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

Aaron Jones and Rashaan Jones, as co-independent administrators of the estate of Tonia Jones, deceased,	)	
Plaintiffs,	)	
v.	)	No. 20 L 11599
Nursepower Services Corp., an Illinois corporation, and Alpha Home Health Inc., an Illinois corporation, and Alpha Home Care Services, Inc., an Illinois corporation,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Physicians who provide reports attesting to a meritorious cause of medical malpractice are not required to meet the same disclosure standards as a testifying expert witness. In this case, the defendants objected to the plaintiff's section 2-622 report based on technical requirements and the lack of identity of the drafter. That portion of the motion to dismiss must be denied. On the other hand, the motion to dismiss is granted for the lack of substance supporting vicarious liability claims.

Facts

On October 29, 2018, Nursepower Services Corp. ("Nursepower") provided in-home care for Tonia Jones at her residence in Tinley Park. Tonia had cerebral palsy and required a gastro-jejunal tube. Nursepower's licensed practical nurse monitored Tonia's condition and documented her condition. On November 2, 2018, a licensed practical nurse indicated Tonia's condition was worse than on October 29. In the morning of November 3, 2018, Alpha Home Health Inc. and Alpha Home Care Services, Inc. (collectively "Alpha Home Health") provided in-home care for Tonia. Later that day, Tonia went into cardiac arrest and died that evening. Tonia's cause of death was listed as multisystem organ failure and septic shock.

On October 29, 2020, Aaron and Rashaan Jones (collectively "the Joneses") as co-independent administrators of Tonia's estate, filed their original complaint. Counts one and two are Survival Act and Wrongful

Death Act claims against Nursepower. The Joneses allege Nursepower failed to: (1) contact Tonia's physician when her heart rate, temperature, breathing, and oxygen saturation levels were abnormal; (2) follow Tonia's physician's written orders for treatment; (3) communicate Tonia's condition to her family and instruct them to contact her physician or 9-1-1 for emergency assistance; and (4) communicate and coordinate with Alpha Home Health. Counts three and four are Survival Act and Wrongful Death Act claims against Alpha Home Health. The Joneses allege Alpha Home Health failed to: (1) conduct a timely and proper review of Tonia's condition; (2) timely and properly document the necessary medical information concerning Tonia's condition; (3) communicate and coordinate with Nursepower; (4) contact Tonia's physician or alert Tonia's family of her condition; and (5) contact Tonia's physician or 9-1-1 for emergency assistance.

On January 22, 2021, the Joneses attached the physician report as to Nursepower. *See* 735 ILCS 5/2-622. On January 27, 2021, this court granted the Joneses' motion for an extension of time to file their section 2-622 affidavit as to Alpha Home Health. On January 7, 2022, the Joneses filed their second amended complaint at law and attached a physician's report as to Alpha Home Health.

On February 7, 2022, Alpha Home Health filed its motion to dismiss Jones's second amended complaint. That same day, Nursepower filed its motion for leave to join and adopt Alpha Home Health's motion to dismiss. The parties fully briefed the motion.

Analysis

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 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.

The legislature enacted section 2-622 "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 the plaintiff's claim to determine whether it is "reasonable and meritorious" and, in the context of a medical malpractice action, one of the crucial factual questions is whether the applicable medical standard of care has been violated. *See Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 112 (2004).

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

> (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; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for the filing of such action. 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 plain language of this provision, section 2-622's pleading requirements apply to all claims premised on medical, hospital, or other healing art malpractice. 735 ILCS 5/2-622(a)(1).

The defendants argue the Joneses' section 2-622 affidavit is insufficient because it does not comport with the written report requirements, such as the reviewing healthcare professional's name, address, current license number, and state of licensure. Importantly, these were the requirements of 735 ILCS 5/2-622 that were removed by amended in 2005. *See* P.A. 94-677 §330 (eff. Aug. 25, 2005). Section 330 also required section 2-622 report authors to meet the same requirements as the expert witness standards in section 8-2501. *Christmas*, 409 Ill. App. 3d at 99. The Illinois Supreme Court subsequently invalidated the earlier version of the statute because it unconstitutionally limited non-economic damages and the act contained an inseverability provision. *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 250 (2010). "The effect of declaring a statute unconstitutional is to revert to the statute as it existed before the amendment." *Lambert v. Coonrod*, 2012 IL App (4th) 110518, ¶ 19 (citing *Cookson v. Price*, 239 Ill. 2d 339, 341 (2010)). As the prior version of section 2-622 does not contain such specifications for written reports, the Joneses' affidavit comported with the written requirements. *See* 735 ILCS 5/2-622(a)(1).

The defendants also argue the Joneses' section 2-622 affidavit is insufficient because it does not meet the expert witness standards set forth in 735 ILCS 5/8-2501. As established above, the *Lebron* court invalidated those requirements. 237 Ill. 2d at 250. Moreover, the qualifications required to testify at a trial are different from those required by section 2-622(a). *Moyer v. Southern Ill. Hosp. Serv. Corp.*, 327 Ill. App. 3d 889, 900 (5th Dist. 2002). This is because the type of testimony relied on at a trial has no bearing on the requirements of section 2-622. *See Lyon v. Hasbro Indus., Inc.*, 156 Ill. App.

3d 649, 655 (1987) (plaintiff must comply with section 2-622 even if the plaintiff can prove his or her case at a trial without an expert).

The Fifth District addressed this precise issue *Shanks v. Memorial Hospital*, 170 Ill. App. 3d 736 (5th Dist. 1988). There, the plaintiff filed a medical malpractice action against a hospital's nursing staff. At issue in *Shanks* was whether the plaintiff's consultation with a registered nurse fulfilled the requirements of section 2-622(a)(1). The *Shanks* court pointed out, "[i]f the defendant is 'a physician licensed to treat human ailments without the use of drugs or medicines and without operative surgery . . . the health care professional must be one licensed in the same profession as the defendant." *Shanks*, 170 Ill. App. 3d at 739 (quoting Ill. Rev. Stat. 1985, ch. 110, par. 2-622(a)(1)). The *Shanks* court stated, "[f]or all other defendants, however, the health care professional must be a 'physician licensed to practice medicine in all its branches.'" *Id.* at 739 (quoting Ill. Rev. Stat. 1985, ch. 110, par. 2-622(a)(1)). The *Shanks* court determined that since the defendant-hospital fell into the category of "all other defendants," the plaintiff was required to consult a physician licensed to practice medicine in all its branches. The court then stated that the plaintiff's consultation with a registered nurse did not comply with the requirements of section 2-622(a)(1). *Id.*

The *Shanks* decision states that section 2-622(a)(1) defines the type of health care professional to be consulted based on the type of defendant sued. Hospitals and nurses fall under the second category of "all other defendants." That portion of the statute provides for all other defendants, the health care professional must be a physician licensed to practice medicine in all its branches. Hence, if a plaintiff is suing a hospital or a nurse, the plaintiff must still attach a report from a physician, according to the statute. *Lyon*, 156 Ill. App. 3d at 655. In sum, the Joneses' physician affidavits properly complied with the requirements of section 2-622(a)(1) because nurses fall within in the meaning of "all other defendants."

The defendants urge this court to apply *Christmas*, in which the appellate court struck down a physician's report that was not prepared by a physician with the same class of license. 409 Ill. App. 3d 91. The defendants contend this decision established more stringent requirements for physician reports and since the physician who authored the Joneses' reports is not a licensed nurse, they cannot meet the "same class of license" requirement. *Christmas* is, however, readily distinguishable because the defendants were podiatrists. *Id.* at 92. As a result, their occupation triggered a different section of the statute, the one addressing physicians who do not use drugs or medicines and who do not conduct surgery. 735 ILCS 5/2-622(a)(1). The court found that because the osteopathic physician who prepared the report

was not in the same class of license as the podiatrists, the report was invalid. *Id.* at 100. As established above, nurses fall within the category of "all other defendants" and therefore, a section 2-622 report must be prepared by a physician licensed to practice medicine in all its branches. In sum, despite the defendants' assertions to the contrary, *Christmas* did not create more stringent requirements for physician reports.

The defendants are, however, correct that the Joneses' reports are insufficient because they fail to identify the specific defendant nurses whose conduct would impose vicarious liability on the other defendants. In the event that multiple defendants are named in a single medical malpractice action, the statute requires a separate health professional's written report for each defendant. 735 ILCS 5/2-622(b). A single report may satisfy the requirements of section 2-622 if the report is sufficiently broad to cover multiple defendants, adequately discusses the deficiencies in the medical care rendered by each, and contains reasons in support of the conclusion that a reasonable and meritorious cause exists for the filing of the action as against each of the defendants. *Comfort v. Wheaton Family Practice,* 229 Ill. App. 3d 828, 832 (2d Dist. 1992); *Premo v. Falcone,* 197 Ill. App. 3d 625, 632 (2d Dist. 1990); *Hagood v. O'Conner,* 165 Ill. App. 3d 367, 373-74 (3d Dist. 1988).

The Joneses assert their reports are sufficient because their claims against the defendants are premised solely on agency and vicarious liability. While it is true that no report need be filed as to a defendant whose claimed liability is wholly vicarious, *Comfort,* 229 Ill. App. 3d at 833-34, the Joneses assume they complied with section 2-622 in their claims against the individual defendants alleged to have been the hospital's agents or employees. *See Mueller v. North Suburban Clinic,* 299 Ill. App. 3d 568, 573 (1st Dist. 1998).

Under the *respondeat superior* doctrine, a health care provider may be liable for a physician's misconduct if an employer-employee or principal-agent relationship exists. *Alford v. Phipps,* 169 Ill. App. 3d 845, 859 (4th Dist. 1988). This form of vicarious liability is independent from the liability for failing to review and supervise the medical care administered to patients by employees and agents. *Id.* at 858; *see Rohe v. Shivde,* 203 Ill. App. 3d 181, 198-99 (1st Dist. 1990) (examples of failing to review or supervise). If a suit is brought against an employer based on an employee's alleged acts, and no independent acts are alleged against the employer, the employer's liability is entirely derivative. *Kirk v. Michael Reese Hosp. & Med. Cntr.,* 117 Ill. 2d 507, 533 (1987); *Rohe,* 203 Ill. App. 3d at 198. For an employer to be vicariously liable, however, its employees must have incurred liability.

In this case, neither the Joneses' second amended complaint nor their section 2-622 reports identify the individual nurses who allegedly acted negligently. The defendants also correctly point out that despite the Joneses' characterization of the claims as vicarious, they are essentially direct claims. Thus, the Joneses have failed to plead adequately the grounds necessary for vicarious liability.

Conclusion

For the reasons presented above, it is ordered that:

1. That portion of the defendants' motion to dismiss based on technical requirements and the lack of the identify of the drafter is denied;
2. That Portion of the defendants' motion to dismiss based on the lack of substance supporting vicarious liability claims is granted; and
3. The plaintiffs are given leave to file their third-amended complaint by July 1, 2022, with a corresponding section 2-622 report identifying the specific conduct of the six individual employees that would form the basis of vicarious liability claims.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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