NO. 5-09-0332

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PENNY SHASTEEN, as Special Administrator of the Estate of Dona Ogilvie, Deceased,	)	Appeal from the Circuit Court of Shelby County.
Plaintiff-Appellant,	)	
v.	)	No. 09-L-3
SHELBY MEMORIAL HOSPITAL, SHELBY AREA AMBULANCE SERVICE, ARNOLD V. AGAPITO, M.D., and JACK M. LEVINE, M.D.,	)	Honorable Michael D. McHaney,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Chapman and Justice Stewart concurred in the judgment.

R U L E 2 3 O R D E R

Held: The dismissal of a medical malpractice complaint with prejudice and no leave to amend solely on the basis of a plaintiff having possessed medical records for a substantial period of time is an abuse of discretion.

Plaintiff, Penny Shasteen, as the special administrator of the estate of Dona Ogilvie, deceased, filed suit against defendants, Shelby Memorial Hospital (Shelby Hospital), Shelby Area Ambulance Service (Shelby Ambulance), Arnold V. Agapito, M.D., and Jack M. Levine, M.D., in the circuit court of Shelby County. Defendants filed separate motions to dismiss, and the circuit court dismissed each of the defendants with prejudice. We affirm in part, reverse in part, and remand.

FACTS

On October 24, 2007, plaintiff filed a seven-count complaint in the circuit court of

Shelby County, No. 07-L-27. Shelby Memorial Hospital, Shelby Area Ambulance Service, and Arnold V. Agapito, M.D., were named as defendants. Jack M. Levine, M.D., was named as a respondent in discovery. Plaintiff alleged that Dona Ogilvie, the decedent, died as a result of improper medical treatment. The date of the alleged occurrence was October 25, 2005. Attached to the complaint was an affidavit from plaintiff's counsel stating as follows: "[Counsel was] unable to obtain a consultation required by paragraph 1 of section 2-622 because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations." See 735 ILCS 5/2-622(a) (West 2006).

In response to the original complaint, Shelby Ambulance filed a motion to dismiss on the grounds that the complaint failed to set forth facts establishing wilful and wanton conduct. See 735 ILCS 5/2-615 (West 2006). Subsequently, Shelby Ambulance filed an additional motion to dismiss, claiming immunity. See 735 ILCS 5/2-619 (West 2006); 210 ILCS 50/3.150 (West 2006). Shelby Hospital and Dr. Agapito jointly filed a motion to dismiss asserting that the affidavit was improper. See 735 ILCS 5/2-619, 2-622(g) (West 2006).

On January 20, 2008, the trial court denied the motion to dismiss filed by Shelby Hospital and Agapito and took under advisement the motions of Shelby Ambulance. On January 22, 2008, plaintiff filed a motion for voluntary nonsuit, and the case was voluntarily dismissed without prejudice. See 735 ILCS 5/2-1009 (West 2008).

On January 21, 2009, plaintiff filed the present action. In this complaint, Levine was named as a defendant. Attached to the complaint was an affidavit from plaintiff's counsel that mirrored the affidavit attached to the original complaint. Shelby Hospital and Agapito filed a motion to dismiss substantially similar to their pleading in the original suit. Shelby Ambulance also filed motions to dismiss substantially similar to those filed in the original

action. Levine filed a motion to dismiss arguing that the complaint was barred by the statute of limitations.

Subsequently, plaintiff's counsel filed certificates of service, attaching a letter from Jeffrey Snow, M.D., and a letter from Cindy Heard, R.N. Plaintiff filed a motion to amend with a proposed amended complaint, attaching an affidavit from plaintiff's counsel and the letters from Snow and Heard.

On May 26, 2009, the trial court entered a lengthy order disposing of the pending motions. In the order, the trial court dismissed each of the defendants. Plaintiff appeals.

ANALYSIS

Plaintiff contends that the trial court's decision is based on plaintiff having medical records prior to the expiration of the statute of limitations. In her appellant's brief, plaintiff, with one exception, does not distinguish between defendants. The one argument directed against a specific defendant was that the interpretation of the limitations period provided by *Hugley* does not apply to Dr. Levine. *Hugley v. Alcaraz*, 144 Ill. App. 3d 726, 732, 494 N.E.2d 706, 709 (1986). In general, plaintiff asserts that the trial court violated the protections afforded her under the Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq*. (West 2008)) by basing its decision on the fact that plaintiff had in her possession medical records for a long period of time. Specifically, plaintiff asserts that she was entitled to an extension of time to file a certificate of merit. See 735 ILCS 5/2-622 (West 2008). The Code requires a plaintiff to support a complaint for medical malpractice with a certificate of merit. 735 ILCS 5/2-622(a)(1) (West 2008); *Cookson v. Price*, No. 109321 (Ill. Dec. 23, 2010). An extension of 90 days to file the certificate is allowed if the filing attorney provides an affidavit. Plaintiff points out that the right to a 90-day extension applies to refiled actions. *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 437, 892 N.E.2d 994, 1005 (2008). From this, and without distinction between defendants, plaintiff argues that the

trial court erred in dismissing the complaint.

The trial court addressed the issues related to each defendant individually and in detail. A review of its order of dismissal reveals that, with one exception, the trial court ruled properly.

Dr. Levine

In the original complaint, Dr. Levine was named as a respondent in discovery. In this regard, the Code provides as follows:

> "A person or entity named as a respondent in discovery in any civil action may be made a defendant in the same action at any time within 6 months after being named as a respondent in discovery, even though the time during which an action may otherwise be initiated against him or her may have expired during such 6 month period. An extension from the original 6-month period for good cause may be granted only once for up to 90 days for (i) withdrawal of plaintiff's counsel or (ii) good cause. Notwithstanding the limitations in this Section, the court may grant additional reasonable extensions from this 6-month period for a failure or refusal on the part of the respondent to comply with timely filed discovery." 735 ILCS 5/2-402 (West 2008).

The trial court dismissed the counts against Dr. Levine as untimely. The court described the grounds for the dismissal in detail. The court stated as follows:

> "3. This court will first address the motion to dismiss filed by LEVINE. OGILVIE'S cause of action accrued on October 25, 2005. SHASTEEN filed Complaint I one day before expiration of the applicable statute of limitations prescribed by 735 ILCS 5/13-212(a). As previously noted, LEVINE was not named as a Defendant[] but was designated as a respondent in discovery pursuant to 735 ILCS 5/2-402. This statute afforded SHASTEEN the opportunity to file a motion to

add LEVINE as a defendant, upon probable cause, within six (6) months, despite the expiration of a statute of limitations. A one time 90 day extension may be granted for good cause. LEVINE relies upon *Hugley v. Alcaraz*, 144 Ill. App. 3d 725 [*sic*] (1st Dist. 1986). After a cogent analysis of the applicable statutes, the court in that case held that the absolute right to refile an action within one year, pursuant to section 13-217 following a voluntary dismissal under section 2-1009, is barred where a plaintiff fails to successfully name a respondent in discovery as a defendant pursuant to section 2-402 and where the statute of limitations prescribed by section 13-212 has run. Here, SHASTEEN failed to even attempt to name LEVINE as a defendant between the filing of Complaint I on October 24, 2005, [*sic*] and the entry of the order granting her motion to voluntarily dismiss entered January 23, 2008. Therefore, LEVINE argues, since the statute of limitations prescribed by [section] 13-212 has expired, SHASTEEN'S claim against him is time barred. This court agrees. *Hugley* is dispositive. The fact that SHASTEEN voluntarily dismissed her complaint before the six (6) month time limit in section 2-402 had expired alters neither the applicability of the holding in *Hugley* nor the reasoning in support of that holding."

The trial court properly applied Illinois law. Plaintiff was untimely according to the plain language of the applicable statutes. The Code states that "no action for damages *** against any physician" based on patient care shall be brought more than two years after the date the plaintiff knew of the alleged injury. 735 ILCS 5/13-212(a) (West 2008). The plain language of the statutes addressing a voluntary dismissal and the right to refile does not include respondents in discovery. 735 ILCS 5/2-1009, 13-217 (West 2008). As the trial court noted, the right to refile an action within one year following a voluntary dismissal is barred where a plaintiff fails to name a respondent in discovery as a defendant within the six-month time period under section 2-402 and the two-year statute of limitations has run. 735

ILCS 5/2-402, 13-217, 2-1009 (West 2008); *Hugley v. Alcaraz*, 144 Ill. App. 3d 726, 732, 494 N.E.2d 706, 709 (1986).

As the trial court noted, *Hugley* provides a cogent analysis of the applicable statutes. In *Hugley*, the plaintiff filed a complaint shortly before the expiration of the two-year statute of limitations naming her treating physician as a respondent in discovery. The plaintiff later voluntarily dismissed her suit, having failed to serve a summons on the treating physician. Upon the plaintiff refiling the action, the treating physician moved to dismiss. *Hugley* found that the treating physician was entitled to a dismissal.

Hugley held that the plain language of the statute of limitations for actions against physicians and the statutes authorizing a voluntary dismissal and a refiling after a voluntary dismissal addressed defendants and not respondents in discovery. As a result, the voluntary dismissal of the original complaint did not preserve a claim against the treating physician "since he was never named as a defendant in that action." *Hugley*, 144 Ill. App. 3d at 733, 494 N.E.2d at 710. In other words, because the plaintiff failed to name the treating physician as a defendant within six months of filing the original action, the plaintiff failed to toll the running of the statute of limitations. See *Hugley*, 144 Ill. App. 3d at 733, 494 N.E.2d at 710.

The trial court correctly found *Hugley* to be dispositive. Plaintiff's comments regarding *Hugley* are conclusory and inaccurate. First, plaintiff states that in *Hugley*, "the six month period to name the respondent in discovery as defendant had already expired prior to the non-suit." *Hugley*, however, was not based on the expiration of the six-month period during the pendency of the original suit. Plaintiff also makes an argument that *Hugley* is inapplicable given the discussion of section 13-217 in *Hamilton v. Chrysler Corp.*, 281 Ill. App. 3d 284, 288, 666 N.E.2d 758, 761 (1996). The theoretical discussion of whether section 13-217 is applicable to statutory causes of action contained in *Hugley* was not controlling in *Hamilton* and is not relevant to the application of the language of the relevant

statutes. Furthermore, the dismissal of Dr. Levine, like the dismissal of the treating physician in *Hugley*, was for a violation of the statute of limitations and not for a failure to exercise diligence in serving process. See *Anderson v. Intengan*, 191 Ill. App. 3d 1001, 1006, 548 N.E.2d 479, 481 (1989). As explained by *Hugley*, under the plain language of the relevant statutes, a voluntary dismissal does not extend the limitations period for respondents in discovery.

Shelby Ambulance

In her appellant's brief, plaintiff directs no argument toward Shelby Ambulance. In her reply brief, however, plaintiff asserts that the trial court abused its discretion in denying her leave to amend her complaint against Shelby Hospital from negligence to wilful and wanton misconduct. Plaintiff points to a delay in moving the decedent to Decatur and in going from the parking lot to the emergency room.

In its order, the trial court pointed out that plaintiff repeated the allegations contained in the initial complaint upon refiling the second complaint. Furthermore, the trial court noted that the proposed amended complaint was identical, except that it did not even plead wilful and wanton conduct. See 210 ILCS 50/3.150 (West 2008). The dismissal was proper.

Shelby Hospital and Arnold V. Agapito, M.D.

In her appellant's brief, plaintiff characterizes the trial court's decision as being based on plaintiff having long possessed the medical records. The trial court granted a combined motion to strike filed by Shelby Hospital and Agapito and then denied plaintiff's motion to amend. Plaintiff's possession of medical records was the basis for the denial of the motion to amend.

The trial court explained the reason for its decision in detail:

"Complaint II was filed on January 21, 2009. Pursuant to [section] 2-622(a)(2), HELLER had until April 21, 2009, to file an affidavit required by [section]

2-622(a)(1). He failed to do so. He also failed to file a request for an extension with which to do so. Instead, he filed on day 76 a certificate of service, which attached Snow's 'letter' opinion. This 'letter' did not even mention AGAPITO. It is not a written report which complies with the requirements of [section] 2-622(a)(1). Further, even though this 'letter' was filed within 90 days of the filing of Complaint II, nowhere in section 2-622 is there a provision allowing for a 'certificate of service', which attaches 'letters', to substitute for the affidavit and accompanying written report mandated by [section] 2-622. On the 91st day following the filing of Complaint II, HELLER filed another certificate of service which attached a 'letter' from a registered nurse. Though this 'letter' does mention AGAPITO, it suffers from even more deficiencies than Snow's, aside from the fact that it was filed after the expiration of the 90 day extension allowed by [section] 2-622(a)(2). Further, a registered nurse is not a 'physician licensed to practice medicine in all its branches.' See *Shanks v. Memorial Hospital*, 170 Ill. App. 3d 736 (5th Dist. 1988). Accordingly, the combined motion to strike filed by [SHELBY] HOSPITAL and AGAPITO on April 23, 2009, is granted.

HELLER has had OGILVIE'S medical records for over three (3) years and four (4) months. He had until April 21, 2009, to file the required affidavit pursuant to [section] 2-622. He has failed to do so. He has failed to provide any explanation for his failure to do so. The statute of limitations has expired. *O'Casek v. Children's Home and Aid Society of Illinois*, 229 Ill. 2d 421 (2008), offers no relief from these failures. Accordingly, the motion to dismiss filed by [SHELBY] HOSPITAL and AGAPITO on February 10, 2009, pursuant to [sections] 2-619 and 2-622(g), is granted. The same result is mandated with respect to LEVINE'S [section] 2-619 motion to dismiss, which is also granted. Based upon the unique facts and

circumstances of this case, this court exercises its discretion and denies SHASTEEN'S motion to amend filed April 23, 2009. Counts I, II, III and IV of Complaint II filed January 21, 2009, are dismissed, with prejudice."

Plaintiff asserts that the trial court erroneously looked to her lengthy possession of the records to deny her motion to amend. The denial of the motion to amend was an abuse of discretion.

The requirement that plaintiffs support complaints for medical malpractice with an affidavit from a health professional is a technical pleading requirement intended to deter frivolous suits. *Thompson v. Heydemann*, 231 Ill. App. 3d 578, 582, 596 N.E.2d 664, 667 (1992). Although permission to amend rests within the discretion of the trial court, amendments should be liberally allowed in order to enable a claim of malpractice to be determined on its substantive merits and not procedural technicalities. *Steinberg v. Dunseth*, 276 Ill. App. 3d 1038, 1042, 658 N.E.2d 1239, 1243 (1995). In this case, the trial court denied permission to amend based on plaintiff having possessed the medical records for a lengthy amount of time.

The trial court did not base its decision on plaintiff's bad faith or intent to frustrate or on prejudice to defendants. See *Cato v. Attar*, 210 Ill. App. 3d 996, 999, 569 N.E.2d 1111, 1113 (1991); *Ebbing v. Prentice*, 225 Ill. App. 3d 598, 601, 587 N.E.2d 1115, 1117 (1992). Upon refiling, plaintiff was entitled to the period to perfect compliance set forth in section 2-622 of the Code (735 ILCS 5/2-622 (West 2008)). See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 437, 892 N.E.2d 994, 1005 (2008). Absent prejudice or bad faith, the trial court abused its discretion by not allowing plaintiff to amend her pleading to timely comply.

CONCLUSION

Accordingly, the order of the court is affirmed in regards to defendants Levine and

Shelby Ambulance; the portion of the order dismissing Shelby Hospital and Agapito with prejudice is reversed; and the matter is remanded.

Affirmed in part and reversed in part; cause remanded.