Plaintiff's Response in Opposition Defendants' Combined Motion to Dismiss

Laura Scarry, ARCD No. XXXXXXX, Deano & Scarry, LLC, 53 W. Jackson Blvd., Suite 550, Chicago, IL 60604, Tel: (630) 690-2800, Fax: (312) 564-4125.

NOW COMES the Plaintiff, MARIA W. EVARISTO, by and through her attorneys, DeANO & SCARRY, LLC, and for her Response in Opposition to Defendants' Combined Motion to Dismiss, states as follows:

1. Defendants filed a motion to dismiss Plaintiff's Complaint at Law pursuant to Sections 2-619 and 2-**615** of the Illinois Code of Civil Procedure. First, Defendants assert that Plaintiff's complaint should be dismissed because Plaintiff failed to comply with Section 2-622 which requires a plaintiff's attorney to file an affidavit of a licensed physician in an action in which the plaintiff seeks damages for injuries or death by reason of a **medical**, hospital or other healing art **malpractice**. Defendants' Motion to Dismiss, p. 2, citing 735 ILCS 5/2-622(a). Second, Defendants assert that each of Plaintiff's claims should be dismissed for failure to state a cause of action. Defendants' Motion to Dismiss, pp. 2-5. For all of the following reasons, Defendants' motion to dismiss should be denied.

Argument

I. PLAINTIFF'S CLAIMS ARE BASED ON COMMON LAW NEGLIGENCE AND ARE NOT BASED ON MEDICALMALPRACTICE ELIMINATING THE REQUIREMENT OF A 2-622 AFFIDAVIT, THEREFORE, DEFENDANTS' 2-619 MOTION TO DISMISS SHOULD BE DENIED.

2. The granting of a section 2-619 motion to dismiss is proper only if it appears that no set of facts can be proved that would entitle the plaintiff to recover. *Turner v. Fletcher,* 302 Ill.App.3d 1051, 1055, 706 N.E.2d 514 (1999). In addressing a section 2-619 motion, a court takes all well-pleaded facts in the complaint as true, and only the complaint's legal sufficiency is contested. *Petty v. Crowell,* 306 Ill.App.3d 774, 776, 715 N.E.2d 317 (1999).

3. While Defendants claim that a 2-622 affidavit is required, noticeably absent from Defendants' argument is any case law supporting their assertion. That's because the courts in Illinois have unerringly held that not every action which arises in a **medical** facility is a healing arts **malpractice** case subject to the requirements of Section 2-622.

4. The case of *Cohen v. Smith* is instructive. There, a husband and wife filed a lawsuit against a male nurse and hospital alleging battery, intentional infliction of emotional distress and violation of Right to Conscience Act. *Cohen v. Smith,* 269 Ill.App.3d 1087, 648 N.E.2d 329 (5th Dist. 1995). The plaintiff's alleged that shortly before the wife was to give birth via cesarean section, they informed her physician that their religious beliefs prohibited the wife from being seen unclothed by a male. Plaintiff's were assured that their religious convictions would be respected. Plaintiff's alleged that during the procedure, a male nurse observed and touched the wife's naked body.

5. The defendants in *Cohen* filed a motion to dismiss contending that Section 2-622 required an affidavit of a health professional in cases based on healing art **malpractice**. The trial court subsequently granted the defendants' motion to dismiss for failure to comply with Section 2-622. The plaintiff's appealed and the court of appeals reversed.

6. The court of appeals first noted that the plaintiffs' claim "is in no way based upon **medical malpractice**. Cohen alleges instead that [the nurse] knowingly violated her privacy interests and religious standards and beliefs by touching her without her consent .... [I]t is not the plaintiff's who are seeking damages because of healing art**malpractice**; it is defendants who are raising a defense based on their positions in the healing arts fields." *Cohen,*269 Ill.App.3d 1087, 1093. The court then concluded, "The fact that the defendants attempt to shield themselves from the plaintiffs' claim by calling this action a **medical malpractice** claim does not transform it into one. The question is whether 'the plaintiff seeks damages for injuries ... *by reason of* **medical** hospital, or other healing art ***malpractice***...' (emphasis added) (735 ILCS 5/2-622 (West 1992)), not whether the incident complained of occurred in the hospital setting or involved some **medical** treatment." *Cohen,* at 1093.

7. As in *Cohen,* Plaintiff in the instant case alleges violations of various common law duties which occurred in a**medical** facility setting, to which Section 2-622 does not apply. Plaintiff is not making a claim of **medical malpractice**. Indeed, the proof of Plaintiff's claims in the instant case, as in *Cohen,* does not depend on whether the treatment was**medically** appropriate. *See also, Grant v. Petroff,* 291 Ill.App.3d 795, 805, 684 N.E.2d 1020 (5th Dist. 1997) (a claim for battery stemming from non-consent to tubal ligation does not result by reason of healing art **malpractice**). As such, Section 2-622 simply has no application to this case, and Defendants' 2-619 motion to dismiss should be denied.

II. PLAINTIFF'S COMMON LAW CLAIMS ARE PROPERLY ALLEGED, THEREFORE, DEFENDANTS' 2-615MOTION TO DISMISS MUST BE DENIED.

8. "The question presented by a section 2-**615** motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Kumar v. Boprnstein,* 354 Ill.App.3d 159, 164, 820 N.E.2d 1167 (2004). "The plaintiff is not required to prove his or her case, but must allege sufficient facts to state all the elements of the asserted cause of action." *Id.,* 354 Ill.App.3d at 165, 820 N.E.2d 1167. When ruling on a section 2-**615** motion, the trial court should deem all well-pleaded facts as true and disregard legal and factual conclusions that are unsupported by allegations of fact. *Id.*

A. *Intentional Infliction of Emotional Distress (Counts I and IV)*

9. Plaintiff properly alleges a claim for intentional infliction of emotional distress. To establish a claim for intentional infliction of emotional distress, a plaintiff must show 1) that the conduct was truly extreme and outrageous, 2) that the actor intended that his conduct inflict severe distress, or knew that there was a high probability that his conduct would inflict such distress, and 3) the conduct must in fact have caused severe emotional distress. *McGrath v. Fahey,* 126 Ill.2d 78, 86, 533 N.E.2d 806 (1988). Liability arises only where the conduct complained of was " 'atrocious, and utterly intolerable in a civilized community.' " *Pavilion v. Kaferly,* 204 Ill.App.3d 235, 245, 561 N.E.2d 1245 (quoting*Restatement (Second) of Torts § 46,* Comment d at 1973 (1965)).

10. The *Pavilion* court found that continued pressuring of an employee for dates and offering her money in return for sexual favors constituted offensive conduct sufficient to inflict emotional distress. Likewise, a jury could certainly conclude that Dr. Lanoff's numerous inappropriate comments regarding Plaintiff's physical appearance, including that she was the only person he had seen that could make a hospital gown look good; as well as comments about her clothing such as whether he would ever get a chance to see her underpants and the front of her bra; and comments that were sexual in nature such as, “just look at me,” “what am I going to do now?” and “I wanted you to see because I am better than a BOB (referring to a ‘battery operated boyfriend’)” after directing Plaintiff's attention to the fact that he had an erection; are such that a “woman of ordinary morality and sensibilities,” particularly in a doctor-patient relationship, would perceive them to be sufficiently offensive and sinister to rise to the level of extreme and outrageous behavior. *Pavilion,* 204 Ill.App.3d at 245, 561 N.E.2d at 1251. As such, this court should deny Defendants' motion to dismiss Counts I and IV.

11. Defendants also assert that Plaintiff's claims for intentional infliction of emotional distress should be dismissed because Plaintiff failed to alleged facts demonstrating she was hospitalized or required to seek **medical** care, or that she was afflicted with a physical or mental condition rendering her particularly vulnerable to emotional distress. Motion to Dismiss, p. 3. However, there is no requirement that Plaintiff demonstrate some physical manifestation of having suffered emotional distress.

12. In *Knierim v. Izzo,* 22 Ill.2d 73, 174, N.E.2d 157 (1961), the first case to recognize the tort of intentional infliction of emotional distress in Illinois, the supreme court found that a plaintiff need not allege physical injury to recover for intentional infliction of emotional distress. The court noted, “[t]he stronger emotions when sufficiently aroused do produce symptoms that are visible to the professional eye and we can expect much more help from the men of science in the future. In addition, jurors from their own experience will be able to determine whether * * * conduct results in severe emotional disturbance.” *Id.,* 22 Ill.2d at 85, 174 N.E.2d 157 (citation omitted). *Knierim* is still the law in Illinois.

13. Furthermore, Plaintiff's claim of intentional infliction of emotional distress because Dr. Lanoff's position as a**medical** doctor coupled with his alleged inappropriate statements and conduct, elevates his conduct to the level of extreme and outrageous. In *McGrath,* the Illinois supreme court stated that “[i]t is clear ... that the degree of power or authority which a defendant has over a plaintiff can impact upon whether that defendant's conduct is outrageous. The more control which a defendant has over the plaintiff, the more likely that defendant's conduct will be deemed outrageous....” *McGrath,* 126 I11.2d at 86-87, 533 N.E.2d 806. Indeed, *McGrath* furnishes examples of positions that might give rise to a finding that conduct that is otherwise not outrageous will be considered so: police officers, school authorities, landlords, creditors, insurance companies, and employers. *Id.*

14. Here, a **medical** doctor is in a position of power, and inherent with that power is a level of trust society expects from that individual, just as it expects with those individuals cited in *McGrath.* Thus, the mere fact that the alleged conduct occurred at the hands of a

physician raises the conduct to the level of extreme and outrageous. For all of these reasons, Defendants' motion to dismiss Counts I and IV should be denied.

B. *Negligent Infliction of Emotional Distress (Counts III and VI*)

15. Likewise, Plaintiff properly alleges a claim for negligent infliction of emotional distress in Counts III and VI. Defendants' only point of contention is that Plaintiff cannot recover for negligent infliction of emotional distress when it is based on Dr. Lanoff's intentional acts. However, contrary to Defendants' assertion, Plaintiff is not basing her claim of negligent infliction of emotional distress on the *intentional* acts of Dr. Lanoff. It is clear, Plaintiff has plead that Dr. Lanoff engaged in *negligent* conduct described more fully in paragraphs 12(a)-(m) of this count, and that Dr. Lanoff's actions and comments "were made carelessly and *negligently"* in disregard of Plaintiff's right to seek **medical** care and treatment without the risk of suffering emotional distress. Complaint, Count III, ¶ 12-13; Count VI, ¶ 12-13. Plaintiff cannot be any more clear in Count III and VI that she is seeking damages as a result of Dr. Lanoff's *negligent,*as opposed to *intentional,* conduct. As such, Defendants' motion to dismiss Counts III and VI should be denied.

C. *Battery (Counts II and V)*

16. Plaintiff properly alleges a claim of battery in Counts II and V. But, Defendants assert, without citing to any case law, that Plaintiff's allegations are conclusory and must be dismissed. To the contrary, Plaintiff's allegations are sufficient to withstand a motion to dismiss.

17. In *Cohen v. Smith, supra,* the plaintiff patient alleged that the defendant male nurse touched the plaintiff's naked body after being informed of her moral and religious beliefs against such touching by the male. Despite being informed of the plaintiff's religious beliefs, the nurse intentionally saw and touched plaintiff's naked body. Nowhere in the complaint did the plaintiff allege the manner in which she was touched or observed, yet the court found that the allegations of battery were sufficient.

18. Similarly, in the instant case, Plaintiff alleges that Dr. Lanoff touched, pinched or squeezed Plaintiff's buttocks, more facts alleged than in *Cohen.* Indeed, in *Cohen,* the plaintiff patient did not make any allegation of what the nurse saw or where on the plaintiff's body he touched her. The Plaintiff in the instant case also alleges that such contact was unprovoked, uninvited and offensive. This is all that is required to assert a claim of battery. *Curtis v. Jaskey,* 326 Ill.App.3d 90, 93, 759 N.E.2d 952 (2nd Dist. 2001) (defining battery as the unauthorized touching of the person of another) (citing *Gaskin v. Goldwasser,* 166 Ill.App.3d 996, 1011-12, 520 N.E.2d 1085 (1988)). Accordingly, Defendants' motion to dismiss Counts II and V should be denied.

D. *Failure to Train and Supervise (Count VII)*

19. Plaintiff's claim against Defendant, Adult and Pediatric Orthopedics, S.C. for failure to train and supervise are also sufficient to withstand Defendants' motion to dismiss.

20. However, should this court disagree, Plaintiff requests this court grant her leave to amend her complaint.

Conclusion

21. Plaintiff's complaint stems from Dr. Lanoff's inappropriate sexual comments and innuendos and unprovoked, non-consensual sexual contact. She does not complain of any **medical malpractice** on the part of Dr. Lanoff and, therefore, her complaint is not subject to Section 2-622 of the Illinois Code of Civil Procedure. Additionally, Plaintiff has sufficiently stated substantive claims in Counts I-VII of her complaint for which relief can be granted. Accordingly, this Court should deny Defendants' motion to dismiss. In the event that this Court finds Plaintiff failed to state a claim in any Count, I-VII, she requests leave to file an amended complaint to correct any deficiencies.

WHEREFORE, Plaintiff, MARIA W. EVARISTO, respectfully requests that this Honorable Court deny Defendants' motion to dismiss Plaintiff's complaint, or more specifically, Counts I-VII. Alternatively, if this Court determines that any one of her seven claims fails to state a claim, Plaintiff respectfully requests that this Court grant her leave to amend her complaint to correct any deficiencies.

Respectfully submitted,
MARIA W. EVARISTO
<<signature>>
By: One of Plaintiff's Attorney

Laura Scarry
ARCD No. 6231266
DeANO & SCARRY, LLC
53 W. Jackson Blvd.
Suite 550
Chicago, IL 60604
Tel: (630) 690-2800
Fax: (312) 564-4125