IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, SIXTH DIVISION

Sally Gary, Plaintiff,	)	
v.	)	No. 15 L 66043
City of Calumet, Defendant.	)	Judge Carrie E. Hamilton

ORDER

This matter is before the Court on defendant's Motion for Summary Judgment, the Court orders as follows:

Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits, viewed in a light most favorable to the non-movant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005; *Progressive Universal Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 215 Ill. 2d 121, 127-28 (2005). The purpose of summary judgment is not to try a question of fact, but simply to determine whether one exists. *Jackson v. TLC Assoc., Inc.*, 185 Ill. 2d 418, 423 (1998). A trial court is required to construe the record against the moving party and may only grant summary judgment if the record shows that the movant's right to relief is clear and free from doubt. *Id.* If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Assoc. Underwriters of Am. Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010, 1016-17 (1st Dist. 2005).

Defendant moves for summary judgment based on the EMS Act and a line of cases interpreting "willful and wanton" pursuant to that statute. Although not precedent that this Court is bound to follow, the analysis by the Seventh Circuit in *Fagocki v. Algonquin/Lake-In-The-Hills Fire Protection District*, 496 F.3d 623, 628-29 (7th Cir. 2007), is very much on point and instructive as it analyzes Illinois cases regarding claims against paramedics. As in *Fagocki*, the plaintiff's best evidence in this case is the paramedics' failure to detect that the intubation, which the paramedics thought successful based upon their multiple efforts to check the intubation, had failed. As the Seventh Circuit stated,

> No one supposes an incorrect insertion itself, in a moving ambulance, negligent. . . . There are, however, procedures for checking that the

endotracheal tube is in the right place, and so the paramedics' failure to detect the misplacement of the tube may have been negligent. But such a failure would not amount to willful and wanton misconduct without circumstances of aggravation. And of that the only evidence is the testimony of one of the plaintiff's experts that, "I could see nowhere in their record that they confirmed the tube placement by chest rise, [or] by that little device you could put on the end of the tube that changes colors if you are in the proper place in the trachea." Given the pressure of time under which the paramedics were laboring, the failure to have made a written notation of having checked for the correct placement of the tube is too thin to justify an inference of willful and wanton misconduct. And suppose the paramedics had detected the incorrect placement (if the tube was placed incorrectly, as we're assuming). There is no evidence they would have had an easier time successfully re-intubating than the emergency-room physician, so at best [plaintiff] would have been intubated a minute or two before she was intubated in the emergency room.

Id.

In this case, unlike in *Fagocki*, the paramedics did check multiple times and in multiple ways to ensure that the intubation was done correctly. The fact that there is no record that they used a third method to check does not amount to negligence, let alone willful and wanton. The plaintiff wants the court to rely upon an affidavit attached to the Complaint pursuant to 735 ILCS 5/2-622. This affidavit was created prior to any discovery in this matter and there was no argument made that this expert had reviewed the entire discovery in this case and maintains this opinion and would be testifying as such in this case. If the Court were to deny a Motion for Summary Judgment based upon this affidavit (which is the sole "evidence" presented of the alleged conduct rising to the level of willful and wanton), then a court could never grant a motion for summary judgment in a case like this. Further, even if the Court were to consider this expert affidavit as competent evidence at this point, as the Seventh Circuit said in *Fagocki*, "the failure to have made a written notation of having checked for the correct placement of the tube is too this to justify an inference of willful and wanton conduct." *Id.*

This is precisely the type of case that falls within the EMS Act and therefore the Motion for Summary Judgement is granted.

Aug 9, 2019
ENTERED,

Judge Carrie E. Hamilton, No. 2144

Judge Carrie E. Hamilton
AUG 09 2019
Circuit Court-2144