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

Thomas Scott Kempner, as special administrator of the estate of Steven Kempner, deceased,	)	
Plaintiff,	)	
v.	)	No. 22 L 1102
Northwestern Memorial Hospital, Jennifer R. Brown, APN, and Highland Park CVS, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

A plaintiff asserting a negligence claim against a pharmacy is not required to file a certificate and written report pursuant to Code of Civil Procedure section 2-622. For that reason, the defendant's motion to dismiss based on the plaintiff's failure to abide by that statute is denied.

Facts

For approximately 11 months, Steven Kempner was a patient of advanced practice nurse (APN) Jennifer Brown in Northwestern Memorial Hospital's pain management section. During that time, Brown had prescribed Kempner Hydrocodone and Oxycodone. In addition to the Hydrocodone and Oxycodone, Steven had also been prescribed Diazepam, Lidoderm, Omeprazole, Prednisone, Pregabalin (Lyrica), Quetiapine, Ventolin HFA inhaler, Advair, Citalopram, Cyclobenzaprine, Zithromycin, and Diclofenac. Steven purchased all of his medications from a pharmacy operated by Highland Park CVS, LLC (CVS).

On November 16, 2020, Steven died of accidental Hydrocodone, Oxycodone, and Diazepam toxicity. On February 2, 2022, Thomas Scott Kempner, as special administrator of Steven's estate, filed a three-count complaint against the defendants. The complaint asserts wrongful death counts against Northwestern, Brown, and CVS. Kempner alleges that the medications sold by CVS "have over 12 significant drug interactions for which therapy modifications or avoid the combinations were recommended in drug interaction references available to CVS and APN Brown." Pursuant to Code of Civil Procedure section 2-622, Kempner attached an affidavit asserting that the causes of action against Northwestern and Brown were reasonable and meritorious. The reviewing health care professional's

report attached to the complaint primarily addresses the conduct of Northwestern and Brown.

CVS filed a motion to dismiss the cause of action directed against it. CVS argues that Kempner's section 2-622 affidavit and report are deficient to keep CVS in the case. CVS expressly reserved its right to assert other defenses at future proceedings. The parties fully briefed the motion.

Analysis

CVS argues that Kempner's claim must be dismissed for failing to comply with the pleading and certification requirements of the Code of Civil Procedure. Specifically, Code section 2-622 that, "[i]n any action . . . in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice," a plaintiff must submit a certificate of merit stating that a qualified, licensed health professional has reviewed the case and determined in a written report that the lawsuit is reasonable and meritorious. 735 ILCS 5/2-622. CVS argues that Kempner's section 2-622 certificate and report are deficient in several respects.

CVS's arguments raise a threshold issue of whether section 2-622 certificates and reports are required for claims made against pharmacies. To argue that they are, CVS cites two federal court cases: *Happel v. Wal-Mart Stores, Inc.*, 286 F. Supp. 2d 943 (N.D. Ill. 2003), and *In re Yasmin & Yaz*, Nos. 3:09-md-02100 & 3:10-cv-0322, 2010 WL 4904488 (S.D. Ill. Nov. 24, 2010). As federal district court cases, these opinions are not precedential in Illinois courts. As discussed immediately below, these cases are also not persuasive.

The *Happel* court held that a section 2-622 certificate and report were required for a negligence claim against a pharmacy because that claim was premised on the pharmacy's failure to warn of a prescription's contraindications. 286 F. Supp. 2d at 947. In the eyes of the *Happel* court, providing such a warning was a "healing art" that triggered the additional pleading requirements of section 2-622 in the narrow circumstances in which the law recognized a pharmacy's duty to warn. *Id.* at 946-47; *see also Happel v. Wal-Mart Stores*, 199 Ill. 2d 179, 193 (2002) (denying learned intermediary defense to pharmacy that had specific knowledge of contraindications in plaintiff's medical history and recognizing duty to warn in such circumstances). Here, Kempner does not allege that CVS failed to warn Steven about the drugs it sold him, but rather merely alleges that CVS was unreasonable in selling the drugs in the combinations and quantities it sold to Steven under the circumstances. *Happel*'s reasoning is, therefore, inapplicable.

The *Yasmin & Yaz* court similarly considered a claim premised on a pharmacy's failure to warn of the dangers of a drug sold to the plaintiff. 2010 WL

4904488 at *2. The court followed *Happel* in holding that the claim was a healing art malpractice claim, and then declined to recognize a claim for the breach of implied warranty of merchantability. *Id.* at *5. Under the Illinois Commercial Code (ICC), breach of warranty claims apply to transactions in goods, *see* 810 ILCS 5/2-102, but the *Yasmin & Yaz* court concluded after a clumsy application of Illinois contract law that the sale of pharmaceutical drugs was a provision of services rather than goods. 2010 WL 4904488 at *5. In doing so, the court drew a dubious analogy to *Brandt v. Boston Scientific Corp.*, 204 Ill. 2d 640 (2003), in which the Illinois Supreme Court found no implied warranty of merchantability on the surgical implantation of a transvaginal mesh device because surgical implantation is a service. *Yasmin & Yaz*, 2010 WL 4904488 at *5 (vaguely characterizing the *Brandt* transaction as "the sale of a medical device . . . in conjunction with the provision of other healthcare services"); *see also, Brandt*, 204 Ill. 2d at 652-53 (finding purchase of device incidental to treatment of patient's urinary incontinence).

CVS argues that this court should follow *Yasmin & Yaz* and dismiss Kempner's claim because it is a breach of implied warranty claim. Were that the case, Kempner would need to prove: "(1) a sale of goods; (2) before the sale the seller had reason to know (a) a particular purpose for which plaintiff bought the goods, and (b) that [he] was relying on the seller's skill to select goods suitable for that purpose; and (3) the goods were not suitable for that particular purpose." *See Rubin v. Marshall Field & Co.*, 232 Ill. App. 3d 522, 526-27 (1st Dist. 1992). Plainly, Kempner alleges only the sale of goods in his claim, which, instead, sounds in ordinary negligence. Thus, regardless of CVS's basis for treating prescription drug sales as contracts for services rather than goods, the unavailability of breach of implied warranty claims in service contracts is irrelevant.

Even if Kempner's claim were construed as a breach of implied warranty claim, this court is not convinced that *Yasmin & Yaz* was correctly decided. The ICC defines goods as "all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale." 810 ILCS 5/2-105(1). On the other hand, contracts for the rendition of services are governed by common law. *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 119 Ill. 2d 325, 352-53 (2002). If a transaction involves the exchange of both goods and services, Illinois courts apply the "predominant purpose" test to determine which set of contract rules governs the transaction. *Id.* at 352. As its name suggests, this test looks to the predominant purpose of the transaction, aiming to discern whether the sale of goods was predominant and the rendition of services incidental, or *vice versa*. *Id.* at 352-53 (citing *Zielinski v. Chris W. Knapp & Son*, 277 Ill. App. 3d 735, 741 (3d Dist. 1995)). The relative proportion of goods and services involved in the transaction is relevant to this analysis. *Brandt*, 204 Ill. 2d at 652 (citing *Tivoli Enters. v. Brunswick Bowling & Billiards Corp.*, 269 Ill. App. 3d 638, 646-47 (2d Dist. 1995)).

The *Yasmin & Yaz* court correctly noted that prescription drugs are goods under the ICC's definition, 2010 WL 4904488 at *4; nonetheless, the court found that the sale of prescription drugs was incidental to the services associated with the practice of pharmacy. *Id.* at *4-5. The court relied on provisions of the Illinois Pharmacy Practice Act, 225 ILCS 85/1 *et seq.*, which defined the practice of pharmacy to include:

> [T]he interpretation and the provision of assistance in the monitoring evaluation and implementation of prescription drug orders[;] patient education on the proper use or delivery of medications[;] provision of patient counseling [to include the] facilitation of the patient's understanding of the intended use of the medication[;] provision of those acts or services necessary to provide pharmacist care[; and] medication therapy management[.]

Id. at *4 (citing 225 ILCS 85/3(d)(1-10), (r)). The court also cited *Walgreen Co. v. Selcke*, 230 Ill. App. 3d 442, 451 (1st Dist. 1992), for the proposition that "the practice of pharmacy involves more than pulling packages from a shelf and ringing up a sale[.]" *Id.*

While it may be true that a pharmacy does more than sell prescription drugs, it does not follow that such sales are predominated by services. What the Pharmacy Practice Act requires of a pharmacy is distinct from what a customer transacts with a pharmacy to do. The *Selcke* court recognized this. *Selcke* concerned an administrative finding that Walgreen had permitted unlicensed employees to engage in the practice of pharmacy by inputting prescription information into a pharmacy computer, pulling drugs off of the shelf for use by the pharmacist, and handing prescriptions to customers at the cash register. 230 Ill. App. 3d at 447-48. In affirming the circuit court's reversal of the administrative finding, the First District drew a clear distinction between the pharmacy's conduct at the point of sale and "functions implicating the professional skill of a pharmacist." *Id.* at 450-51. Because the practice of pharmacy focused more heavily on the "professional skill" functions, the conduct of Walgreen's unlicensed employees strictly as to the business functions was insufficient to find that it had engaged in unlicensed practice of pharmacy. *Id.* at 453.

The *Selcke* decision followed the supreme court's guidance in *Miller v. Department of Registration & Educ.*, 75 Ill. 2d 76 (1979). The *Miller* court held that the definition of pharmacy practice "emphasizes the performance of acts requiring professional study and training in the science of pharmacy, rather than the business aspects of the practice of pharmacy." *Miller*, 75 Ill. 2d at 82. Relying on this distinction, the court concluded that the Department of Registration and Education could not revoke the appellee pharmacists' licenses for the payment of bribes and kickbacks to nursing homes because such payments were "not concerned

with the exercise of the professional skill of a pharmacist, the focus of the definition of the practice of pharmacy." *Id.* at 83.

While the distinction between business and professional functions offers protection to pharmacies on the licensing front by removing business functions from the licensing criteria in the Pharmacy Practice Act, a corollary of that rule is that the business functions of pharmacy practice do not include the professional services listed in the Pharmacy Practice Act. The sale of prescription drugs—a business function—is, therefore, a contract for goods rather than services. Indeed, the sale of prescription drugs is similar to sales of goods in other highly regulated industries in which a seller's compliance with regulations has never been thought to transform its sales into contracts for services.

This conclusion does not conflict with *Brandt* because the plaintiff's treatment in that case involved much more than the purchase of the medical device. 204 Ill. 2d at 651-52. Beyond the surgical procedure to implant the device, the hospital provided operating and hospital rooms, medical testing, and other forms of treatment. *Id.* The purchase of the medical device was incidental to these services in part because the device would be useless without them, such that the device would not be sold without the services. *Id.* at 652 (analyzing "the predominate nature of the transaction as a whole"). The sale of prescription drugs, on the other hand, can occur irrespective of whether a pharmacy performs the services associated with pharmacy practice under the Pharmacy Practice Act, and the record in its present state offers nothing to show that CVS actually performed those services here. *Cf. id.* Moreover, the services provided in *Brandt* had discrete charges associated with them that outweighed the discrete charges associated with the sale of the medical device and other goods. *Id.* Nothing in the record suggests that CVS similarly charged customers separately for the services it performed and the drugs it sold, much less that the former outweighed the latter. *Cf. id.* Finally, to conclude that the sale of prescription drugs was a service contract would actually contradict *Brandt*'s application of the predominant purpose test that expressly considered the sale of pharmaceuticals as weighing in favor of finding a contract for goods. *Id.*

It remains to be determined whether the sale of prescription drugs is a healing art triggering the heightened pleading standards of section 2-622. CVS does not provide a single example of an Illinois court requiring a section 2-622 report for a claim against a pharmacy. Notably, in *Brandt*, the Fourth District held that a section 2-622 report was not required to state the plaintiff's breach of warranty claim, because the provision of the medical device was not a healing art—an issue not raised on appeal to the supreme court. *Id.* at 644. Against this backdrop, the test for distinguishing a healing arts malpractice claim from an ordinary negligence claim involves consideration of three factors: "(1) whether the standard of care involves procedures not within the grasp of the ordinary lay juror;

(2) whether the activity is inherently one of medical judgment, and (3) the type of evidence that will be required to establish the plaintiff's case." *Jackson v. Chicago Classic Janitorial & Cleaning Servs., Inc.*, 355 Ill. App. 3d 906, 909 (1st Dist. 2005); *see also id.* at 911-13 (applying factors).

With respect to the first factor, the sale of prescription drugs is sufficiently within the grasp of the ordinary lay juror, because the ordinary lay juror has most likely purchased prescription drugs and is aware that some drugs should not be combined with other drugs or taken in certain quantities. Thus, the first factor weighs in favor of construing Kempner's claim as one of ordinary negligence. *See id.* at 911. The second factor also weighs in favor of an ordinary negligence claim because the sale of prescription drugs is one of business rather than medical judgment. To the extent that medical judgment is necessary to facilitate drug sales, that judgment is made by physicians—or APNs, as here—rather than pharmacists. It also bears repeating that Kempner's claim is not premised on CVS's failure to warn, which may be more akin to activity requiring inherent medical judgment. The third factor may weigh in favor of a healing art malpractice claim because expert testimony could be necessary to establish the pharmacy's standard of care, particularly with respect to the quantities and combinations of opioids sold that would be unreasonable. *See id.* at 912. It is also possible, however, that the standard of care in this case will be established on the basis of CVS's administrative policies or other evidence short of medical expert testimony, *see id.*, and in any case, the need for medical expert testimony is not dispositive. *See, e.g., Milos v. Hall*, 325 Ill. App. 3d 180, 184 (5th Dist. 2001). In sum, the *Jackson* factors and Illinois case law support the conclusion that Kempner's claim is an ordinary negligence claim.

Conclusion

For the reasons presented above, it is ordered that:

Defendant Highland Park CVS, LLC's motion to dismiss is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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