

FIFTH DIVISION  
November 16, 2012

No. 1-12-0132

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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BERNIECE H. HUTTON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 L 13777
	)	
HOLY CROSS HOSPITAL and THE CITY	)	
OF CHICAGO,	)	
	)	Honorable
Defendants - Appellees.	)	Randy A. Kogan,
	)	Judge Presiding.

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**ORDER**

JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice McBride and Justice Palmer concurred in the judgment.

¶ 1 HELD: Third amended complaint properly dismissed where plaintiff failed to support claims of medical negligence with Section 2-622 affidavits (2-619) and failed to allege sufficient facts to state a cause of action (2-615).

¶ 2 This appeal arises as the result of the circuit court's order granting defendant City of Chicago (City) and defendant Holy Cross Hospital's section 2-619.1 (735 ILCS 5/2-619.1 (West 2010)) motions dismissing plaintiff Berniece Hutton's third amended complaint with prejudice. On appeal, plaintiff contends that the circuit court improperly granted defendants' motion to dismiss with prejudice. For the following reasons, we affirm.

### ¶ 3 BACKGROUND

#### ¶ 4 Factual Background

¶ 5 Briefly stated, plaintiff's third amended complaint alleged that on July 16, 2009, she was a passenger on a Boeing aircraft operated by Southwest Airlines that landed at Midway International Airport. When the plane landed, a portion of the aircraft's ceiling tile or overhead panel cover allegedly fell and struck plaintiff and another passenger on their heads, causing her to lose consciousness and suffer traumatic closed head trauma. Mr. Ware, the other passenger who was struck during the incident, signed a statement indicating that he believed "[plaintiff was] trying to accuse Southwest Airlines of something that did not take place. This is from first hand observation since I was seated right next to [plaintiff]."

¶ 6 Upon notice of an in-flight injury, several agencies, including the Chicago Police Department and the Chicago Fire Department with Paramedics were dispatched to the scene. The emergency team took plaintiff's vital signs and she was subsequently transported by ambulance to Holy Cross Hospital upon her insistence. According to the paramedic report, per the plane's captain, a very small piece of wood fell on plaintiff's head during landing, weighing no more than a couple of ounces.

1-12-0132

¶ 7 Plaintiff arrived at Holy Cross Hospital at 9:08 p.m. and was triaged at 9:19 p.m., with a stated complaint of head injury, for which she was given an ice pack at 9:23 p.m. On July 17, 2009, at 12:08 a.m., a nurse noted that plaintiff was alert and oriented to person, place and time, moved all extremities, and there was no trauma noted in the area. At 12:37 a.m., plaintiff was seen by a physician who noted that she complained of constant, dull pain in the frontal area of her scalp. It was further noted that plaintiff had no tenderness in the frontal area, her eye movements were intact, and her pupils were equal, round, reactive to light and accommodation. At 12:57 a.m., plaintiff was given acetaminophen and she was subsequently discharged at 12:58 a.m. in stable condition with instructions to ice the area for one to two days, to take Tylenol or Advil and return to the emergency room if the condition worsened.

#### ¶ 8 Procedural Background

¶ 9 On July 16, 2010, plaintiff filed her initial *pro se* complaint against defendants Southwest Airlines, Boeing, City of Chicago and Holy Cross Hospital in the circuit court of Cook County. The defendants moved the case to federal court, where plaintiff filed three amended complaints before the federal court dismissed the case on November 4, 2010.

¶ 10 On December 3, 2010, plaintiff refiled her case in Cook County, seeking damages in excess of \$25 million. She claimed that as a result of the incident, she suffered blunt trauma and closed head injuries, among other injuries. Plaintiff's complaint alleged negligence, medical negligence and conspiracy among the defendants. However, the complaint did not include an affidavit from a health professional in accordance with section 2-622 of the Code of Civil Procedure (Code) (735 ILCS 5/2-622 (West 2010)). The defendants filed their first motions to

1-12-0132

dismiss, alleging, among other things, that plaintiff's complaint did not include a section 2-622 affidavit.

¶ 11 On May 16, 2011, plaintiff responded to the motions and filed a first amended complaint without leave of court. The amended complaint sought in excess of \$35 million and did not contain a section 2-622 affidavit. On May 23, 2011, the trial court struck the amended complaint and gave plaintiff leave to file a section 2-622 affidavit.

¶ 12 On June 2, 2011, plaintiff filed a motion for leave to file a second amended complaint with an attached file-stamped second amended complaint that did not contain a section 2-622 affidavit. The trial court again granted plaintiff another extension, until July 1, 2011, to provide the affidavit and struck the second amended complaint without prejudice. On July 8, 2011, plaintiff filed a motion seeking an extension of time to file the section 2-622 affidavit, which the trial court granted and gave plaintiff a "final" extension of time to file the affidavit, until August 12, 2011. On August 5, 2011, plaintiff filed a motion for leave to file a second amended complaint and filed another second amended complaint without leave of court, again without a section 2-622 affidavit attached.

¶ 13 On August 12, 2011, plaintiff filed a motion seeking leave to file a third amended complaint, to join additional defendants, and to file an affidavit of merit. She also filed a third amended complaint and a document titled "Plaintiff's Affidavit Pursuant to 735 ILCS 5/2-622" with an August 9, 2011, two-page letter from plaintiff to a Dr. Demke requesting a report of her history and conditions. The third amended complaint contained 15 counts, alleging various counts of negligent misrepresentation, ordinary negligence, medical negligence, and conspiracy.

1-12-0132

The trial court allowed plaintiff's third amended complaint to stand after plaintiff advised the court on August 25, 2011, that she would be standing on the third amended complaint without the section 2-622 affidavit. The trial court also granted defendants leave to file motions to dismiss plaintiff's third amended complaint by September 15, 2011. Both the City and Holy Cross Hospital filed timely motions to dismiss plaintiff's third amended complaint.

¶ 14 Both the City and Holy Cross Hospital filed section 2-619.1 (735 ILCS 5/2-619.1 (West 2010)) motions to dismiss plaintiff's third amended complaint, stating that any claims sounding in medical negligence should be dismissed pursuant to section 2-619 (735 ILCS 5/2-619 (West 2010)) for plaintiff's failure to attach a section 2-622 affidavit and that all other claims should be dismissed pursuant to section 2-615 (735 ILCS 5/2-615 (West 2010)) for failure to state a claim upon which relief could be granted.

¶ 15 During the September 15, 2011, status hearing, plaintiff tendered to the court a September 14, 2011, letter from optometrist Dr. Deborah Zelinsky purporting to be a section 2-622 affidavit. The court found that the letter did not meet the requirements of section 2-622 and set a briefing schedule on defendants' motions to dismiss. On October 27, 2011, plaintiff filed another motion seeking leave to file an affidavit of merit and attached her own affidavit stating that she had consulted with an expert witness who had reviewed the records and believed that the standard of care was breached by one or more of the defendants.

¶ 16 On December 15, 2011, the trial court granted both the City's and Holy Cross Hospital's motions to dismiss plaintiff's third amended complaint with prejudice and found no just reason to delay enforcement or appeal. This timely appeal followed.

¶ 17 ANALYSIS

¶ 18 On appeal, plaintiff contends that the circuit court improperly granted defendants' motions to dismiss with prejudice.

¶ 19 The City and Holy Cross Hospital filed section 2-619.1 (735 ILCS 5/2-619.1 (West 2010)) motions to dismiss plaintiff's third amended complaint. Section 2-619.1 permits a party to combine a section 2-615 (735 ILCS 5/2-615 (West 2010)) motion to dismiss based on a plaintiff's substantially insufficient pleadings with a section 2-619 (735 ILCS 5/2-619 (West 2010)) motion to dismiss based on certain defects or defenses. "It is proper for a court[,] when ruling on a motion to dismiss under either section 2-615 or section 2-619[,] to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmoving party." *Edelman, Combs and Lattuner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003), (citing *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1998)). "Our review is *de novo* for motions to dismiss brought under both sections 2-615 and 2-619." *Edelman*, 338 Ill. App. 3d at 164.

¶ 20 Section 2-619 motion to dismiss pursuant to section 2-622

¶ 21 Our first inquiry is whether plaintiff complied with the statutory requirements for pleading the medical negligence counts in her third amended complaint under section 2-622 of the Code, and if not, whether dismissal of the complaint with prejudice was warranted under section 2-619 of the Code.

¶ 22 Section 2-622 was enacted to discourage frivolous suits for medical malpractice and to eliminate such actions in the early stages, before the expenses of litigation have mounted.

1-12-0132

*DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 65 (1992). Section 2-622 of the Code directs a plaintiff to follow one of three options when filing a complaint. *Hobbs v. Lorenz*, 337 Ill. App. 3d 566, 569 (2003). Under section 2-622(a)(1) of the Code, a plaintiff must attach a report from a qualified health professional stating that he or she has reviewed the medical records and believes that the plaintiff has a reasonable and meritorious cause to file the action. 735 ILCS 5/2-622(a)(1) (West 2010). Under section 2-622(a)(2) of the Code, an affidavit must be provided, stating that the report cannot be procured prior to the expiration of the limitations period, in which case the plaintiff is given 90 days to procure and file the required documents. 735 ILCS 5/2-622(a)(2) (West 2010). Under section 2-622(a)(3) of the Code, the affidavit must state that counsel has made a request for the records pursuant to section 8-2001 of the Code (735 ILCS 5/8-2001 (West 2010)), and that the party to whom the request was made failed to comply within 60 days, after which the plaintiff is granted 90 days from the time the records are received to file the required report. Section 2-622 of the Code should be liberally construed so that plaintiffs do not lose substantive rights merely because they have not strictly complied with the statute. *Hobbs*, 337 Ill. App. 3d at 569.

¶ 23 Here, the record is clear that plaintiff failed to supply a 2-622 affidavit with any of her complaints, including the third amended complaint which was dismissed with prejudice, despite numerous opportunities to amend and include the affidavits. In her reply brief, for the first time, plaintiff contends that the "evidence in this case is not premised on the '2-622' affidavit upon which her argument is based or from which a conclusion is draw. [*sic*]" Accordingly, she did not supply any 2-622 affidavits with her third amended complaint.

1-12-0132

¶ 24 Contrary to plaintiff's assertion, section 2-622 of the Code applies to any action in which a plaintiff seeks damages for injuries by reason of medical, hospital or healing art negligence. 735 ILCS 5/2-622 (West 2010); *Jackson v. Chicago Classic Janitorial and Cleaning Service, Inc.*, 355 Ill. App. 3d 906, 910 (2005). Clearly her action against Holy Cross Hospital applies as she specifically makes allegations against the emergency room personnel, including doctors and nurses. Additionally, ambulatory and paramedic services fall under the more general "healing arts" category. See *Lyon by Lyon v. Hasbro Industries, Inc.*, 156 Ill. App. 3d 649, 654-55 (1987); *Mooney v. Graham Hospital Association*, 160 Ill. App. 3d 376, 380 (1987) (healing art may also include actions against other health care professionals); *Kolanowski v. Illinois Valley Community Hospital*, 188 Ill. App. 3d 821, 824-25 (1989) (to determine whether a complaint sounds in ordinary negligence or healing art malpractice, courts look to the evidence that will be necessary to establish the defendant's standard of care). As such, plaintiff's claims against the City and Holy Cross Hospital required section 2-622 affidavits.

¶ 25 If a plaintiff does not comply with section 2-622, the trial court may, in its discretion, dismiss the complaint with prejudice under section 2-619. *Hobbs*, 337 Ill. App. 3d at 569. A reviewing court will not reverse a dismissal unless the trial court abused its discretion. *Christmas v. Dr. Donald W. Hugar, Ltd.*, 409 Ill. App. 3d 91, 100 (2011). The test is whether the trial court considered the specific facts and circumstances of the case before dismissing the complaint and denying plaintiff leave to amend. *Christmas*, 409 Ill. App. 3d at 100. Among the factors that a court considers in determining whether to grant leave to amend a complaint are " 'whether the amendment would cure a defect in the pleadings; whether the other party would



be prejudiced or surprised by the proposed amendment; timeliness of the proposed amendment; and whether there were previous opportunities to amend the pleadings.' " *Christmas*, 409 Ill. App. 3d at 100-01, (quoting *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467-68 (1992)).

¶ 26 Here, plaintiff filed the original complaint in July 2010, the action was moved to federal court and plaintiff filed three amended complaints before the action was dismissed in November 2010. Plaintiff refiled her complaint in the circuit court in December 2010, and defendants' filed their first motions to dismiss alleging, among other things, plaintiff's failure to include section 2-622 affidavits. Thereafter, plaintiff was given the opportunity to amend the complaint three times, including time to secure and include the necessary section 2-622 affidavits, which she failed to do, without explanation. Additionally, the record reveals that plaintiff attempted to satisfy the requirements of section 2-622 by filing documents that were inappropriate on at least two occasions. Moreover, for the first time in her reply brief, plaintiff argues that section 2-622 affidavits are unnecessary, which is without merit, as discussed above.

¶ 27 While we recognize that dismissal with prejudice is a harsh result, we note that it has already been dismissed from federal court after three amended complaints and dismissed in the circuit court after three amended complaints on other bases besides the lack of section 2-622 affidavits. We are bound by the abuse of discretion standard and the record shows that the trial court considered the correct criteria and its decision cannot be considered arbitrary or unreasonable. We conclude that the trial court did not abuse its discretion dismissing the medical negligence counts with prejudice for plaintiff's failure to include section 2-622 affidavits.

¶ 28 Section 2-615 motions to dismiss

¶ 29 Plaintiff further contends that the trial court erred in granting defendants' section 2-615 motions to dismiss the remaining counts of her third amended complaint for failure to state a claim.

¶ 30 In reviewing a dismissal pursuant to section 2-615, all well-pleaded facts in the complaint are taken as true. *Johnson v. Matrix Financial Services Corp.*, 354 Ill. App. 3d 684, 688 (2004). Dismissal pursuant to a section 2-615 motion is proper only where the court can determine the relative rights of the parties solely from the pleadings. *Johnson*, 354 Ill. App. 3d at 688. A plaintiff cannot rely on conclusions of law or fact unsupported by specific factual allegations. *Johnson*, 354 Ill. App. 3d at 688. To withstand a motion to dismiss based on section 2-615, a complaint must allege facts that set forth the essential elements of the cause of action. *Visvardis v. Ferleger*, 375 Ill. App. 3d 719, 724 (2007). When a complaint is dismissed pursuant to section 2-615, the standard of review is *de novo*. *Johnson*, 354 Ill. App. 3d at 688.

¶ 31 The additional claims that plaintiff raised in her third amended complaint which were dismissed by the section 2-615 motion are misrepresentation, negligence and conspiracy. Specifically, plaintiff claims that the "paramedics tried to talk her out of going to the hospital; and that they viewed the debris at the accident scene but acted in coercion with Southwest Airlines to intentionally and fraudulently misrepresent material facts, conceal material facts pertinent to trying to minimize plaintiff's injuries and condition, condition of subject airplane, the description of the defective malfunctioned parts, its volume, weight and material, debris that had fallen into passenger cabin at the scene of the incident." Plaintiff further stated that the City and Holy Cross Hospital engaged in coercive negligent conduct in that they intentionally and

1-12-0132

fraudulently misrepresented information that was provided for the guidance of the receiving doctors and nurses and conspired by falsifying the paramedics and police reports. Additionally, plaintiff alleged that Holy Cross Hospital's conduct was willful and wanton with intentional carelessness and recklessness with utter indifference, intentional conscious disregard in the interest of her health, thereby negligently violated its standard of care by failing to provide a medical screening examination to determine whether an emergency medical condition existed. With regards to Holy Cross Hospital, plaintiff alleged that it "intentionally [and] fraudulently failed to conduct any imaging studies of plaintiff's injuries from direct blunt force head trauma and ground trajectory that would determine the extent of an emergency medical condition;" "failed to properly diagnose the extent of [her] injuries, " thus under diagnosed her injuries; and committed "intentionally and willful acts of negligence [in] conscious disregard for safety and patient care."

¶ 32 The City contends that the trial court properly granted its section 2-615 motion because it is immune from suit under the Local Government and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2 *et. seq.* (West 2010)). The City contends, and we agree, that plaintiff's allegations either fall within the scope of employment which is covered by the Act (745 ILCS 10/6-106 (West 2010)) or were allegations of misrepresentation, also covered by the Act (745 ILCS 10/2-106 (West 2010)). Additionally, the City contends that plaintiff failed to plead any facts which would support a claim for misrepresentation and that plaintiff failed to allege a conspiracy claim against it, but rather made conclusory allegations regarding the City's conduct. Likewise, Holy Cross Hospital contends that the trial court properly granted its section

1-12-0132

2-615 motion for plaintiff's failure to state a claim for negligent misrepresentation or loss in enjoyment of life.

¶ 33 While a plaintiff is not required to prove his case in the pleading stage, he must allege sufficient facts to state all the elements which are necessary to sustain his cause of action.

*Visvardis*, 375 Ill. App. 3d at 724. A review of plaintiff's third amended complaint, consisting of 15 counts, 74 pages and 249 paragraphs, reveals it to be a series of conclusory allegations without factual support. Plaintiff has wholly failed to make any specific factual allegations in her third amended complaint in support of her conclusions. Illinois is a fact-pleading jurisdiction, and plaintiff has failed to plead sufficient facts to support the causes of action alleged in her third amended complaint. See *Beahringer v. Page*, 204 Ill. 2d 363, 370 (2003) (a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted). Additionally, plaintiff had amended her complaint several times and failed to cure the deficiencies. As such, dismissal was warranted.

#### ¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 36 Affirmed.