**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS,**
**EASTERN DIVISION**

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| LARRY DUBOSE, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 19 cv 8255 |
| | ) | |
| COOK COUNTY, JOHN HALLINAN DR. DAVID KELNER, | ) | Honorable Judge Valderrama |
| | ) | |
| | ) | JURY TRIAL DEMANDED |
| | ) | |
| Defendants. | ) | |

**DEFENDANT COOK COUNTY'S MOTION TO DISMISS PLAINTIFF'S HEALING ARTS MALPRACTICE CLAIMS**

NOW COMES Defendant, Cook County, by its attorney KIMBERLY M. FOXX, State's Attorney of Cook County, through her Assistant State's Attorneys, Rachael D. Wilson and Cory J. Cassis, and moves this honorable court to enter an order dismissing the state law Healing Arts Malpractice Claims in Plaintiff's Third Amended Complaint, pursuant to 12(b)(6) and 735 ILCS 5/2-622. In support of its Motion to Dismiss, Cook County states as follows:

**INTRODUCTION**

Plaintiff Larry Dubose, a former detainee at the Cook County Jail, filed his Third Amended Complaint ("TAC"), his third attempt to state a claim, alleging that defendants Dr. David Kelner, John Hallinan, and Cook County failed to provide him with prescribed medication upon arrival at the Cook County Jail in violation of Section 1983 and he went seven (7) days without a medication prescription. R. 42. As a result, Plaintiff claims that he experienced pain and suffering. defendants Dr. Kelner, Hallinan, and Cook County ("Defendants") filed their 12(b)(6) Motion to Dismiss

Plaintiff's Amended Complaint[1] requesting dismissal of individual defendants Hallinan and Dr. Kelner ("Individual Defendants"), as well as both the *Monell* and Healing Arts Malpractice Claim against Cook County. R. 31. This Honorable Court denied Defendants' 12(b)(6) motion as to the Individual Defendants and the *Monell* claim against Cook County while granting the motion as to the Healing Arts Malpractice Claim. R. 41. Plaintiff has since filed his Third Amended Complaint in an attempt to cure the pleading deficiencies in his Healing Arts Malpractice claim against Cook County. R. 42. Defendant Cook County contends that Plaintiff has failed to state a claim against Cook County and moves again for dismissal.

Plaintiff's Complaint must be dismissed as to Defendant Cook County because the Illinois Local Government and Government Employee Tort Immunity Act, 745 ILCS 10/1-101 *et seq*., bars Plaintiff's malpractice claim and because Plaintiff further fails to allege sufficient facts showing Cook County is liable pursuant to the Illinois Healing Arts Malpractice Statute or provide the affidavits required under § 2-622. This is Plaintiff's third attempt to make a claim against Cook County. Thus, the Court should dismiss Plaintiff's Amended Complaint with prejudice.

## FACTUAL BACKGROUND

The following facts are taken from Plaintiff's Third Amended Complaint and presumed true solely for the consideration of this Motion to Dismiss. In January 2018, Plaintiff was taking prescription medication. (TAC, ¶8.) On January 11, 2018, Plaintiff entered the Cook County Jail ("CCJ"). (*Id.* at ¶7.) Defendant Hallinan, a mental health specialist, interviewed Plaintiff during the intake process. (*Id.* at ¶¶4, 12.) Plaintiff's responses informed Defendant Hallinan that Plaintiff had been detained at CCJ in July of 2015; Plaintiff received prescription medication at that time; Plaintiff continued to receive such medication; Plaintiff's physician's name; and Plaintiff's

[1] The same motion applied to the Second Amended Complaint which substituted the Amended Complaint and remedied minor errors.

previous hospital visits. (*Id.* at ¶13.) Defendant Hallinan had the power to refer Plaintiff to a qualified medical professional or mental health professional. (*Id.* at ¶14-15.)

On January 11, 2018, CCJ had in place a policy that required a qualified medical professional or qualified mental health professional with prescribing authority to see a detainee within 24 hours of booking ("24 Hour Policy") in relation to the detainees medication needs. (*Id.* at ¶9.) At that appointment, the professional would determine whether to continue the detainee on the prescription medication reported. (*Id.*) On August 31, 2013, Plaintiff claims CCJ stopped using the 24 Hour Policy. (*Id.* at ¶11.)

Plaintiff then alleges that Defendant Dr. Kelner had the power to assign a psychiatrist to the intake process, but no psychiatrist was assigned at the time Plaintiff entered CCJ on January 11, 2018. (*Id.* at ¶¶17,19, 22.) On January 12 and January 15, 2018, Plaintiff submitted a grievance concerning the discontinuation of his medication. (*Id.* at ¶25.) Plaintiff continued to experience pain and suffering until January 18, 2018, when he saw his original prescribing physician. (*Id.* at ¶26.)

## STANDARD OF REVIEW

A court may dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) if the plaintiff fails "to state a claim upon which relief can be granted." When considering a motion to dismiss, the Court must assume as true all well-pled allegations in the complaint and construe all reasonable inferences in favor of the plaintiff. *See, e.g., Gibson v. City of Chicago*, 910 F.2d 1510, 1520-21 (7th Cir. 1990). "[T]he liberal notice pleading allowed by the federal rules requires the complaint to include the operative facts upon which a [P]laintiff bases his claim." *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 198 (7th Cir. 1985) (citations omitted). While a complaint attacked by a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) does not need detailed factual allegations,

Plaintiff has an obligation to provide grounds for his alleged entitlement to relief with more than labels, conclusions, or a formulaic recitation of the elements. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Courts are not bound to accept as true a legal conclusion posing as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

## ARGUMENT

### I. The Court should dismiss Plaintiff's state law claims with prejudice because the Illinois Local Government and Government Employee Tort Immunity Act bars any state law claims.

Illinois state court claims against Cook County should be dismissed from Plaintiff's Third Amended Complaint because under the Illinois Local Government and Government Employees Tort Immunity Act (the "Tort Immunity Act"), "a local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109. The Tort Immunity Act exists to "protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101(a). The term "'Public Employee' means an employee of a local public entity." 745 ILCS 10/1-207; 745 ILCS 10/1-202; *Moy v. County of Cook*, 159 Ill. 519, 530-32 (1994). In order for a government entity or employee to be liable in Tort, the Tort Immunity Act requires that the employee or entity in a correctional setting acted at minimum by "willfully and wantonly" failing to take reasonable action to summon medical care where he observes that an inmate is in need of immediate care. 745 ILCS 10/4-105.

Further, 745 ILCS 10/6-105 states:

> "Neither a local public entity nor a public employee acting within the scope of his employment is liable for injury caused the by the failure to make a physical or mental examination, or to make an adequate physical or mental examination of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others."

Similarly, 745 ILCS 10/6-106(a) states:

> "Neither a local public entity nor a public employee acting within the scope of his employment is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental or physical illness or addition or from failing to prescribe for mental or physical illness or addiction."

Defendants are public employees and entities within the Tort Immunity Act, and although Plaintiff uses phrases such as "turned a blind eye" and "disregarding," he fails to allege any actual facts of willful and wanton conduct or that Defendants knew from their "observation of conditions that plaintiff was in need of immediate medical care." Plaintiff concludes that Defendants use of the 24-Hour Policy and Plaintiff not being seen by a psychiatrist on the day of intake satisfy the requirement for wanton conduct. However, other than interviewing Plaintiff and taking his information as well as having a policy to see newly booked inmates within 24 hours, Plaintiff does not plead any other facts to suggest that willful and wanton conduct occurred. Although the Tort Immunity Act allows plaintiffs to bring a cause of action against a public official once the defendant's conduct reaches willful and wanton, it does not create new liabilities that did not previously exist in common law. *Sparks v. Starks*, 367 Ill. App. 3d 834, 838 (1st Dist. 2006).

Further, at the crux of Plaintiff's pleading is the allegation that Defendants failed to provide medical care and treatment, which is the exact allegations that 10/6-105 and 10-106(a) are intended to immunize Defendants and public entities from, absent willful and wanton conduct. In *Mich. Ave. Nat'l Bank v. Cook County*, that plaintiff alleged that the defendants failed to conduct examinations to evaluate whether that decedent suffered from breast cancer and a fibrocystic condition, and therefore failed to provide treatment on the date alleged in the Complaint. *Mich. Ave. Nat'l Bank v. Cook County*, 191 Ill. 2d 493, 516 (2000). The Illinois Supreme Court affirmed the appellate court's finding that the Tort Immunity Act "provides immunity from liability to a local public entity and its employees who have failed to make a

physical or mental examination, or who have failed to make an adequate physical or mental examination." *Id*. at 505. The Tort Immunity Act "is broad in scope and immunizes local public entities and public employees who fail to make or who make inadequate physical or mental examinations for purposes of determining whether a person suffers from a disease or physical or mental condition." *Id*. at 502 (*internal quotations omitted*).

The allegations of the instant case are synonymous to *Mich. Ave. Nat'l Bank*: Plaintiff alleges that Defendants Hallinan and Kelner failed to refer Plaintiff for evaluation before a mental health professional within 24 hours of arrival, that Plaintiff did not receive treatment or diagnoses for seven days, and Plaintiff does not allege that either defendant Hallinan or Dr. Kelner treated Plaintiff at another time. Accordingly, sections 10/6-105 and 10/6-106(a) of the Tort Immunity Act must apply. Pursuant to sections 10/6-105 and 10/6-106(a), Defendants are not liable for the allegations Plaintiff makes under state law and this Court should dismiss any state law claims with prejudice.

Because Plaintiff alleges merely that Defendants failed to examine or prescribe medication for his alleged mental illness; fails to allege Defendants observed the need for immediate medical care; facts indicating they acted willful and wantonly; the Tort Immunity Act bars Plaintiff's allegations against Defendants for failure Healing Arts Malpractice claim, and it must be dismissed with prejudice.

**II. Alternatively, the Court should Dismiss Plaintiff's State Law Claims Against Defendant Cook County Pursuant to 12(b)(6) and 735 ILCS 5/2-622.**

In his Complaint, Plaintiff states he is bringing a supplemental state law claim against Cook County based upon Healing Arts Malpractice, 735 ILCS 5/2-622, of the Illinois Civil Code of Procedure ("the Act"). Plaintiff has added paragraphs to his allegations against Cook County in attempt to support his State Law Healing Arts Malpractice claim, as follows:

> 6. Defendant Cook County is an Illinois municipal corporation. Plaintiff seeks to impose liability on the County under 42 U.S.C. § 1983 for injuries he incurred because of a widespread practice described below and under the doctrine of *respondeat superior* for a state law tort committed by employees of Cook County.
>
> 28. In January of 2018, the standard of care applicable to plaintiff, as a person entering a custodial facility who had been prescribed and was taking medication for a serious health need, was to continue that medication or replace it with an appropriate substitute.
>
> 29. Defendant Cook County, through its employees breached this standard of care when its employees did not provide plaintiff with his previously prescribed medication or any substitute for seven days.
>
> 30. Plaintiff was injured as a result of the aforesaid breach of the standard of care.
>
> 31. Plaintiff will submit the documents specified in Section 2-622 of the Illinois Code of Civil Procedure as may be required by *Young v. United States*, 942 F.3d 349 (7th Cir. 2019).
>
> 32. As a supplemental state law claim against defendant Cook County only: as a result of the foregoing, plaintiff was subjected to healing arts malpractice under Illinois Law.
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> (TAC, ¶ 6, 28-32)

Plaintiff's allegations fail to state a claim because: (a) Plaintiff fails to plead facts against Cook County and (b) Plaintiff failed to comply with the requirements of Section 2-622. Accordingly, Plaintiff's supplemental state law claim against Cook County must be dismissed with prejudice.

**A. Plaintiff Fails to Plead Sufficient Facts Against Cook County**

A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), in order to put the defendant on fair notice of the claim and its basis. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although detailed factual allegations are not required in Federal Court, mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The complaint must contain

sufficient factual matter to state a claim of relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim for healing arts malpractice exists "when a professional applies his expert knowledge or skill in an unreasonably deficient way resulting in injury." *Hales v. Timeberline Knolls, LLC* 2017 U.S. Dist. LEXIS 11 at *17 (ND Ill. 2017) (citing *Awalt v. Marketti*, 2012 U.S. Dist. LEXIS 49182 at *4 (ND Ill. 2012)). The nature of the act alleged determines whether there has been healing art malpractice and falls within the scope of Section 2-622. *Id*. A plaintiff alleging a medical malpractice claim must establish three elements: "(1) the proper standard of care, (2) a deviation from that standard, and (3) an injury proximately caused by that deviation." *Prairie v. Univ. of Chicago Hosps*., 298 Ill. App. 3d 316, (1st Dist. 1998)(citing to *Purtill v. Hess*, 111 Ill. 2d 229 (1986)).

Although Plaintiff has added new statements, such as the assertion that Plaintiff suffered from "a serious health need" and that the standard of care owed was a general duty to replace Plaintiff's medication, Plaintiff fails to identify what the standard of care is. Identifying the standard of care is essential in order to properly plead the conclusory allegation that the standard has been breached. By merely asserting that there exists a standard and Defendants breached it, Plaintiff fails to establish causation or otherwise to put Defendants on notice of how they could be liable for healing arts malpractice within the scope of the Act. Much like the prior amended pleading, Plaintiff's vague allegations and catch-all "as a result of the foregoing," is simply insufficient to identify how Cook County has committed healing arts malpractice.

**B. Plaintiff Lacks the Requisite Affidavit Required by §2-622**

Even if Plaintiff were able to plead enough facts that would sufficiently put Defendant Cook County on notice of its role in his cause of action, Cook County must still be dismissed under Plaintiff's state law Healing Arts Malpractice theory. Section 5/2-622 of the Illinois Code of Civil

Procedure prescribes the procedure that must be followed by a plaintiff when filing a complaint alleging damages for injuries or death by reason of medical, hospital, or other healing art. *McAlister v. Schick*, 147 Ill. 2d 84, 88 (1990). Section 2-622 states that a plaintiff is required to attach to their complaint, an affidavit stating that they have consulted with a qualified healthcare professional. 735 ILCS 5/2-622(a)(1). The plaintiff must also attach a report from a reviewing healthcare professional setting forth why they believe that there exists a reasonable and meritorious cause for the filing of the complaint. *Id*. In cases where the defendant is a "physician licensed to treat human ailments without the use of drugs or medicines and without operative surgery," including "a psychologist," the written report must be from a professional holding the same class of license in that profession. *Id*. A health professional's report and attorney affidavit must accompany complaints brought against health care providers. *McCastle v. Mitchell B. Sheinkop, M.D., Ltd.*, 121 Ill. 2d 188, 190 (1987). A failure to attach such an affidavit or the physicians report shall be grounds for dismissal. 735 ILCS 5/2-622(g).

In his Complaint, Plaintiff alleges that he will supplement his 2-622 affidavit "as required by *Young v. United States*, 942 F.3d 349 (7th Cir. 2019)." But in *Young*, a *pro se* federal inmate in Illinois filed a suit alleging malpractice because the prison in which he was housed failed to perform or authorize cataract surgery where two physicians recommended surgical intervention. *Id*. at 350. The *Young* plaintiff failed to request or provide a § 2-622 report or accompanying affidavit, arguing that the two recommendations were sufficient. *Id.* The District Court granted the "motion by the United States to dismiss the complaint or for summary judgment." *Id*. On appeal, the appellate court stated that the difference between the two was important, as a motion to dismiss addresses whether a complaint is defective, while summary judgment asserts a conclusion based on the evidence. *Id*. 350-351. In considering the facts, the court reasoned that:

> **"[a] prisoner may have insuperable difficulty obtaining a favorable physician's report before filing a complaint**, so if a complaint not accompanied by a §5/2-622 affidavit is defective, many a prisoner will be unable to litigate a malpractice claim. But **if a prisoner or other *pro se* plaintiff** has until the summary judgment stage to comply with the state law, information obtained in discovery may allow a physician to evaluate the medical records and decide whether there is reasonable cause for liability."

*Id*. at 351 **(emphasis added).**

The court considered that 5-2/622(a)(2) and (3) allowed for extensions of time in which a litigant may supplement his or her report, and determined that the plaintiff, a *pro se* detainee, could similarly have extensions when responding to a motion for summary judgment in order to "gather essential evidence." *Id*. 351. The Seventh Circuit held that the *pro se*, detainee plaintiff in *Young* did not need to have his 2-622 affidavit at the pleading stage, but his failure to do so at summary judgment made finding for Defendants at that stage appropriate. *Id*. 352.

*Young* is not the general dispensation from the requirements of §2-622 upon which Plaintiff relies. Rather, *Young* recognizes the limitations of *pro se* litigants and allows them additional time. (See *Parker v. Four Seasons Hotels, Ltd*., 845 F.3d 807, 811 (7th Cir. 2017) "pleadings filed by *pro se* litigants are not held to the same stringent standards as those filed by trained attorneys; and *Omar v. O'Leary*, 1991 U.S. Dist. LEXIS 10118 (ND Ill. 1991) giving "the benefit of the doubt to which pro se litigants –and perhaps especially prisoners- are entitled"). Per Plaintiff's representations, he is neither a *pro se* litigant nor a detainee. (TAC ¶ 3). In fact, Plaintiff has retained legal counsel who hold themselves out as specializing in Civil Rights and Jail/Prison litigation. Plaintiff has provided no justification for why he or his counsel are not able to provide the documents required under the Act and attempts to use the holding in *Young* to sidestep the requirements of Section 2-622 and avoid providing the requisite documents identified by Illinois law. Because Plaintiff is not a *pro se* litigant, there is nothing impeding his ability to comply with

Illinois law and provide a Section 2-622 report and affidavit confirming that his claim is in fact meritorious. At minimum, there is no reason why Plaintiff's counsel cannot include the attorney affidavit required under 2-622 confirming the merit of the claim after consultation with a medical provider. Plaintiff's continued failure warrants dismissal of his supplemental state law claim with prejudice.

## CONCLUSION

WHEREFORE Defendant Cook County respectfully requests that the Healing Arts Malpractice Claim in Plaintiff's Third Amended Complaint and any other state law claim be dismissed with prejudice for failure to state a claim upon which relief may be granted because: (1) his claim is barred by the Illinois Local Government and Government Employee Tort Immunity Act, and (2) Plaintiff has failed to allege sufficient facts showing Cook County is liable pursuant to the Illinois Healing Arts Malpractice Statute and Plaintiff failed to provide the affidavits required under § 2-622. In the alternative, Defendants request that this Court require Plaintiff to submit the attorney affidavit under § 2-622. Finally, Defendants request that the Court enter an order staying all deadlines for responsive pleadings in this matter until there is a ruling on this motion, and any other relief this Court deems fair and just.

Respectfully submitted,

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