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

David Schlessinger,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 L 11338
	)	
Swedish Hospital and Northshore University Healthsystem,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

A motion to reconsider should be granted if the judge misapplied the law in a previous ruling. In this instance, this court did not misapply the law requiring the plaintiff to attach a health care professional's report to a complaint for medical negligence. For that reason, the plaintiff's motion to reconsider must be denied.

Facts

On March 25, 2021, this court issued an order granting Swedish Hospital's and Northshore University Healthsytem's combined motion to dismiss David Schlessinger's first amended complaint. The order granted the motion without prejudice as to count one (medical battery), count two (negligence), and count three (willful and "wonton" conduct). The order granted Schlessinger leave to file an amended complaint with a health professional's report attached as required by the Code of Civil Procedure. 735 ILCS 5/2-622(a). The order also dismissed with prejudice Schlessinger's prayer for punitive damages.

Rather than amend with the necessary section 622 report, Schlessinger filed a motion to reconsider. In that motion,

Schlessinger argues his first amended complaint had deleted any references to medical malpractice and, therefore, a section 622 report was unnecessary. Schlessinger repeats his contention that he is pleading only medical battery based on his refusal to be "touched or treated by any students." Mtn. Recon. at 2-3. On that basis, Schlessinger argues this court misapplied the law by requiring him to attach a section 622 health care professional's report to his first amended complaint.

Schlessinger's first amended complaint contains numerous allegations as to the Swedish medical staff's alleged negligent treatment of him when drawing his blood, measuring blood pressure and temperature, testing blood sugar levels, and moving him. He also alleges the staff failed to empty his urinal, forcing him to urinate in his bed, or that they failed to change his bedding, clean a bedside table, and provide him with food and water. Schlessinger also alleges that Swedish staff made fun of him, laughed at him, ridiculed him, antagonized him, tortured him, and possibly poisoned him.

Analysis

The purpose of a motion to reconsider is to bring to the trial court's attention a change in the law, evidence unavailable at the time of the previous decision, or the trial court's error in applying the law. *Horlacher v. Cohen*, 2017 IL App (1st) 162712, ¶ 79 (citing cases). Schlessinger, in this instance, and as is most often the case, argues this court misapplied the law. This court disagrees with that conclusion as explained below.

Section 2-622 requirements may apply to causes of action other than medical malpractice. *Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 150067, ¶ 28. A section 2-622 report is required, for example, if the conduct alleged is "beyond the ken of a layperson and requires a medical expert's opinion to help the jurors understand." *Id.* (citing *McDonald v. Lipov*, 2014 IL App (2d) 130401, ¶¶ 24, 27). That distinction is important because, as *McDonald* cautioned, "'[a] plaintiff challenging an

implicit part of the medical treatment should not be able to avoid the requirement of an expert medical opinion simply by claiming medical battery or something other than medical malpractice.'" *Id.* at ¶¶ 28 (quoting *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 88). In other words, "a court will look beyond a party's characterization of the claim and will examine the underlying allegations or facts to determine whether they raise issues requiring expertise to aid in the understanding of matters beyond the ken of laypersons." *Id.* at ¶ 29. In *McDonald*, the plaintiff pleaded a medical battery cause of action, but her claims alleged the defendant's treatment substantially deviated from the consent she granted. *McDonald*, 2014 IL App (2d) 130401, ¶ 21. The court ultimately held that McDonald's allegations stated a cause of action for medical malpractice and, therefore, required a section 2-622 health professional's report opining that a meritorious claim existed given that the alleged treatment went beyond McDonald's explicit consent. *Id.* ¶ 27.

Schlessinger's overarching argument is that he is not pleading a medical negligence cause of action, but one for medical battery. That argument is belied as a matter of fact based on the following statements taken from the first amended complaint (emphasis added):

Paragraph 13	"he made it clear to all the doctors and nurses *treating* him"
Paragraph 14	"Plaintiff's refusal to allow students to touch and/or *treat* him" "Swedish forced Plaintiff to be touched and *treated* by these students"
Paragraph 15	"to prevent any further touching and/or *treatment* of him"
Paragraph 16	"concerns of continuously being touched and/or *treated* by these students"
Paragraph 17	"students would no longer touch and/or *treat* him"
Paragraph 18	"students would no longer touch and/or *treat* him"
Paragraph 19	"Plaintiff did not want these students to touch and/or *treat* him"

Paragraph 48	"Plaintiff's right to withhold consent and refuse *treatment*"
Paragraph 49	"that he not be touched and/or *treated* by . . . students"
Paragraph 51	"to endure touching and/or *treatment*"
Paragraph 59	"personal decision of his right not to be touched and/or *treated* by Swedish's students"
Paragraph 61	"Plaintiff refused touching and/or *treatment* from Swedish's students"
Paragraph 70	"his right not to be touched and/or *treated* by Swedish's students"
Paragraph 72	"Plaintiff refused touching and/or *treatment* from Swedish's students" "nothing to prevent Plaintiff from being touched and/or *treated* by them"

Even if Schlessinger's use of the word "treat" in its various forms is merely imprecise, the substance of his pleading unquestionably alleges negligent treatment. For example, Schlessinger alleges improper care and treatment when students drew blood, took his blood pressure and temperature, tested his blood sugar, and moved him. While each of those procedures required touching, they are, quite plainly, medical procedures. Schlessinger further alleges that Swedish's medical staff failed to empty his urinal forcing him to urinate in his bed, failed to change his bedding, clean a bedside table, and provide him with food and water. None of those failings required Swedish personnel to touch Schlessinger, nonetheless, they constitute medical care and treatment. Schlessinger also alleges that Swedish staff made fun of him, laughed at him, ridiculed him, antagonized him, tortured him, and possibly poisoned him. Again, this alleged conduct did not require Swedish staff to touch Schlessinger, but unquestionably implicates whether the Swedish staff violated standards of patient care. In sum, a section 622 report is necessary to support Schlessinger's claims regardless of the name he gives to his causes of action.

As a legal matter, Schlessinger's allegations require a section 622 report. As noted above, an expert opinion is needed if

the conduct alleged is "beyond the ken of a layperson and requires a medical expert's opinion to help the jurors understand." *Fiala*, 2015 IL App (2d) 150067 at ¶ 28. In this case, it is beyond the ken of an average juror to understand how Swedish medical staff could have treated Schlessinger without touching him. Further, an average juror would not be expected to understand whether Swedish breached standards of care by allowing students, as opposed to non-students, to treat Schlessinger. Also, a jury could not be expected to know whether the particular care given or withheld by Swedish violated standards of patient care and treatment. Plainly, an expert opinion is necessary as a matter of law.

As a final note, clarification is necessary as to this court's prior dismissal with prejudice of Schlessinger's prayer for punitive damages. Such a remedy may not be included in a complaint. 735 ILCS 5/2-604.1. Rather, a plaintiff must at a later point file a motion to amend a complaint to seek such relief. *See id.* This court's previous dismissal of the punitive claim from the complaint was, therefore, correct; however, it should be without prejudice so that Schlessinger may at some future point file a motion seeking such damages.

Conclusion

For the reasons presented above, it is ordered that:

1. The plaintiff's motion to reconsider is denied;
2. The plaintiff has until July 14, 2021, with no extension possible, to file an amended complaint with a section 622 report attached; and
3. The March 25, 2021 order is modified to indicate that the plaintiff's prayer for punitive damages is granted without prejudice so that he may, at a later point file a motion seeking those damages.

Judge John H. Ehrlich

JUN 09 2021

Circuit Court 2075

John H. Ehrlich, Circuit Court Judge