

Health Law Update

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Affidavit and Health-Professional's Report Requirements Extended to Medical Battery Claims

The Illinois Appellate Court, Second District, recently re-emphasized the importance of strictly complying with the attorney affidavit and certificate of merit requirements of 735 ILCS 5/2-622 in medical malpractice cases. In *McDonald v. Lipov*, 2014 IL App (2d) 130401, the court addressed whether the plaintiff is required to comply with § 2-622 when pleading medical battery claims. This decision will be useful for attorneys defending medical battery claims, and will be especially useful in quickly disposing of non-meritorious suits.

The Affidavit and Health-Professional's Report Requirements

Section 2-622 of the Illinois Code of Civil Procedure permits the dismissal of a medical malpractice complaint when a plaintiff fails to attach a supporting affidavit of merit. 735 ILCS 5/2-622. The plaintiff must file an affidavit stating that, based on consultation with a health professional, there is a “reasonable and meritorious” cause for filing the action. 735 ILCS 5/2-622(a)(1). The court may dismiss the action with prejudice if the plaintiff fails to comply with the statute. *See Cuthbertson v. Axelrod*, 282 Ill. App. 3d 1027 (1st Dist. 1996). One purpose of § 2-622 is to protect the substantive rights of the parties and deter non-meritorious litigation. *McDonald*, 2014 IL App (2d) 130401, ¶ 28.

Factual Background and Procedure

In *McDonald*, the plaintiff's complaint alleged medical malpractice and medical battery claims. *Id.* ¶ 1. The trial court granted the *pro se* plaintiff three extensions to comply with the affidavit and report requirements of § 2-622. The defendants filed motions to dismiss arguing that the plaintiff's filings did not meet the health-professional's report requirements. *Id.* The court agreed and dismissed the plaintiff's amended complaint with prejudice. *Id.*

On the initial appeal, the plaintiff argued that her amended complaint should not have been dismissed with prejudice and that the trial court erred in determining that all of her claims were based only on medical malpractice. *Id.* ¶ 2. The Second District disagreed with the plaintiff's argument and concluded that the plaintiff's medical malpractice claims required her to comply with § 2-622. *Id.* ¶ 3. The appellate court, however, held that the trial court abused its discretion in dismissing the medical battery allegations with prejudice, and the appellate court remanded the case to allow the plaintiff the opportunity to cure the defective pleadings. *Id.*

On remand, the plaintiff filed a 33-count second amended complaint, which attempted to allege the following claims: (1) medical battery; (2) medical negligence; (3) fraudulent concealment; (4) conspiracy; (5) violations of the Emergency Medical Treatment and Active Labor Act; (6) breach of contract; (7) vicarious liability; and (8) spoliation of evidence. *Id.* ¶ 4. The second amended complaint restated nine claims from the amended complaint and contained fourteen new claims. *Id.* ¶¶ 9-10. Following a new motion to dismiss, the trial court dismissed the second amended complaint with prejudice for failing to state a cognizable claim. *Id.* ¶ 4.

Again, the plaintiff appealed, arguing that § 2-622 did not apply to her medical battery claims. *Id.* ¶ 5. Furthermore, the plaintiff argued that she satisfied the affidavit requirement of § 2-622(a)(3) by verifying the second amended complaint in accordance with § 1-109 of the Code of Civil Procedure. 735 ILCS 5/1-109. On this appeal, the appellate court affirmed. *Id.* ¶ 6.

Appellate Court Analysis

The Second District heavily relied on the recent opinion of a sister district in *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 96. In *Holzrichter*, the Illinois Appellate Court, First District, concluded that the plain and unambiguous language of § 2-622 did not limit the requirement of an affidavit and certifying report solely to medical malpractice claims. *Id.* ¶ 23. The *Holzrichter* court affirmed summary judgment entered against the plaintiff alleging medical battery who failed to file a health professional's report. *Id.* There, the plaintiff claimed that the defendant committed medical battery by exceeding the scope of his consent in severing tendons in a procedure that did not require the medical professional to do so. The court explained that the plaintiff's medical battery action, grounded in tort law, arose from a medical procedure that he claimed went beyond the scope of his consent. *Id.* ¶ 24.

The *McDonald* court agreed with the reasoning in *Holzrichter*, finding that § 2-622 can apply to medical battery claims. *Id.* ¶ 27. The issue was whether the defendants exceeded the surgical parameters to which the plaintiff consented. The salient issue required the assessment of the claims, which were outside the comprehension of a lay person because it required knowledge, skill, or training of a medical professional. Thus, the court held that the plaintiff required a medical expert and a supporting affidavit to sustain her medical battery claims. *Id.*

Conclusion

The affidavit and health professional's report requirements of § 2-622 are intended to deter frivolous medical malpractice suits and medical battery claims at an early stage. The *McDonald* court ultimately dismissed the complaint with prejudice, reiterating the consequences of non-compliance with the requirements outlined in § 2-622. Defense counsel should advocate for the strict compliance with § 2-622 to deter frivolous medical malpractice and medical battery actions.

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