2016 IL App (4th) 160194-U

NO. 4-16-0194

FILED
December 16, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

TOBY WALSH, Plaintiff-Appellant, v. SAILAJA CHERUKU, M.D.; SPRINGFIELD CLINIC, LLC, an Illinois Limited Liability Company, Defendants-Appellees.	)	Appeal from Circuit Court of Sangamon County No. 15L159 Honorable Leslie J. Graves, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in dismissing plaintiff's medical malpractice complaint with prejudice based upon her failure to comply with the statutory filing requirements.

¶ 2 The *pro se* plaintiff, Toby Walsh, appeals from the trial court's order dismissing with prejudice her medical malpractice complaint against defendants, Sailaja Cheruku, M.D., and Dr. Cheruku's employer, Springfield Clinic, LLC, an Illinois limited liability company. Plaintiff contends the dismissal order must be reversed and the cause remanded for further proceedings on the merits. For the reasons that follow, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 On June 30, 2015, plaintiff filed a *pro se* complaint for medical malpractice against defendants, alleging Dr. Cheruku injured plaintiff during a routine colonoscopy. She claims, during the procedure, while she was "rendered unconscious under anesthesia gas," Dr.

Cheruku negligently inserted gas into her colon, which caused her colon to become twisted and ruptured her spleen. She alleges a total loss of her colon. Attached to plaintiff's complaint was an affidavit, which stated: (1) she "was unable to get consultation due to lack of legal coun[sel]" and (2) she would "work diligently to obtain a written report, as required by 735 ILCS 5/2-622 [(West 2014)], and submit same within 90 days of the filing of this complaint."

¶ 5 On October 5, 2015, defendants filed a motion to dismiss on the ground plaintiff failed to file a medical report within the required 90-day period. On October 15, 2015, plaintiff filed a "proof of service," indicating she had mailed a copy of the medical report "as soon as [she] was able and after [she] was made aware of whom [defendants'] legal representative [was] by mail on 14th day of October 2015."

¶ 6 On October 21, 2015, plaintiff filed a memorandum in opposition to defendants' motion to dismiss. She asserted she had filed a medical report on October 5, 2015. However, she also asserted the medical records relating to the incident are incomplete, making it "almost impossible for any expert or professional to make an opinion." The "medical report" filed on October 5, 2015, consisted only of an affidavit filed by plaintiff's primary care physician, Dr. Robert Juranek, who certified that plaintiff "did not have any signs or symptoms of a transverse volvulus before March 29, 2012." On October 23, 2015, plaintiff filed an "addendum to affidavit." This "addendum" was a subsequent affidavit from Dr. Juranek, which stated, on "March 29, 2012, a colonoscopy was performed at Springfield Clinic by Sailaja Cheruku, M.D., and records show patient, [plaintiff], had signs and symptoms immediately after procedure of something seriously wrong that required urgent care."

¶ 7 On October 27, 2015, defendants filed an amended motion to dismiss, alleging the October 5, 2015, affidavit did not comply with the statutory requirements of section 2-622 of the

Code of Civil Procedure (Code) (735 ILCS 5/2-622 (West 2014)). Defendants argued the affidavit was untimely and insufficient.

¶ 8 On November 12, 2015, plaintiff filed an "amended affidavit," wherein she stated she (1) was relying on the "discovery rule" to make the affidavit timely; (2) was relying on the doctrine of *res ipsa loquitur;* (3) concluded "that a reasonable health professional would have informed the patient of the consequences of the procedure"; and (4) believed, "based on all the evidence," her complaint has merit. The same day, plaintiff also filed an amended complaint. The next day, she filed a motion for leave to file that amended complaint.

¶ 9 On November 16, 2015, the trial court conducted a hearing on defendants' motion to dismiss. We are without the benefit of a transcript, bystander's report, or an agreed statement of facts from the hearing. According to defendants' brief on appeal, the hearing included a "considerable explanation by the court" before it granted defendants' motion to dismiss. The docket entry from the date of the hearing states only that the "motion [was] argued and granted."

¶ 10 On December 16, 2015, plaintiff filed a motion to reconsider, which the trial court denied after a hearing on February 16, 2016. Again, we do not have the benefit of a report from those proceedings.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 A. Plaintiff's Brief

¶ 14 Initially, we address the issue of the sufficiency of plaintiff's brief. Defendants request we strike plaintiff's brief and dismiss her appeal, relying on Illinois Supreme Court Rule 341(h) (eff. Jan. 1, 2016). Rule 341(h) governs the contents of an appellant's opening brief. We note the provisions set forth in our Illinois Supreme Court rules are not mere suggestions, but are

requirements. *People v. Stevenson*, 2014 IL App (4th) 130313, ¶ 22. The purpose of Rule 341 is to require the parties before this court to present orderly and clear arguments so that we may properly identify and dispose of the issues raised. *Hall v. Naper Gold Hospitality, LLC*, 2012 IL App (2d) 111151, ¶ 7.

¶ 15 Rule 341(h)(7) (eff. Jan.1, 2016) requires that an appellant's brief include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." "Bare contentions in the absence of argument or citation of authority do not merit consideration on appeal and are deemed waived." *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993); see also *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises*, 2013 IL 115106, ¶ 56 (stating the "[f]ailure to comply with the rule's requirements results in forfeiture").

¶ 16 Plaintiff's "argument" section in her brief consists of one sentence. She states: "The undisputed evidence that was not heard in this case will establish the plaintiff's injuries were caused by negligence." Because this appeal is from the order dismissing her complaint with prejudice for her failure to comply with section 2-622, the "argument" section of her brief provides this court with no guidance on the issue presented and fails to comply with Rule 341(h)(7) by not citing legal authority for her position on appeal. An appellate brief that does not substantially comply with the rules may be stricken. *Hall*, 2012 IL App (2d) 111151, ¶ 7. " '[T]he striking of an appellate brief, in whole or in part, is a harsh sanction and is appropriate only when the alleged violations of procedural rules interfere with or preclude review.' " *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005) (quoting *Moomaw v. Mentor H/S, Inc.*, 313 Ill. App. 3d 1031, 1035 (2000)).

¶ 17 Also troubling here is plaintiff's failure to provide this court with a full and complete record of the proceedings below. Because plaintiff has the burden of providing a complete record on appeal, "any doubts which may arise from the incompleteness of the record will be resolved against the [plaintiff]." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Although we have not been presented with a record of the trial court's specific findings on the issues presented at the various hearings, we will assume the court granted defendants' motion to dismiss on the grounds stated in their motion. See *Foutch*, 99 Ill. 2d at 391-92 ("[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis.").

¶ 18 "*[P]ro se* litigants are presumed to have full knowledge of applicable court rules and procedures and must comply with the same rules and procedures as would be required of litigants represented by attorneys." *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1067 (2009). "Although [her] right to appear *pro se* is well established, it is equally well established that when [she] does appear *pro se*, [she] must comply with the established rules of procedure." *Tannenbaum v. Lincoln National Bank*, 143 Ill. App. 3d 572, 574 (1986).

¶ 19 Despite plaintiff's deficiencies, we choose to address plaintiff's appeal on the merits. See *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001) (The appellate court may still consider an appeal, despite the appellant's failures, "so long as we understand the issue [appellant] intends to raise and especially where the court has the benefit of a cogent brief of the other party."). For plaintiff's benefit, we state that we do not reach the question of whether defendants were negligent or whether they caused plaintiff harm. In fact, we point out that the trial court did not reach that question either. The reason neither

court may even broach the subject of whether negligence occurred at this point is because plaintiff has, as explained below, failed to comply with the requirements for even filing a medical malpractice claim—requirements set forth by our legislature.

¶ 20 B. Noncompliance With Section 2-622

¶ 21 The issue on appeal is whether the trial court erred in dismissing plaintiff's complaint with prejudice. Although defendants did not specifically cite a section of the Code in support of their motion to dismiss, we note section 2-622(g) of the Code (735 ILCS 5/2-622(g) (West 2014) specifically provides the failure of the plaintiff to file an affidavit and report in compliance with this section "shall be grounds for dismissal under Section 2-619 [(735 ILCS 5/2-619 (West 2014))]." Generally, we review *de novo* a dismissal pursuant to section 2-619 of the Code. *Gulley v. Noy*, 316 Ill. App. 3d 861, 864 (2000). However, we review the court's decision to dismiss a complaint with or without prejudice for failure to file a section 2-622 certificate under an abuse-of-discretion standard. *Gulley*, 316 Ill. App. 3d at 864.

¶ 22 Pursuant to section 2-622(a), plaintiff was required to attach to her complaint the following two documents: (1) an affidavit certifying she had consulted with a qualified health-care professional in whose opinion there is a reasonable and meritorious cause for the filing of the action, and (2) a copy of that health professional's written report setting forth the reasons for his determination. 735 ILCS 5/2-622(a) (West 2014). Specifically, the plaintiff must file an affidavit (1) avowing the claim is reasonable and meritorious based on a written health-care professional's report; (2) attesting the statute of limitations prevented the plaintiff from obtaining a health-care professional's affidavit and requesting an additional 90 days to file a health-care professional's report; or (3) affirming plaintiff requested the relevant medical documents, but the defendants failed to make the requested documents available within 60 days of the request, thus

defeating the plaintiff's ability to seek a health professional's expert opinion. 735 ILCS 5/2-622 (West 2014).

¶ 23 Based upon our review of the record, we reject plaintiff's implicit argument the affidavits filed by Dr. Juranek comply with section 2-622. In short, Dr. Juranek certified only that plaintiff did not possess any signs or symptoms of a transverse volvulus or spleen injury before March 29, 2012, but immediately after her March 29, 2012, colonoscopy, she possessed signs and symptoms that "something [was] seriously wrong that required urgent care." Dr. Juranek's affidavit is not accompanied by any medical report supporting his statements.

¶ 24 We acknowledge "Illinois courts liberally construe a physician's certificate of merit in favor of the malpractice plaintiff and recognize that the statute is a tool to reduce frivolous lawsuits by requiring a minimum amount of merit, not a likelihood of success." *Hull v. Southern Illinois Hospital Services*, 356 Ill. App. 3d 300, 305 (2005); see also *Cato v. Attar*, 210 Ill. App. 3d 996, 998 (1991). Additionally, we acknowledge that section 2-622 should not be applied mechanically to deprive a plaintiff of his or her substantial rights. *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584, 595 (2006); see also *Hobbs v. Lorenz*, 337 Ill. App. 3d 566, 569 (2003). However, such liberal construction does not excuse plaintiff from filing *any* medical documentation or anything that includes a medical basis supporting the claims stated in her complaint. Dr. Juranek's affidavits are woefully inadequate and are not supported by a medical report providing justification that plaintiff's claims are reasonable and meritorious. Further, plaintiff's complaint was not supported by any medical professional who could (1) attest to the applicable standard of care or the methods, procedures, and treatments relevant to the allegations at issue; or (2) state negligence occurred.

¶ 25 We cannot say the trial court abused its discretion in dismissing plaintiff's complaint with prejudice after it had allowed plaintiff more than 90 days within which to comply with the statutory requirements. We conclude the trial court's dismissal pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)) for plaintiff's failure to comply with the certification requirements of section 2-622 of the Code (735 ILCS 5/2-622 (West 2014)) was proper. See 735 ILCS 5/2-622(g) (West 2014).

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the trial court's judgment.

¶ 28 Affirmed.