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

Barbara Ferris, as independent administrator of the estate of William Ferris, Sr., deceased, Plaintiff, v. Presence RHC Senior Services, an Illinois not-for-profit corporation, d/b/a Presence Ballard Nursing Center, and Jodl Martinez, R.N., Defendants.	)	No. 14 L 4573

MEMORANDUM OPINION AND ORDER

The Nursing Home Care Act does not explicitly prohibit a resident-plaintiff from suing a nurse-employee-defendant for professional negligence, and Illinois Supreme Court *dicta* says that such a cause of action must be asserted independently. In this case, the resident-plaintiff's estate sued the nursing home owner and licensee under the NHCA and a nurse-employee under the Healing Art Malpractice Act. Since the court's *dicta* is the closest statement available of law controlling this case, the nurse's motion to dismiss must be denied.

FACTS

From October 26, 2011 until January 22, 2013, William Ferris lived at the Presence Ballard Nursing Center, located at 9300 Ballard Road in Des Plaines, Illinois. William's condition required him to receive supervision and extensive assistance with the activities of daily living, including being turned and repositioned in bed. At some point while at Ballard, William developed a pressure ulcer on his coccyx. On January 22, 2013, Ballard discharged William and

Lutheran General Hospital admitted him for treatment of an infected stage IV pressure ulcer. William died on January 28, 2013.

On April 22, 2014, a Lake County Circuit Court judge entered an order opening William's estate and naming Barbara as the independent administrator. Two days later, Barbara filed a four-count complaint, the first three of which she directed against Ballard under the Nursing Home Care Act (NHCA), the Survival Act, and the Wrongful Death Act. In count four, Barbara named three respondents in discovery (RIDs), Susan Ahlgren, Jodi Martinez, and Leny Napata, as authorized by the Code of Civil Procedure. *See* 735 ILCS 5/2-402. Barbara attached to her complaint various written interrogatories and document production requests directed at the RIDs as permitted by Supreme Court rules. *See* Ill. S. Ct. R. 213 & 214. The RIDs complied with these discovery requests.

On August 11, 2015, this court granted Barbara's motion to terminate Ahlgren and Napata as RIDs and to file a first-amended complaint, which she did the same day. The first-amended complaint named Ballard, once again, as a defendant, and, for the first time, named Martinez as a defendant,[1] alleging that he is Ballard's "actual, implied and/or apparent agent, servant and/or employee," First Amd. Cmplt. ¶ 14, and that Ballard is vicariously liable for Martinez's negligent acts and omissions. *Id.* at ¶ 15. Counts I-III are directed against Ballard under the NHCA and the Wrongful Death and Survival Acts. Barbara claims that Ballard, through its agents, servants, and employees, including nurses, acted negligently by failing to: (1) protect William from neglect in violation of the Illinois Administrative Code; (2) provide him with necessary treatment and services, also in violation of the Code; (3) make a comprehensive assessment of William's needs; (4) maintain a clinical record and document changes in his condition; (5) provide necessary treatment to avoid the development of pressure ulcers; (6) provide adequate and properly supervised care; (7) provide appropriate infection control measures; (8) develop and implement a plan to prevent the

[1] The first-amended complaint corrected the spelling of Martinez's first name from Jodi to Jodl.

development of William's pressure ulcers; (9) perform a daily skin inspection; (10) assess accurately his pressure ulcers; (11) provide necessary treatment to heal the pressure ulcers; (12) follow a physician's orders; (13) document the progression of William's pressure ulcers; (14) ensure that he received appropriate medical care; and (15) prevent William's pressure ulcers from becoming infected. Barbara further alleges that these omissions proximately caused William's pressure ulcer and contributed to or caused his death.

Counts IV-V are directed against Martinez and charge negligence under the Wrongful Death and Survival Acts. These counts allege that Martinez was acting within the scope of his employment during the time William was at Ballard. These counts claim that Martinez breached his duty to exercise reasonable care by failing to: (1) develop an appropriate care plan for William given his risks for dehydration, malnutrition, and development of pressure ulcers; (2) implement such a care plan; (3) revise the plan after William developed pressure ulcers; (4) turn and reposition William; (5) use pressure relieving devices; (6) provide appropriate infection-control measures; (7) follow a physician's orders; and (8) keep William clean and dry of urine and feces. Barbara, once again, alleges that these omissions proximately caused William's pressure ulcer and contributed to or caused his death.

Attached to the first-amended complaint are two reports from a health care professional. These reports are required under the Healing Arts Malpractice Act (HAMA), 735 ILCS 5/2-622, for causes of action based on a health-care provider's alleged breach of a professional standard of care. One report is directed against Ballard and, for purposes of establishing a meritorious claim for malpractice under the Wrongful Death and Survival Acts, repeats the identical claims against Ballard contained in the first-amended complaint. The second report is the same but directed against Martinez and repeats the identical claims against him as contained in the first-amended complaint.

On September 1, 2015, Martinez filed a motion to dismiss the first-amended complaint. In her motion, Martinez argues that the NHCA, 210 ILCS 45/1-101 to 45/3A-101, is a comprehensive statute that authorizes residents to sue nursing home owners and licenses exclusively for alleged negligent and intentional conduct. *See* 210 ILCS 45/3-601. He further argues that since nursing home owners and licensees found to be negligent are liable for actual damages, costs, and attorney's fees, *see* 210 ILCS 45/3-601 & 3-602, Barbara is attempting to obtain a double recovery – the first based on NHCA violations and the second for professional negligence. According to Martinez, Barbara elected to sue under the NHCA and is, therefore, bound by its limitation to obtain damages, costs, and fees from Ballard's owners and licensees exclusively, not from a nurse-employee such as Martinez.

Barbara responds to Martinez's motion with two arguments. First, the NHCA does not prevent a plaintiff from naming a nursing home employee as a defendant. In support of her position, Barbara relies on the NHCA provision stating that remedies available under the act are cumulative. *See* 210 ILCS 45/3-714. Further, *Eads v. Heritage Enterps., Inc.*, 204 Ill. 2d 92 (2003), and *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350 (1986), each interpret the phrase "cumulative remedy," as used in the NHCA, to mean that its statutory remedy is not exclusive, *see* 111 Ill. 2d at 365, and, therefore, a common-law cause of action against a nursing home employee is permitted. Second, independent of the NHCA's statutory authority, the first-amended complaint states an independent cause of action against Martinez for negligence based on his breach of the applicable nursing standard of care. To that end, Barbara attached as an exhibit to the first-amended complaint a health professional's report as required by the Code of Civil Procedure. *See* 735 ILCS 5/2-622.

ANALYSIS

The issue for this court's consideration is whether a resident-plaintiff may sue both a nursing home owner and licensee under the NHCA and independently sue a nurse-employee under the HAMA.

This issue raises two related questions. The first is whether the NHCA authorizes a plaintiff to sue a nursing home employee at all. The answer to this question is significant because the NHCA does not provide an explicit answer. The second is whether a plaintiff may bring a common-law negligence cause of action against a nursing home employee regardless of whether the NHCA authorizes a statutory cause of action. The answer to this question is significant because it goes to the scope of a plaintiff's potential recovery.

Regardless of the answers to these questions, this court must analyze them in light of Code of Civil Procedure section 2-619. *See* 735 ILCS 5/2-619. A section 2-619 motion authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion is to construe the pleadings and supporting documents in a light most favorable to the nonmoving party, *see Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008), and all well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008).

One of the enumerated grounds for a section 2-619 motion to dismiss is that the claim is barred by affirmative matter that avoids the legal effect of or defeats the claim. For purposes of a section 2-619(a)(9) motion,[2] "affirmative matter" is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *See Illinois Graphics*, 159 Ill. 2d at 485-86. While the statute requires that affirmative matter be supported by affidavit, some affirmative matter has been considered to be apparent on the face of the pleading. *Id.*

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[2] Martinez has not identified the specific section 2-619 subparagraph that authorizes his motion to dismiss. This court infers that the subparagraph is (a)(9) because the affirmative matter on which Martinez relies are various NHCA provisions and the common law interpreting them.

The questions this court must address implicate four NHCA provisions. Three of those provisions are contained in article III, part six, "Duties," and state as follows:

> The owner and licensee are liable to a resident for any intentional or negligent act or omission of their agents or employees [that] injures the resident.

210 ILS 45/3-601.

> The licensee shall pay the actual damages and costs and attorney's fees to a facility resident whose rights, as specified in Part 1 of Article II of this Act, are violated.

210 ILCS 45/3-602.

> A resident may maintain an action under this Act for any other type of relief, including injunctive and declaratory relief, permitted by law.

210 ILCS 45/3-603. The fourth provision is in Article III, part seven, "Complaint, Hearing and Appeal," which states:

> The remedies provided in this Act are cumulative and shall not be construed as restricting any party from seeking any remedy, provisional or otherwise, provided by law for the benefit of the party from obtaining additional relief based upon the same facts.

210 ILCS 45/3-714.

Since both parties' arguments focus on these NHCA provisions, this court must analyze them according to the rules of statutory construction. To ascertain and give effect to the legislature's intent is the fundamental rule of statutory construction on which all others are based. *See Wisniewski v. Kownacki*, 221 Ill. 2d 453, 460 (2006). Legislative intent is judged best by giving the words contained in the statute their plain and ordinary meaning. *See Gurba v. Community*

H.S. Dist. No. 155, 2015 IL 118332 at ¶ 32. If the statutory language is unambiguous, a court may not read into the statute exceptions, limitations, or conditions not expressed by the legislature. *See Evanston Ins. Co. v. Riseborough*, 2014 IL 114271, ¶ 15. A statute's plain meaning is determined based on the entire statute, its subject, and the legislature's apparent intent. *See Orlak v. Loyola Univ. Health Sys.*, 228 Ill. 2d 1, 8 (2007). A statute is to be interpreted so as not to make any provision meaningless or redundant. *See Land v. Board of Ed.*, 202 Ill. 2d 414, 422 (2002).

Beginning with sections 3-601, the statutory language could not be clearer – a nursing home's owner and licensee are liable to a resident-plaintiff for injuries resulting from an employee's intentional or negligent acts or omissions. Section 3-602 is also straightforward, but narrower, indicating that the nursing home licensee is to pay to the resident-plaintiff the actual damages awarded by a judge or jury for violations of the so-called resident's bill of rights contained in article II, part one, plus attorney's fees and costs. The import by omission is that the owner, if different than the licensee, is not liable to pay damages arising from a violation of the resident's bill of rights, but is liable for all other violations. As with section 3-601, section 3-602 does not require that a nursing home employee pay a jury award for a violation arising from a bill-of-rights violation.

Although sections 3-601 and 3-602 are unambiguous in identifying who is to pay damages awarded to a successful resident-plaintiff after a trial, neither section addresses the procedure by which the resident-plaintiff reaches that end. That is one of the essential questions here because, as Barbara argues, the issue is not who pays the damages award, but whom she may sue to obtain the award. For that answer, Barbara relies on section 3-714.

Section 3-714 provides that any statutorily provided remedies are not exclusive, but cumulative to all other remedies "provided by law" and, therefore, do not restrict a resident-plaintiff from "obtaining additional relief" in the same lawsuit. *See* 210 45/3-714. According to Barbara, section 3-714 authorizes her to file a common-law professional negligence cause of action based on a breach of the

nursing standard of care since that cause of action provides additional relief not available under the NHCA. It is this conclusion that proves to be the fundamental error with Barbara's argument.

Barbara improperly conflates a cause of action with a remedy. Causes of action are verbs or verbal phrases, for example, "acted negligently," "breached a contract," or "committed fraud." Remedies are nouns of which there are many in the law of contracts – rescission, reformation, abatement of rent, to name a few – and include equitable remedies – substantial performance, an accounting, and preliminary or permanent injunction, to name a few more. In contrast, in the law of common-law torts, there is but one remedy, monetary damages. They may come in the form of general (compensatory) damages or special (punitive) damages, but they come only in the form of money. In addition, tort damages may be awarded for a variety of losses – medical expenses, lost earnings, pain and suffering, to name a few – *see, e.g.*, Ill. Pattern Jury Instructions series 30.00 to 36.00 – but, once again, those damages are reduced to a monetary sum.

The plain language of the NHCA provides that only *remedies* are cumulative, not *causes of action*. In fact, Barbara's most recent complaint does not seek any remedy other than monetary damages. In other words, she is not seeking a declaratory judgment or an accounting; rather, she is seeking to bring a separate cause of action for professional negligence against Martinez. If successful before a jury on either the NHCA or negligence cause of action or both, Barbara would be entitled to an award of monetary damages – the same remedy she would obtain even if she had not named Martinez as a defendant.

This conclusion comports with another NHCA provision, section 3-603, which Barbara does not address. That section clarifies that a resident-plaintiff may bring an action for any other type of relief, "including injunctive and declaratory relief. . . ." 210 ILCS 45/3-603. This unambiguous language supports this court's conclusion that a cause of action is distinct from a remedy because the statute provides examples of two forms of relief other than monetary damages.

Section 3-603 contemplates that if, for example, a resident-plaintiff sued a nursing home seeking to enjoin an ongoing violation of the resident's rights under article II, part one, the resident could also sue for tort damages for any injuries suffered. That is the sort of cumulative remedy contemplated by the statute's plain language.

Since Barbara's argument is ultimately unhelpful, the answers to this court's questions lie elsewhere. Martinez, for his part, argues that Barbara cannot sue him because the NHCA is a comprehensive statute and, therefore, constitutes her sole means of recovery. The Supreme Court has written that the NHCA is, "a comprehensive statute [that] established standards for the treatment and care of nursing home residents; created minimum occupational requirements for nurses aides; and expanded the power of the Illinois Department of Public Health to enforce the provisions of the [Nursing Home Care] Act." *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 358 (1986). According to Martinez, since the statute is comprehensive, it has displaced previously recognized causes of action such as those for professional negligence under the Survival and Wrongful Death Acts. It is true that, "[w]here the legislature enacts a comprehensive statutory scheme, creating rights and duties which have no counterpart in common law or equity, the legislature may define the 'justiciable matter' in such a way as to preclude or limit the jurisdiction of the circuits." *Board of Ed. of Warren Twp. H.S. Dist. 121 v. Warren Twp. H.S. Fed. of Teachers, Local 504*, 128 Ill. 2d 155, 165 (1989). Yet, "if the legislative enactment does divest the circuit courts of their original jurisdiction through a comprehensive statutory administrative scheme, it must do so explicitly." *Employers Mut. Cos. v. Skilling*, 163 Ill. 2d 284, 287 (1994).

Martinez's argument ultimately fails because, although the NHCA creates rights and duties that did not otherwise exist at common law, the statute does not contain an explicit statement limiting a court's jurisdiction. Further, such a limitation would run counter to the General Assembly's acknowledgement that residents are in the best position to know of statutory violations and seek redress, effectively serving as private attorneys general. *See Eads v. Heritage Entrps., Inc.*, 204 Ill. 2d 92, 98 (2003). Given the statute's

gaps and the court's interpretation of them, the only way *Harris*'s finding that the NHCA is a "comprehensive statute" can be interpreted is that it is comprehensive as a nursing home's duties and operations, but not as to a resident-plaintiff's available remedies. Martinez's second argument – that causes of action under the NHCA and for professional negligence could lead to a double recovery – is resolvable by a trial judge fashioning the judgment. As the court wrote in *Harris*, "[i]f a verdict is returned in plaintiff's favor on both counts I and II, the trial court can enter judgment on the two verdicts in the alternative so that plaintiff recovers only one satisfaction. 111 Ill. 2d at 366.

Answers to this court's questions are not informed by the existing common law. Although *Eads* provides some direction through *dicta*, it is a badly fractured opinion.[3] The majority opinion holds that Code of Civil Procedure section 2-622 does not apply to suits filed under the NHCA, but jumps over the threshold issue of whether a resident-plaintiff may bring an independent professional negligence claim at all. The closest any case comes to answering this court's questions comes is the following: "Nothing in the Nursing Home Care Act requires owners or licensees to be medical professionals themselves, and nothing in the Act authorizes nursing home residents to recover damages for medical malpractice from the individuals who actually provided the care. Suits against those individuals *must be asserted independently* of the Nursing Home Care Act." *Eads*, 204 Ill. 2d at 108-09 (emphasis added). Even the dissent appears to agree on this point. *Id.* at 110-11 (J. Garman, dissenting). The reasoning for this conclusion is, however, dubious for a variety of reasons.

First, the majority in *Eads* writes that, "while claims under the Nursing Home Care Act may sometimes involve a resident's medical

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[3] The first sentence of the *Eads* opinion states that the, "sole issue in this case is whether a plaintiff asserting a private right of action under the Nursing Home Care Act must attach to her complaint the certificate of merit and supporting report required by section 2-622 of the Code of Civil Procedure." 204 Ill. 2d at 94. Whether a plaintiff-resident may bring a professional negligence cause of action in addition to an NHCA cause of action is an entirely different matter.

care, they do not directly implicate the individual health-care providers." *Id.* at 108-09. Of course they do. In fact, they must because the statutory definition of "facility" includes nursing care. *See* 210 ILCS 45/1-113 ("nursing for 3 or more persons"). If the statute's scope includes the conduct of licensed professionals, *Eads'* requirement that negligence claims against them must be brought separately cannot be correct.

Second, by requiring a resident-plaintiff to bring professional negligence claims separately, *Eads* creates an anomaly. *Eads* effectively limits the NHCA's scope to only two types of employees – administrators and unlicensed employees, generally nursing assistants. Neither the majority nor the dissent in *Eads* explains the reason for the carve-out reserved for licensed professionals given the statute's comprehensive nature.

Third, the requirement that professional negligence claims be raised independently is illogical because it gives those employees an illusory benefit. Under the common-law doctrine of *respondeat superior*, nursing home owners and licensees are liable for their employees' conduct; consequently, a resident-plaintiff does not need the NHCA to obtain derivative liability on the employer. Sections 3-601 and 3-602 are, therefore, superfluous, a statutory interpretation courts are loath to make. Rather, the sections only have meaning if their purpose is to immunize employees, particularly licensed professionals, from liability in all statutory and professional negligence claims.

Fourth, *Eads'* independent-pleading requirement creates redundancy. A resident-plaintiff could support a claim against a nursing home owner and licensee by presenting claims based on the acts and omissions of a nurse-employee. Requiring a separate cause of action for professional negligence is simply unnecessary.

Fifth, *Eads* effectively subjects a resident-plaintiff to an initial higher burden and a subsequent lower recovery. An independent professional negligence claim requires a resident-plaintiff to comply with Code of Civil Procedure section 2-622. *See* 735 ILCS 5/2-622.

That provision requires the resident-plaintiff to hire an expert to review records and write a report concluding that there exists a basis for a meritorious cause of action. Yet a common-law professional negligence cause of action does not entitle a successful resident-plaintiff to attorney's fees. In contrast, the NHCA does not require compliance with section 2-622 and ensures that a successful plaintiff will be reimbursed for attorney's fees. But for *Eads'* requirement, it is questionable why a resident-plaintiff would ever want to bring an independent professional negligence cause of action.

Sixth, a trial in which an NHCA and a professional-negligence claim goes to a jury would make an inconsistent verdict possible. If, for example, a jury were to find for a nursing home's owner and licensee but against a nurse, a resident-plaintiff would be unable to collect attorney's fees for precisely the same conduct alleged against the successful nursing home owner and licensee. In effect, *Eads* creates confusion because nursing home owners and licensees should support rather than oppose professional negligence claims against their employees in hopes that the former can avoid attorney's fees.

In sum, *Eads'* interpretation of the NHCA provides nurse-employee-defendants no benefit and imposes on resident-plaintiffs a penalty. It is not, however, this court's place to alter the current view of the statute. According to *Eads*, professional negligence claims must be raised independently of any cause of action arising under the NHCA, which means that they may be brought in the first instance. Any review of *Eads* is for another day by another court.

CONCLUSION

For the reasons presented above, Martinez's motion to dismiss is denied.

Judge John H. Ehrlich

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John H. Ehrlich, Circuit Court Judge