Circuit Court for Baltimore City
Case No. 24-C-18-001-464

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2527

September Term, 2018

DIANA MILLER

v.

THE JOHNS HOPKINS HEALTH SYSTEM CORPORATION *ET AL.*

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*Wright,
Graeff,
Kehoe,

JJ.

Opinion by Kehoe, J.

Filed: November 19, 2019

*Wright, J., now retired, participated in the hearing and conference of this case while an active member of the Court; after being recalled pursuant to Maryland Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this Opinion.

*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See* Md. Rule 1-104.

Diana Miller appeals from a judgment of the Circuit Court for Baltimore City, the Honorable Lawrence Fletcher-Hill, presiding, that dismissed, without leave to amend, the second amended complaint in Miller's civil action against The Johns Hopkins Hospital and The Johns Hopkins Health System Corporation (collectively "Hopkins"), as well as several individual defendants affiliated in one capacity or another with Hopkins. Miller raises four issues for our consideration, which we have reworded and consolidated as follows:

1. Did the circuit court err in dismissing Ms. Miller's second amended complaint?

2. Even if dismissal were proper, did the circuit court abuse its discretion by not granting Ms. Miller leave to file a third amended complaint?

We answer no to both questions and thus affirm the circuit court's dismissal of Miller's second amended complaint without leave to amend.

Background

A. The request for medical records

Seeking relief from chronic pain, Diana Miller became a patient at Hopkins. Eventually, she grew dissatisfied with her treatment and, on December 15, 2017, had her attorney request copies of her records from Hopkins's medical-records department. Miller, through her attorney, asked for those records twice more: once on December 27, 2017, and a second time on January 27, 2018.

By March 2018, Hopkins still had not handed over Miller's records. On March 2, 2018, Miller's attorney told the hospital's records department that Miller *could* sue for its refusal

to provide the requested medical records. A week later, on March 9, 2018, Miller's attorney told the hospital he *would* sue if the hospital continued to refuse to provide the requested records. A week after that, on March 16, 2018, Miller *did* sue under Md. Code, § 4-309(a) of the Health–General Article ("Health–Gen."). This statute provides (emphasis added):

> If a health care provider *knowingly refuses* to disclose a medical record within a reasonable time but no more than 21 working days after the date a person in interest requests the disclosure, the health care provider is liable for actual damages.

B. The lawsuit

Miller's first complaint contained two counts: one for tortious violation of Health–Gen. § 4-309(a) and another for conspiracy to violate the same statute. The first count alleged, *inter alia*, that Hopkins "was required to issue the requested medical records within a reasonable time and, under all circumstances, within 21 working days of the medical records request"; that Hopkins "knowingly refused to issue any of Diana Miller's requested medical records" within that timeframe; and that Hopkins still had not provided the requested records as of the date the complaint was filed.[1] "As a direct cause of [the refusal]," the complaint alleged, Miller "sustained damages" in excess of $30,000.

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[1] The complaint also alleged that Miller's attorney was a "person in interest" entitled to request the disclosure under Health–Gen. § 4-301(l) (defining "person in interest" to include "[a]n attorney appointed in writing by [an adult on whom a health care provider maintains a medical record]").

The second count, for conspiracy to violate Health-Gen. § 4-309(a) was brought against Hopkins and four individual defendants (three Hopkins-employed physicians and a third-party contractor hired by Hopkins to handle medical-record requests). This count alleged, "[u]pon information and belief," that the doctors and the medical-records administrator "entered into an agreement . . . to wrongfully refuse to issue Diana Miller's records within a reasonable time from the date of the request." Miller alleged that the defendants formed these conspiracies "with an evil or wrongful motive, an intent to injure, and ill will" and that they committed "overt actions to further the conspiracies." As a result of these conspiracies, the complaint alleged, Miller "sustained damages."

Hopkins filed a motion for a more definite statement which, unsurprisingly, the circuit court granted. The motion, and the court's order, focused mainly on the amorphous nature of Miller's conspiracy allegations and the allegation common to both counts that Miller "sustained damages." The trial court gave Miller twenty days to amend her complaint and required her to identify: (1) the "specific manner" in which the individual defendants had conspired to violate the statute, (2) the "specific injury" Miller claimed and all the facts corroborating it, and (3) all facts supporting her position that the value of the injury exceeded the jurisdictional minimum for proceeding in circuit court.

In response to the circuit court's order, Miller filed a first amended complaint—even if three days late and without attaching a comparison copy, as required by Md. Rule 2-341(e). With respect to the first count, for tortious violation of § 4-309(a), Miller's first

amended complaint barely differed from the original complaint. It was revised to reflect the fact that Miller had, by the time of filing the second amended complaint, received the requested records. It also alleged that "[a]s a direct cause of [Hopkins's] refusal to issue any requested medical records, Diana Miller suffered and continues to suffer chronic pain." The allegations for the conspiracy count received a similar *de minimis* revision.

Ten days after filing the first amended complaint, and without any intervening action by the trial court or by Hopkins, Miller filed a second amended complaint. These more substantial amendments included the addition of a third count (for "Negligent Selection, Supervision, and Retention of a Contractor"), as well as additional factual allegations for the first two counts. The relevant allegations included that the defendant doctors "felt contempt toward chronic-pain sufferer [Miller]" and that one of the doctors "expressed his contempt [by] directing his personal attorney to demand that a [Hopkins] employee stop inquiring into the facts of the medical treatment he provided to [Miller]" and by "ignoring [Miller] even when he and she were in the same room." Miller expounded on her damages (alleging that she "experienced and continues to experience chronic pain, emotional distress, and mental suffering") and also on Hopkins's alleged refusal to provide Miller with her requested records (emphasis in original):

> [Hopkins] had a choice and a chance. The hospital had a chance to provide the medical records within a reasonable period of time. The hospital *chose* not to do so. The hospital had a chance to provide the medical records within 21 working days. The hospital again *chose* not to do so. These were the hospital's choices—notwithstanding the hospital's great financial resources, notwithstanding the hospital's human resources (thousands of employees),

> and notwithstanding the *foreseeable* impact, on Plaintiff Miller's health condition, of the hospital's failure to provide the requested records.

The third count, for negligent selection, supervision and retention of a contractor, alleged that the contractor hired to handle medical-records requests had "a poor track record of providing requested medical records in a timely manner" both before Hopkins hired the company and while working for Hopkins. No additional factual allegations about this "poor track record" were provided.

A flurry of motions from both parties followed the filing of this second amended complaint. Only one is relevant here: Hopkins's motion to dismiss the complaint for failure to comply with the court's order granting the motion for a more definite statement and for failure to state a claim for which relief could be granted. With respect to the first count, alleging Hopkins's violation of § 4-309(a), Hopkins's argument focused on the fact that the statute requires a knowing refusal for there to be a violation. With respect to the conspiracy count, Hopkins focused on the lack of any facts to support some kind of agreement—even that the medical-records administrator and the doctors knew each other or had ever communicated. The hospital noted that Miller had been a sufferer of chronic pain before all of this, and her only physical injury supposedly caused by the violation was chronic pain. Hopkins asserted the second amended complaint did not explain a causal connection between the supposed violation of the statute and Miller's injuries.

In an attempt to clarify things, the circuit court held a hearing on August 27, 2018. During the hearing the court engaged in a colloquy with Miller's counsel about the factual

basis for the allegations in the second amended complaint. Relevant to Miller's second contention on appeal was an extensive exchange between the court and Miller's counsel—who made the records requests and communicated with Hopkins personnel—as to whether there were any facts that suggested Hopkins had *knowingly refused* to turn over Miller's records, rather than suggesting Hopkins was "simply late" in delivering them. The colloquy ended with the following exchange:

> Counsel: [In speaking with the record administrator's] office and leaving voice mails, I stated that she was in violation or that Hopkins was in violation of the statute, that we would sue if they did not send the records within a number of days. I said, "Are you sure that there has not been any miscommunication, that maybe you tried to fax it to the wrong number or that perhaps you mailed it to us but it hasn't come in the mail yet, because we don't want to sue you if we don't have to." And the agent that I talked to said, "No. No miscommunication. *We haven't done anything on it yet*."
>
> The Court: "It's coming."
>
> Counsel: No, no, no. No, they didn't say that. They said, "There's no miscommunication."
>
> The Court: *Well, they never said, "We're not going to produce the records;" is that correct?*
>
> Counsel: *No, they never said those magic words, if you will, but . . . those words are not required.*

Miller's counsel was unable to provide any additional facts not found in the second amended complaint that suggested that Hopkins or its agents had knowingly refused to provide Miller's medical records. Judge Fletcher-Hill ended the hearing by telling Miller

he planned to dismiss the case entirely, unless he could find something "salvageable" upon review of the motions, the supporting memoranda and the case law presented at the hearing.

The circuit court ultimately found nothing salvageable in the second amended complaint. In a memorandum opinion, the circuit court found Miller's first and second amended complaints failed to comply with the procedural and substantive demands of the order granting the motion for a more definite statement. The court concluded that this was enough to justify striking both amended complaints, but not enough to warrant "[t]he more severe sanction of dismissal" if Miller's second amended complaint effectively asserted viable claims on the merits.

But even taking "[a]ll well-pleaded facts . . . as true," the trial court decided Miller had not advanced factual allegations sufficient to overcome a motion to dismiss:

> . . . [Miller] refuses to acknowledge the fundamental distinction, based on statutory language, between a mere failure to produce medical records quickly enough and a knowing refusal to provide them. She has not alleged anything more than purely conclusory allegations of a refusal to produce the required medical records. Even after two attempts at amendment, she has still failed to state a claim on any count.

Apart from the allegations contained in the complaint, the information gathered by the court at the motions hearing did nothing to inspire the trial court's confidence in the factual basis of the claims. The opinion described that exchange as follows:

> [Miller's] counsel obviously has personal knowledge of [the requests for medical records]. . . . [Eventually,] he acknowledged that he was told that [the administrator] or others were just getting to the task of fulfilling [Miller's] request. That delay might or might not be justified, but that statement alone does not support an inference of a deliberate refusal to

> provide records. It became perfectly clear to the Court that [Miller's] counsel's characterization of [the administrator's] or others' communications as a "refusal," . . . was and is nothing more than [Miller's] counsel's unwarranted perception of her or other's statements.

Accordingly, the circuit court granted Hopkins's motions to strike and to dismiss the second amended complaint, without granting leave to amend.

To this Court, Miller argues that the allegations in her complaint were sufficient to survive a motion to dismiss. Alternatively, she argues that if the second amended complaint had been deficient and dismissal warranted, the trial court erred in not granting leave to amend the complaint for a third time. Importantly, Miller's challenge relates only to the first count in her complaint, for tortious violation of § 4-309(a). She does not challenge the dismissal, without leave to amend, of the counts for conspiracy to violate the statute and negligent selection, supervision and retention of a contractor.

Analysis

A. Standard of Review

In reviewing a trial court's grant of a motion to dismiss, appellate courts must decide whether the trial court was "legally correct." *Litz v. Maryland Department of the Environment*, 446 Md. 254 (2016). If the dismissal was granted for failure to state a claim under Md. Rule 2-322(b)(2), we must therefore determine, just like the dismissing trial court, whether the complaint discloses on its face a "legally sufficient" cause of action.

Torbit v. Baltimore City Police Department, 231 Md. App. 573 (2017) (quoting *Pittway Corp. v. Collins*, 409 Md. 218, 234 (2009)).

In determining the legal sufficiency of the complaint, we limit our review to the allegations contained within the four corners of the relevant complaint. *Litz*, 446 Md. at 264. And we accept as true all facts alleged in the complaint, "as well as any reasonable inferences that may be drawn from those allegations," so long as they are well-pleaded. *Horridge v. St. Mary's County Department of Social Services*, 382 Md. 170, 176 (2004). Dismissal is proper only if the alleged facts and permissible inferences, viewed in the light most favorable to the plaintiff, would still be insufficient to establish a cause of action. *Board of Education of Montgomery County v. Browning*, 333 Md. 281, 286 (1994) (citing *Faya v. Almaraz*, 329 Md. 435, 443 (1993)). To survive a motion to dismiss for failure to state a cause of action, the allegations in the complaint must establish a *prima facie* case, addressing all the basic elements of the claim for which the plaintiff seeks relief. *Scott v. Jenkins*, 345 Md. 21, 28 (1997) (holding that pleadings must allege facts "sufficient to support each and every element of the asserted claim"); *see, e.g.*, *Bobo v. State*, 346 Md. 706, 714 (1997) (holding that to state a claim in negligence, an injured plaintiff must establish the existence of a duty, the breach of that duty and an injury actually and proximately caused by that breach); *Campbell v. Cushwa*, 133 Md. App. 519, 535 (2000) (outlining the "essential elements" to be alleged in order to state a claim under 42 U.S.C. § 1983).

Important in this case is the requirement that the facts used to establish a cause of action be well-pleaded. The Maryland Rules and the case law interpreting those rules make clear what is required in this regard. The allegations should be "simple, concise, and direct." Md. Rule 2-303(b). The facts comprising the cause of action must still be pleaded "with sufficient specificity." *Bobo v. State*, 346 Md. 706, 708 (1997). "Bald assertions and conclusory statements by the pleader will not suffice." *Id.* at 708–09. Requiring specific allegations ensures that the defendant has proper notice of the nature of the claims against him, helps to "establish the boundaries of the litigation" and facilitates "the speedy resolution of frivolous claims." *Heritage Harbour, LLC v. John J. Reynolds, Inc.*, 143 Md. App. 698, 710 (2002) (citing *Scott*, 345 Md. at 27–28).

In short, "a complaint is sufficient to state a cause of action even if it relates 'just the facts' necessary to establish its elements." *Tavakoli-Nouri v. State*, 139 Md. App. 716, 730 (2001). But it must allege *facts*, and not mere conclusions or a restatement of the elements of the claim.

In the present case, Miller sought to bring a cause of action under Health–Gen. § 4-309(a). This means that, to survive a motion to dismiss, her complaint must have alleged facts sufficient to establish, among other things, that Hopkins "knowingly refused" to provide her medical records within 21 days of a valid request. In *Davis v. Johns Hopkins Hospital*, 330 Md. 53 (1993), the Court interpreted a predecessor statute to Health–Gen.

§ 4-309.[2] The Court held that "refuses" as used in the statute means "intentional, as opposed to negligent or contractual, conduct." *Id.* at 74 (quoting *Laubach v. Franklin Square Hospital*, 79 Md. App. 203, 218 (1989)). In contrast, a "mere failure to produce records" is *not* a refusal in violation of the statute. *Id.*

The procedural posture of *Davis*—a case deciding the propriety of a granted motion for summary judgment—is different from that of this case. But *Davis*, together with the pleading principles outlined above, tells us that Miller's complaint needed to *specifically allege* "intentional, as opposed to negligent or contractual, conduct," *id.* (cleaned up), in order to survive a motion to dismiss for failure to state a claim. She was required to allege specific facts that would show "an intent on the part of Hopkins not to produce the records." *Id.*

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[2] The statute at issue in *Davis*, then codified at Md. Code, Health–Gen. § 4-302 (1990), provided in pertinent part:

> If a facility refuses to disclose a medical record within a reasonable time after a person in interest requests the disclosure, the facility is, in addition to any liability for actual damages, liable for punitive damages.

By the time *Davis* was decided, that statute had been replaced by the statute at issue in this case, § 4-309, which provides for actual damages when a health care provider "*knowingly refuses* to disclose a medical record within a reasonable time." *Davis*, 330 Md. at 74 n.7 (emphasis added).

Miller's second amended complaint fell short of this requirement. The allegations in the complaint[3] can be summarized as follows: Hopkins could have produced the requested records within 21 days; it did not produce the requested records within 21 days; therefore, Hopkins knowingly refused to produce the records within 21 days. The skeletal factual allegations, reinforced only by conclusions and restatements of the elements of the claim, in no way suggest that the hospital's untimely turnaround was anything more than a simple failure to the produce records. And *Davis* is clear that Health–Gen. § 4-309(a) does not punish mere failures to produce requested medical records.

As Miller's counsel argued at the circuit court's hearing on the motion to dismiss, there are no "magic words" required to establish a knowing refusal under the statute. Miller need not have alleged that someone at the hospital told her, "I refuse to turn over your records." Refusal might be evidenced by less direct language or by circumstantial facts: phone calls repeatedly ignored or some clear personal animosity between Miller and a custodian of the

[3] Miller is correct that a trial court considering a Rule 2-322(b)(2) motion to dismiss for failure to state a claim should not consider material outside the facts alleged in the pleadings, as well as facts that "fairly may be inferred from the facts expressly alleged." Paul V. Niemeyer et al., *Maryland Rules Commentary* 269 (4th ed. 2014). This is because such a motion to dismiss tests the legal sufficiency *of the pleadings*. *See Converge Services Group, LLC v. Curran*, 383 Md. 462, 475 (2004) ("[T]he universe of 'facts' pertinent to the court's analysis of the motion [is] limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any."). Accordingly, our decision that dismissal was proper is based *solely* on the shortcomings of the allegations in Miller's complaint. Our analysis of this issue does not factor in any additional context provided during the court's motions hearing on August 28, 2017.

records, for example. At some point, a prolonged, unexplained failure to turn over the records would start to look like stonewalling—constructive refusal. But something more than alleging Hopkins "chose" not to take its "chance" to comply is needed.

In sum, to address essential elements of her claim, Miller relies exclusively on her own characterization of Hopkins's actions and motivations. Her second amended complaint is filled with "little more than very general argumentative conclusions." *Continental Masonry Co. v. Verdel Construction Co.*, 279 Md. 476, 481 (1977). She tells because she cannot show. She forgets that "what we consider are allegations of fact and inferences deducible from them, not merely conclusory charges." *Berman v. Karvounis*, 308 Md. 259, 265 (1987). Accordingly, the circuit court was correct to grant Hopkins's motion to dismiss for failure to state a claim.

B. The denial of leave to amend

Miller's second contention on appeal is that the circuit court abused its discretion when it did not expressly grant leave to amend her second amended complaint upon dismissal. The entirety of Miller's argument on this point is as follows: "The Circuit Court should have . . . at least granted leave to amend." We cannot agree.

First, as a technical point, the coverage of the leave-to-amend issue in Miller's brief fails to meet the requirements of Md. Rule 8-504(a)(5), which provides that a brief must contain "[a]rgument in support of the party's position on each issue." Because Miller's brief presents no argument in support of her position, there is no reason for us to consider

this challenge to the circuit court's decision not to grant it. *See Hartford Accident and Indemnity Co. v. Scarlett Harbor Associates Ltd. P'ship*, 109 Md. App. 217, 288 n.18 (1996).

Second, Miller did not request permission from the circuit court to file a third amended complaint. And "[i]n the absence of such application we do not think the appellant is in a position to ask for a reversal on the ground that an opportunity to amend was withheld." *Noellert v. Noellert*, 169 Md. App. 559 (1936) (quoting *State, to Use of Lease, v. Bealmear*, 149 Md. 10, 15 (1925); *see also McMahon v. Piazze*, 162 Md. App. 588, 597 n.4 (2005) (noting nonpreservation was not an issue because appellant's counsel had requested leave to amend); Paul V. Niemeyer et al., *Maryland Rules Commentary* 268 (4th ed. 2014) (explaining, in the context of dismissals under Md. Rule 2-322, that "the burden rests with the plaintiff to ensure that leave to amend is included in the order").

Third, even if this issue had been properly preserved in the circuit court and properly presented to this Court in Miller's brief, we would not side with Miller. It is true that, as a general rule, amendments to pleadings are to be "allowed freely and liberally." *Asphalt & Concrete Services, Inc. v. Perry*, 221 Md. App. 235, 269 (2015); *see also* Md. Rule 2-341(c) ("Amendments shall be freely allowed when justice so permits."). However, our liberal attitude toward amendment notwithstanding, the decision whether to grant a plaintiff leave to amend her complaint to address dismissal-worthy defects is within the trial judge's sound discretion. *Higginbotham v. Public Service Commission of Maryland*,

171 Md. App. 254, 275 (2006). Our caselaw makes clear that judges need not grant leave to amend when doing so would be "futile because the claim is flawed irreparably." *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 674 (citing *Robertson v. Davis*, 271 Md. 708, 710 (1974)). This can include cases in which the plaintiff has already been given chances to amend the complaint to state a legally sufficient cause of action but has failed to do so nonetheless. *See Prince George's County v. Blumberg*, 288 Md. 275, 297 (1980) (holding trial court did not abuse its discretion in refusing to allow plaintiffs a third opportunity in which to state a cause of action).

At the hearing, the circuit court explored with Miller's counsel whether there existed any additional facts, not alleged in her brief, that would support a contention that Hopkins was anything more than "simply late" in delivering Miller's requested records. Miller's counsel, who was the exclusive intermediary between his client and the hospital with regard to the records request, was not able provide the court with any new information that could, in the court's words, "salvage[]" the complaint. Considering what the circuit court learned by questioning Miller's counsel at the motions hearing, it appears clear to us that granting leave to amend would have been "futile" because Miller's claim was "flawed irreparably." *RRC Northeast*, 413 Md. at 674 (citing *Robertson*, 271 Md. at 710).

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. APPELLANT TO PAY COSTS.