



Alerts

Trial Court Not "Without Discretion" When Plaintiff Fails to File Certificate of Merit

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Health Care Alert

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Issue

Is a trial court "without discretion" to grant extension of time for obtaining certificate of merit when plaintiff fails to comply with 2-622?

Terrance Owens v. Riverside Medical Center, et al., 2020 IL App (3d) 180391

Case Summary

On September 11, 2017, plaintiff filed a medical malpractice lawsuit to which an affidavit was attached requesting a ninety (90) day extension of time to obtain a certificate of merit, which is required by 735 ILCS 5/2-622. Plaintiff filed no formal written request for a successive extension of time. On February 1, 2018, defendant filed a Motion to Dismiss for failure to obtain a certificate of merit. At the hearing, plaintiff's counsel informed the trial court about problems he had identifying the defendant doctor for service of process and that he himself had experienced "some very substantial medical problems" since filing the complaint, which resulted in him having trouble working. The statute of limitations had run, so a dismissal with prejudice would terminate the litigation. The trial court granted the Motion to Dismiss with prejudice stating, "I just don't believe I can do anything about it" and "this is not a discretionary matter." On April 9, 2018, plaintiff filed a Motion to Reconsider, which was heard on May 31, 2018. At that time, plaintiff's counsel informed the trial court that he had still not sought nor obtained an expert affidavit, but argued plaintiff's belief that the trial court had erred in determining it did not have discretion to allow additional time to comply. Nevertheless, the trial court denied the Motion to Reconsider.

On appeal, plaintiff argued that the trial court erred in concluding that it lacked discretion to dismiss the complaint without prejudice. The appellate court noted that the legislative history of 735 ILCS 5/2-622 reveals the legislature did not intend to require dismissal with prejudice, citing *McCastle v. Sheinkop*, 121 Ill.2d 188, 192 (Ill.Sup.Ct. 1987). In that case, the Supreme Court vacated and remanded an order of dismissal entered by a trial court which operated under the misapprehension that it did not have discretion. The appellate court further reviewed cases in which the "good cause" standard was employed to allow extensions of time to obtain the certificate of merit in instances where plaintiff had failed to comply with 2-622. The appellate court vacated the trial court's order dismissing the case with prejudice and remanded for the trial court "to exercise its discretion."

Takeaway

The trial court must not dismiss a case for failure to comply with 2-622 without first exercising its discretion.



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