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No. 3-09-0699

Order filed May 5, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

DENEASE COLLINS, as Special Administrator	)	Appeal from the Circuit Court
of the Estates of JANICE HARRIS, deceased,	)	for the 10th Judicial Circuit,
and DE'ANDRE VEREECE MARKS, JR.,	)	Peoria County, Illinois
deceased,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 08-L-371
	)	
MELVIN FLEMING, M.D., and OSF	)	
HEALTHCARE SYSTEM, d/b/a OSF ST.	)	
FRANCIS MEDICAL CENTER OF THE	)	
HOSPITAL SISTERS OF THE THIRD ORDER	)	
OF ST. FRANCIS, an Illinois not-for-profit	)	
corporation,	)	Honorable
	)	Stephen Kouri
Defendants-Appellees.	)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.  
Presiding Justice Carter and Justice Lytton concurred in the judgment.

**ORDER**

*Held:* Under section 2-622 of the Code of Civil Procedure, trial court had discretion to grant additional extension to plaintiff to file attorney affidavit and health professional's report. Cause is remanded for determination of whether Collins can establish good cause for extension.

Denease Collins, special administrator of the estates of Janice Harris and De'Andre Marks,

Jr., brought this medical malpractice action against defendants Melvin Fleming, M.D., and OSF Healthcare System (hereinafter OSF), alleging that the defendants' negligence caused the deaths of Harris and her unborn fetus, Marks. The trial court granted the defendants' motions to dismiss on the basis that Collins failed to timely file an attorney affidavit and health professional's report as required under section 2-622 of the Code of Civil Procedure (Civil Code). 735 ILCS 5/2-622 (West 2005). Collins appealed the dismissal. We reverse and remand.

### FACTS

Plaintiff Collins's decedents Harris and Marks died during childbirth on June 23, 2006, while hospitalized at defendant OSF. Defendant Fleming was Harris's treating physician. Following the deaths of Harris and Marks, Collins sought and received Harris's medical records concerning her June 20 to 23, 2006, hospitalization at OSF. Collins had the records reviewed by a board certified maternal fetal medicine specialist, Robert Eden, M.D., who opined that Collins's cause of action for medical malpractice was meritorious. Eden, however, noted that certain records were missing from the file, including records regarding other hospitalizations during Harris's pregnancy and the fetal monitor strips from the June 2006 hospitalization. Eden wanted the additional information before rendering a final opinion.

Collins filed a malpractice complaint in Cook County on June 23, 2008, alleging various negligent acts by Fleming and OSF that resulted in the deaths of Harris and Marks. Included with the complaint was an attorney affidavit pursuant to section 2-622(a)(2) of the Civil Code (735 ILCS 5/2/622(a)(2) (West 2005)) which stated that the statute of limitations would impair the action and that Collins was unable to obtain the required consultation before the statute of limitations expired. Collins then sought and was granted leave to transfer the cause from Cook County to Peoria County

on September 26, 2008. Peoria County received the case on December 11, 2008. Following the transfer, the trial court granted an agreed order on Fleming's motion for a Health Insurance Portability & Accountability Act qualified protective order on January 21, 2009. The same month, Fleming issued a request for the production of documents from OSF and filed a motion to dismiss Collins's complaint. OSF also filed a motion to dismiss and responded to Fleming's request for production on March 24, 2009, providing records of Harris's hospitalizations at OSF from 1998 through June 2000 and the missing fetal monitor strips. Fleming, in turn, provided the records to Collins.

At an April 9, 2009, hearing on the defendants' motions to dismiss, Collins presented to the court the attorney affidavit and Eden's report per section 2-622. The trial court did not allow the documents to be filed and took the matters under advisement. It subsequently granted Fleming's and OSF's motions to dismiss and denied Collins's oral motion to file her section 2-622 affidavit and report. In doing so, the trial court noted that it did not have any discretion to further extend the 90-day extension period under section 2-622(a)(2). The trial court stated in its dismissal order that "[w]hile this Court may have had discretion to extend the 90-day requirement in earlier versions of Section 2-622, it no longer does so." Collins filed a motion to reconsider, which the trial court denied after a hearing on July 31, 2009. Collins followed with this timely appeal.

#### ANALYSIS

On appeal, the issue is whether the trial court erred when it dismissed Collins's complaint for failure to comply with the requirements of section 2-622 of the Civil Code. 735 ILCS 5/2-622(a)(2) (West 2005). Collins asserts that the trial court erred in determining that it was without discretion to grant her additional time to file the required section 2-622 documents after the original

90-day extension expired. Collins further asserts that because she has a meritorious claim, dismissal of her complaint with prejudice fails to serve the purpose of the section 2-622 requirements.

Section 2-622(a)(1) requires in any healing arts malpractice action that the plaintiff's attorney file an affidavit and health professional's report stating that a reasonable and meritorious cause of action exists. 735 ILCS 5/2-622(a)(1) (West 2005). Section 2-622(a)(2) allows the plaintiff a 90-day extension to file the affidavit and report if the same cannot be obtained because the statute of limitations would impair the action and the required consultation could not be secured before the limitations period expired. 735 ILCS 5/2-622(a)(2) (West 2005). Failure to file an affidavit and report is grounds for dismissal under section 2-619 of the Civil Code. 735 ILCS 5/2-622(g) (West 2005); 735 ILCS 5/2-619(a)(9) (West 2006). Our review of the issue of whether filing of the attorney affidavit and report complied with section 2-622 is *de novo*. *Mueller v. North Suburban Clinic, Ltd.*, 299 Ill. App. 3d 568, 572 (1998).

At the time of Collins's complaint, section 2-622 prohibited additional 90-day extensions except when plaintiff's counsel withdrew. 735 ILCS 5/2-622(a)(2) (West 2005). The prior versions of the statute did not include the prohibition against additional extensions. *O'Casek v. Children's Home & Aid Society*, 229 Ill. 2d 421, 450 (2008). The limitation on additional extensions was added to the statute in its 2005 amendment. Pub. Act 94-677, §330, eff. August 25, 2005. The 2005 version was the version in effect at the time Collins filed her complaint and attempted to file her attorney affidavit and health professional report. While this appeal was pending, the Illinois Supreme Court issued its opinion in *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 250 (2010), wherein it struck down as facially unconstitutional the limitations on noneconomic damages in medical malpractice actions as mandated by Public Act 94-677 (Pub. Act 94-677, §330, eff.

August 25, 2005). The 2005 version of section 2-622 of the Civil Code had been enacted in PA 94-677, and because of the legislation's inseverability clause, it was also held invalid. *Lebron*, 237 Ill. 2d at 250 ("we hold the Act invalid and void in its entirety"). The 2005 version of section 2-622 that was invalidated pursuant to *Lebron* prohibited any additional extensions to file the required affidavit and health professional's report beyond the statute's express 90-day extension set forth in section 2-622(a)(2) except for where plaintiff's counsel had withdrawn. *Jackson v. Victory Memorial Hospital*, 387 Ill. App. 3d 342, 349 (2008), citing 735 ILCS 5/2-622(a)(2) (West 2006).

Because the 2005 version of section 2-622 was voided in its entirety, its provisions amended by PA 94-677 reverted to what they were prior to the 2005 amendment. *Jackson*, 387 Ill. App. 3d at 346 (where statute declared unconstitutional, its language reverts back to its version prior to the amendment). The prior version of the statute did not include a limitation on additional extensions, providing only that required documents be filed within 90 days. 735 ILCS 5/2-622(a)(2) (West 1994). The pre-2005 version of the statute has been interpreted to allow additional extensions beyond the 90 days if the plaintiff could establish good cause for not filing within the 90-day time period. *Tucker v. St. James Hospital*, 279 Ill. App. 3d 696, 704 (1996); *Simpson v. Illinois Health Care Services, Inc.*, 225 Ill. App. 3d 685, 689 (1992); *Premo v. Falcone*, 197 Ill. App. 3d 625, 630 (1990); *Wasielewski v. Gilligan*, 189 Ill. App. 3d 945, 951 (1989).

The second district recently considered the effect of the *Lebron* decision in *Knight v. Van Matre Rehabilitation Center, LLC*, 404 Ill. App. 3d 214 (2010), a case factually aligned with the instant case. In *Knight*, the plaintiff sought additional time to file the section 2-622 affidavit and report after the 90-day statutory extension expired, claiming that the health professional needed more documents to evaluate her claims. *Knight*, 404 Ill. App. 3d at 215. The trial court dismissed the

complaint on the defendant's motion, determining that only one extension was allowed under the 2005 version of the statute. *Knight*, 404 Ill. App. 3d at 215. On review, the appellate court found that prior to the 2005 version of the statute, dismissal with prejudice was not required for failure to timely file the section 2-622 documents. *Knight*, 404 Ill. App. 3d at 217. Rather, a plaintiff could be granted an additional extension if he or she could establish good cause for not filing within the 90-day period. *Knight*, 404 Ill. App. 3d at 217. The second district noted that it was within the discretion of the trial court whether good cause existed to grant the extension. *Knight*, 404 Ill. App. 3d at 217. The *Knight* court remanded the cause for the trial court to determine whether good cause existed to allow a late filing. *Knight*, 404 Ill. App. 3d at 217 (trier of fact to make determination of good cause).

Like the trial court in *Knight*, the trial court here believed that it lacked discretion to grant an additional extension to Collins for the filing of the required documents under section 2-622. The trial court stated, “[w]hile this Court may have had discretion to extend the 90-day requirement in earlier versions of section 2-622, it no longer does.” The court acknowledged that *Lebron* was then pending before the Illinois Supreme Court but indicated it was bound by the 2005 version of section 2-622 which prohibited further extensions. Since *Lebron* invalidated the 2005 version of the statute, the earlier version that has been interpreted to allow additional extension with good cause shown is reenacted, and applies to the case at bar. We find that under the pre-2005 version, the trial court is vested with discretion to allow late filings. Because the trial court failed to exercise its discretion, we remand the cause for its consideration of whether Collins established good cause for her untimely filing.

For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and

the cause remanded.

Reversed and remanded.

JUSTICE SCHMIDT, specially concurring:

I concur in the judgment. I do so based on the repeated improper behavior of the prosecutor as outlined by the majority. However, I write separately because I do not agree with the majority with respect to the holding that the State improperly shifted the burden of proof to the defendant when it commented on her credibility in closing argument. Slip op. at 11. The defendant elected to testify. There were two versions of what occurred: that of the defendant and that of the police officers. Nothing is unreasonable about arguing that version A was unbelievable, and that left them with only version B. That argument did not shift the burden of proof to the defendant. In the context of what occurred in this case, the State's argument that "defendant had to lie," was not improper.