COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2023-P-0961

MIDDLESEX, ss.

Yu-Fen Liu, Plaintiff/Appellant

V.

Tufts Medical Center, Inc, Et Al.,

Defendants/Appellees

On Appeal From Middlesex Superior Court's Judgement of Dismissal

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Reply Brief of Plaintiff Yu-Fen Liu

Date: December 19, 2023

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RESPONSE TO DEFENDANTS ARGUMENTS

A. THERE WAS NO PREVIOUS FINAL VALID JUDGMENT WITH PREJUDICE.

On Defendants' Brief, page 10, it is stated that:

> On Kaplan's Motion to Dismiss on July 29, 2022. R.A.I. III 6. The Court's Endorsement reads: "After careful consideration of the parties' positions, the motion to dismiss **for failing to post a bond**, pursuant to G.L. c. 231, Section 60B, **is Allowed** and this civil action is dismissed as to both defendants. Plaintiff asks for more time to obtain a diagnosis for the harm allegedly, caused by defendants, however, that request is denied because a) this incident occurred nearly three years ago; and b) medical malpractice plaintiffs are obligated to have support for their claim at the point of a medical malpractice tribunal, or face the consequences under the statute, namely, the bond requirement. Further, based on the complaint, it does not appear that additional time would aid the plaintiff in supporting her claim for negligence. **Case dismissed.**" R.A.I. III 96-97.

The previous judge did not determine whether the dismissal was with prejudice under his discretion. The judge of the current case assumed that the dismissal was with prejudice under *Farese v. Connolly*, 664 N.E.2d 450 (Mass. 1996). But *Farese v. Connolly* is not a very well-reasoned decision; and the current case is defiantly distinguishable from *Farese* in that

(1) there was no medical tribunal decision in favor of defendants, which is the entire basis and logic for the *Farese* decision; (2) the bond order was entered on May 19, 2022 (#10); On July 7, 2022, the plaintiff moved (#13) for more time to post the bond and on August 3, 2022 did post the $6000 bond (#18) albeit she was late for the 30-day deadline (paper#18). R.A.I. III 6. So the plaintiff did make efforts to obey the order of bond, and made reasonable effort to request the court consider her hardship and health situation, which the previous judge declined without consideration. *See* the above the judge decision above and R.A.I. III 96-97. As such, other precedent authorities such as *Goldstein v. Barron*,382 Mass. 181 (1980) (holding "court exercised its discretion under Mass.R.Civ.P. 6(b) to permit a medical malpractice action to continue even though the plaintiff's bond was not filed within thirty days as required by G.L.c. 231, § 60B") and *Croteau v. Swansea Lounge, Inc.*, 402 Mass. 419, 422 (Mass. 1988) (holding "[a] Superior Court judge has discretion to enlarge the period for filing the affidavit setting forth sufficient facts to raise a legitimate question of liability appropriate for judicial inquiry required by G.L.c. 231, § 60J

(formerly G.L.c. 231, § 60F), the 'dramshop act,' even though a plaintiff's request for the extension has not been made within ninety days of the date of filing a complaint"), are more properly authorities for the present case.

Further, if the previous judge made a determination with his sound discretion under the guidance of precedents, he would have made a dismissal without prejudice. "Involuntary dismissal is a drastic sanction which should be utilized only in extreme situations. As a minimal requirement, there must be convincing evidence of unreasonable conduct or delay. A judge should also give sufficient consideration to the prejudice that the movant would incur if the motion were denied, and whether there are more suitable, alternative penalties. Concern for the avoidance of a congested calendar must not come at the expense of justice. The law strongly favors a trial on the merits of a claim. *Monahan v. Washburn*, 400 Mass. 126, 128-29 (Mass. 1987) (Emphasis added). *See Also Massachusetts Broken St. v. Pl. Bd. of Weston*, 45 Mass. App. Ct. 738, 740 (Mass. App. Ct. 1998).

"[E]xcept in extreme cases, the "mere passage of time" is not enough to warrant dismissal." *Comley v. Lazaris*, 79 N.E.3d 1111 (Mass. App. Ct. 2017) quoting *School Comm. of Holyoke v. Duprey*, 8 Mass. App. Ct. 58, 60-61 (1979).

In *Croteau v. Swansea Lounge, Inc.*, 402 Mass. 419, 422 (Mass. 1988), the Court reasoned that, quoting *Goldstein v. Barron*,382 Mass. 181 (1980), the Court "dealt with a case in which a plaintiff failed to post the bond required by G.L.c. 231, § 60B, within the requisite thirty-day period. Despite the statutory directive that, '[i]f said bond is not posted within thirty days . . . the action shall be dismissed,'… '[a] corrective is available in appropriate situations. It is found in the principle of [Mass. R. Civ. P.] 6 (b), 365 Mass. 747 (1974), which permits `enlargement' of time under stated conditions. . . . Although the rule is not applicable by its terms, it should be applied by analogy. . . ." and "the allowance of the motion rests with the sound discretion of the trial judge who may condition the exercise of this discretion on the plaintiff's amelioration of any prejudice to the defendant arising

out of the plaintiff's failure to act in a timely manner." *Croteau v. Swansea Lounge, Inc.*, supra at 422-23.

In *Commonwealth v. Pimentel*, 169 N.E.3d 1213, 1216 (Mass. App. Ct. 2021), this Court decided that in absence of showing of egregious prosecutorial misconduct, substantial threat of prejudice, or irreparable harm to defendant's opportunity to obtain fair trial, "dismissal of a complaint on a basis such as want of prosecution should not be with prejudice".

"Given the procedural history of this case, the plaintiffs' request for a sixty- to ninety-day extension to obtain replacement counsel did not constitute an unreasonable delay; nor would the defendants have been unduly prejudiced by a continuance." *Cranmore v. CWC Builders, Inc.*, 92 Mass. App. Ct. 1104 (Mass. App. Ct. 2017).

Here the plaintiff submitted evidence and arguments that she was in poor health condition and needed more time for diagnoses (i.e. involving third parties) and was in financial difficulty (R.A.III 19). But there is no record that the previous judge made any consideration as to the prejudice. "On the state

of this record, which fails to demonstrate any consideration of the threshold factors as required by *Monahan*, we have no hesitation in concluding that it was 'erroneously Draconian,' (citation omitted) to dismiss Dewing's complaint with prejudice." *Dewing v. J.B. Driscoll Ins. Agency*, 30 Mass. App. Ct. 467, 471 (Mass. App. Ct. 1991).

In *Comley v. Lazaris*, 79 N.E.3d 1111 (Mass. App. Ct. 2017), the court reasoned that because third parties are required, dismissal with prejudice is "[o]n this record, we cannot say that such a severe sanction was warranted. While it is true that the plaintiff voluntarily took the laboring oar in order to complete the necessary actions contemplated by the agreement, a seven-month delay is not egregious, particularly where some actions were dependent on third parties such as the planning board of the town of Rowley. Nor are the defendants able to establish prejudice. Finally, the judge and the defendants had additional remedies available, short of the action taken. *See Monahan*, supra; *Dewing v. J.B. Driscoll Ins. Agency*, 30 Mass. App. Ct. 467, 470-73 (1991)." (emphasis added).

Similarly, here no such severe sanction on the plaintiff was warranted just because she was late for the bond payment.

B. IN HER PREVIOUS COMPLAINT PLAINTIFF STATED A VALID "LACK OF CONSENT" MEDICAL MALPRACTICE CLAIM AND BATTERY THAT SHOULD NOT BE SUBJECTED TO MEDICAL TRIBUNAL REVIEW AND NO BOND SHOULD BE REQUIRED

In the previous complaint, the plaintiff stated that "The MD (Medical Doctor refused to release his name) in charge instructed the security to violently detain the [Plaintiff] when she attempted to flee"; "An officer kicked the back of [Plaintiff's] knee, resulting in her toppling to the ground"; "Six securities proceeded to drag her onto a stretcher"; "the [Plaintiff's] friend comes to bring her home...they both try to leave but are surrounded by security. And offending officer kicks of her knee, and the [Plaintiff] crumples to the floor"; "On plaintiff's medical records, there is no mention of these events (roughly 10 pm -> 3am time she left)"; "The patient requests to leave the hospital, only to be ignored. The plaintiff agrees to sign a release form, but is still rebuked. Around midnight, the patient's friend comes to bring her home; only to be met with similar results. They both try to leave but

are surrounded by security. An offending officer kicks her knee, and the patient crumples to the floor. There are no records between 21:48 (9pm 1112412019 --> 3am 11/25/2019).” R.A.I. III 8-9.

Plaintiff obviously stated a valid claim of medical malpractice under the “lack of informed consent” theory. In *Matter of Spring*, 380 Mass. 629, 634 (1980), it was held that "[u]nless there is an emergency or an overriding State interest, medical treatment of a competent patient **without his consent is said to be a battery**." *Id.* at 638., see also *Shine v. Vega,* 429 Mass. 456, 464-65 (Mass. 1999) (emphasis added).

A "competent individual may refuse medical treatment which is necessary to save that individual's life." *Norwood Hosp. v. Munoz*, 409 Mass. 116, 121 (1991). “Both the common law and constitutional bases for our recognition of the ‘right of a competent individual to refuse medical treatment.’” *Id.* at 122. Also See *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 430 (1986); *Superintendent of Belchertown State Sch. v. Saikewicz,* 373 Mass. 728, 739, 742 (1977) (right to refuse medical treatment is rooted in

common-law jurisprudence and guaranteed through constitutional right to privacy).

The emergency only comes into play "when the patient is unconscious or otherwise incapable of consenting, and harm from a failure to treat is imminent and outweighs any harm threatened by the proposed treatment. When a genuine emergency of that sort arises, it is settled that the impracticality of conferring with the patient dispenses with need for it. Even in situations of that character the physician should, as current law requires, attempt to secure a relative's consent if possible." *Shine v. Vega*, 429 Mass. 456, 465 (Mass. 1999) (emphasis added).

In the complaint Plaintiff was conscious and competent and capable of consent when she was in the hospital. The hospital made no effort to contact her son or other relatives either. The plaintiff's complaint was clearly about a medical **detaining** without consent — which is a battery. Medical malpractice procedure through tribunal is not required here because no standard of care needs to be determined. *Leininger v. Franklin Medical Center*, 404 Mass. 245, 534 N.E.2d 1151, 1152 (1989) (holding that

claims for civil rights violation and false imprisonment, arising out of civil commitment are not appropriate for tribunal review); see also *Brace v. Commonwealth of Massachusetts*, 673 F. Supp. 2d 36, 41 (D. Mass. 2009). The previous judge should have waived or reduced the bonds requirement and allowed Plaintiff's motion to reduce the bond, because the plaintiff's claim will not fail as a matter of law, and the dismissal should be without prejudice. *See Athru Grp. Holdings v. SHYFT Analytics, Inc.*, No. 21-P-560, at *7-8 (Mass. App. Ct. Mar. 29, 2022) ("to the extent the plaintiff argues that the defendants violated the SPA by not providing reasonable access to information, that argument itself can be raised in the context of arbitration without prejudicing the rights of the plaintiff… dismissal without prejudice was proper").

C. The Current Complaint Is Not a Re-branding.

As previously concluded, medical batteries can be both a medical malpractice and a battery that does not require medical tribunal review.

The Complaint Procedure (2008), following "a dismissal without prejudice, the prosecution may either file a motion to reconsider, file a new application for complaint in the same court, appeal from the dismissal of the original complaint, or seek an indictment from the grand jury". See *Commonwealth v. Pimentel*, 169 N.E.3d 1213, 1216 (Mass. App. Ct. 2021).

Chace v. Curran, 71 Mass. App. Ct. 258, 265 (Mass. App. Ct. 2008) concluded that medical record fraud is not a medical malpractice. "To succeed on their claims, the plaintiffs first must prove all of the elements of misrepresentation and fraud or fraudulent concealment discussed earlier. Here, those elements do not focus on the quality of care the defendants rendered." "They focus instead on whether the defendants engaged in activity designed to hide from the plaintiffs the precise nature of the treatment they provided so that the plaintiffs would not have the knowledge they needed to sue them for it." Id. "Because such factual disputes concerning liability require no direct inquiry into the standard of care that Andrew received during the defendants' attempts

to revive him, they are distinguishable from medical malpractice claims." *Id* at n.11. "If the plaintiffs are successful in proving fraud, however, then the quality of the defendants' care is relevant, but only because it supplies the measure of damages for their fraud. In other words, upon proof of fraud, evidence on the merits of the malpractice claim becomes, in effect, evidence on the issue of damages for fraud. See generally, e.g., *Fishman v. Brooks*, 396 Mass. 643, 647 (1986); *Jernigan v. Giard*, 398 Mass. 721 (1986)." "The malpractice claim is gone, and without proof of fraud, the quality of the defendants' care is irrelevant." Id at 266. The plaintiffs "allege the intentional and wrongful concealment of a cause of action based on a fiduciary duty of full disclosure, a claim that does not require an assessment of policies or procedures surrounding appropriate record-keeping by a medical provider." *Id*.

"We thus do not see how the defrauding of a patient of a timely cause of action, either through silence or intentional false statements made in the patient's record, raises an appropriate question for submission to a medical malpractice tribunal, whose sole purpose

under G.L. c. 231, § 60B, is to evaluate only the medical aspects of a patient's claim of malpractice." Id at 267. "As this is not a malpractice claim, the tribunal has no role to play in deciding whether the action should proceed." *Id* at 268.

D. The Security Guards and Additional Defendants are Each Individually Liable to the Plaintiff.

In the current complaint, the medical doctors, nurses and security personnels are each individually liable to the plaintiff, and TMC as the employer "was vicariously liable under a theory of respondeat superior for violations of the Massachusetts Civil Rights Act." *Sarvis v. Boston Safe Deposit and Trust*, 47 Mass. App. Ct. 86 (Mass. App. Ct. 1999). *See also Leininger v. Franklin Medical Center*, 404 Mass. 245, 534 N.E.2d 1151, 1152 (1989).

E. The TMC Has refused to Produce Record of Information of the Unserved Defendants In order for Plaintiff to Complete the Service process.

Plaintiff made services upon TMC for the unserved defendants together with other defendants on January 31, 2023. R.A.I 8. TMC refused to accept services for

the unserved defendants, see affidavits of Sheriff, #12-18, R.A.I 10. TMC filed a motion to quash Plaintiff's subpoena for the information of the unserved defendants. #19, R.A.I 10. The court allowed the motion to quash. TMC should be compelled to produce the information of the unserved defendants, and extension of time to serve the unserved defendants should be allowed, or special services by publication should be allowed after the appeal.

F. THE AUTHORITIES FROM OTHER JURISDICTIONS

Plaintiff provided authorities from other jurisdictions in order for the court to borrow reasonings and perspectives, in this Reply Brief, Plaintiff supplements with additional authorities for Massachusetts.

CONCLUSION

The judge errored in dismissing plaintiff's present complaint by assuming the prior dismissal was with prejudice.

Respectfully submitted,

/s/ Jie tan

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, _Jie Tan__, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

Use only if producing brief in a proportional font/word limit: I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Courier New at size _12, and contains _3169_words, total non-excluded words as counted using the word count feature of Microsoft Word.

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on December 19, 2023, I have made service of this Replay Appeal upon the attorney of record for each party, by email and the Electronic Filing System on:

/s/ Jie Tan

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