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

GLADYS VENSON, individually and as next of kin of MARY ARMSTEAD, deceased,

Plaintiff,

v.

ADVOCATE SOUTH SUBURBAN HOSPITAL HAZEL CREST, a not-for-profit corporation, by and through its agents and employees,

Defendant.

No. 20 L 5810

ORDER

One purpose of Illinois' fact pleading requirement is to provide a defendant with sufficient notice of the facts underlying a cause of action. In this case, the plaintiff's allegations as to various causes of action are incomplete while others are inherently flawed as a matter of law and are incapable of being cured. For these reasons, the defendant's motion to dismiss is granted in part, with prejudice, and denied in part, without prejudice.

Facts

On June 1, 2018, Mary Armstead, now deceased, was a patient at Advocate South Suburban Hospital Hazel Crest. Armstead presented to Advocate for an above-knee amputation as a result of complications from gangrene and ischemia in her right leg. Armstead's daughter, Gladys Venson, signed Advocate's "Permission for Limb Disposal" form on Armstead's behalf, indicating the option: "I elect to contact a funeral director of my choice and arrange for the burial and/or cremation of

these remains at my expense." Venson intended to have Armstead's amputated leg buried by the Burton Funeral Home after the surgery. On June 1, 2018, doctors at Advocate performed the surgery and amputated Armstead's right leg above the right knee.

On January 17, 2019, Armstead died. Barton later contacted Advocate to retrieve the limb so it could be buried with Armstead's remains. Advocate told Barton that Advocate had previously disposed of the limb. When Venson learned that Advocate had disposed of her mother's limb, she collapsed in a state of shock. On January 26, 2019, Armstead was buried without the amputated limb.

On May 20, 2020, Venson filed her complaint with counts of: (1) tortious interference with the right to possess a corpse; (2) negligence; (3) willful and wanton conduct barring next of kin from determining time, manner, and place of burial; (4) intentional infliction of emotional distress; and (5) Family Expense Act. The complaint alleges that, based on information and belief, Advocate's policy and procedure was to keep an amputated limb in custody for one year until a funeral home retrieved the limb. Advocate's response to Venson's request to admit denied Advocate had such a policy. Ex. E, Plntf's Resp. to Def's Mtn. to Dismiss, ¶ 11. Venson has offered no affidavits or other documentation supporting her assertion.

On September 3, 2020, Advocate filed its motion to dismiss. On October 13, 2020, Venson filed her response with accompanying exhibits. On November 4, 2020, Advocate filed its reply.

Analysis

The Code of Civil Procedure authorizes a combined motion to dismiss under sections 2-615 and 2-619. *See* 735 ILCS 5/2-619.1. Section 2-615 allows a party to object to a pleading or portion of it as "substantially insufficient in law[.]" 735 ILCS 5/2-615. A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on facially apparent defects. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). In reviewing the sufficiency of a complaint, courts accept all well-pleaded facts, and all reasonable inferences drawn from

those facts, as true. *Id.* Courts also construe the allegations in the light most favorable to the plaintiff. *Id.* Thus, a court should not dismiss a cause of action unless it is "clearly apparent" that no set of proven facts would entitle recovery. *Id.*

As a fact-pleading jurisdiction, Illinois requires plaintiffs to allege sufficient facts to bring a claim within a legally recognized cause of action. *Id.* at 429-30. Plaintiffs need not prove their case, but must allege sufficient facts to state all the elements of their causes of action. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (1st Dist. 2008). Mere conclusions are insufficient. *Marshall*, 222 Ill. 2d at 430.

A section 2-619 motion to dismiss admits the legal sufficiency of a complaint, but raises defects, defenses, or some other affirmative matter appearing on the face or by external submissions, that defeat the plaintiff's claim. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of easily proven factual issues. *Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 115 (1993). When considering a section 2-619 motion, a court must construe all pleadings and supporting matter in the light most favorable to the non-movant. *Doe v. University of Chi. Med. Ctr.*, 2015 IL App (1st) 133735, ¶ 35. Dismissal is appropriate only if no set of provable facts support a cause of action. *Id.*

Section 2-619(a)(9) authorizes the dismissal of a complaint if affirmative matter outside the pleading bars the claim asserted by avoiding the legal effect or defeating the claim. *Doe*, 2015 IL App (1st) 133735, ¶ 37. "Affirmative matter" encompasses any type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of fact contained or inferred from the complaint. *Id.* ¶ 38. The affirmative matter must do more than contest or refute a well-pleaded fact and be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. *Id.* ¶¶ 37, 39.

Crematory Regulation Act

Advocate notes that Venson originally brought her claim pursuant to the Crematory Regulation Act and the common law causes of action of tortious interference with the right to possess a body and intentional infliction of emotional distress. Advocate argues that Venson has failed to plead facts sufficient to state a cause of action under any of the avenues. In response, Venson stated that the Crematory Regulation Act was not the driving force of her cause of action. Regardless, the Crematory Regulation Act provides a private cause of action. *See Rekosh v. Parks*, 316 Ill. App. 3d 58, 72 (2nd Dist. 2000). Thus, when Venson re-pleads her complaint, as explained further below, she may bring a private cause of action under the statute[1] if she can allege specific statutory violations that caused her severe emotional distress. *Id.*

Count 1 – Tortious Interference with the Right to Possess a Corpse

Count one of Venson's complaint claims Advocate is liable for the tortious interference with the right to possess a corpse (TIRPC). TIRPC is a "distinct and independent tort that has a settled place in Illinois jurisprudence. It arises from the next of kin's common-law right to possess and make appropriate disposition of a decedent's remains and from the correlative duty not to interfere wrongfully with that right." *Cochran v. Securitas Sec. Servs. USA*, 2017 IL 121200, ¶ 24. In Illinois, "the next of kin have a quasi-property right to possession of a decedent's remains in order to make appropriate disposition thereof." *Drakeford v. University of Chicago Hosp.*, 2013 IL App (1st) 111366, ¶ 14 (1st Dist. 2013) (citing *Rekosh v. Parks*, 316 Ill. App. 3d 58, 68 (2nd Dist. 2000) and *Leno v. St. Joseph Hosp.*, 55 Ill. 2d 114, 117 (1973)). Importantly, the actionable tort "is the interference with the plaintiff's right to possess the decedent's remains, *not* the infliction of the resulting mental distress." *Cochran*, 2017 IL 121200, ¶ 24 (emphasis in original).

[1] Advocate admits that a portion of its building holds and cremates remains. Advocate may, therefore, be a "crematory" under the statutory definition. *See* 410 ILCS 18/5.

It is plain, however, that a TIRPC cause of action applies only to human remains, not amputated body parts. An amputated leg is not within the definition of "human remains," especially in instances such as this in which Armstead was still alive after her amputation. If the opposite were true, a TIRPC cause of action would exist for the disposal of tissue samples taken from a patient during a routine medical examination, a biopsy, or a surgery. That cannot be the correct result. For this reason, count one must be dismissed, but without prejudice.

If Venson chooses to re-plead this cause of action, she must address the following issue:

- Venson must plead that there exists a legal duty to include amputated limbs removed from the decedent prior to death in order to have an "appropriate" or "decent" burial. *See Cochran*, 2017 IL 121200, ¶ 24; *Drakeford*, 2013 IL App (1st) 111366, ¶ 14; *Leno*, 55 Ill. 2d at 119. The only similar case in Illinois is *Mensinger v. O'Hara*, 189 Ill. App. 48 (1st Dist. 1914), in which the plaintiff-widower alleged the defendant-undertaker had interfered with his right to possess his wife's corpse by cutting off the "beautiful head of hair" she had at the time of death. *Id.* at 49-50. The defendants had "cut[ ] off and remov[ed] the hair from the head of the said dead body and otherwise mutilate[ed] the same" making the corpse "unfit to be viewed by the plaintiff and his relatives and friends. . . ." *Id.* (internal quotations omitted). *Mensinger* is distinguishable, however, because Venson does not allege that Advocate removed any portion of or mutilated Armstead's corpse postmortem. Further, Illinois appellate court decisions made prior to 1935 have no precedential authority. *See Krivokuca v. City of Chicago*, 2017 IL App (1st) 152397, ¶ 8, n.1 (citing *North Shore Comm. Bk. & Trust Co. v. Kollar*, 304 Ill. App. 3d 838, 844 (1st Dist. 1999)).

Count 2 – Negligence

To plead negligence, Venson must "allege[ ] a legally cognizable duty, a breach of that duty by defendant, and injuries proximately caused by that breach." *Cochran*, 2017 IL 121200, ¶ 26. The current

negligence allegations in count two are patently insufficient to state a proper cause of action.

The "Permission for Limb Disposal" form attached as exhibit C to Venson's response brief states that she, "elect[s] to contact a funeral director of [her] choice and arrange for the burial and/or cremation of these remains at [her] expense."[2] The document's contents directly contradict Venson's allegations in count two indicating that she "wished to retain the leg so that her mother, Mary Armstead, would be buried whole" and that the document "assumed a duty not to interfere with Plaintiff's right to possess the leg." Cmplt. ¶¶ 34-35. Yet the document contains no such expression of Venson's wishes, nor does it indicate that Advocate "assum[ed] the duty of custody of the limb." Cmplt. ¶37. Rather, the document indicates that Venson personally took the responsibility of arranging for the limb's disposal. Further, Advocate cannot have "assumed a duty not to interfere with Plaintiff's right to possess the leg[,]" because when Venson signed the document on June 1, 2018, Armstead was alive and Venson had no right to possess her mother's leg.

As the complaint does not contain sufficient allegations that Advocate owed Venson a duty of care, Venson cannot establish a claim for negligence. Count one must be dismissed pursuant to 735 ILCS 5/2-619, without prejudice to replead. Should Venson seek to replead this cause of action, she must, at a minimum, address the following issues.

- Venson must offer affidavits or other documentation establishing Advocate's policy of retaining amputated limbs for one year. The reason is that "[v]iolation of self-imposed rules or internal guidelines . . . 'does not normally impose a legal duty, let alone constitute evidence of negligence, or beyond that, willful and wanton conduct.'" *Wade v. City of Chicago*, 364 Ill. App. 3d 773, 781 (1st Dist. 2006) (quoting *Morton v. City of Chicago*, 286 Ill. App. 3d 444, 454 (1st Dist. 1997)).

[2] The document's evidentiary value at this stage is highly questionable. The form purports to be Armstead's statement, but Vinson executed the document. Absent the existence of a valid power of attorney, Venson would not have had authority to sign the form on Armstead's behalf.

- Venson has not produced affidavits or other documents establishing that she or Armstead told Advocate of Armstead's wish to be "buried whole."
- Venson must clarify the nature of Advocate's alleged breach of duty. If the wrong alleged is the limb's disposal, which occurred after the amputation but before Armstead's death, then Armstead, not Venson, had a quasi-property right to the leg. That right is not transferable to her next of kin.
- Venson must clarify Advocate's duty.
- Venson must remedy conclusory and insufficient damages allegations. Venson's characterization that Armstead could not be interred whole is an injury to Venson is unclear; the damages sought in this cause of action are those incurred by Venson, not Armstead.

Count 3 – Willful and Wanton Conduct Barring Next of Kin from Determining Time, Manner, and Place of Burial

Despite the title Venson attaches to this count, its name is not controlling. *See Aebischer v. Zobrist*, 56 Ill. App. 3d 151, 154 (5th Dist. 1977). The character of a pleading is determined from its content, not its label. *Id.* (citing *Eden v. Eden*, 34 Ill. App. 3d 382, 386 (1st Dist. 1975)). A court may consider the ultimate efficacy of a claim in considering a motion to dismiss. *Id.* (citing *Deasey v. City of Chicago*, 412 Ill. 151, 157 (5th Dist. 1952)). Despite the title of this count, its content appears to allege the willful and wanton tortious interference with the right to possess a corpse.

There is, of course, no separate, independent tort of willful and wanton conduct; rather, willful and wanton conduct is regarded as an aggravated form of negligence. *See Stewart v. Oswego Comm. Unit Sch. Dist. No. 308*, 2016 IL App (2d) 151117, ¶ 72 (2nd Dist. 2016) (citing *Doe-3 v. McLean Cnty. Unit Distr. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 19). "To prevail on an allegation of willful and wanton conduct, 'a plaintiff must plead and prove the basic elements of a negligence claim—that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the plaintiff's injury.'" *Id.* (quoting *Doe-3,* 2012 IL

112479, ¶ 19). As noted in the discussion concerning counts one and two, Venson has failed to plead negligence adequately; therefore, she certainly cannot have pleaded willful and wanton conduct adequately. Count three must be dismissed pursuant to 735 ILCS 5/2-619, without prejudice.

This court notes the following issues that Venson must address in her amended complaint:

- Venson's allegation that Advocate knew or should have known of Armstead's wish to be "interred as a whole person" is insufficient to support a willful and wanton cause of action. To plead willful and wanton conduct, a plaintiff must allege the defendant acted with actual intent or with a conscious disregard or indifference for the consequences when the known safety of other persons was involved. *Burke v. 12 Rothschild's Liquor Mart*, 148 Ill. 2d 429, 451 (1992).
- Venson asserts that "as a proximate result of one or more of the . . . negligent acts and or [*sic*] omissions on the part of Defendant Advocate, the leg was improperly disposed of and Mary Armstead was unable to be inter[r]ed as a whole person." Cmplt. ¶ 49. This injury is directed to Armstead, not Venson; therefore, she cannot claim the injury as her own.
- Venson claims that Advocate "willfully, maliciously, and without any just cause or provocation on the part of the Plaintiff improperly disposed of the limb." This is another conclusory allegation unsupported by specific supporting allegations.

Count 4 – Intentional Infliction of Emotional Distress

To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege: (1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended to inflict severe emotional distress or knew there was a high probability its conduct would do so; and (3) the defendant's conduct actually caused severe emotional distress. *Welsh v. Commonwealth Edison Co.*, 306 Ill. App. 3d 148, 154 (1st Dist. 1999) (citing *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988)). Venson's complaint fails to allege facts supporting these

essential elements in at least two substantial ways. First, Venson does not allege that Advocate intended to inflict severe emotional distress, but alleges "Advocate knew that there was a high probability that its conduct would cause severe emotional distress." There are no allegations indicating Advocate's knowledge. Second, Venson alleges that "the improper disposal of human remains against Plaintiff's express wishes as herein alleged is extreme and outrageous." Cmplt. ¶ 56. As noted above: (1) there is no indication Venson notified Advocate of her express wish that Venson's leg be kept until her death; (2) Venson fails to plead that Advocate knew of Venson's wishes; (3) Venson had no right to possession of the leg at the time of disposal; and (4) the bare allegation that the leg disposal was "extreme and outrageous" is insufficient.

Count four must, therefore, be dismissed pursuant to 735 ILCS 5/2-615, without prejudice. Venson's amended complaint must address the following:

- If Venson is correct that Advocate intended to inflict emotional distress by disposing of Armstead's leg, Venson has not alleged Advocate targeted her for emotional distress as opposed to Armstead.
- Venson characterizes her severe emotional distress as "collaps[ing] under extreme mental and emotional anguish." This allegation is factually conclusory and insufficient to support a damages claim.

Count 5 – Family Expense Act

Venson's allegation that she "sustain[ed] great losses in the form of funeral and medical expenses," Cmplt, ¶ 63, is a conclusion unsupported by any facts and, more importantly, is illogical. Venson's case is premised on the fact that she was unable to bury Venson's amputated leg. It is unclear how Venson incurred any costs associated with not burying the amputated leg. Count five must, therefore, be dismissed pursuant to 735 ILCS 5/2-615 with prejudice.

Conclusion

For the reasons presented above, it is ordered that:

1. Advocate's motion to dismiss pursuant to 735 ILCS 5/2-619.1 is granted, in part, with prejudice, and denied, in part, without prejudice; and
2. Venson is granted leave to file an amended complaint by January 15, 2021.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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