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Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 170336-U

NO. 4-17-0336

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

The State of Illinois, ex rel. DONALD HELFER, M.D., Plaintiff-Appellant, v. ASSOCIATED ANESTHESIOLOGISTS OF SPRINGFIELD, LTD., an Illinois Corporation; CBIZ MEDICAL MANAGEMENT PROFESSIONALS, INC., a Former Ohio Corporation; and ANESTHESIA BUSINESS CONSULTANTS, LLC, a Michigan Limited Liability Corporation, Defendants-Appellees.	)	Appeal from Circuit Court of Sangamon County No. 14L257
	)	Honorable John M. Madonia, Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Harris and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in granting defendants' motions to dismiss.

¶ 2 In October 2014, plaintiff, Donald Helfer, M.D., filed a *qui tam* action against defendants, Associated Anesthesiologists of Springfield, Ltd. (Associated), CBIZ Medical Management Professionals, Inc. (CBIZ), and Anesthesia Business Consultants, LLC (Business Consultants). The trial court dismissed the complaint due to procedural errors and gave plaintiff leave to refile. After plaintiff filed his second amended complaint, defendants moved to dismiss the complaint. The court granted the motions and dismissed the complaint with prejudice.

¶ 3 On appeal, plaintiff argues the trial court erred by granting the motions to dismiss. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff was employed as an anesthesiologist for Associated from August 1990 until October 2009. Associated is a group of physicians who contract with Memorial Medical Center (Memorial) in Springfield, Illinois, to supply anesthesia services to Memorial's patients. Associated bills patients' insurance companies or Medicaid for covered anesthesia services. Business Consultants contracts with anesthesia groups like Associated to provide billing, accounts receivable, and business services. In 2008, Business Consultants contracted with Associated to provide those services for various payers such as Medicaid. Part of the contract with Medicaid required Associated to comply with all current and future program policy and billing provisions set forth in the applicable Healthcare and Family Services Medical Assistance Program rules and handbooks, as well as federal standards specified in the Social Security Act (42 U.S.C. § 1396 (1984), 42 U.S.C. § 1397aa-mm (1981)), and be fully liable for the truth, accuracy, and completeness of all claims submitted for payment.

¶ 6 The physicians for Associated work on shift assignments at the hospital. The Associated anesthesiologist "performs medical direction" of anesthesia services for up to four procedures during the majority of his or her work time. When a patient arrives at Memorial for a procedure requiring anesthesia, the anesthesiologist meets with the patient for a preoperative consultation. After the patient is taken into the operating/procedure room, the anesthesiologist is called into the room to direct induction of anesthesia. As allowed by Medicaid regulations, Associated anesthesiologists, generally, do not remain in the operating room throughout the procedure but turn the anesthesia monitoring over to a certified registered nurse anesthetist

(CRNA). The Associated anesthesiologist is then free to perform anesthesia services for other patients, until such time as he or she is called to the procedure room for any services which may be required of the anesthesiologist. In fact, physician anesthesiologists perform anesthesia services for up to four surgical patients at one time.

¶ 7 As was noted by defendant, Business Consultants, in its brief, the administration of epidural anesthesia services for patients in labor is not included in the Associated anesthesiologists normal daily surgical schedule. Instead, they are called to the obstetrics ward whenever a pregnant woman presents in labor and is scheduled for the administration of epidural anesthesia. The anesthesiologist then leaves his/her assigned operating room to attend to the patient in labor, start the flow of anesthesia, leave the patient in the care of a qualified nurse, and return to his/her normal duties.

¶ 8 In March 2010, plaintiff filed a claim in the United States District Court for Central Illinois, seeking relief under the federal False Claims Act (31 U.S.C § 3729 (2006)) and Illinois False Claims Act (IFCA) (740 ILCS 175/3(a)(1)(B) (West 2008)), alleging defendants (Associated, CBIZ, and Business Consultants) created fraudulent billing records relating to their continuous epidural anesthesia services, which were submitted by Associated. In August 2014, the district court granted defendants' consolidated motion to dismiss all federal claims for failure to state a claim, except two claims for retaliatory firing against Associated, pursuant to Federal Rule of Civil Procedure 12(b)(6) (Fed. R. Civ. P. 12 (eff. Dec. 9, 2009)). The court declined to exercise supplemental jurisdiction over the state law claims and dismissed the IFCA claims. *United States ex rel. Helfer v. Associated Anesthesiologists of Springfield*, No. 10-3076 (U.S.D.C., C.D. IL, Springfield Division, August 25, 2014.)

¶ 9 In October 2014, plaintiff filed a *qui tam* action, which forms the basis of this appeal, alleging defendants violated section 3(a)(1) of the IFCA (740 ILCS 175/3(a)(1) (West 2014)) under the same theory as his federal court claim. Each defendant filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)), alleging failure to state a claim and lack of standing due to the failure of the plaintiff to follow procedural requirements. The trial court granted the motions without prejudice because the court found plaintiff failed to properly follow procedural pleading requirements for initiating a *qui tam* action, citing failure to notify the State of Illinois of the proceeding, among others. The court also found plaintiff's complaint failed to allege sufficient facts to state a claim against defendants.

¶ 10 Plaintiff filed his first amended complaint in November 2015, and the State of Illinois declined to intervene. Defendants again moved to dismiss the first amended complaint under section 2-615 of the Code, contending the complaint failed to state a claim, and the trial court dismissed the complaint without prejudice, finding plaintiff failed to provide sufficient facts to support the allegations of fraud. In January 2017, plaintiff filed his second amended complaint with a jury demand, which is the subject of this appeal, and the State of Illinois again declined to intervene.

¶ 11 In his second amended complaint, plaintiff alleged defendants committed fraud by not following the "Anesthesia Guidelines" on reporting time set forth in the American Medical Association Current Procedural Terminology (CPT) for continuous epidural anesthesia for childbirth services provided from March 2002 to present. Plaintiff alleged defendants submitted false claims or created false statements indicating an anesthesiologist was present with the obstetric patient during the entire course of the administration of anesthesia, when the

anesthesiologist was not in fact physically present during the entire period. According to plaintiff, the anesthesiologists left the patient after beginning the epidural and anesthesia service and did not return, even though the anesthesia administration continued. The complaint asserted Associated submitted claims to Illinois Medicaid for inflated anesthesia time as a result of its continued billing when the anesthesiologist had left the patient before the patient could be safely placed under postoperative supervision. The CPT for 2017 stated, in part, as follows:

> "Time for anesthesia procedures may be reported as is customary in the local area. Anesthesia time begins when the anesthesiologist begins to prepare the patient for the induction of anesthesia in the operating room or in an equivalent area and ends when the anesthesiologist is no longer in personal attendance, that is, when the patient may be safely placed under postoperative supervision."

We note plaintiff attached annual versions of the CPT's "Anesthesia Guidelines" from 2002 to 2017 to the amended complaint. The language in each version is identical. We have referenced the 2017 version because plaintiff alleges the fraudulent billing occurred from 2002 to the present. In plaintiff's complaint, he contended this provision was a binding obligation on Associated and other defendants to report time for anesthesia services only when the anesthesiologist was in the actual physical presence of the patient. Plaintiff alleged he did not calculate the total anesthesia time, as he was advised CBIZ/Business Consultants would do so. He further alleged the time as reported by CBIZ/Business Consultants was from the time the induction of anesthesia began to the birth of the child. He contended CBIZ knew from the patient's record an Associated anesthesiologist was not physically present for the entire time

anesthesia was being administered to a patient. He also alleged Illinois Medicaid paid Associated for the epidural anesthesia claims submitted.

¶ 12 Defendants moved to dismiss the action pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)), contending plaintiff failed to plead facts sufficient to establish (1) how time for continuous epidural services was customarily reported in the local area or, alternatively, (2) defendants improperly billed for time after patients had been safely placed under postoperative supervision. The trial court dismissed the second amended complaint with prejudice. The court found plaintiff did not and could not allege facts sufficient to establish defendants billed for time while patients were safely under postoperative supervision or, alternatively, the local custom was not to bill from induction of epidural services until the birth of the baby. This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Plaintiff contends the trial court erred in granting defendants' motions to dismiss. He asserts whatever may constitute the "local custom" does not apply and the "Anesthesia Guidelines" of the CPT should be interpreted to mean billing ends when the anesthesiologist has left the physical presence of the patient. We disagree.

¶ 15 A. Standard of Review

¶ 16 "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint." *State ex rel. Pusateri v. Peoples Gas Light & Coke Co.*, 2014 IL 116844, ¶ 8, 21 N.E.3d 437. When analyzing a section 2-615 motion, we "must accept all well-pleaded facts in the complaint as true." *Id*. The allegations in the complaint are construed in the light most favorable to the plaintiff. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429, 856 N.E.2d 1048, 1053 (2006). "Thus, a cause of action should not be dismissed pursuant to section 2-615 unless it

is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Id*. "Illinois is a fact-pleading jurisdiction." *Id*. "While the plaintiff is not required to set forth evidence in the complaint [citation], the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action, not simply conclusions." *Id*. at 429-30. "A high standard of specificity is imposed on pleadings asserting fraud." *Chatham Surgicore, Ltd. v. Health Care Service Corp.*, 356 Ill. App. 3d 795, 803, 826 N.E.2d 970, 977 (2005). Our review of an order to grant a section 2-615 motion to dismiss is *de novo*. *Pusateri*, 2014 IL 116844, ¶ 8.

¶ 17 "Administrative rules and regulations have the force and effect of law, and must be construed under the same standards which govern the construction of statutes." *People ex rel. Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 380, 899 N.E.2d 227, 232 (2008). "In interpreting an agency regulation, our primary objective is to ascertain and give effect to the intent of the agency." *Id*.

¶ 18 B. Motions to Dismiss

¶ 19 In plaintiff's second amended complaint, he alleges Associated enrolled as a participating provider in the Illinois Medicaid program and signed an "Agreement for Participation in the Illinois Medical Assistance Program." Associated agreed to "bill the Department [of Public Aid] as stipulated in the applicable Medical Assistance Program handbook(s)." Plaintiff points to language in section A-221 of the Handbook for Practitioners Rendering Medical Services (Handbook) published by the Illinois Department of Healthcare and Family Services. This language mimics the language in the Illinois Handbook for Physicians published by the Department of Public Aid, which regulated anesthesia billing prior to August 2010. The Handbook states, "[a]nesthesia services may be provided by an anesthesiologist or a [CNRA] and should be reported according to the Anesthesia Guidelines in the CPT." Plaintiff

draws this court's attention to the "Anesthesia Guideline's" language in the CPT, which states, "[a]nesthesia time begins when the anesthesiologist begins to prepare the patient for the induction of anesthesia in the operating room or in an equivalent area and ends when the anesthesiologist is no longer in personal attendance, that is, when the patient may be safely placed under postoperative supervision."

¶ 20 The crux of plaintiff's fraud claim is defendants have billed for time when an anesthesiologist was not physically present in the room delivering the epidural services to the patient. As plaintiff stated in oral argument, the CPT focuses on general rules for submitting payment nationwide. We will focus instead on the Handbook, which gives Illinois-specific rules on billing for anesthesia. Plaintiff's second amended complaint specifically alleged defendants were required to comply with the relevant version of the Handbook in existence at the time of billing and those provisions contained in the Handbook regulating billing practices for anesthesia services provided. Even in his complaint, plaintiff noted how "CPT codes are a set of medical code numbers utilized by healthcare providers to report to insurance companies and other medical payors the specific medical, surgical and diagnostic procedures provided to patients." In essence, they are the uniform method of identifying the specific nature of the service provided.

¶ 21 Defendants contend reliance on the general prefatory language of the CPT "Anesthesia Guidelines" is both misleading and in error. They point to the specific language of the Handbook relating to epidural administration in section A-221 and how it provides for one charge for the continuous administration of epidural anesthesia during the operative procedure, without reference to or a requirement for the actual presence of the physician anesthesiologist throughout the entire procedure. "[W]here there exists a general statutory provision and a specific statutory provision, either in the same or in another act, both relating to the same subject,

the specific provision controls and should be applied." *Knolls Condominium Ass'n v. Harms*, 202 Ill. 2d 450, 459, 781 N.E.2d 261, 267 (2002). As a result, they contend, absent evidence Medicaid was being billed for anesthesia services postoperatively, or that their billing practices were not consistent with local custom and practice, there was no basis for alleging a violation of the Handbook or Medicaid regulations for payment.

¶ 22 Section 3 of the IFCA provides for liability if a defendant "(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or "(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 740 ILCS 175/3(a)(1) (West 2014). Under the facts as alleged here, the plaintiff had to be able to prove the defendants were submitting claims for payment they knew to be false—either because they contained time for which they were not entitled to compensation or for services which were not rendered. Plaintiff referenced a shareholder's meeting wherein the billing practices were discussed as evidence of a fraudulent scheme; however, even if shown to be true, the actions taken merely evinced a change in the billing procedure.

¶ 23 In light of plaintiff's counsel's acknowledgement both before the trial court and in argument the billing practices of defendants were consistent with all like services provided throughout the state, there are no facts alleged in the complaint from which a trier of fact could find evidence of fraudulent intent. As the trial judge indicated in dismissing the second amended complaint with prejudice, plaintiff would never be able to allege facts sufficient to establish fraud.

¶ 24 We note the Handbook explicitly sets out rules for epidural administration in section A-221.2.2, titled "Continuous Epidural Anesthesia." Section A-221.2.2 states, "[t]he

anesthesiologist/CRNA is to submit one charge for the continuous epidural anesthesia services provided during a single operative session using the appropriate anesthesia CPT code. Enter the appropriate physical status modifier and the total anesthesia administration time." This language contradicts plaintiff's complaint because it states the anesthesiologist is to submit "one charge for the continuous epidural anesthesia services" for the "total anesthesia administration time."

¶ 25 At oral argument, plaintiff referenced, for the first time, certain language in the Handbook he contends favors his interpretation. This was not raised either in his brief or in his complaint and is therefore subject to forfeiture. See *Cebertowicz v. Baldwin*, 2017 IL App (4th) 160535 ¶ 50, 86 N.E.3d 374, 385; see also Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1 2017). However, although not necessary for our decision, we will discuss plaintiff's argument since it exemplifies the deficiencies in those claims properly before us. Since this case is before us on a pleadings issue, we are to consider only the sufficiency of the complaint on its face to determine whether facts, not conclusions pleaded, are sufficient to bring a claim. See *Marshall*, 222 Ill.2d at 429-30.

¶ 26 Quoting from section A-221, plaintiff stated, "[w]hen anesthesia is personally administered by an anesthesiologist who remains immediately available in the operating area during the surgical procedures, the anesthesiologist may submit charges." Plaintiff contends this language means the administering anesthesiologist must remain personally present with the patient for all times to be billed.

¶ 27 As was noted by defendants' counsels at oral argument, this language is taken from the guidelines referencing anesthesia administration in general, as opposed to those which relate specifically to the administration of epidural anesthesia for childbirth.

> "Because all provisions of a statutory enactment are viewed as a whole [citations], words and phrases should not be construed in

> isolation, but must be interpreted in light of other provisions of the statute [citations]. Each word, clause[,] and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous." *In re Detention of Lieberman*, 201 Ill. 2d 300, 308, 776 N.E.2d 218, 223 (2002).

Section A-221 of the Handbook states, "[i]f the anesthesiologist is concurrently responsible for the care of more than one anesthetized patient, a claim may be submitted for each patient involved." Since it would be impossible to be physically present in multiple operating rooms at once and highly unlikely more than one patient is in the operating room at a time, a reasonable interpretation of section A-221 would indicate it is acceptable to bill patients when the anesthesiologist is responsible for the patients and not necessarily in the same room. As plaintiff stated in his second amended complaint, he would have been called back to the obstetrics ward where the patient was receiving an epidural if there was a complication. This would indicate the anesthesiologist is still responsible for the patient, regardless of whether he returns to the procedure room in case of an emergency. Plaintiff also alludes to the fact that an Associated anesthesiologist can leave the hospital after beginning the epidural, if he is at the end of his shift. While that may be true, it does not logically follow, in the case of a complication, there would be no anesthesiologist responsible for the care of the patient, but rather, that it may be an anesthesiologist other than the one who started the procedure.

¶ 28 Even under plaintiff's claim the CPT's general prefatory language somehow superseded the more specific wording of the Handbook, his claim still fails. The CPT states "[a]nesthesia time begins when the anesthesiologist begins to prepare the patient for the induction of anesthesia in the operating room or in an equivalent area and ends when the

anesthesiologist is no longer in personal attendance, that is, when the patient may be safely placed under postoperative supervision." The parties agree billing time begins when the anesthesiologist begins the preparation for induction. In one instance, plaintiff argues the dictionary definition of the phrase "that is" is the same as "such as," which introduces a rewording or a clarification of a statement. "In determining the plain meaning of a statutory term, it is entirely appropriate to look to the dictionary for a definition." *People v. Perry*, 224 Ill. 2d 312, 330, 864 N.E.2d 196, 208 (2007).

¶ 29 Despite plaintiff accurately defining "that is" in one instance, he interprets the CPT phrase as "ends when the anesthesiologist is no longer in personal attendance *because* the patient may be safely placed under postoperative supervision." His interpretation is incorrect. "It is a cardinal rule of statutory construction that we cannot rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations or conditions not expressed by the legislature." *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81, 919 N.E.2d 311, 316-17 (2009).

¶ 30 The phrase, correctly interpreted, means, anesthesia time "ends when the anesthesiologist is no longer in personal attendance, *such as* when the patient may be safely placed under postoperative supervision." By plaintiff's own account, anesthesiologists may leave patients prior to the time when a patient could be safely placed under postoperative supervision. "Personal attendance" must instead mean under supervision of an anesthesiologist "on call."

¶ 31 Plaintiff's reliance on the language of the general "Anesthesia Guidelines" in the CPT is in error. The trial court found plaintiff was unable to plead any set of facts sufficient to make a claim of either knowledge of fraudulent billing or knowledge of fraudulent billing practices and properly concluded plaintiff could not succeed on the merits of his complaint. We do not find the trial court's conclusion to be in error.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment.

¶ 34 Affirmed.