IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Jessica Cervantes, as independent administrator of the estate of Jordyn Cervantes, deceased,	)	
Plaintiff,	)	
v.	)	No. 20 L 5637
Ann and Robert H. Lurie Children's Hospital d/b/a Lurie Children's and) Emily Roben, M.D., Jennifer Colgan, M.D., and Daniel Levine, M.D.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

A motion to dismiss is to be heard and decided before the court and parties bear the expense and inconvenience of litigation. Here, the defendants had ample opportunity to object to the plaintiff's defective pleadings and section 2-622 reports before moving this case forward over the past two years; consequently, they have forfeited those arguments. Further, the plaintiff's health professional report fulfilled the section 2-622 requirements. In sum, the defendants' motion to dismiss count three and motion to dismiss the plaintiff's second amended complaint are denied.

Facts

On December 10, 2019, Dr. Joanne Knapik, a pediatrician, saw Jordyn Cervantes. Knapik noted that Jordyn had an elevated temperature. Knapik contacted Michelle Stelzer at Ann and Robert H. Lurie Children's Hospital ("LCH") heart center for further evaluation and direction. Knapik directed Jordyn's parents to take her to LCH's emergency room. Jordyn arrived at LCH around 3:25 p.m. where doctors examined her. They noted that Jordyn was two-and-a-half months old, had a history of hypoplastic, left heart syndrome, and had previously had an E. Coli urinary tract infection. Around 8:33 p.m., doctors admitted Jordyn to the critical care unit ("CCU"). Shortly thereafter, Jordyn developed a high-grade fever with respiratory distress and poor perfusion. Around midnight, Jordyn's condition worsened, and she went into cardiac arrest.

Jordyn's blood cultures tested positive for group B strep infection. Although Jordyn's condition stabilized, neurological testing revealed

catastrophic neurological injury. Jordyn was later removed from life-sustaining therapies, and she died on December 13, 2019.

On May 26, 2020, Jessica Cervantes, as the independent administrator of Jordyn's estate, filed her initial complaint against LCH and Dr. Emily Roben. Jessica attached a health professional's report as required by the Code of Civil Procedure. 735 ILCS 5/2-622. The 2-622 report stated that the reviewing health professional "is a Board Certified physician specializing in internal medicine and infectious disease, licensed to practice medicine in all of its branches . . . , has practiced medicine within the last five (5) years, and is knowledgeable in the relevant issues involved in this particular action."

On September 3, 2020, LCH and Roben answered the complaint. The parties then engaged in written and oral discovery. On November 5, 2021, after Roben's deposition, Jessica filed an amended complaint adding an institutional cause of action against LCH and lack-of-informed-consent causes of action against both defendants. Count three of the complaint sounds in institutional negligence, and Jessica alleges LCH owed a duty "institutionally, to provide adequate medical care, diagnosis and treatment to its patients, including the Decedent, Jordyn Cervantes." Jessica claims LCH: (1) failed to establish proper evidence-based policies, procedures, and protocols relating to sepsis screening, diagnosis, and treatment in the emergency department; (2) improperly implemented a sepsis screening protocol that failed to follow the established SIRS/sepsis criteria; (3) failed to train its staff properly and adequately train on proper policies, procedures, and protocols relating to SIRS/sepsis diagnosis and treatment; (4) allowed its staff to disregard SIRS/sepsis criteria for diagnosis and treatment of patients with sepsis; (5) failed to have in place an appropriate process for the screening and early recognition and treatment of patients with sepsis in the emergency room; (6) failed to have in place a proper process to treat patients like Jordyn when the CCU had no available bed; (7) improperly instructed Jordyn's parents to bring her to LCH knowing no beds were available in the CCU; (8) had a policy in place allowing LCH physicians to contact the on-call cardiology fellow instead of the heart clinic physicians when Jordyn arrived; (9) failed to have in place a proper process to recognize and treat high-risk patients in the emergency department who would otherwise be directly admitted to the CCU; and (10) failed to have in place a proper process to coordinate timely bed availability between the emergency department and the CCU for patients like Jordyn.

The parties engaged in additional discovery, and on February 17, 2022, Jessica filed a second amended complaint adding Dr. Daniel Levine and Dr. Jennifer Colgan as defendants.

On March 17, 2022, LCH filed a motion to dismiss count three of the second amended complaint. The same day, LCH, Roben, Colgan, and Levine (collectively "defendants") filed a motion to dismiss the entire second amended complaint. Jessica responded, and the defendants replied.

Analysis

I. Motion to Dismiss Count Three

A section 2-615 motion to dismiss attacks a complaint's legal sufficiency. *See DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). A section 2-615 motion must identify the complaint's defects and specify the relief sought. *See* 735 ILCS 5/2-615(a) (2008).

A court considering a section 2-615 motion is to consider only the allegations presented in the pleadings. *See Illinois Graphics*, 159 Ill. 2d at 485. All well-pleaded facts and reasonable inferences arising from them must be accepted as true, *see Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts, *see Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). Conclusory statements cannot state a cause of action even if they generally inform the defendant of the nature of the claims. *See Adkins v. Sarah Bush Lincoln Health Cntr.*,129, Ill. 2d 497, 519-20 (1989). The paramount consideration is whether the complaint's allegations, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action for which relief may be granted. *See Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. If not, section 2-615 authorizes the dismissal of a cause of action. *See DeHart*, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 488. The failure to file an affidavit or report in accordance with section 2-622 of the Code is an appropriate ground for the dismissal of a complaint sounding in "medical, hospital, or other healing art malpractice." 735 ILCS 5/2-622(g); *Ripes v. Schlechter*, 2017 IL App (1st) 161026, ¶ 12.

LCH argues that count three must be dismissed because it fails to state a claim for negligence. Specifically, LCH points to claims it asserts improperly reference the care and treatment provided by individual treaters. As to that argument, it is well established that a defendant may raise at any time a claim that the complaint fails to state a cause of action. *Wagner v. Kepler*, 411 Ill. 368 (1951); *Krachock v. Department of Revenue*, 403 Ill. 148 (1949). This exception applies, however, only if a complaint fails to state a recognized cause of action. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 61-62 (1994). The exception does not apply if the complaint states a recognized

cause of action but contains an incomplete or otherwise insufficient statement of that cause of action. *Id.* This general rule is especially pertinent if the pleading defect can be remedied by amendment. *Gulley v. Noy*, 316 Ill. App. 3d 861, 865 (4th Dist. 2000). Here, LCH does not argue that institutional negligence is not a cause of action, merely that two of the claims do not support the cause of action. Given the principle laid out in *Adcock*, LCH does not have the benefit of the exception.

LCH faces a second hurdle. As a general rule, "objections to a pleading may be waived by failure to urge the objection at the proper time and in the proper manner or by any act which, in legal contemplation, implies an intention to overlook it." *Chimerofsky v. School Dist.*, 121 Ill. App. 2d 371, 374 (1st Dist. 1970). Once a party has filed an amended pleading, the parties waive any objection to the ruling on a former complaint. *See W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill. App. 3d 752, 756 (1st Dist. 2004) (citing *Boatmen's Nat'l Bank v. Direct Lines, Inc.*, 167 Ill. 2d 88, 99 (1995)). To allow a party to introduce allegations related to earlier pleadings would result in confusion and impose an unnecessary burden on a trial judge. *See Foxcroft Townhome Owners Assoc. v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 154 (1983). Given that LCH did not challenge count three after Jessica presented it in the amended complaint, and that count three is identical in the second amended complaint, LCH has forfeited its argument.

II. Motion to Dismiss Plaintiff's Second Amended Complaint

The defendants assert that Jessica's second amended complaint should be dismissed in its entirety pursuant to sections 2-619 and 2-622. A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). A court is not to accept as true those conclusions unsupported by facts. *See Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

Section 2-622 was enacted "to reduce the number of frivolous suits that are filed and to eliminate such actions at an early stage, before the expenses of litigation have mounted." *Christmas v. Hugar*, 409 Ill. App. 3d 91, 97 (1st Dist. 2011) (citing *DeLuna v. St. Elizabeth's Hosp.*, 147 Ill. 2d 57, 65 (1992)).

The statute requires a health professional to review a plaintiff's claim to determine whether it is "reasonable and meritorious," and in the context of a medical malpractice action. *See Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 112 (2004). One of the crucial factual questions is whether the applicable medical standard of care has been violated. *Id.*

Section 2-622 of the Civil Code provides as follows:

> § 2-622. Healing art malpractice.
> (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:
> (1) That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case. . . . If the *affidavit is filed as to a defendant who is a physician* licensed to treat human ailments without the use of drugs or medicines and without operative surgery, a dentist, a podiatrist, a psychologist, or a naprapath, *the written report must be from a health professional licensed in the same profession, with the same class of license, as the defendant. For affidavits filed as to all other defendants, the written report must be from a physician licensed to practice medicine in all its branches.* In either event, the affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit, but information which would identify the reviewing health professional may be deleted from the copy so attached.

735 ILCS 5/2-622(a)(1) (emphasis added). In accordance with the provision's plain language, the pleading requirement of section 2-622 applies to all claims based on medical, hospital, or other healing art malpractice. 735 ILCS 5/2-622(a)(1).

The defendants argue that Jessica's section 2-622 reports are insufficient because the physician who drafted them is board-certified in internal medicine and infectious disease. The defendants point out that Roben, Colgan, and Levine are pediatric emergency medicine physicians; consequently, they argue, a pediatric emergency medicine physician must author the written report. In response, Jessica argues the reports are sufficient because they set forth the physician's qualifications and familiarity with the standard of care for a physician and institution caring for a child, like Jordyn, who presented with signs and symptoms of infection.

Returning to the statute, section 2-622 explicitly states that if:

> the *affidavit is filed as to a defendant who is a physician* licensed to treat human ailments without the use of drugs or medicines and without operative surgery, a dentist, a podiatrist, a psychologist, or a naprapath, *the written report must be from a health professional licensed in the same profession, with the same class of license, as the defendant. For affidavits filed as to all other defendants, the written report must be from a physician licensed to practice medicine in all its branches.*

735 ILCS 5/2-622(a)(1) (emphasis added). Here, none of the defendant physicians fall into any of the specified categories of physicians that require the report's author to be a health professional with the same class of license. Rather, under the present circumstances, the reviewing health professional need only be a physician licensed to practice medicine in all its branches. *See Cutler v. Northwest Suburban Cmty. Hosp., Inc.*, 405 Ill. App. 3d 1052, 1064 (2d Dist. 2010). Here, the physician reports to being a "Board Certified physician specializing in internal medicine and infectious disease, licensed to practice medicine in all of its branches" and has practiced within the last five years. The physician's report plainly meets the standards of section 2-622.

Jessica also emphasizes the defendants' delay in raising their objections to the section 2-622 reports until now. Jessica is correct. A motion to dismiss pursuant to section 2-619 or 2-622 is intended to be heard and decided before the expense and inconvenience of litigation has been borne by either party or the trial court. *Gulley*, 316 Ill. App. 3d at 866. In *Gulley*, the plaintiff had not filed a health professional's report when the defendants filed an answer to the complaint and conducted discovery. *Id.* at 862. The defendants later moved to dismiss the complaint for the plaintiff's failure to file a health professional's report. *Id.* The court found that before the defendants filed their motion to dismiss, their answer and initiation of discovery "manifested an intent to move the case forward, and their omission—their failure to raise their section 2-622 objection for over 2 1/2

years—defendants manifested an intention to overlook [the plaintiff's] failure to file the health professional's report." *Id.* at 866. The court concluded the defendants' delay resulted in forfeiting their right to seek dismissal under section 2-622. *Id.* The court cautioned that to rule otherwise might encourage defendants to sit on their right to seek a dismissal, an outcome precisely opposite to that intended by sections 2-622 and 2-619. *Id.* at 867. As the court explained:

> [I]t would be a complete waste of judicial manpower and court resources to permit defendants to sit by and acquiesce in a plaintiff's prosecution of his claim, with the attendant expenditure of time and money, and then allow them to later attack pleadings that they contend should be dismissed, even though the ground for dismissal was present all along.

Id.

Similarly, the defendants here answered Jessica's initial complaint containing the section 2-622 report in dispute. The parties then conducted two separate rounds of discovery. Over the course of the litigation, Jessica twice amended her complaint and submitted the corresponding 2-622 reports authored by the same physician who authored the first report. Given the defendants' affirmative actions and failure to raise a section 2-622 objection for nearly two years, this court finds that the defendants have forfeited their right to seek a dismissal under section 2-622.

Conclusion

For the reasons presented above, it is ordered that:

1. Lurie Children's Hospital motion to dismiss count three of the plaintiff's second amended complaint is denied; and
2. The defendants' motion to dismiss the plaintiff's second amended complaint is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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