

Motion to Dismiss and Strike

Respectfully Submitted, Baker & Enright, By: Attorneys for Defendant, St. Mary of Nazareth, Hospital Center, [Robert S. Baker](#), [Brad E. Wolven](#), Baker & Enright, 33 West Jackson Blvd., 3rd Floor, Chicago, Illinois 60604, (312) 663-9600.

NOW COMES the Defendant, ST. MARY OF NAZARETH HOSPITAL CENTER, by and through its attorneys, BAKER & ENRIGHT, and moves this Honorable Court to dismiss the Plaintiff's complaint as to this Defendant, pursuant to [Sections 2-619](#) and [2-622 of the Illinois Code of Civil Procedure](#). In the alternative, this Defendant moves the Court to strike sub-paragraphs (a) - (e) and (g) of Paragraph 6 of Counts I and V of the Complaint, pursuant to [Section 2-619\(a\)\(4\)](#) of the Code of Civil Procedure. In support of its Motion, this Defendant states the following.

BACKGROUND

1. On November 8, 1996, Plaintiff filed his complaint in the original lawsuit, 96 L 13091, alleging that this Defendant and others were negligent in treating the decedent, Eleodora Bruno (Exhibit A).
2. On January 7, 1998, this Court dismissed Counts I and V, upon this Defendant's motion, ruling that the allegations in those Counts were not sufficiently supported by the Plaintiff's 2-622 reviewing physician's report. Plaintiff was granted leave to replead.
3. Plaintiff filed an amended pleading on February 27, 1998 (Exhibit B). However, upon this Defendant's motion, this Court again found the reviewing physician's report to be insufficient as to most allegations of negligence against this Defendant. Thus, this Court struck sub-paragraphs (a) - (e) and (g) of Paragraph 6 of Counts I and V *with prejudice*. A copy of the Court's order, dated March 31, 1998, is attached as Exhibit C.
4. At some point, this case was voluntarily dismissed. It was then refiled under the current caption on June 4, 2001. A copy of the present complaint is attached as Exhibit D.
5. The present complaint contains the same sub-paragraphs in Paragraph 6 of Counts I and V that were stricken with prejudice on March 31, 1998.
6. The present complaint also lacks a reviewing physician's report or attorney's affidavit, as required by [735 ILCS 5/2-622](#).

ARGUMENTS

I. PLAINTIFF'S COMPLAINT MUST BE DISMISSED, AS HE HAS FAILED TO PROVIDE A REVIEWING PHYSICIAN'S REPORT TO SUPPORT HIS ALLEGATIONS OF HEALING ART MALPRACTICE, PURSUANT TO [735 ILCS 5/2-622](#).

The Illinois legislature has clearly set forth that a claim for **malpractice** of **medical** caregivers must be accompanied by a report attesting to the standard of care that is applicable to the present case. [Section 2-622](#) states, in pertinent part:

5/2-622. 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 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 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 filing of such action ... 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 ...

[735 ILCS 5/2-622\(a\)\(1\)](#). [Subsection \(b\)](#) additionally provides:

Where a certificate and written report are required pursuant to this Section a separate certificate and written report shall be filed as to each defendant who has been named in the complaint and shall be filed as to each defendant named at a later time.

[735 ILCS 5/2-622\(b\)](#). Plaintiff has failed to provide either the affidavit of his attorney or the reviewing physician's report, as required by the statute. As such, his complaint must be dismissed, pursuant to [Section 2-619\(a\)\(9\)](#).

II. SUB-PARAGRAPHS (a) - (e) AND (g) OF PARAGRAPH 6 OF COUNTS I AND V OF PLAINTIFF'S COMPLAINT MUST BE DISMISSED WITH PREJUDICE.

The Illinois Supreme Court has explicitly set forth the standard for the binding nature of a court's ruling of dismissal of a cause of action with prejudice:

Rule 273. Effect of Involuntary Dismissal

Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

Further, the Appellate Court for the First District has held on many occasions that, "Dismissal with prejudice is deemed to be on the merits of plaintiff's claim and as conclusive of rights of parties as if matter had been tried in result by final **judgment** adverse to plaintiff." See [Scott Wetzel Services v. Regard, 208 Ill.Dec. 98, 648 N.E.2d 1020, 271 Ill.App.3d 478 \(1 Dist. 1995\)](#).

Under this well-established statutory and common-law standard, then, sub-paragraphs (a) - (e) and (g) of Paragraph 6 of Counts I and V must be stricken from the present cause of action with prejudice, as they were in the previous suit. This court's March 31, 1998 order clearly demonstrates an intent to permanently dispose of the issues raised in those allegations, and Plaintiff's reasserting them in this case is improper.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests that this Honorable Court enter an order, dismissing Plaintiff's Complaint as to this Defendant, with prejudice, pursuant to [735 ILCS 5/2-619](#) and 622. In the alternative, this Defendant requests an order, striking sub-paragraphs (a) - (e) and (g) of Paragraph 6 of Counts I and V of the Complaint with prejudice, pursuant to [735 ILCS 5/2-619\(a\)\(4\)](#). This Defendant further requests a finding that there is no just reason to delay enforcement or appeal or both of said order, pursuant to [Supreme Court Rule 304\(a\)](#).

Respectfully Submitted,

BAKER & ENRIGHT

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