2011 IL App (5th) 080513-U

NO. 5-08-0513

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

TAMMIE PORTER, Special Administrator of the Estate of Lawrence A. Porter, Deceased, Plaintiff-Appellant, v. LITTON AMBULANCE SERVICE, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Jefferson County. No. 08-L-14 Honorable Robert W. Lewis, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Chapman and Justice Goldenhersh concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court abused its discretion in failing to grant the plaintiff leave to amend to comply with section 2-622 of the Code of Civil Procedure (735 ILCS 5/2-622 (West 2008)). The trial court did not abuse its discretion in dismissing the plaintiff's claim alleging willful and wanton conduct.

¶ 2 The plaintiff, Tammie Porter, the special administrator of the estate of Lawrence A. Porter, deceased, appeals the judgment dismissing her complaint against the defendant, Litton Ambulance Service, Inc., entered by the circuit court of Jefferson County. For the reasons that follow, we affirm in part, reverse in part, and remand.

¶ 3 On October 1, 2004, the decedent was at the Belle Rive Speedway, where he was participating in a go-kart race. After the race, the decedent began developing signs and symptoms of a possible heart attack. The Belle Rive Speedway had provided ambulance service for the go-kart race participants pursuant to an agreement with the defendant. The defendant rendered services to the decedent.

¶ 4 On September 29, 2006, the plaintiff filed a multicount complaint against the defendant. The plaintiff asserted that the defendant failed to exercise the degree of skill and care normally exercised by reasonably well-qualified emergency medical technicians and that as a direct and proximate result of the defendant's negligent acts, the decedent died. The plaintiff's counsel attached to the complaint an affidavit as required by section 2-622(a)(2) of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-622(a)(2) (West 2008)), stating that a physician consultation was unobtainable prior to the expiration of the statute of limitations but that the required affidavit and report would be filed within 90 days. On March 27, 2007, the plaintiff voluntarily dismissed the complaint.

¶ 5 On March 20, 2008, the plaintiff filed a new complaint alleging that the defendant willfully and wantonly failed to appropriately staff its ambulance with qualified and trained staff, failed to properly equip the ambulance, and as a result of the defendant's gross misconduct or willful or wanton conduct, delayed the transfer of the decedent from the racetrack to the nearest emergency department for appropriate care. The plaintiff's counsel attached to the new complaint an affidavit as required by section 2-622(a)(2) of the Code, stating that the plaintiff had not previously dismissed a suit based on the same or similar acts and that a physician's consultation could not be obtained prior to the expiration of the statute of limitations.

¶ 6 On May 8, 2008, the defendant filed a motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619(a)(5) (West 2008)), first contending that the plaintiff's complaint was barred by the two-year statute of limitations. Second, the defendant argued that the plaintiff's complaint should be dismissed for the failure to comply with section 2-622 of the Code. According to the defendant, the plaintiff's claim was a "healing art malpractice" claim, which is governed by section 2-622 of the Code. The defendant relied on the decision in *Cargill v. Czelatdko*, 353 Ill. App. 3d 654 (2004), which held that the version of section

2-622 of the Code as set out in Public Act 90-579 (eff. May 1, 1998) barred plaintiffs from seeking a 90-day extension to file the section 2-622 affidavit if the plaintiff had already voluntarily dismissed an action based on the same or substantially the same acts, omissions, or occurrences. The defendant asserted that the plaintiff's attorney improperly stated that the plaintiff had not previously voluntarily dismissed an action based on the same or substantially the same acts, omissions, or occurrences. The defendant requested that the plaintiff's complaint be dismissed because the trial court lacked discretion to permit the plaintiff a 90-day extension to file the section 2-622 affidavit because the plaintiff had previously voluntarily dismissed a cause of action based on the same facts.

¶ 7 The plaintiff responded on May 19, 2008, arguing that the action was not barred by the two-year statute of limitations and that section 2-622 of the Code did not apply because the plaintiff's cause of action was not based on medical malpractice but was based on the gross misconduct or willful and wanton conduct of the defendant. Alternatively, the plaintiff requested as follows: "If this Honorable Court does not find the preceding argument persuasive, it is within the court's discretion to allow a late filing of said Affidavit outside of the statutory period. As such, allowing an amendment to Plaintiff's Complaint which would include the filing of the proper Affidavit and physician's report to conform with Section 2-622 would be proper, and dismissal of the Plaintiff's Complaint is not proper."

¶ 8 The defendant replied on June 12, 2008, arguing that section 2-622 of the Code did apply because the plaintiff's allegations fall within "healing art malpractice." The defendant cited *Lyon v. Hasbro Industries, Inc.*, 156 Ill. App. 3d 649, 655 (1987), for the proposition that "the allegation that defendant failed to adequately equip its ambulance *** falls within the ambit of the term 'healing art malpractice' and section 2-622 of the Code." The defendant again argued that the trial court did not have discretion to allow the plaintiff to amend her complaint to add a section 2-622 affidavit and report.

¶ 9 On June 19, 2008, the plaintiff filed another response. At this time, the plaintiff had 1 day remaining in her 90-day period to file the affidavit and report. However, she failed to file a physician's report or affidavit. Instead, the plaintiff continued to argue that section 2-622 did not apply and for the first time argued that her claims were based on the defendant's violations of the Emergency Medical Services Systems Act (210 ILCS 50/1 *et seq.* (West 2008)). The plaintiff asserted that section 2-622 did not apply to claims based on statutory violations and therefore did not apply to her claims against the defendant. Again, in the alternative, the plaintiff requested, "[I]f this Honorable Court does not find the Plaintiff's argument persuasive as to why Section 2-622 does not apply to this matter, the Plaintiff reiterates and realleges her argument in her Response to the Defendant's Motion to Dismiss that the Court has discretion to allow the Plaintiff to file a Section 2-622 Affidavit and report."

¶ 10 On July 14, 2008, the defendant filed a second motion to dismiss. The defendant alerted the court that a recent supreme court decision, *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421 (2008), had overruled *Cargill v. Czelatdko*. The defendant's previous motion to dismiss had cited *Cargill* for the proposition that the trial court lacked discretion to permit the plaintiff a 90-day extension where the plaintiff had previously voluntarily dismissed a cause based on the same facts. *O'Casek* held that the language in Public Act 90-579 providing that a plaintiff may not refile a previously voluntarily dismissed action without simultaneously filing a section 2-622 report has no effect. The defendant then noted that it was not abandoning its argument that section 2-622 still applied to this case because the cause alleged "healing art malpractice" pursuant to the decision in *Lyon*. The defendant further alleged that the Emergency Medical Services Systems Act does not create a private cause of action for damages and that the plaintiff's complaint failed to identify a specific statute that the defendant allegedly violated, in

contravention of Supreme Court Rule 133(a) (eff. Jan. 1, 1967), and should be dismissed pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)). The defendant also argued that the plaintiff's complaint attempted to allege willful and wanton conduct but that the plaintiff failed to allege sufficient facts to plead a cause of action based on willful and wanton conduct and the complaint was "substantially insufficient at law" and should be dismissed pursuant to section 2-615(a) of the Code (735 ILCS 5/2-615(a) (West 2008)).

¶ 11 The plaintiff responded on July 21, 2008, arguing that, based on the ruling in *O'Casek*, the defendant's argument must fail. Furthermore, the plaintiff stated that due to the plethora of motions and responses filed in this matter, she did not wish to burden the court with another lengthy response, and so she incorporated her previous arguments as filed in her responses.

¶ 12 On September 10, 2008, the trial court held that the plaintiff failed to file the section 2-622 affidavit and report and that 90 days had passed since the case had been filed. The trial court held, "To the extent Plaintiff seeks recovery on a theory of 'healing arts malpractice', that claim is dismissed with prejudice." The court further held, "To the extent Plaintiff seeks to recover under a different theory, Plaintiff's complaint fails to state a cause of action and is dismissed under § 2-615." The trial court granted the plaintiff 28 days in which to file an amended complaint. The plaintiff failed to file an amended complaint. The plaintiff filed a timely notice of appeal on October 6, 2008. On March 30, 2009, the defendant filed a motion for the entry of a final order dismissing the plaintiff's complaint in its entirety with prejudice. The defendant argued that since the court granted the plaintiff 28 days to amend her complaint and the 28-day period for the plaintiff to file her amended complaint had expired on October 8, 2008, the defendant was entitled to a final order of dismissal. On March 31, 2009, the trial court entered a final judgment of dismissal with prejudice.

¶ 13 On appeal, the plaintiff argues that no section 2-622 affidavit and report is required because her claim is not based on a "healing arts malpractice" claim but is instead based on gross misconduct in violation of the Emergency Medical Services Systems Act (210 ILCS 50/1 *et seq*. (West 2008)). In response, the defendant argues that the plaintiff's claim is a "healing arts malpractice" claim which requires a section 2-622 affidavit, which the plaintiff has failed to produce. The defendant further asserts that the plaintiff failed to mention the Emergency Medical Services Systems Act in her complaint and that, in any event, the Emergency Medical Services Systems Act specifically states that it cannot be the basis for liability.

¶ 14 The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact early in litigation. *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 436 (2008). On appeal from a section 2-619 motion to dismiss, the reviewing court " 'must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *O'Casek*, 229 Ill. 2d at 436 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). A court's disposition of a section 2-619 motion is reviewed *de novo*. *O'Casek*, 229 Ill. 2d at 436. In this case, the basis for the defendant's motions to dismiss was the plaintiff's alleged failure to comply with the affidavit requirements of section 2-622.

¶ 15 Section 2-622(a) of the Code requires that all "healing art malpractice" complaints include an attorney affidavit attesting that the plaintiff's claims have merit, along with a report of the reviewing health professional. 735 ILCS 5/2-622(a) (West 2008). Alternatively, section 2-622(a)(2) provides that the complaint may be accompanied by an attorney affidavit stating that the plaintiff was unable to obtain a reviewing health professional's written report before the expiration of the statute of limitations. 735 ILCS 5/2-

622(a)(2) (West 2008). The filing of that alternative affidavit requires that the health professional's written report be filed in 90 days. 735 ILCS 5/2-622(a)(2) (West 2008). The noncompliance with section 2-622 is a ground for a dismissal under section 2-619. 735 ILCS 5/2-622(g) (West 2008). The purpose of section 2-622 of the Code is to deter the filing of frivolous medical malpractice lawsuits. *Cato v. Attar*, 210 Ill. App. 3d 996, 998 (1991).

¶ 16 Whether a complaint should be dismissed, with or without prejudice, for a failure to comply with section 2-622 of the Code is within the sound discretion of the trial court. *Moyer v. Southern Illinois Hospital Service Corp.*, 327 Ill. App. 3d 889, 894 (2002). The trial court may, in its discretion, dismiss a case with prejudice in situations where a plaintiff has made an attempt to comply with the requirements of section 2-622 of the Code but the attempt was deficient in one or more ways. *Jacobs v. Rush North Shore Medical Center*, 284 Ill. App. 3d 995 (1996). Absent an abuse of discretion, the trial court's decision will not be disturbed on appeal. *Moyer*, 327 Ill. App. 3d at 894. There is no abuse of discretion where the trial court took the particular facts and unique circumstances of the case into consideration before determining that the complaint should be dismissed with prejudice. *Ingold v. Irwin*, 302 Ill. App. 3d 378, 384 (1998).

¶ 17 We first discuss whether the plaintiff's claim was based on a healing art malpractice claim. "Healing art malpractice" is a broad term that includes negligence claims directed at "interrelated health-care services." *Lyon v. Hasbro Industries, Inc.*, 156 Ill. App. 3d 649, 654 (1987). An allegation that the defendant failed to adequately equip its ambulance is within the ambit of "healing art malpractice." *Lyon*, 156 Ill. App. 3d at 654. The decision regarding "which equipment is necessary and precautionary to meet" a person's needs "is inherently one of medical judgment," and alleged negligence in this regard goes to "an intrinsic part of the provision of the facilities for emergency health care." *Lyon*, 156 Ill. App. 3d at 655.

¶ 18 This case is similar to *Lyon v. Hasbro Industries, Inc.*, 156 Ill. App. 3d 649 (1987).

In *Lyon*, a child needed emergency medical attention, and during transport in an ambulance, the child suffered cardiac arrest. The plaintiff alleged that the ambulance had a duty to equip its emergency vehicles with life-support equipment adequate to handle foreseeable emergencies and was negligent because it failed to provide adequate medical equipment. The court stated that the determination of which equipment was necessary and appropriate to render aid is one of medical judgment. *Lyon*, 156 Ill. App. 3d at 654. Accordingly, the court held that the plaintiff's allegations were within the meaning of the term "healing art malpractice" and that the plaintiff had to provide a physician's affidavit stating that a meritorious cause of action existed under the facts of the case. *Lyon*, 156 Ill. App. 3d at 654.

¶ 19 Similarly, the plaintiff's complaint alleges that the defendant had a duty to properly equip its vehicles with necessary equipment to provide appropriate care by its personnel and to staff its ambulances with appropriately trained emergency technicians. The plaintiff alleges that the defendant failed to provide properly qualified staff to provide appropriate medical emergency care to the decedent and that the defendant negligently failed to equip the ambulance with appropriate and necessary equipment to treat a patient like the decedent. As in *Lyon*, the plaintiff asserts that the decedent needed a specific level of care that he did not receive because of the defendant's alleged deficiencies. Accordingly, we conclude that the plaintiff's claim is based on a "healing art malpractice" claim, and therefore, section 2-622 of the Code applies.

¶ 20 The plaintiff filed her complaint on March 20, 2008, without an attorney affidavit attesting that the plaintiff's claims have merit, along with a report of a reviewing health professional. Instead, pursuant to section 2-622(a)(2) of the Code (735 ILCS 5/2-622(a)(2) (West 2008)), the plaintiff's complaint was accompanied by an attorney affidavit stating that the plaintiff was unable to obtain a reviewing health professional's written report before the expiration of the statute of limitations. The filing of that alternative affidavit requires that

the reviewing health professional's written report be filed in 90 days. 735 ILCS 5/2-66(a)(2) (West 2008). Accordingly, the plaintiff had 90 days, or until June 20, 2008, in which to file the amended complaint with the required affidavit and report. The plaintiff failed to do so. The noncompliance with section 2-622 is a ground for a dismissal under section 2-619. 735 ILCS 5/2-622(g) (West 2008).

¶ 21 The plaintiff argues that she was required to seek leave to amend in order to properly file the amended complaint with the required affidavit and report. The plaintiff argues that she sought leave to amend within the 90-day period twice, in her responses to the defendant's motions on May 19, 2008, and June 19, 2008, but that the trial court failed to grant her leave to amend. The plaintiff also notes that the argument from the outset was not whether the plaintiff had filed the affidavit within 90 days, but whether or not the plaintiff could file the affidavit within 90 days. The defendant argued that based on *Cargill* she could not. The supreme court overruled *Cargill* in *O'Casek*, but the defendant still stood on the argument that section 2-622 of the Code applied and that the plaintiff failed to comply with section 2-622. The plaintiff maintained that section 2-622 did not apply, but the plaintiff asked in the alternative, if the court did not find that argument persuasive, that she be granted leave to amend her complaint to comply with section 2-622 by filing the appropriate affidavit and report. The plaintiff noted that the trial court had the discretion to allow her to do so.

¶ 22 The plaintiff relies on *McCastle v. Mitchell B. Sheinkop, M.D., Ltd.*, 121 Ill. 2d 188 (1987), which involved the dismissal of a plaintiff's cause of action for failing to attach an attorney affidavit and a report from a reviewing health professional. The supreme court reversed the dismissal and held that it was error to dismiss the complaint with prejudice, because the trial court believed that it had no choice but to dismiss the complaint with prejudice. In the instant case, the trial court dismissed with prejudice the cause of action with regard to healing art malpractice. The trial court did not grant the plaintiff leave to file an

amended complaint. It is within the trial court's discretion to grant leave to amend the pleadings. *McCastle*, 121 Ill. 2d at 194 . Because this case involved a law that was in flux at the time of the filing of the complaint but became clear in the supreme court's decision in *O'Casek*, the trial court abused its discretion by not addressing the issue and the plaintiff's requests for leave to amend. In any event, the plaintiff, within the 90-day period, sought leave to amend the complaint and file the affidavit and report if the court thought that this was a healing art malpractice case. The trial court still dismissed the plaintiff's complaint for a failure to comply with section 2-622 of the Code. Amendments to a pleading in a medical malpractice case should be liberally allowed so that the case is decided on the merits and not procedural technicalities. *Cato v. Attar*, 210 Ill. App. 3d 996, 999 (1991). Accordingly, we conclude that the trial court abused its discretion for failing to grant the plaintiff leave to amend to comply with section 2-622 of the Code and dismissing her claim of healing art malpractice with prejudice. It is on this claim that we reverse.

¶ 23 We next address the plaintiff's argument that the Emergency Medical Services Systems Act is the foundation of her claim and that, thus, the requirements of section 2-622 of the Code do not apply. We agree with the defendant's argument that the Emergency Medical Services Systems Act cannot be the basis of the plaintiff's claim, because that Act does not create a cause of action or civil liability and immunizes emergency care providers from ordinary negligence. 210 ILCS 50/3.150(a) (West 2008). Section 3.150(h) specifically provides, "Nothing in this act shall be construed to create a cause of action or any civil liabilities." 210 ILCS 50/3.150(h) (West 2008). Furthermore, section 3.150(a) immunizes persons or agencies from claims of ordinary negligence, stating "[Those] who in good faith provide[] emergency or non-emergency medical services *** in the normal course of conducting their duties, or in an emergency, shall not be civilly liable as a result of their acts or omissions in providing such services unless such acts or omissions *** constitute willful

and wanton misconduct." 210 ILCS 50/3.150(a) (West 2008). Although the plaintiff alleges that the defendant's conduct was willful and wanton and amounted to gross negligence, the trial court held that the plaintiff's complaint failed to allege facts in support of these allegations. Illinois is a fact-pleading jurisdiction that requires sufficient facts to plead a cause of action. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 498 (2009). To sufficiently plead willful and wanton conduct a plaintiff must allege either a deliberate intention to harm or an utter indifference to or conscious disregard for the welfare of the plaintiff. *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 518 (1989). The alleged willful or wanton conduct must be manifested in the facts alleged; conclusory allegations or mere characterizations of alleged acts as willful are insufficient. *Snyder v. Olmstead*, 261 Ill. App. 3d 986, 991 (1994).

¶ 24 In the instant case, the court held, "To the extent Plaintiff seeks to recover under a different theory, Plaintiff's complaint fails to state a cause of action and is dismissed under § 2-615." The plaintiff's complaint lacked facts alleging willful or wanton conduct and instead made conclusory allegations of willful or wanton conduct. The trial court granted the plaintiff 28 days in which to file an amended complaint. The plaintiff failed to file an amended complaint with sufficient facts to allege willful and wanton conduct on the part of the defendant. Accordingly, because the plaintiff has failed to sufficiently plead willful and wanton misconduct on the part of the defendant, the plaintiff cannot use the Emergency Medical Services Systems Act as the foundation of her claim. We conclude that the trial court did not abuse its discretion in dismissing the plaintiff's claim of willful and wanton conduct, and we affirm the dismissal of that claim.

¶ 25 For the foregoing reasons, we affirm the circuit court of Jefferson County's dismissal of the plaintiff's claim of willful and wanton conduct. We reverse the dismissal of the plaintiff's claim of healing art malpractice with prejudice for a failure to file the section 2-622

affidavit and report, and we remand the cause for further proceedings consistent with this decision.

¶ 26 Affirmed in part and reversed in part; cause remanded.