

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 140236-U
NO. 4-14-0236
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
February 17, 2015
Carla Bender
4th District Appellate
Court, IL

CANDICE DYER,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Champaign County
THE CARLE FOUNDATION HOSPITAL, a Not-for-)	No. 12L139
Profit Illinois Corporation,)	
Defendant-Appellee.)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed in part, reversed in part, and remanded for further proceedings, concluding the trial court (1) did not err in dismissing with prejudice count I of plaintiff's amended complaint but (2) erred in dismissing count II based on plaintiff's failure to comply with section 2-622 of the Code of Civil Procedure (735 ILCS 5/2-622 (West 2012)).

- ¶ 2 In July 2010, plaintiff, Candice Dyer, underwent knee surgery at The Carle Foundation Hospital (Carle). While recuperating from surgery at Carle, Dyer fell while trying to walk from the commode to her hospital bed without assistance and suffered further injury to her knee. In February 2013, Dyer filed an amended complaint alleging negligence against Carle. In October 2013, Carle filed a motion to dismiss the amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-619 (West 2012)) based on Dyer's failure to file a health-professional's certificate and an affidavit of merit as required under section

2-622 of the Civil Code (735 ILCS 5/2-622 (West 2012)). In December 2013, the trial court dismissed the amended complaint with prejudice.

¶ 3 Dyer appeals, asserting the trial court erred in dismissing her amended complaint with prejudice. Specifically, Dyer asserts (1) her claim does not arise out of medical malpractice, so no section 2-622 affidavit was required; (2) she alleged a duty of ordinary care; and (3) dismissal with prejudice was improper because, contrary to the court's findings, she sought an extension of time for filing her section 2-622 affidavit. We affirm in part, reverse in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In February 2013, Dyer filed an amended complaint alleging two counts of negligence against Carle. The general facts alleged in the complaint are undisputed for purposes of this appeal. Dyer alleged a Carle staff member assisted Dyer from her hospital bed to the commode. The staff member then left the room. After she was finished using the commode, Dyer called out for assistance multiple times, with no response. The call button remained attached to her bed and out of reach. When Dyer received no response, she attempted to return to bed on her own. However, she fell on the way to her bed and suffered further injury to her knee. As a direct and proximate cause of Carle's failure to exercise reasonable care, Dyer suffered damages in excess of \$50,000.

¶ 6 In count I, Dyer alleged Carle breached its duty of ordinary, reasonable care by failing to (1) assist Dyer to her bed, (2) respond to Dyer's calls for assistance, and (3) provide Dyer with a means of communicating with hospital staff. Count II contained the identical allegations under a theory of medical, hospital, or healing-art malpractice.

¶ 7 Pursuant to section 2-622(a)(3) of the Civil Code (735 ILCS 5/2-622(a)(3) (West 2012)), Dyer attached an affidavit from her attorney averring he made a request for the examination and copying of Dyer's medical records but Carle failed to comply within 60 days. Her attorney requested a 90-day extension to obtain a health-professional's affidavit. At oral argument, the parties conceded Carle eventually provided Dyer with the medical records; however, neither party provided the date on which those records were delivered.

¶ 8 In September 2013, Carle's attorney sent a letter to Dyer's attorney, (1) asking whether Dyer intended to file a section 2-622(a)(1) affidavit averring the claim was reasonable and meritorious with an accompanying health-professional's report, and (2) requesting an update regarding Dyer's response to written discovery. In October 2013, Carle filed a motion to compel Dyer to comply with discovery. At the same time, Carle filed a motion to dismiss under section 2-619 of the Civil Code, asserting Dyer failed to file an affidavit of merit and accompanying health-professional's report pursuant to section 2-622. Carle argued Dyer was required to comply with section 2-622 because both of Dyer's claims arose out of medical, hospital, or healing-art malpractice, not just ordinary negligence.

¶ 9 Later that month, the trial court entered a docket entry scheduling a December 18, 2013, hearing on Carle's pending motions and ordering Dyer to file any responses to the motions by November 22, 2013. The docket entry also stated, "[a] failure to comply with the foregoing order by [Dyer] will result in the Court granting the motions as confessed."

¶ 10 On December 10, 2013, prior to the scheduled hearing date, the trial court entered an order granting Carle's motion to dismiss with prejudice. By that date, Dyer had not responded to Carle's pending motions. The court noted, in January 2013, it had dismissed Dyer's original complaint for failure to file a section 2-622 affidavit of merit where she alleged she "was under

doctor's orders to have the assistance of nursing and support staff to get out of her bed and to ambulate around the room." Though Dyer removed that language from her amended complaint, the court determined the allegations set forth in the amended complaint nevertheless necessitated the filing of a section 2-622 certificate. Thereafter, the court dismissed Dyer's claim with prejudice, emphasizing Dyer had not filed a section 2-622 affidavit of merit or requested an extension to obtain a health-professional's report.

¶ 11 In January 2014, Dyer filed a motion to reconsider the trial court's order. Dyer asserted her attorney's paralegal inadvertently failed to schedule the due date for responding to Carle's motions. Dyer then argued the facts in the case supported a claim for ordinary negligence; therefore, she was not required to submit an affidavit of merit pursuant to section 2-622. Dyer asserted a layperson could determine whether Carle breached its duty, as the act constituted ordinary negligence, not an improper deviation from any medical standard of care. In February 2014, the trial court entered an order denying Dyer's motion to reconsider.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, Dyer asserts the trial court erred in dismissing her amended complaint with prejudice. Specifically, Dyer asserts (1) her claim does not arise out of medical malpractice, so no section 2-622 affidavit was required; (2) she alleged a duty of ordinary care; and (3) dismissal with prejudice was improper because, contrary to the court's findings, she sought an extension of time for filing her section 2-622 affidavit.

¶ 15 Generally, we conduct a *de novo* review where the trial court dismisses a complaint pursuant to section 2-619 of the Civil Code (735 ILCS 5/2-619 (West 2012)). *Gulley v. Noy*, 316 Ill. App. 3d 861, 864, 737 N.E.2d 1115, 1118 (2000). The same standard applies

where the court's dismissal is based on whether the plaintiff complied with section 2-622.

Knight v. Van Matre Rehabilitation Center, LLC, 404 Ill. App. 3d 214, 215-16, 936 N.E.2d 1152, 1154 (2010). 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, 737 N.E.2d at 1118.

¶ 16 A. Section 2-622 Certificate

¶ 17 Section 2-622 requires a plaintiff to attach certain information to a complaint arising from hospital, medical, or healing-art malpractice. 735 ILCS 5/2-622(a) (West 2012). Specifically, the plaintiff must file an affidavit (1) avowing the claim is reasonable and meritorious based on a written health-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-professional's report; or (3) affirming plaintiff requested the relevant medical documents, but the defendant 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 2012). The failure to file a section 2-622 certificate is grounds for dismissal under section 2-619. 735 ILCS 5/2-622(g) (West 2012).

¶ 18 B. Count I of the Amended Complaint

¶ 19 Dyer first asserts count I of her amended complaint sufficiently alleged ordinary negligence rather than medical malpractice, thus excusing her from complying with section 2-622 of the Civil Code (735 ILCS 5/2-622 (West 2012)). We disagree.

¶ 20 The question before us is whether the hospital employees' failure to (1) timely assist Dyer from the commode, (2) respond to Dyer's call for assistance, and (3) provide Dyer

with a means of communicating with staff while out of her bed constitutes a claim for hospital, medical, or healing-art malpractice requiring Dyer to comply with section 2-622.

¶ 21 In support of her argument that section 2-622 is inapplicable to count I of her amended complaint, Dyer asserts her claim of negligence was (1) not a medical-malpractice claim and (2) within the grasp of layperson and, therefore, required no expert testimony or certification of the claim. Dyer argues her cause of action arose from being left on a commode without the ability to communicate with staff, a claim which requires no medical experts because an ordinary juror could determine whether Carle's actions constituted a breach of its duty to act with reasonable care.

¶ 22 The purpose of section 2-622 is to reduce the number of frivolous medical-malpractice claims at an early stage of litigation. *Hobbs v. Lorenz*, 337 Ill. App. 3d 566, 569, 786 N.E.2d 260, 263 (2003). This section should be broadly applied; however, "not every act or omission committed by a physician or hospital constitutes healing art malpractice." *Milos v. Hall*, 325 Ill. App. 3d 180, 183, 757 N.E.2d 654, 657 (2001). Rather, the trial court should consider the nature of the act or omission in determining whether the allegation constitutes healing-art malpractice. *Id.* at 184, 757 N.E.2d at 657. The inquiry should focus on whether the damages arose " *by reason of* medical, hospital, or other healing art *malpractice*. [Citation]" (Emphases in *Cohen*.) *Cohen v. Smith*, 269 Ill. App. 3d 1087, 1093, 648 N.E.2d 329, 334 (1995) (holding section 2-622 inapplicable to a battery claim arising from a male nurse touching the plaintiff's body without consent). Section 2-622 is inapplicable where the plaintiff alleges a breach of care not related to the patient's treatment or the hospital's medical standard of care. *Mooney v. Graham Hospital Ass'n*, 160 Ill. App. 3d 376, 382, 513 N.E.2d 633, 637 (1987).

¶ 23 In determining whether a claim raises a cause of action requiring a section 2-622 certificate, we consider three factors: "(1) whether the standard of care involves procedures not within the grasp of the ordinary lay juror; (2) whether the activity is inherently one of medical judgment; and (3) the type of evidence that will be necessary to establish [the plaintiff's] case." *Jackson v. Chicago Classic Janitorial & Cleaning Service, Inc.*, 355 Ill. App. 3d 906, 909, 823 N.E.2d 1055, 1058 (2005).

¶ 24 With respect to the first factor set forth in *Jackson*, Dyer argues an ordinary lay juror would require no expert testimony to determine that failing to provide means by which a patient could communicate with hospital staff breached Carle's duty of ordinary care. Conversely, Carle contends Dyer's claim requires medical testimony to demonstrate (1) whether Dyer should have been permitted out of bed to use the commode, and (2) Carle's procedures and protocols for determining when a patient requires additional staff assistance. We conclude the allegations in count I are undeniably related to Dyer's medical condition, which would dictate the appropriate standard of medical care. At its core, Dyer's position is that the hospital should have provided a certain level of supervision or method of communication based on her medical condition. Dyer does not dispute the appropriateness of Carle permitting her to use a commode rather than, for example, a bedpan or the restroom. Rather, her argument is that, in a circumstance where she requested assistance to walk to the commode, Carle staff breached its duty of ordinary care by abandoning her without means by which to contact staff for assistance in returning to bed. Determining whether it was appropriate to leave someone in Dyer's condition unattended with no call button within reach requires evidence on the appropriate level of supervision for a person in Dyer's condition. The fact finder will need to know what the appropriate medical standard of care requires in such a situation. The average juror does not

possess knowledge of reasonably expected postsurgical abilities of an individual such as Dyer but, rather, requires expert testimony to resolve Dyer's claim.

¶ 25 Regarding the second *Jackson* factor, the specific activity of leaving Dyer on the commode, then failing to either respond to her pleas for assistance or return to assist her back to bed, also requires consideration of her medical condition and the applicable standard of medical care. Determining the appropriateness of the frequency and nature of the attention and assistance provided to Dyer can only be done by taking into account her condition and the standard of care for someone in her condition. Thus, Dyer's amended complaint does allege a mistake in medical judgment or that she sustained injuries "by reason of" malpractice. See *Cohen*, 269 Ill. App. 3d at 1093, 648 N.E.2d at 334.

¶ 26 Finally, as to the third *Jackson* factor, we must consider the evidence necessary to prove the plaintiff's case. *Jackson*, 355 Ill. App. 3d at 909, 823 N.E.2d at 1058. Here, there is no indication the claimed negligence is so apparent that a lay juror could readily apprehend it. Instead, expert medical testimony would be required to establish the appropriate standard of care. Thus, the third *Jackson* factor weighs in favor of requiring a section 2-622 certificate.

¶ 27 In dismissing Dyer's amended complaint, the trial court relied in part on *Kolanowski v. Illinois Valley Community Hospital*, 188 Ill. App. 3d 821, 544 N.E.2d 821 (1989). In that case, the plaintiff suffered from partial paralysis and the defendant's respite program promised to provide proper supervision and medical treatment. *Id.* at 825, 544 N.E.2d at 824. The hospital failed to provide bed rails and the plaintiff fell out of the bed while left unsupervised. *Id.* at 822, 544 N.E.2d at 822. The *Kolanowski* court held a section 2-622 certificate was required where the plaintiff alleged the hospital provided inadequate supervision

and restraints, as decisions on those issues required medical judgments concerning the plaintiff's condition and needs. *Id.* at 825, 544 N.E.2d at 824-25.

¶ 28 In the present case, the issue boils down to whether Carle provided the necessary supervision and assistance in light of Dyer's medical condition. Although there is no allegation that restraints should have been employed, like in *Kolanowski*, the fact finder will be faced with determining whether Carle's conduct regarding Dyer, of whose condition they were well aware, was consistent with the appropriate standard of care. Thus, *Kolanowski*, although not factually identical, is helpful when analyzing the issues in this matter.

¶ 29 In applying the *Jackson* factors and the reasoning set forth in *Kolanowski*, we conclude the facts in this case weigh heavily in favor of Carle's position. Because the nature of Dyer's medical condition is at the core of this case, Dyer was required to comply with section 2-622. We therefore hold the trial court did not error by dismissing count I of Dyer's amended complaint for failure to comply with section 2-622.

¶ 30 C. Count II of the Amended Complaint

¶ 31 Count II of Dyer's amended complaint raised the same allegations as those contained in count I but based its theory of negligence on hospital, medical, or healing-art malpractice. Accordingly, section 2-622 required Dyer to file an appropriate affidavit. 735 ILCS 5/2-622(a) (West 2012). Attached to her amended complaint, Dyer's attorney filed an affidavit avowing he submitted to Carle a request for Dyer's medical records to be made available, but Carle had failed to produce those records within 60 days. Dyer's attorney further requested an extension of 90 days following receipt of the records to file the appropriate health-professional's report and affidavit of merit. This affidavit is consistent with the language contained in section 2-622(a)(3). Thus, the trial court's finding that Dyer failed to file the

appropriate affidavit for an extension of time is inaccurate and potentially deprived Dyer of an opportunity to pursue a health-professional's affidavit of merit. Because this inaccurate finding served as a basis upon which the court found Dyer lacked good cause for her failure to file the health-professional's affidavit, we reverse the court's dismissal of count II.

¶ 32 For the first time at oral argument, the parties conceded Dyer received the medical records she requested. However, neither party could provide this court with the date on which Carle delivered the records to Dyer. In this case, the date that Carle delivered the medical records is critical to the determination of whether Dyer was given 90 days after receiving the medical records to file the necessary affidavit as required by the statute. Thus, we remand count II for the trial court to determine whether the period of 90 days after receipt of the records had expired when the court entered its December 10, 2013, order dismissing Dyer's amended complaint for failure to comply with section 2-622.

¶ 33 If, upon remand, the trial court determines the 90-day extension period had expired by December 10, 2013, the court may, *in its discretion*, grant Dyer an additional extension of time in which to file the necessary health-professional's affidavit if Dyer can demonstrate good cause for failing to file the affidavit during the statutory period. *Tucker v. St. James Hospital*, 279 Ill. App. 3d 696, 704, 665 N.E.2d 392, 397 (1996).

¶ 34 However, if upon remand the trial court determines Dyer's 90-day extension had not expired by the date of the December 2013 order dismissing the case, the court must provide Dyer with the remaining time to file her affidavit of merit. Thereafter, if Dyer fails to meet the deadline, the court may, in its discretion, grant Dyer an additional extension of time in which to file the necessary affidavit. *Woodard v. Krans*, 234 Ill. App. 3d 690, 703, 600 N.E.2d 477, 486 (1992). In exercising its discretion, the court should consider the purpose of a section 2-622

affidavit is to reduce frivolous lawsuits. *Hobbs*, 337 Ill. App. 3d at 569, 786 N.E.2d at 263.

Section 2-622 should not be mechanically applied in such a way that it deprives a plaintiff of his or her substantive rights. *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584, 595, 862 N.E.2d 1011, 1021 (2006).

¶ 35 Because the trial court relied on an erroneous finding that Dyer failed to file for an extension of time in which to file her health-professional's affidavit of merit, we reverse the court's dismissal of count II pending a hearing on remand regarding whether (1) the 90-day extension period had expired by December 10, 2013; or (2) Dyer can demonstrate good cause for failing to file the affidavit within the statutory timeframe.

¶ 36 III. CONCLUSION

¶ 37 For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings.

¶ 38 Affirmed in part and reversed in part; cause remanded with directions.