No. 2—10—0881
Order filed June 3, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ZELNER GLADNEY,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09—L—475
	)	
DR. MARK A. RAUTER and ROCKFORD MEMORIAL HOSPITAL/ROCKFORD HEALTH SYSTEM,	)	Honorable
	)	J. Edward Prochaska,
Defendants-Appellees.	)	Judge, Presiding

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

Held: (1) Plaintiff's appeal of the dismissal of her complaint was timely: although plaintiff's postjudgment motion was purportedly brought under section 2—1401 of the Code of Civil Procedure, that label did not defeat its true identity as a section 2—1203 motion; that motion was filed within 30 days after the judgment, and plaintiff appealed within 30 days after the ruling on the motion; (2) the trial court properly dismissed plaintiff's medical-malpractice complaint: defendant timely appeared with a motion to dismiss and thus was not in default; plaintiff did not comply with section 2—622 of the Code of Civil Procedure, which applied despite plaintiff's assertion that her complaint asserted "accidental injury" and not medical malpractice; plaintiff forfeited review of the court's denial of her motion for leave to file a second amended complaint, as the record contained no proposed complaint.

Plaintiff, Zelner Gladney, appeals from an order of the circuit court of Winnebago County dismissing her lawsuit against defendants, Mark A. Rauter and Rockford Memorial Hospital/Rockford Health System (Rockford Memorial). The suit was dismissed because plaintiff failed to comply with section 2—622(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2—622(a) (West 1994)).[1] We affirm.

On December 11, 2009, plaintiff filed a *pro se* complaint[2] in the circuit court of Winnebago County against "Ismie Mutual Insurance Co. For Mark A. Rauter M.D. and All known and Unknown Liable Parties Defendants." Plaintiff alleged that, on December 13, 2007, she underwent surgery at Rockford Memorial for diverticulitis. According to the complaint, Rauter, who performed the procedure, severed plaintiff's left ureter, causing nerve damage, enlargement of her left kidney, left "flank" pain, disfiguring scarring, incontinence, and vulnerability to painful urinary tract infections. On February 2, 2010, ISMIE Mutual Insurance Company (ISMIE) moved to dismiss the complaint on the basis that a direct action against a liability insurance carrier arising from a policyholder's allegedly tortious conduct is not permitted until a judgment has first been obtained against the

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[1]Our citation to the 1994 edition of the Illinois Complied Statutes comports with our supreme court's observation that, in light of *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 250 (2010), which invalidated a 2005 amendment to section 2—622(a)(1), section 2—622(a)(1) now reads as it did prior to 1995 (except for certain language added in 1998 that has no bearing on this case). *Cookson v. Price*, 239 Ill. 2d 339, 341-42 (2010).

[2]Plaintiff entitled the pleading a "petition," but "complaint" is the appropriate designation. See 735 ILCS 5/2—602 (West 2008) ("The first pleading by the plaintiff shall be designated a complaint"). The latter term will be used here.

policyholder. On February 10, 2010, the trial court granted the motion to dismiss, noting in the dismissal order that ISMIE was the only defendant named in the complaint. The trial court granted plaintiff 28 days to file an amended complaint. Plaintiff did so on March 8, 2010. The amended complaint named Rauter and Rockford Memorial as defendants.

Neither the original complaint nor the amended complaint included an affidavit from plaintiff or a health professional's report pursuant to section 2—622(a). In brief, section 2—622(a) provides that a complaint seeking recovery for death or injury resulting from medical, hospital, or other healing art malpractice must be accompanied by an affidavit from the plaintiff's attorney or the plaintiff (if proceeding without counsel), stating that the affiant has consulted with a health professional who has concluded in a written report—which must be filed with the court—that there is reasonable and meritorious cause for filing the lawsuit. 735 ILCS 5/2—622(a)(1) (West 1994). The plaintiff may obtain an extension of time for filing the affidavit and report described above, by filing an affidavit stating that a consultation could not be obtained prior to the expiration of the statute of limitations (735 ILCS 5/2—622(a)(2) (West 1994)) or that a health care practitioner or facility has failed to comply with a request to examine and copy records related to the action (735 ILCS 5/2—622(a)(3) (West 1994); 735 ILCS 5/8—2001 (West 2008)). Neither plaintiff's original complaint nor her amended complaint included such an affidavit.

Within 30 days after being served with summons and the amended complaint, Rauter and Rockford Memorial separately filed timely combined motions to dismiss pursuant to sections 2—615 and 2—619 of the Code (735 ILCS 5/2—615, 2—619 (West 2008)). Rauter asserted that the amended complaint suffered from numerous defects. Rockford Memorial asserted that the amended complaint failed to state a cause of a action against it. Rauter and Rockford Memorial both

argued that dismissal was warranted because of plaintiff's failure to comply with section 2—622(a). Rauter also sought dismissal under section 2—619(a)(5) (735 ILCS 5/2—619(a)(5) (West 2008)) on the basis that the amended complaint was filed after the expiration of the statute of limitations.

On May 25, 2010, while both motions to dismiss were pending, plaintiff moved for leave to file a second amended complaint. She did not attach a copy of a proposed second amended complaint to her motion. On the same date, plaintiff also filed a motion for entry of a default judgment against Rauter. On June 3, 2010, the trial entered an order providing, in pertinent part, as follows:

"It is ORDERED:

1) Plaintiff withdraws her motion for Default Judgment;

2) Plaintiff's motion for leave to file her second amended complaint is denied.

3) Defendant Rauter's §2—619 motion to dismiss is granted *with prejudice* and Defendant [Rockford Memorial's] §2—619 motion to dismiss is granted *with prejudice* for Plaintiff's failure to comply with 735 ILCS 5/2—622 (Code of Civil Procedure)." (Emphases in original.)

On July 1, 2010, plaintiff filed a "motion for *nunc pro tunc* or successive petition for rehearing or for reinstatement of case and to void final order in case." The motion indicated that it was filed pursuant to section 2—1401(c) of the Code (735 ILCS 5/2—1401(c) (West 2008)). The trial court denied the motion on August 5, 2010. Plaintiff filed her notice of appeal on August 31, 2010.

At the outset, we consider Rauter's argument that this appeal should be dismissed for lack of jurisdiction. Supreme Court Rule 303(a)(1) (eff. May 30, 2008) provides, in pertinent part, that

"[t]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, whether in a jury or a nonjury case, within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order[.]" Here judgment was entered on June 3, 2010. Rauter notes that plaintiff's motion of July 1, 2010, purported to seek relief pursuant to section 2—1401 of the Code, which permits a party to mount a collateral challenge to a judgment (see *Burchett v. Goncher*, 235 Ill. App. 3d 1091, 1098 (1991)). Rauter argues that, because a proceeding under section 2—1401 is collateral to, rather than a continuation of, the proceeding at which the challenged judgment was entered (see *Niemerg v. Bonelli*, 344 Ill. App. 3d 459, 464 (2003)), a section 2—1401 petition does not qualify as a posttrial motion for purposes of Rule 303(a)(1). Thus, according to Rauter, plaintiff's notice of appeal, which was filed more than 30 days after the entry of judgment, was untimely.

We disagree with Rauter's underlying premise that plaintiff's July 1, 2010, motion was a section 2—1401 petition. Reviewing courts should not impose hypertechnical drafting requirements on posttrial motions. *Monat v. County of Cook*, 322 Ill. App. 3d 499, 505 (2001). Consonant with that principle, reference to a particular section of the Code is not determinative of the true character of the motion. See *Williamsburg Village Owners' Ass'n v. Lauder Associates*, 181 Ill. App. 3d 931, 935 (1989). Section 2—1401(a) provides that "[r]elief from final orders and judgments, *after 30 days from the entry thereof,* may be had upon petition as provided in this Section." (Emphasis added.) 735 ILCS 5/2—1401(a) (West 2008). In contrast, section 2—1203(a) of the Code provides that "[i]n all cases tried without a jury, any party may, *within 30 days* after the entry of the judgment ***, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the

judgment or for other relief." (Emphasis added.) 735 ILCS 5/2—1203(a) (West 2008). Here, plaintiff's motion was filed within 30 days after entry of judgment. Under such circumstances it may be characterized as a postjudgment motion, rather than a section 2—1401 petition. *Cf. Williamsburg Village Owner's Ass'n*, 181 Ill. App. 3d at 935 (although nominally filed under section 2—1401, motion to vacate default judgment that was filed within 30 days of entry of judgment was properly characterized as a motion under section 2—1301(e) of the Code (Ill. Rev. Stat. 1987, ch. 110, par. 2—1301(e)) authorizing court "on motion filed within 30 days after entry thereof [to] set aside any final order or judgment upon any terms and conditions that shall be reasonable"). Therefore, Plaintiff's notice of appeal was due within 30 days after entry of the order disposing of the motion. That order was entered on August 5, 2010, and plaintiff's notice of appeal, which was filed 26 days later on August 31, 2010, was timely.

Rauter also argues that plaintiff's brief fails to meet the requirements of Supreme Court Rule 341 (eff July 1, 2008). Rauter notes that the brief fails to state the standard of review applicable to each issue (see Ill. S. Ct. R. 341(h)(3) (eff. July 1, 2008)) and fails to advance a coherent argument properly supported by relevant legal authority. Although we agree with Rauter as to plaintiff's brief's shortcomings, the issues presented are simple and we will address them on the merits.

Plaintiff first argues that the trial court erred in ordering her to withdraw her motion for entry of a default judgment and should have granted the motion instead. As seen, the words "IT IS ORDERED," precede the trial court's recital in its written order of June 3, 2010, that "Plaintiff withdraws her motion for Default Judgment." Although plaintiff contends that she was ordered to withdraw the motion, Rauter cites the order as evidence that plaintiff voluntarily withdrew the motion. Regardless of whether plaintiff voluntarily withdrew her motion, it was without merit and

the trial court's failure to enter a default judgment against Rauter was not error. Section 2—1301(d) of the Code provides, in pertinent part, that "[j]udgment by default may be entered for want of an appearance, or for failure to plead[.]" 735 ILCS 5/2—1301(d) (West 2008). The summons served on Rauter notified him pursuant to Supreme Court Rule 101(d) (eff. May 30, 2008) that he was required to file his answer or otherwise file an appearance within 30 days of service. Supreme Court Rule 181(a) (eff. Feb. 10, 2006) provides that when the summons requires appearance within 30 days after service, "[t]he defendant may make his or her appearance by filing a motion within the 30-day period, in which instance an answer or another appropriate motion shall be filed within the time the court directs in the order disposing of the motion." Rauter was not in default for want of an appearance; he appeared in the action by filing a combined motion to dismiss within the 30-day period. Nor was Rauter in default for failure to answer the complaint. Because the motion to dismiss was granted, no answer was ever required.

Plaintiff next argues that it was error to dismiss her complaint on the basis of her failure to attach the affidavit and written report required by section 2—622. The thrust of plaintiff's argument, as far as we are able to understand it, is that her claim is based on an "accidental injury," not medical malpractice, so section 2—622 does not apply. The argument is meritless. "[T]he term 'medical, hospital or other healing art malpractice' must be construed broadly. [Citations.]" *Jackson v. Chicago Classic Janitorial & Cleaning Service, Inc.*, 355 Ill. App. 3d 906, 910 (2005). Malpractice means " '[f]ailure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury *** to the recipient of those services.' " *Id.* (quoting Black's Law Dictionary 959 (6th ed.1990)). Whether Rauter's alleged act of severing

plaintiff's ureter during a surgical procedure is actionable depends on, *inter alia*, whether Rauter exercised the requisite degree of skill and learning while performing surgery. Thus, plaintiff's lawsuit asserts a claim of medical malpractice subject to the procedural requirements of section 2—622. Section 2—622(g) expressly provides that "[t]he 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—622(g) (West 2008). Accordingly, the action was properly dismissed.

Plaintiff next argues that the trial court erred in denying her motion to file a second amended complaint. Plaintiff did not attach a proposed second amended complaint to that motion, and none appears in the record on appeal. Accordingly, plaintiff has forfeited review of the trial court's ruling on her motion for leave to amend. *Hamer v. City Segway Tours of Chicago, LLC*, 402 Ill. App. 3d 42, 46 (2010).

Lastly, plaintiff contends that the trial court erred in denying her postjudgment motion. In that motion, she argued that section 2—622 did not apply to her claim seeking recovery for an accidental injury. She also requested leave to file an amended complaint. For the reasons set forth above, neither argument is meritorious. Accordingly, the trial court properly denied the postjudgment motion.

For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

Affirmed.