2015 IL App (5th) 140319-U

NO. 5-14-0319

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PATTI COOK, Plaintiff-Appellant, v. SSM HEALTH CARE ST. LOUIS, GOOD SAMARITAN REGIONAL HEALTH CENTER, and DR. DAVID NEIDIG, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Jefferson County. No. 13-L-16 Honorable David K. Overstreet, Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not abuse its discretion in granting the defendants' motions to dismiss and denying the plaintiff's request for leave to amend, and the judgment is affirmed as the plaintiff failed to comply with 735 ILCS 5/2-622.

¶ 2 The plaintiff Patti Cook appeals from the circuit court's order granting motions to dismiss filed by the defendants, Good Samaritan Regional Health Center (GSRHC) and Dr. David Neidig. The plaintiff also appeals from the circuit court's order denying her request for leave to amend. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On April 16, 2013, the plaintiff filed a complaint asserting claims against GSRHC and Dr. Neidig. According to the complaint, on or about April 21, 2011, the plaintiff went to GSRHC for an epidural injection in her lower back. Dr. Neidig performed this procedure and was assisted by two nurses and a technician assigned by the hospital. During the procedure, the table on which the plaintiff was lying collapsed, causing the epidural needle to jab her in the spinal cord area. The plaintiff asserted that GSRHC was thus negligent for failing to set up an examination table, failing to set up the room for the epidural with a proper table and equipment, failing to properly supervise the staff regarding how to operate the table, failing to train the staff in the use of the table, and failing to send a qualified staff person to operate the equipment. The plaintiff asserted that Dr. Neidig was negligent for failing to properly supervise the staff during the procedure, failing to train the staff in the proper operation of the table, becoming agitated at the staff who subsequently caused the table to release and fall, and failing to require the hospital staff to set up a proper examining bed or table. The plaintiff also sought judgment against SSM Health Care St. Louis (SSM) "as may be just" but did not detail a theory of liability against it.

¶ 5 On July 1, 2013, SSM filed a motion to dismiss for failure to state a cause of action (735 ILCS 5/2-615 (West 2010)). On July 25, 2013, GSRHC filed a separate motion to dismiss under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)) on the ground that the plaintiff's claim was a healing art malpractice claim and the plaintiff had failed to attach the affidavit and report by a

reviewing health professional as required for such claims under section 2-622 of the Code (735 ILCS 5/2-622 (West 2010)). On August 28, 2013, Dr. Neidig filed a motion to dismiss under section 2-619 for failure to follow the requirements under section 2-622 and under section 2-615 for failure to state a claim. On September 10, 2013, GSRHC and SSM filed a joint amended motion to dismiss, incorporating the arguments raised in their previous motions and joining Dr. Neidig's August 28, 2013, motion to dismiss.

¶ 6 On September 24, 2013, the circuit court heard oral argument on the pending motions, took the motions to dismiss under advisement, and ordered counsel to provide supplemental briefing. On that same day, the circuit court also dismissed SSM as a defendant. On September 24, 2013, the plaintiff also filed her reply to the motions to dismiss and request for leave to amend, stating that "[t]his action is in the nature of a battery or negligence case, in that the patient had an epidural needle in her back at the time the table fell" and therefore "[p]laintiff believes the most appropriate manner of pleading this case is negligence and also battery, and a statement of medical malpractice is not required." The plaintiff also requested 30 days to amend her complaint. On September 27, 2013, both GSRHC and Dr. Neidig filed supplements to the motions to dismiss, providing additional authority as requested. On September 30, 2013, the plaintiff filed a motion for leave to amend to add specific battery count, based again on the fact that the plaintiff had an epidural needle in her back at the time the table fell, and again requested 30 days to amend. The plaintiff did not attach a proposed amendment pleading medical battery to this claim.

¶ 7 On September 30, 2013, the plaintiff's attorney also filed an affidavit of attorney as to receipt of medical records. In this affidavit, the plaintiff's attorney stated that she had attempted to acquire the plaintiff's medical records but had been unsuccessful in doing so. As such, and with the limitations period approaching, she was required to file the case without the medical records or without being able to procure an affidavit from a physician as required by section 2-622 of the Code (735 ILCS 5/2-622 (West 2010)). The plaintiff's attorney requested "90 days past receipt of the records to provide an affidavit from a physician regarding the viability of the claim, which would be approximately 11/16/2013."

¶ 8 On October 1, 2013, the circuit court entered an order via docket entry. In this order, the court found "that the complaint alleges facts that sound in medical malpractice" and that, therefore, "[plaintiff] is required to comply [with] 735 ILCS 5/2-622." Further, the court denied the plaintiff's motion for leave to amend to add specific battery count, noting that "[t]his is not a case of ordinary negligence or battery." The court lastly noted that the affidavit of attorney as to receipt of medical records was untimely under section 2-622(a)(3) of the Code (735 ILCS 5/2-622(a)(3) (West 2010)), as the affidavit should have been filed with the complaint. Nevertheless, the circuit court "reserve[d] ruling on the [defendants'] motions to dismiss until 11/18/13 pursuant to [plaintiff's attorney's] affidavit."

¶ 9 On November 18, 2013, the circuit court entered an order via docket entry granting the defendants' motions to dismiss with prejudice. In the entry, the circuit court stated that the plaintiff "has still failed to file an affidavit from a physician." On

December 17, 2013, the plaintiff filed a motion for reconsideration of dismissal pursuant to section 2-619 (735 ILCS 5/2-619 (West 2010)) and to reconsider denial of request to amend, asking that the court permit her to file an amended complaint. On June 3, 2014, the circuit court heard oral argument on the motion for reconsideration of dismissal and denied it. On July 2, 2014, the plaintiff timely filed notice of appeal.

¶ 10 ANALYSIS

¶ 11 On appeal, the plaintiff presents two issues for review. First, the plaintiff argues that the circuit court abused its discretion in denying the plaintiff's motions for leave to amend her complaint to allege medical battery. Second, the plaintiff argues that count I of her complaint sufficiently pled an action in negligence, and not medical malpractice, and therefore her complaint should not have been dismissed. Both arguments will be considered in turn.

¶ 12 "At any time before final judgment amendments may be allowed on just and reasonable terms, *** changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim." 735 ILCS 5/2-616(a) (West 2010). "The decision to grant leave to amend a complaint rests within the sound discretion of the circuit court[,] and we will not reverse such a decision absent an abuse of that discretion." *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 219 (2010). "An abuse of discretion will be found only where no reasonable person would take the view adopted by the trial

court." *Keefe-Shea Joint Venture v. City of Evanston*, 364 Ill. App. 3d 48, 61 (2005). "In order to determine whether the circuit court abused its discretion in denying a motion to file an amended complaint, the court looks at four factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether the parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Id.* at 62; see also *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). "If the amendment would not have cured a defect in the pleading, the other factors are superfluous." *Keefe-Shea Joint Venture*, 364 Ill. App. 3d at 62.

¶ 13 The elements of a medical battery claim are an intentional act on the part of the defendant, a resulting offensive contact with the plaintiff's person, and a lack of consent to the defendant's conduct. *McNeil v. Brewer*, 304 Ill. App. 3d 1050, 1055 (1999). "In a medical-battery case, a plaintiff may recover by establishing either a total lack of consent to the procedure performed, that the treatment was contrary to the patient's will, or that the treatment was at substantial variance with the consent granted." *Curtis v. Jaskey*, 326 Ill. App. 3d 90, 94 (2001). "[T]he gist of an action for battery is the absence of consent on the plaintiff's part." *Id.* " 'The law distinguishes between a total lack of consent for the contested act (battery) and the lack of informed consent (negligence).' " *McDonald v. Lipov*, 2014 IL App (2d) 130401, ¶ 20 (quoting *Doe v. Noe*, 293 Ill. App. 3d 1099, 1113 (1997)). "To state a claim for battery based upon a lack of informed consent to medical procedures, plaintiff must allege a total lack of consent to a medical procedure involving

an intentional unauthorized touching of the plaintiff's person by another." *McNeil*, 304 Ill. App. 3d at 1054-55.

¶ 14 The plaintiff argues that the stabbing of the needle into the plaintiff's spine as part of the epidural procedure shows an offensive contact. Even assuming this to be true, however, the plaintiff offers no evidence that the defendants acted intentionally in causing harm to the plaintiff. The plaintiff argues that "[i]t does not matter that it was likely an unintentional battery" and cites to the statute for nonmedical battery (720 ILCS 5/12-3 (West 2010)) as proof. However, an intentional act on the part of the defendant is an element of *medical* battery. Because the plaintiff offers no evidence that the defendants' alleged harmful acts were intentional, she cannot prove the elements of medical battery.

¶ 15 Moreover, taking the plaintiff's pleadings as true, it appears the plaintiff consented to the procedure itself and was harmed by an alleged unintentional collapse of the table used in the procedure. In her complaint, the plaintiff stated she "was a patient at the hospital facility for the purpose of undergoing an[ ] epidural injection in her lower back." She then states that GSRHC failed to set up the room for the epidural with appropriate equipment and that Dr. Neidig failed to supervise the staff properly by becoming upset. Due to these failures, "the staff of said facility caused the examining table or gurney that she was laying on [*sic*] to collapse and fall while the epidural needle was inserted in the [p]laintiff's lower spinal cord area." Thus, the plaintiff alleges that she consented to the epidural procedure itself and that GSRHC's failure to set up the room and Dr. Neidig's failure to supervise resulted in the table's collapsing and injuring the plaintiff. Such

evidence shows that the plaintiff hardly exhibited the "total lack of consent" required in a medical battery case. Because the plaintiff cannot prove two of the elements of medical battery, amending her complaint to add a medical battery count would not cure the defects in her pleading. Thus, the circuit court did not abuse its discretion in denying the plaintiff leave to amend her complaint.

¶ 16 Even if the plaintiff were able to prove all elements of a medical battery, she would still need to provide a medical affidavit as required by section 2-622 of the Code (735 ILCS 5/2-622 (West 2010)). Under that statute, "[i]n any action *** in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney *** shall file an affidavit, attached to the original and all copies of the complaint" declaring either that the affiant consulted and reviewed the facts of the case with a health professional in order to ensure the viability of the claim, that the affiant was unable to obtain such a consultation due to the statute of limitations, or that a request has been made by the affiant to examine and copy the necessary medical records for such a consultation but the records have not yet been produced. *Id*. The term "healing art malpractice" is broad in scope, and the failure to provide "the equipment necessary and precautionary to treat a person in plaintiff's condition" has been held to fall under "healing art malpractice." *Lyon v. Hasbro Industries, Inc.*, 156 Ill. App. 3d 649, 654-55 (1987). While not all medical battery claims constitute healing art malpractice, those claims in which "an assessment of the claims requires knowledge, skill, or training in a technical area outside the comprehension of laypersons" must comply with section 2-622. *McDonald*, 2014 IL App

(2d) 130401, ¶ 6. In other words, if "the issue is beyond the ken of a layperson and requires a medical expert to opine" on its merit, the plaintiff must comply with section 2-622. *Id.* ¶ 27.

¶ 17 The plaintiff alleges that this case is more akin to medical battery cases that have not been held to require compliance with section 2-622. However, in the examples cited by the plaintiff, the medical professionals went beyond the consent granted by the patient or otherwise breached a statutory duty. See *Chadwick v. Al-Basha*, 295 Ill. App. 3d 75 (1998) (defendant's alleged battery was also a breach of the Mental Health Code and thus did not require compliance with section 2-622) and *Cohen v. Smith*, 269 Ill. App. 3d 1087 (1995) (plaintiff's alleged medical battery claim did not require compliance with section 2-622 when defendant went beyond plaintiff's expressed consent by having a male nurse assist in her cesarean section). This case more closely resembles *Kolanowski v. Illinois Valley Community Hospital*, 188 Ill. App. 3d 821 (1989). In that case, the plaintiff fell from a bed while in the defendant's respite care program. *Id*. at 821-22. The plaintiff alleged that the defendant knew the plaintiff was partially paralyzed and thus susceptible to falling from a bed and yet both left him unattended and failed to fix the bed to prevent a fall. *Id*. at 822. The court held that "the standard of care where an injury allegedly results from a hospital's failure to provide adequate restraints *** can be established only upon expert medical testimony" and thus was "subject to statutory restrictions for healing art malpractice." *Id*. at 824.

¶ 18 Here, the plaintiff alleges that the faulty table and inadequate training resulted in her falling and being injured by the epidural needle. To establish this claim, she would

need medical testimony to show the level of training needed and the type of table that should have been used. Thus, she is alleging healing art malpractice, and her failure to comply with section 2-622 in a proposed amended complaint does not cure her earlier defective pleading.

¶ 19 Lastly, the plaintiff cannot now add a claim for medical battery because she could have done so in her original complaint. "Ordinarily, amendment should not be allowed where the matters asserted were known by the moving party at the time the original pleading was drafted and for which no excuse is offered in explanation of the initial failure." *Trans World Airlines, Inc. v. Martin Automatic, Inc.*, 215 Ill. App. 3d 622, 628 (1991). "The test to be applied in determining whether the trial court's discretion was properly exercised is whether allowance of the amendment furthers the ends of justice." *Id*. Here, the medical battery claim arises out of the same factual basis alleged in the plaintiff's original complaint. Moreover, the plaintiff has not offered any excuse as to why she did not allege the medical battery claim in the initial complaint. Thus, we cannot say the amendment would have furthered the interests of justice, and the circuit court did not abuse its discretion in denying the amendment.

¶ 20 Secondly, the plaintiff alleges that she has shown sufficient facts in the complaint sounding in ordinary negligence such that she should have been granted an opportunity to file an amended complaint. The plaintiff concedes that no section 2-622 affidavit was filed with her complaint and that the circuit court granted her 90 days to file such an affidavit after she had procured the medical records. Thus, the circuit court properly dismissed any and all medical negligence claims. The plaintiff argues that many of the

facts alleged, specifically Dr. Neidig's causing staff members to be upset, the failure to provide an adequate table, and GSRHC's potential liability for the acts of its staff, constitute ordinary negligence and, thus, she should be allowed to amend her complaint. However, for the reasons stated above, we disagree. Healing art malpractice is broad, and all of the facts the plaintiff labels as ordinary negligence would qualify as healing art malpractice since they would require expert testimony to explain the correct standards for staff member supervision and for examination tables. Thus, the plaintiff has only alleged medical malpractice and, as she concedes, the circuit court properly dismissed her claim.

¶ 21 CONCLUSION

¶ 22 For the reasons stated, we affirm the judgment of the circuit court of Jefferson County.

¶ 23 Affirmed.