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2012 IL App (4th) 110665-U

Filed 5/30/12

NO. 4-11-0665

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

EBONY HOPSON; TIFFANY L. HOPSON;)	Appeal from
MICHELLE KNOX; SOPHIA B. WASHINGTON;)	Circuit Court of
JAMILA T. WILSON; HALEY K. MENDENALL, a)	Macon County
Minor, By and Through Her Mother and Next Friend,)	No. 10L50
STEPHANIE L. SHINGLETON; STEPHANIE L.)	
SHINGLETON, Individually; and JEREMY)	
MENDENALL,)	
Plaintiffs-Appellees,)	
v.)	
MACON COUNTY, KENNETH P. WEBB, and)	Honorable
TAMARA YOUNKER,)	Albert G. Webber,
Defendants-Appellants.)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices McCullough and Cook concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion in certifying the class; however, we modify the definition of the class and remand for further proceedings.
- ¶ 2 In September 2010, plaintiffs, Ebony Hopson; Tiffany L. Hopson; Michelle Knox; Sophia B. Washington; Jamila T. Wilson; Haley K. Mendenall, a minor, by and through her mother and next friend, Stephanie L. Shingleton; Stephanie L. Shingleton, individually; and Jeremy Mendenall, filed a an amended motion to certify a class action against defendants, Macon County, Kenneth P. Webb, and Tamara Younker. In June 2011, the trial court certified the class.
- ¶ 3 On appeal, defendants argue the trial court erred in certifying plaintiffs as a class. We affirm as modified and remand for further proceedings.

¶ 4

I. BACKGROUND

¶ 5

In May 2010, plaintiffs filed a first-amended class-action complaint against defendants. Plaintiffs alleged Webb was a dentist licensed by the State of Illinois to practice general dentistry. See 225 ILCS 25/1 to 57 (West 2010) (Illinois Dental Practice Act). He and Younker, a dental assistant, worked at the Macon County health department. Several of Webb's patients were recipients of public aid. Plaintiffs alleged Webb directed Younker to inject anesthetic, pull teeth, and suture and clean tooth extraction sites on multiple patients.

¶ 6

In the first-amended complaint, each plaintiff set forth claims of battery and negligence against Younker, medical malpractice against Webb, and willful and wanton misconduct against Macon County. For example, Ebony Hopson alleged Younker committed a battery against her when Younker placed her fingers inside Ebony's mouth and administered anesthetic by needle. Sophia Washington alleged Younker placed her fingers inside Sophia's mouth and performed "numerous administrations of anesthesia by needle and numerous extractions in her mouth." The complaint alleged Younker did not have a license to perform these procedures and Webb knew she was doing so without a license and directed her to do so.

¶ 7

Stephanie Shingleton brought a derivative action for medical expenses incurred by Haley Mendenall, her daughter, as a result of negligent acts or omissions of defendants. Shingleton and Jeremy Mendenall also brought counts of intentional infliction of emotional distress based on the distress suffered upon learning of Younker's battery of Haley.

¶ 8

In September 2010, plaintiffs filed an amended motion to certify the class action and for leave to file a second-amended complaint. The motion alleged the class was so numerous that joinder of all members was impracticable, questions of fact or law existed that were common

to the class and that predominate over any questions affecting only individual members, the representative parties would fairly and adequately protect the interest of the class, and the class action was an appropriate method for the fair and efficient adjudication of the controversy.

¶ 9 In February 2011, the trial court conducted a hearing on the motion to certify a class. In June 2011, the court found the named plaintiff had satisfied her burden of showing the members included in the class were so numerous that joinder of all the members was impracticable, the members share common questions of fact or law, and those common questions predominate over any questions affecting only individual members. The court also found the representative parties will fairly and adequately protect the interest of the class and the class action is an appropriate method for the fair and efficient adjudication of the controversy. The court appointed plaintiff, Ebony Hopson, as representative of the "technical battery class." The court conditionally certified the technical battery class as follows:

"All persons who, during the limitations period as defined by applicable statute, were patients at the Macon County Health Department and were examined or treated there by Tamara Younker at a time when Tamara Younker did not possess a license as required by the Illinois Dental Practice Act (225 ILCS 25/1 *et seq.*) and who as a result of examination or treatment by Tamara Younker have suffered no permanent injury or loss."

¶ 10 In July 2011, plaintiffs filed a second-amended class-action complaint against defendants for actions involving Webb and Younker at the health department. Plaintiffs alleged Webb directed Younker to perform certain dental procedures knowing she did not have a license

to practice dentistry. Plaintiffs alleged they did not consent to being treated by an unlicensed person and both Younker and Webb fraudulently concealed their negligent and/or intentional acts. Plaintiff, Ebony Hopson, claimed she and other plaintiffs suffered batteries without permanent injury.

¶ 11 Count I alleged Younker, in performing certain dental procedures without consent, committed the act of willful touching without consent. Count II alleged Webb committed medical malpractice. Count III set forth a claim of *respondeat superior* and vicarious liability against Macon County. Count IV alleged Macon County engaged in willful and wanton misconduct. Count V set forth a claim of negligence against Younker.

¶ 12 In September 2011, this court granted defendants' petition for leave to appeal pursuant to Illinois Supreme Court Rule 306(a)(8) (eff. Feb. 16, 2011).

¶ 13 II. ANALYSIS

¶ 14 Defendants argue the trial court erred in certifying the class action. We find the trial court did not abuse its discretion in certifying the class. However, we modify the definition of the class and remand for further proceedings.

¶ 15 Section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801 (West 2010)) sets forth the prerequisites for the maintenance of a class action as follows:

"(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy."

"When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class." 735 ILCS 5/2-802(b) (West 2010).

¶ 16 The party seeking class certification bears the burden of establishing all four prerequisites of section 2-801. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125, 835 N.E.2d 801, 819 (2005). "In determining whether the proposed class should be certified, the court accepts the allegations of the complaint as true." *Chultem v. Ticor Title Insurance Co.*, 401 Ill. App. 3d 226, 234, 927 N.E.2d 289, 296 (2010).

¶ 17 "Decisions regarding class certification are within the discretion of the trial court and will not be disturbed on appeal unless the trial court abused its discretion or applied impermissible legal criteria." *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 447, 860 N.E.2d 332, 336 (2006). That said, "[a] trial court's discretion in deciding whether to certify a class action is not unlimited and is bounded by and must be exercised within the framework of the civil procedure rule governing class actions." *Avery*, 216 Ill. 2d at 126, 835 N.E.2d at 820 (quoting 4 A. Conte & H. Newberg, *Newberg on Class Actions* § 13:62, at 475 (4th ed. 2002)).

¶ 18 A. Numerosity

¶ 19 In the case *sub judice*, plaintiffs contend there could be well over 170 patients victimized by the alleged torts committed by defendants. Defendants do not dispute the class is

so numerous that joinder of all members would be impracticable. Accordingly, the first prerequisite for class certification is met. See 735 ILCS 5/2-801(1) (West 2010).

¶ 20

B. Predominance

¶ 21

Defendants argue the predominance requirement in section 2-801(2) does not exist in this case because the injuries are not the same among class members, proving damages and proximate cause requires individualized determinations, and adjudicating Ebony Hopson's claim does not establish a right of recovery for other class members.

¶ 22

Under the predominance or commonality requirement, plaintiffs must show "(1) there are questions of fact or law common to the class; and (2) the common questions predominate over any questions affecting only individual members." *Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 673, 850 N.E.2d 357, 366 (2006).

"The purpose of the predominance requirement is to ensure that the proposed class is sufficiently cohesive to warrant adjudication by representation ***. [Citations.] The test for predominance is not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court. [Citations.] Determining whether issues common to the class predominate over individual issues requires the court to identify the substantive issues that will control the outcome, assess which issues will predominate, and then determine whether these issues are common to the class. [Citation.] Such an inquiry requires the court to look beyond the

pleadings to understand the claims, defenses, relevant facts, and applicable substantive law. [Citation.]" *Smith*, 223 Ill. 2d at 448-49, 860 N.E.2d at 337.

To satisfy the predominance requirement, "it must be shown that 'successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members.'" *Avery*, 216 Ill. 2d at 128, 835 N.E.2d at 821 (quoting *Goetz v. Village of Hoffman Estates*, 62 Ill. App. 3d 233, 236, 378 N.E.2d 1276, 1279 (1978)). "Where the predominance test is met, 'a judgement in favor of the class members should decisively settle the entire controversy, and all that should remain is for other members of the class to file proof of their claim.'" " *Smith*, 223 Ill. 2d at 449, 860 N.E.2d at 337 (quoting *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 434 (Tex. 2000) (quoting *Life Insurance Co. of the Southwest v. Brister*, 722 S.W.2d 764, 772 (Tex. Ct. App. 1986)).

¶ 23 In their second-amended complaint, plaintiffs alleged Younker performed at least one of the following procedures on the class members: "giving injections of anesthetic, pulling teeth, suturing and cleaning bone fragments from extraction sites, filling teeth, cleaning teeth, taking impressions for dentures, giving fluoride treatments" as well as other procedures that constituted the practice of dentistry. Plaintiffs alleged Younker did not have a license to practice dentistry and they did not consent to her placing her fingers in their mouths to perform the listed procedures. Plaintiffs claimed they suffered a battery without permanent injury.

¶ 24 Plaintiffs also set forth claims of medical malpractice, *respondeat superior*, willful and wanton misconduct, and negligence. In the medical-malpractice count, plaintiffs alleged, *inter alia*, Webb knew, or should have known, Younker did not possess a license but

directed her to perform the offending procedures anyway. The *respondeat superior* count alleged, in part, that Younker and Webb were agents and/or employees of Macon County, thereby making it vicariously liable for the damages suffered by plaintiffs by the negligent and/or intentional acts of its employees.

¶ 25 A "civil battery" has been defined as " 'the wilful touching of the person of another or a successful attempt to commit violence on the person of another.' " *Britamco Underwriters, Inc. v. J.O.C. Enterprises, Inc.*, 252 Ill. App. 3d 96, 101, 623 N.E.2d 1036, 1039 (1993) (quoting *Parrish v. Donahue*, 110 Ill. App. 3d 1081, 1083, 443 N.E.2d 786, 788 (1982)). "An action for battery does not depend on the hostile intent of the defendant, but on the absence of the plaintiff's consent to the contact." *Pechan v. DynaPro, Inc.*, 251 Ill. App. 3d 1072, 1084, 622 N.E.2d 108, 117 (1993).

¶ 26 "A class action may be properly pursued where the defendant allegedly acted wrongfully in the same basic manner as to an entire class, and, in such circumstances, the common class questions predominate the case and the class action is not defeated." *Walczak*, 365 Ill. App. 3d at 674, 850 N.E.2d at 367. In this case, several common questions of law or fact exist such that they predominate over the issues specific to individual plaintiffs. Such common questions include whether Younker was licensed to practice dentistry and whether the placing of her fingers into a patient's mouth for the purpose of performing the practice of dentistry constituted a battery. On the non-battery related claims, common questions exist as to whether Webb knew Younker did not have a license, whether he directed her to perform the procedures, and whether they were agents or employees of Macon County. The allegations in the second-amended complaint raise issues of law and fact that are common to all potential class members.

See *Terry L. Braun, P.A. v. Campbell*, 827 So.2d 261, 267 (Fla. Dist. Ct. App. 2002) (finding common issues of law and fact existed in allegations of implied contract, negligence, and battery in a class-action lawsuit by patients treated by an unlicensed dentist).

¶ 27 Among other arguments, defendants claim each member's consent is a critical element to the battery claim and the statutory limitations period could be peculiar to each member's case. However, "[a] class action is not defeated solely because of some factual variations among class members' grievances." *Walczak*, 365 Ill. App. 3d at 677, 850 N.E.2d at 369. Moreover, "[c]ommonality is not destroyed even where class members may be differently affected by the applicability of the statute of limitations, the doctrines of *laches*, good-faith and unclean hands, exhaustion of contract, or other remedies." *Walczak*, 365 Ill. App. 3d at 677, 850 N.E.2d at 369. "It is appropriate to litigate the questions of fact common to all members of the class and, after the determination of the common questions, to determine in an ancillary proceeding the questions that may be peculiar to an individual class member." *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 812, 863 N.E.2d 800, 816 (2007); see also *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) ("If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings").

¶ 28 Defendants also argue the class members have not suffered the same injury and the amount of damages must be proved for each one and it is not subject to a formulaic calculation. We note "[i]ndividual questions of injury and damages do not defeat class certification."

Clark v. TAP Pharmaceutical Products, Inc., 343 Ill. App. 3d 538, 549, 798 N.E.2d 123, 132 (2003). Here, however, the question of injuries and/or damages is not at issue. The injuries suffered in this case resulted from the alleged nonconsensual violation of the members' mouths. Each member was subjected to the same battery by the same person. As to damages, plaintiffs' counsel stated at the hearing that "the class should be limited to people who have no secondary injury at all." Moreover, the members are "identical in terms of what their injury was." They either had "an extraction, or an X-ray, or a filling, or a tooth pulled and they're just fine." Based on these statements, the class members alleged they suffered a tort but have no compensable damages. The damages available to each of the class members are identical because they are nominal damages. Thus, damages need not be proved for each one.

¶ 29

C. Adequate Representation

¶ 30

Defendants argue Ebony Hopson cannot adequately represent all class members because she lacks commonality with class members. See 735 ILCS 5/2-801(3) (West 2010).

"The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim.' [Citation.] 'The test to determine the adequacy of representation is whether the interests of those who are parties are the same as those who are not joined.' [Citation.]" *Walczak*, 365 Ill. App. 3d at 678, 850 N.E.2d at 370.

In this case, Ebony Hopson will fairly and adequately protect the interests of the class. She is a member of the class and could maintain an individual cause of action against defendants. See

Ramirez, 371 Ill. App. 3d at 811, 863 N.E.2d at 814. Moreover, her interest does not appear collusive, and it is apparent her interests are the same as those of the absent class members, *i.e.*, to recover damages for the alleged torts.

¶ 31 D. Appropriateness

¶ 32 Defendants argue the certified class will not provide for the fair and efficient adjudication of this matter. See 735 ILCS 5/2-801(4) (West 2010).

"In deciding whether the fourth requirement for class certification is met, a court considers whether a class action can best secure economies of time, effort, and expense or accomplish the other ends of equity and justice that class actions seek to obtain. [Citation.] Where the first three requirements for class certification have been satisfied, the fourth requirement may be considered fulfilled as well. [Citations.]" *Walczak*, 365 Ill. App. 3d at 679, 850 N.E.2d at 371.

¶ 33 Here, a class action is an appropriate method for fairly and efficiently adjudicating the controversy. Our holding that the first three prerequisites of section 2-801 have been fulfilled makes it evident that the fourth requirement has been fulfilled as well. Because there are numerous class members and common questions, a class action will serve the economies of time, effort, and expenses and will prevent possible inconsistent results. Moreover, the class action will aid in judicial administration and help reduce the waste of judicial resources brought on by litigating over 170 individual lawsuits. As all four prerequisites of section 2-801 have been established, we find the trial court did not abuse its discretion in granting the motion for class

certification.

¶ 34 E. The Class Definition

¶ 35 Defendants take issue with two elements of the class definition, claiming it is both vague and overbroad. We agree and find a modification of the definition is in order.

¶ 36 The trial court conditionally certified the technical battery class as follows:

"All persons who, during the limitations period as defined by applicable statute, were patients at the Macon County Health Department and were examined or treated there by Tamara Younker at a time when Tamara Younker did not possess a license as required by the Illinois Dental Practice Act (225 ILCS 25/1 *et seq.*) and who as a result of examination or treatment by Tamara Younker have suffered no permanent injury or loss."

¶ 37 Defendants argue the definition is vague because class members who were "examined" by Younker may not have suffered a tort at all. We agree. The term "examined" could include members who suffered no battery at all at the hands of Younker. It could include a person who was asked to open his or her mouth so Younker could look inside. However, that person would not have had a procedure performed for which the Illinois Dental Practice Act required a license and thus no tort would have been committed. We modify the definition so it includes patients upon which acts of dentistry, as set forth in the Illinois Dental Practice Act, were performed by Younker.

¶ 38 Defendants also take issue with the categorization of damages as limited to those plaintiffs who "suffered no permanent injury or loss." In their brief on appeal, plaintiffs state the

class members are entitled to nominal damages and no individual determination of damages need be made. "Nominal damages" have been defined as " '[a] trifling sum awarded when a legal injury is suffered but when there is no substantial loss or injury to be compensated.' " *Department of Transportation v. Bolis*, 313 Ill. App. 3d 982, 988, 730 N.E.2d 1152, 1157 (2000) (quoting Black's Law Dictionary 396 (7th ed. 1999)).

¶ 39 Here, however, the class is defined as those who "suffered no permanent injury or loss." This definition does not limit the class to nominal damages. Thus, the class definition must be modified to expressly limit the class members to the recovery of nominal damages and not any other compensable damages. Any victim seeking damages other than the nominal amount would need to opt out of the class. See 735 ILCS 5/2-804(b) (West 2010) ("Any class member seeking to be excluded from a class action may request such exclusion and any judgment entered in the act shall not apply to persons who properly request to be excluded").

¶ 40 Based on the foregoing, we modify the definition of the class as follows:

"All persons who, during the limitations period as defined by applicable statute, were patients at the Macon County Health Department and upon which acts of dentistry, as set forth by the Illinois Dental Practice Act, were performed by Tamara Younker at a time when Younker did not possess a license as required by the Illinois Dental Practice Act and who, as a result of the examination or treatment by Younker, have suffered only nominal damages and not any other compensable injuries."

We note "[a] court has broad discretion to limit or redefine the class definition to correct

deficiencies." *Smith v. Illinois Central R.R. Co.*, 363 Ill. App. 3d 944, 955, 845 N.E.2d 703, 713 (2005), *rev'd on other grounds*, 223 Ill. 2d at 458, 860 N.E.2d at 342. Moreover, "[b]ecause the class action device is flexible, it may be modified to accommodate newly discovered facts as they arise." *Smith*, 363 Ill. App. 3d at 956, 845 N.E.2d at 713, *rev'd on other grounds*, 223 Ill. 2d at 458, 860 N.E.2d at 342; see also *Clark*, 343 Ill. App. 3d at 552, 798 N.E.2d at 135. Accordingly, the trial court may make any appropriate modifications should the facts of the case dictate a change.

¶ 41

III. CONCLUSION

¶ 42

For the reasons stated, we affirm as modified the trial court's judgment and remand for further proceedings.

¶ 43

Affirmed as modified; cause remanded for further proceedings.