also failed to ascertain whether plaintiff had any adverse reactions to any sorts of drugs. According to plaintiff, they placed a mask over plaintiff's face that caused him to be rendered unconscious. Additionally, plaintiff alleges that prior to surgery, he informed members of Rush-Copley's nursing and support staff that he did not want a urinary catheter inserted. On March 28, 2012, plaintiff returned to Rush-Copley complaining of a fever. He was admitted that day and subsequently discharged on March 30, 2012.

¶ 8 About two years later on March 7, 2014, plaintiff sought care from Dr. Juliet Fallah. Fallah discovered a metallic object extending from the rear wall of plaintiff's gastric antrum into his peripancreatic fat. The gastric antrum is the portion of the stomach before its outlet. http://www.medicinenet.com/script/main/art.asp?articlekey=2290 (last visited July 19, 2017). More specifically, "[t]he antrum, the lowermost part of the stomach, is somewhat funnel-shaped, with its wide end joining the lower part of the body and its narrow end connecting with the pyloric canal, which empties into the duodenum (the upper division of the small intestine)." https://www.britannica.com/science/human-digestive-system/Esophagus#ref212880 (last visited July 19, 2017). The needle was removed surgically.

¶ 9 Plaintiff filed a six-count amended complaint. The first count alleged medical negligence based on a surgical needle being left in his abdomen during his appendectomy. Count II alleged battery based on the administration of anesthesia to plaintiff without his consent. Count III alleged battery based on the insertion of the catheter contrary to plaintiff's express directions. Count IV alleged fraud in that "RUSH-COPLEY and DOE #1[] forged [plaintiff's] signature on the 'Consent for Anesthesia or Pain Management Services' form." It added that defendant Neri

"falsely claimed that he personally observed and witnessed [plaintiff] sign" the form by signing it as a witness. Plaintiff further alleged Rush-Copley and Doe #1 committed forgery by inserting the consent form into plaintiff's medical records. Count V alleged fraudulent concealment in that various defendants purportedly conspired to conceal from plaintiff that the number of needles counted before and after the appendectomy revealed that one was missing. Plaintiff also alleged that various defendants altered his medical records. Plaintiff claims Rush-Copley refused to release certain medical records. Finally, in Count VI, plaintiff alleges spoliation of evidence based on Rush-Copley's purported failure to release a complete and unaltered copy of his medical records in a timely manner. Plaintiff asserts Rush-Copley destroyed or altered portions of the records that would prove negligence and battery.

¶ 10 The trial court dismissed all counts with prejudice. In an extensive oral pronouncement, it ruled as follows. It first noted that it had previously dismissed, with prejudice, several counts of plaintiff's initial complaint, including the medical negligence count and the medical battery counts, and the fraudulent concealment count. A fraud count was dismissed without prejudice. The trial court stated it gave a detailed explanation of its reasoning in open court; however, no court reporter was present. Plaintiff was given 28 days to replead the fraud count. Instead, he filed his amended complaint, which re-alleged the negligence count, two battery counts, a fraud count, and a fraudulent concealment count. It also added a spoliation of evidence count. No affidavit of merit (see 735 ILCS 5/2-622 (West 2016)) was filed in support of the amended complaint.

¶ 11 The trial court observed that plaintiff attached a police report in support of the fraud count, which, the trial court noted, was prepared over two years after plaintiff's cause-of-action arose and was hearsay. The police report purportedly supports his claim that his signature on the

consent-for-anesthesia-and-pain-management form was forged. According to the report, Ronald Neri (a defendant), who signed as witness, could not recall—possibly due to the passage of time—whether plaintiff signed the form personally or if he was unable to do so and someone else signed on his behalf. Plaintiff admitted signing the consent for surgery, which does not expressly disallow anesthesia or a catheter. Plaintiff contends that he orally informed a nurse at some point that he did not want a catheter. The trial court then found that plaintiff's allegations of fraud were merely conclusions and speculation and did not contain facts sufficient to support a fraud claim. Further, according to the trial court, plaintiff did not plead damages. The trial court observed, "It's hard to believe that the [p]laintiff would agree to surgery without anesthesia or pain management services of some kind." The trial court noted that plaintiff was now arguing that had he not been anesthetized, he could have prevented the insertion of the urinary catheter; however, the trial court could not find such an allegation in the complaint. Given that it had been over four years since the surgery and plaintiff had an opportunity to amend his complaint, the trial court found dismissal with prejudice appropriate.

¶ 12 As for the spoliation count (Count VI), the trial court first noted that it had been filed without leave of the court and after the expiration of the applicable statute of limitations had run. The trial court found that the claim would have accrued no later than November 2013, when plaintiff received what he claimed was an altered copy of his medical records. Moreover, plaintiff relied "almost exclusively on [his] theories and belief's rather than facts." Accordingly, the trial court dismissed this count with prejudice.

¶ 13 The trial court then inquired as to whether any summonses had been served on other defendants beside Rush-Copley in connection with the amended complaint. After ascertaining that they had not, the trial court, on its own motion, dismissed all other defendants in accordance

with Illinois Supreme Court Rule 103(b) (eff. July 1, 2007). The trial court issued a written order reflecting its ruling. This appeal followed.

¶ 14 III. ANALYSIS

¶ 15 As this appeal comes to us after being dismissed by the trial court, our review is *de novo* as to all counts pertaining to Rush-Copley. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 658 (2006) ("A dismissal under either section 2– 615 or section 2–619 is reviewed *de novo*".); *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 100 (holding that a dismissal under section 2-622 is reviewed in the same manner as a dismissal pursuant to 2-619). A dismissal in accordance with Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) is reviewed using the abuse-of-discretion standard of review. *Emrikson v. Morfin*, 2012 IL App (1st) 11687, ¶¶ 13-14. An abuse of discretion occurs only if no reasonable person could agree with the position taken by the trial court. *Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 568, 571 (2001). With these standards in mind, we will address the issues presented in this appeal in the order they appear in plaintiff's complaint.

¶ 16 A. NEGLIGENCE

¶ 17 Though no court reporter was present when the trial court announced its decision regarding the dismissal of plaintiff's initial complaint, the parties characterize the salient issue as whether plaintiff needed to file an affidavit of merit (see 735 ILCS 5/2-622 (West 2016)) in support of his negligence claim (he re-alleged this count in his amended complaint to preserve it for review). We will accept this characterization and address it thusly. As our review is *de novo* (*Holzrichter*, 2013 IL App (1st) 110287, ¶ 100), the absence of a transcript of the trial court's reasoning does not hamper our review. See *People v. Nash*, 173 Ill. 2d 423, 432 (1996) ("The question before us on review is the correctness of the trial court's result, not the correctness of

the reasoning upon which that result was based."). Thus, we will examine the controlling statute and determine whether plaintiff was required to file an affidavit of merit.

¶ 18 Section 2-622 of the Civil Practice Law (see 735 ILCS 5/2-622 (West 2016)) states, in pertinent part, as follows:

> "In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:
>
> > 1. That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action. * * *.
> >
> > 2. That the affiant was unable to obtain a consultation required by paragraph 1 because a statute of limitations would impair the action and the consultation

> required could not be obtained before the expiration of the statute of limitations. * * *. 735 ILCS 5/2-622 (West 2016).
>
> 3. That a request has been made by the plaintiff or his attorney for examination and copying of records pursuant to Part 20 of Article VIII of this Code and the party required to comply under those Sections has failed to produce such records within 60 days of the receipt of the request."

It has been explained that "the general rule 'is that the required consultation with a health professional must occur before the complaint is filed and the required documents certifying the meritoriousness of the action must be filed with the complaint.' " *Fox v. Gauto*, 2013 Il App (5th) 110327, ¶ 17 (quoting *Premo v. Falcone*, 197 Ill. App. 3d 625, 631 (1990)). The purpose of section 2-622 is to "prevent frivolous medical malpractice lawsuits." *Cookson v. Price*, 393 Ill. App. 3d 549, 553 (2009).

¶ 19 At issue here is the scope of section 2-622. By its own terms, this statute applies to claims based on "healing art malpractice." 735 ILCS 5/2-622 (West 2016). Thus, whether this section applies to a given claim turns on the meaning of the phrase "healing art malpractice." It has been held that "[t]he term 'healing art malpractice' is broad in scope." *Kolanowski v. Illinois Valley Community Hospital*, 188 Ill. App. 3d 821, 823 (1989). Generally, "the type of case in which a plaintiff need not file a section 2–622 affidavit against a defendant health care provider is the exceptional one." *Woodard v. Krans*, 234 Ill. App. 3d 690, 705 (1992). The nature of a plaintiff's claim determines whether section 2-622 applies. *Cohen v. Smith*, 269 Ill. App. 3d 1087, 1093 (1995). The section's application does not depend on whether expert testimony will be necessary to prove a plaintiff's case at trial. *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 70 (1992) ("That section 2–622 requires the submission of a health professional's report even

in cases in which expert testimony might not be necessary at trial [citation] merely reflects the legislature's assessment of the statute's desired scope"); *Lyon by Lyon v. Hasbro Industries, Inc.*, 156 Ill. App. 3d 649, 655 (1987) ("The legislative history of section 2–622 of the Code reveals that its purpose was to eliminate frivolous lawsuits at the pleadings stage. [Citation.] Thus, that expert testimony would not be needed at trial to establish negligence, [*sic*] does not address the necessity of complying with the provisions contained in section 2–622 of the Code at the pleading stage."); see also *Woodard*, 234 Ill. App. 3d at 704 ("In upholding the constitutionality of section 2–622, the supreme court has adopted the *Lyon* view that a section 2–622 affidavit may not be dispensed with simply because the defendant's alleged negligence may be proved without expert testimony.").

¶ 20 In this case, plaintiff's first count is based on the alleged failure of certain defendants to maintain control of a surgical needle that was allegedly left in plaintiff's body following his appendectomy. Subsequently, that needle was allegedly found extending from the rear wall of plaintiff's gastric antrum into his peripancreatic fat. Thus, plaintiff is claiming that a needle could migrate from the surgical site of his appendectomy to the wall of the stomach and into plaintiff's peripancreatic fat. Whether this is even possible is clearly a matter that requires medical knowledge. The purpose of section 2-622 is to "eliminate frivolous lawsuits." *Lyon*, 156 Ill. App. 3d at 655. Lacking expert medical knowledge, we cannot say whether this claim is frivolous. As such, it was necessary for plaintiff to file a affidavit of merit in support of this claim.

¶ 21 Plaintiff cites two cases in support of his position that bear some similarities to the instant case, *Forsberg v. Edward Hospital & Health Services*, 389 Ill. App. 3d 434 (2009), and *Willaby v. Bendersky*, 383 Ill. App. 3d 853 (2008). Both involved leaving a surgical sponge inside a

patient following a surgery. Plaintiff asserts that these cases stand for the proposition that leaving a surgical instrument in a patient's body after surgery establishes a *prima facie* case of negligence. Initially, we note that in *Forsberg*, 398 Ill. App. 3d at 437, the plaintiff filed a section 2-622 affidavit and *Willaby* does not state whether such an affidavit was filed. However, *Willaby* does state that the plaintiff "was not obligated to present an expert to establish the standard of care and its breach." *Willaby*, 383 Ill. App. 3d at 866. It continues, "An expert witness is not required where the defendant's actions are grossly apparent or where the treatment is so common that a layperson would understand the conduct without the necessity of an expert." *Id*. Similarly, in *Forsberg*, 398 Ill. App. 3d at 442 (quoting *Walski v. Tiesenga*, 72 Ill. 2d 249, 257 (1978)), the court held that "expert testimony is not required to establish the standard of care 'where the common knowledge of laymen is sufficient to recognize or infer negligence.' " These cases do not support plaintiff's position.

¶ 22 Notably, they concern establishing the standard of care rather than the necessity of filing an affidavit of merit in accordance with section 2-622. These are not the same thing. As noted, our supreme court has stated, "That section 2-622 requires the submission of a health professional's report even in cases in which expert testimony might not be necessary at trial [citation] merely reflects the legislature's assessment of the statute's desired scope." *DeLuna*, 147 Ill. 2d at 70. Therefore, cases that concern the necessity of expert testimony at trial are not pertinent to the question before us. As noted, the salient point here is the legislature's pronouncement that "in any action * * * in which the plaintiff seeks damages for * * * healing art malpractice, * * * the plaintiff * * * shall file an affidavit" of merit. 735 ILCS 5/2-622 (West 2016). That requirement is dispositive of this issue. Plaintiff's unsupported assertion that "not every 'medical malpractice' case in Illinois requires a [s]ection 2-622 [r]eport" is simply wrong.

¶ 23 Plaintiff also cites *Zangara v. Advocate Christ Medical Center*, 2011 IL App (1st) 091911, ¶ 26, where the court stated, "Section 2–622 should not be mechanically applied to deprive a plaintiff of his substantive rights." We have no quarrel with this proposition; however, we note that in *Zangara*, the issue was the scope of discovery before the filing of an affidavit of merit. Here, we are concerned with the necessity of filing such an affidavit in the first place. Thus, *Zangara* provides only tangential guidance. Moreover, we see nothing "mechanical" in requiring plaintiff to file an affidavit where the question of whether a surgical needle could have travelled from the surgical site to plaintiff's stomach and peripancreatic fat requires medical knowledge to address.

¶ 24 In sum, we find plaintiff's arguments unpersuasive (plaintiff makes a number of brief, undeveloped related arguments and assertions throughout his brief which we need not address, but find insufficient to warrant reversing the trial court).

¶ 25 B. BATTERY

¶ 26 Count II of plaintiff's complaint alleged medical battery in that anesthesia was administered to plaintiff without his consent; Count III alleged medical battery in that a catheter was inserted without his consent. More specifically, with respect to Count II, plaintiff alleged defendants Thupvong and McGuire failed to "obtain informed-consent" for their medical services; failed to consult with plaintiff to minimize risks associated with those services; and administered controlled substances to plaintiff without his informed-consent. As to defendants Rush-Copley and Guardian Anesthesia, plaintiff alleges they failed to implement and enforce protocols and otherwise permitted their agents to perform medical procedures on plaintiff without his consent. These counts, like the negligence count, were dismissed when the trial court announced its decision regarding plaintiff's initial complaint and no court reporter was present.

Again, the parties characterize the issue as whether plaintiff needed to file an affidavit of merit (see 735 ILCS 5/2-622 (West 2016)) and, as noted above, we will accept this characterization.

¶ 27 In *McDonald v. Lipov*, 2014 IL App (2d) 130401, this court considered the application of section 2-622 in a medical battery case. The court noted, "It is well established that a claim that a health professional acted without the informed-consent of the patient is a type of medical malpractice claim." *Id.* ¶ 18. Further, "lack of consent to medical procedures gives rise to two causes of action: one based on negligence and the other based on battery." *Id.* ¶ 20. Where there is a total lack of consent, a battery is committed; where there is a lack of informed-consent, the action is one for negligence. *Gragg v. Calandra*, 297 Ill. App. 3d 639, 645 (1998).

¶ 28 Viewing the complaint in the light most favorable to plaintiff, as we must (*Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 18), we conclude that Count II alleges a claim for lack of informed-consent and sounds in negligence (despite the label plaintiff places upon it). It alleges defendants Thupvong and McGuire failed to meet with plaintiff, inform him of the risks of anesthesia and pain management services, and "obtain informed-consent from Plaintiff." They then "prescribed and administered" controlled substances to plaintiff. They placed a mask over his face causing him to ingest substances, resulting in a loss of consciousness. Plaintiff also alleged that defendants Rush-Copley and Guardian Anesthesia were vicariously liable for the acts of Thupvong and McGuire. The complaint does not allege that plaintiff forbid the use of anesthesia; only that no informed-consent was obtained. Lack of informed-consent alleges a claim in negligence. *Gragg*, 297 Ill. App. 3d at 645.

¶ 29 Count III alleges that plaintiff "explicitly informed Rush-Copley's nurses and support staff that he did not want a urinary catheter inserted into his body." It further alleges that defendants Prentiss and Smith "damaged [plaintiff's] urethra while inserting and attempting to

insert urinary catheters into [his] urinary tract." Here, plaintiff alleges that a catheter was inserted contrary to his consent and that plaintiff's lack of consent was expressly communicated to various defendants.

¶ 30 Hence, Counts II and III allege substantially different theories. It is undisputed that plaintiff signed a form granting consent to an appendectomy. This form also stated that plaintiff was consenting to "other urgent procedures that were unanticipated." Thus, regarding Count II (informed-consent), the question is whether plaintiff's consent to the procedure generally entailed the use of anesthesia. Plaintiff argues that it was not, pointing out that Rush-Copley typically uses a separate form for that purpose. However, regarding the preliminary matter of whether plaintiff was required to file an affidavit in accordance with section 2-622, we first note that an informed-consent claim is a type of malpractice claim (*McDonald*, 2014 IL App (2d) 130401, ¶ 18), so it is within the scope of section 2-622, which applies to "healing art malpractice." 735 ILCS 5/2-622 (West 2016). Moreover, in *McDonald*, 2014 IL App (2d) 130401, ¶ 27, we held that, in an informed-consent case where medical knowledge is necessary to comprehend the scope of a patient's consent and whether a particular procedure exceeded that scope, the submission of an affidavit of merit was required. Quite simply, a lay person would not know whether it was even possible to perform an appendectomy of the sort plaintiff underwent without anesthetic. Therefore, we affirm the trial court's dismissal of Count II.

¶ 31 Count III presents different issues. Here, plaintiff alleges that he expressly informed the nursing staff that he would not consent to the insertion of a urinary catheter. This (if proven) moots any questions regarding the scope of the consent to the appendectomy. In *Curtis v. Jaskey*, 326 Ill. App. 3d 90, 96 (2001), we held, "Where, however, a patient has expressly refused to assent to some procedure, implying consent from the circumstances becomes

problematic." Similarly, where a general grant of consent conflicts with a specific denial of consent, it is impossible to construe the general grant as overriding the specific refusal. *C.f. Brzozowski v. Northern Trust Co.*, 248 Ill. App. 3d 95, 99 (1993) (holding that more specific provision in contract controls over general provision).

¶ 32 In construing another section of the Civil Practice Law (see 735 ILCS 5/2-1115 (West 1996)), the Fifth District held that performing a medical procedure contrary to a patient's consent did not constitute "healing art malpractice." We find that observation pertinent in the present context. Expert testimony is simply not necessary to ascertain whether a claim is frivolous under the present circumstances. Plaintiff allegedly stated "no catheter"; defendants inserted a catheter. Such issues are well within a layperson's grasp. See *Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 150067, ¶ 35 ("By alleging a lack of consent rather than a deviation from consent given, plaintiff remains outside of the requirements of section 2-622."). Indeed, "[t]here is no scope of consent where consent is categorically withheld." *Id.* ¶ 47.

¶ 33 Defendants assert that plaintiff "has never alleged any follow up treatment addressing his urethra or any other condition that could have been caused by a catheter." Battery is an intentional tort. *Bakes v. St. Alexius Medical Center*, 2011 IL App (1st) 101646, ¶ 21. Further, "The law infers damages when any trespass on the person of another is committed." *Pratt v. Davis*, 118 Ill. App. 3d 161, 181 (1905). Nominal damages will support an intentional tort (*Crosby v. City of Chicago*, 11 Ill. App. 3d 625, 630 (1973), and, in appropriate circumstances, punitive damages (*Chicago Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420, ¶ 88 ("While an award of punitive damages cannot stand alone, an award of nominal damages can support the assessment of punitive damages in the case of an intentional tort.")). As such,

plaintiff's purported failure to plead damages is not fatal to this count. We therefore reverse the dismissal of plaintiff's third count (the catheter) and remand for further proceedings.

¶ 34 C. FRAUD

¶ 35 Plaintiff next contends that the trial court erred in dismissing the fourth count of his amended complaint, which alleged fraud. The gist of Count IV is that "RUSH-COPLEY and DOE #1[] forged [plaintiff's] signature on the 'Consent for Anesthesia and Pain Management Services' form." Plaintiff contends that these defendants "made this misrepresentation * * * with the intent to conceal the medical battery" alleged in Count II. Further, plaintiff alleges, Rush-Copley inserted the forged form into his medical records. At the time of the surgery, plaintiff was rendered unconscious by Thupvong and McGuire, who, according to plaintiff, knew defendants "would forge the Anesthesia Consent Form to make it appear that [plaintiff] consented to their medical treatment." But for this alleged scheme, they would have had to obtain plaintiff's informed-consent, and he presumably could have chosen to undergo abdominal surgery without anesthesia. This also rendered plaintiff "unable to reject the several attempts and eventual insertion of the urinary catheter" and to "reject the substandard medical care" he received.

¶ 36 To successfully allege common-law fraud, a plaintiff must plead the following elements: " '(1) a statement by defendant; (2) of a material nature as opposed to opinion; (3) that was untrue; (4) that was known or believed by the speaker to be untrue or made in culpable ignorance of its truth or falsity; (5) that was relied on by the plaintiff to his detriment; (6) made for the purpose of inducing reliance; and (7) such reliance led to the plaintiff's injury.' " *Oldendorf v. General Motors Corp.*, 322 Ill. App. 3d 825, 831 (2001) (quoting *Duran v. Leslie Oldsmobile,*

Inc., 229 Ill. App. 3d 1032, 1039 (1992)). Fraud must be pleaded with specificity. *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 528 (1996).

¶ 37 We do not see any allegation in plaintiff's amended complaint that would satisfy the fifth element of fraud. Plaintiff asserts that the alleged forgery "could have been done on any of the 580 days that Rush-Copley concealed the Plaintiff's medical records." Thus, the forgery, as alleged, could have occurred well after the surgery. How plaintiff relied on the alleged forgery is not apparent to us and plaintiff does nothing to explain how he could have relied on it if it occurred after the surgery. As such, plaintiff has failed to allege an essential element of fraud. Parenthetically, we further note that plaintiff's allegations lack specificity, as is required when pleading fraud. *Cramer*, 174 Ill. 2d at 528.

¶ 38 We therefore affirm the trial court's dismissal of Count IV.

¶ 39 D. FRAUDULENT CONCEALMENT

¶ 40 Plaintiff next contends that defendants Prentiss, Stamper, McGuire, and Thupvong conspired to fraudulently conceal the (alleged) fact that the postoperative inventory of surgical needles revealed that one was missing. Plaintiff also complains that Rush-Copley failed to release his medical records to him in a timely manner. Further, plaintiff alleges his medical records were altered to conceal the loss of the needle. Defendants contend that plaintiff is, in essence, attempting to avoid the requirements of section 2-622 by recasting his medical negligence and medical battery claims as a fraudulent concealment claim. We agree.

¶ 41 In *Holzrichter*, 2013 IL App (1st) 110287, ¶ 88, the court held, "A plaintiff challenging an implicit part of the medical treatment should not be able to avoid the requirement of an expert medical opinion simply by claiming medical battery or something other than medical malpractice." Here, plaintiff is complaining about defendants purportedly leaving a surgical

needle inside him during his appendectomy. In accordance with *Holzrichter*, he cannot avoid the requirements of section 2-622 by alleging, in essence, "defendants left a needle in me and they did not tell me they did."

¶ 42 Moreover, regarding Rush-Copley's failure to release plaintiff's medical records in a timely manner, defendant does not explain how he relied on this in any way. Reliance is one of the elements of fraudulent concealment. See *Abazari v. Rosalind Franklin University of Medicine & Science*, 2015 IL App (2d) 140952, ¶ 27 (quoting *Bauer v. Giannis*, 359 Ill. App. 3d 897, 902-03 (2005)) ("To state a claim for fraudulent concealment, a plaintiff must allege the following elements: '(1) the defendant concealed a material fact under circumstances that created a duty to speak; (2) the defendant intended to induce a false belief; (3) the plaintiff could not have discovered the truth through reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and *justifiably relied upon the defendant's silence as a representation that the fact did not exist*; (4) the concealed information was such that the plaintiff would have acted differently had he or she been aware of it; and (5) the plaintiff's reliance resulted in damages.' " (Emphasis added.)). Thus, as a result of plaintiff's failure to allege reliance, this claim fails as well.

¶ 43 We affirm the dismissal of this count.

¶ 44 E. SPOLIATION OF EVIDENCE

¶ 45 The trial court found that plaintiff's spoliation-of-evidence claim was barred by the applicable statute of limitations. The trial court found that plaintiff's cause of action accrued in November 2013, when, according to the allegations of the amended complaint, plaintiff received an altered copy of his medical records. Spoliation of evidence is not an independent tort; rather, it is a species of negligence. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 192-93 (1995). In

Wofford v. Tracy, 2015 IL App (2d) 141220, ¶ 35, this court held that as a derivative cause of action, the statute of limitations for a spoliation claim was controlled by the limitations period of the underlying negligence action. As personal injury is at issue here, section 13-202 of the Code of Civil Procedure applies (735 ILCS 5/13-202 (West 2016)). That section specifies a two-year limitations period. *Id*. Therefore, the trial court correctly determined that this count was barred by the applicable statute of limitations.

¶ 46 F. SUPREME COURT RULE 103(b)

¶ 47 Finally, plaintiff alleges error in the trial court's decision to dismiss, with prejudice, all defendants other than Rush-Copley, as plaintiff failed to serve them after he dismissed and refiled his case. Unlike the other issues raised in this appeal, review here will be conducted using the abuse-of-discretion standard. See *Emrikson*, 2012 IL App (1st) 11687, ¶¶ 13-14. Therefore, we will reverse only if no reasonable person could agree with the trial court. *In re Estate of Wright*, 377 Ill. App. 3d 362, 803-04 (2007).

¶ 48 During the hearing on the motion to dismiss plaintiff's amended complaint, plaintiff stated that he attempted to serve various named defendants, but was unable to. He stated that he did not know where some defendants were and that he did not know the identity of the defendants identified as "Doe" in the amended complaint. However, he acknowledged knowing that Dryer Clinic and Guardian Anesthesia were involved. Despite this knowledge, he did not serve these two defendants. Consequently, the trial court dismissed, on its own motion, all defendants beyond Rush-Copley (who was served) with prejudice.

¶ 49 Plaintiff argues that he served Rush-Copley and it should have "advanced the summonses to the other defendants." He continues, "each of the defendants should be summonsable at Rush-Copley Memorial Hospital in Aurora, Illinois, as that is where they conduct their business

affairs." Plaintiff cites nothing to support his contention that serving one defendant should be sufficient to constitute serving other defendants or that in certain circumstances, a defendant like Rush-Copley would have a duty to assist plaintiff serve other defendants. This omission forfeits this issue. *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009). Moreover, we have located authority to the contrary. In *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 35 (2006), the court observed "a defendant's actual knowledge that an action is pending or that service has been attempted is not the equivalent of service of summons and would not relieve the plaintiff of its burden or vest the court with jurisdiction." Here, there is no indication in the record that the other defendants were even aware that this action was pending. If a failure to effect service cannot be excused where a defendant has actual knowledge of the pendency of an action, it surely cannot be excused simply because plaintiff effected service on a third party.

¶ 50 In short, we are unable to conclude that no reasonable person could agree with the trial court, so we can find no abuse of discretion here.

¶ 51 IV. CONCLUSION

¶ 52 In light of the foregoing, the order of the circuit court of Kane County is reversed with respect to Count III of plaintiff's amended complaint (pertaining to the catheter). It is otherwise affirmed. This cause is remanded for further proceedings, as appropriate.

¶ 53 Affirmed.