FOURTH DIVISION
May 14, 2015

No. 1-14-2165

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TRACY KUZMIAK and EUGENE KUZMIAK,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 13 L 11783
	)	
STEVEN L. KOOPERMAN, M.D., KRISTEN STONE-MULHERN, M.D., EMCARE, INC. d/b/a EMCARE-MMC, SITARAMARAO BOBBA, M.D., NORTHWEST WOMEN'S CONSULTANTS, S.C. and CENTEGRA HEALTH SYSTEMS d/b/a CENTEGRA MEMORIAL MEDICAL CENTER,	)	Honorable
	)	William Gomolinski,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Where plaintiffs' 2-622 reports were deficient for failing to comply with section 2-622(a) of the Code of Civil Procedure (735 ILCS 5/2-622(a) (West 2012)), and where plaintiffs' proposed amendment could not cure those deficiencies, the trial court's orders dismissing plaintiffs' complaint with prejudice and denying plaintiffs

leave to amend are affirmed.

¶ 2 On May 1, 2009, plaintiffs Tracy Kuzmiak and Eugene Kuzmiak, filed a medical negligence complaint against defendants Steven L. Kooperman, M.D., Kristen Stone-Mulhern, M.D., EmCare Inc. d/b/a EmCare-MMC, Sitaramarao Bobba, M.D., Northwest Women's Consultants, S.C., and Centegra Health Systems d/b/a Centegra Memorial Medical Center. In support of their medical negligence claims, plaintiffs filed two 2-622 reports of merit authored by J.S. Meyer, M.D. pursuant to section 2-622 of the Code of Civil Procedure (the Code). 735 ILCS 5/2-622 (West 2008). Plaintiffs voluntarily dismissed their original complaint on October 25, 2012 and refiled their complaint on October 24, 2013. Attached to the refiled complaint were two 2-622 reports that were nearly identical to those reports attached to the original complaint. Defendants moved to dismiss the refiled action because the 2-622 reports attached to the refiled action were presumably authored by the same health professional who authored the 2-622 reports attached to the original complaint, and that health professional died on February 17, 2011. The trial court ultimately dismissed plaintiffs' refiled action with prejudice for failing to show that Dr. Meyer authored or approved the changes in the 2-622 reports attached to the refiled complaint, and denied plaintiffs' requests for leave to file the original 2-622 reports in support of their refiled action. Plaintiffs now appeal the trial court's orders dismissing the refiled action with prejudice and denying plaintiffs leave to amend their complaint. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On May 1, 2009, plaintiffs filed a four-count complaint against defendants Steven L. Kooperman, M.D., Kristen Stone-Mulhern, M.D., EmCare Inc. d/b/a EmCare-MMC, Sitaramarao Bobba, M.D., Northwest Women's Consultants, S.C., and Centegra Health Systems

d/b/a Centegra Memorial Medical Center. The complaint alleged medical negligence relating to the care and treatment of plaintiff Tracy Kuzmiak, specifically that defendants failed to adequately diagnose and treat Tracy Kuzmiak's vascular condition, resulting in a stroke for which necessary treatment was also not provided. Attached to the May 1, 2009 complaint was an attorney affidavit declaring insufficient time to obtain the necessary health professional's written report of merit pursuant to section 2-622 of the Code (735 ILCS 5/2-622 (West 2008)), prior to the expiration of the statute of limitations and seeking a 90-day extension for filing of the requisite report. Within that 90-day extension, plaintiffs filed two 2-622 reports in support of their allegations in the complaint. Each report was authored by and signed by J.S. Meyer, M.D., and each contained identical contents except that each one supported allegations against different defendants. Both reports were filed on July 28, 2009.

¶ 5 Dr. Meyer died on February 17, 2011. Following the death of Dr. Meyer, all of the parties' depositions were taken as well as all of the treating physicians' depositions.

¶ 6 Plaintiffs voluntarily dismissed their complaint on October 25, 2012. On October 24, 2013, plaintiffs refiled their complaint against the same defendants. The refiled complaint was different from the original complaint in that certain negligence claims were removed and an institutional negligence claim was added against Centegra Memorial Medical Center. Attached to the refiled complaint was an attorney affidavit affirming that an attorney consulted with a qualified health professional who is knowledgeable in the relevant issues involved in the case, who has practiced or taught within the six years in the same area of health care involved in the case, who is board certified in the same or substantially the same medical specialties involved in the case and who has devoted a majority of his work to the area of medicine involved in the case, and that after reviewing the health professional's reports and opinion, the attorney had

determined that a reasonable and meritorious causes of action exists based upon medical negligence. The attorney affidavit also states: "A physician licensed to practice in all its branches has prepared and provided this affiant with a written report stating that medical negligence occurred in the care and treatment of Plaintiff, Tracy Kuzmiak[.]" Also attached to the refiled complaint are two 2-622 reports of merit. Both reports are nearly identical to the reports that were filed with the original complaint back on July 28, 2009, except that the 2013 reports have minor edits throughout and do not disclose the identity of the health professional that authored the reports. The reports of merit that were filed in 2013 state that the health professional reviewing the case reviewed the following eight documents prior to formulating his opinions: Northwest Community Hospital records (Pre-Natal/Post-Partum); Northwest Community Hospital records (Labor & Delivery 4/26/07-4/28/07); Northwest Community Hospital records (Admission: 4/30/07—Discharge: 5/3/07); McHenry Western Lake County EMS/Ambulance report (5/12/07); Centegra Memorial Medical Center records (E.R. and Hospital Admission: 5/16/07—Discharge: 5/16/07); Northwest Community Hospital Day Surgery Center Outpatient records (6/1/07-7/6/07); and Chicago Neuropsychology Group Nueropsych Evaluation (Heilbronner, Ph.D). The July 28, 2009 reports state that Dr. Meyer reviewed the same eight documents in formulating his opinions.

¶ 7 On January 22, 2014, defendant Dr. Kooperman filed a motion to dismiss the refiled complaint pursuant to sections 2-615 and 2-622 of the Code (735 ILCS 5/2-615 (West 2012); 735 ILCS 5/2-622 (West 2012)), claiming that the complaint was not supported by adequate 2-622 reports. The motion argued that the reports were insufficient because the 2009 and 2013 2-622 reports were nearly identical, yet the health professional who authored the 2-622 reports in support of the 2013 filing had died on February 17, 2011. More specifically, the motion

argued: "At the time of filing the complaint on October 24, 2013, plaintiff's counsel could not have consulted with Dr. Meyer, who obviously authored the attached Healthcare Practitioner's reports."

¶ 8 On February 3, 2014, defendant Centegra Memorial Medical Center filed a motion to compel plaintiffs to identify the author of the 2-622 reports that were filed in support of the refiled complaint. The motion to compel argued that the attorney affidavit and health professional reports attached to the original complaint and the refiled complaint strongly suggested that plaintiffs may not have secured a new reviewing physician to support the refiled action.

¶ 9 On March 11, 2014, plaintiffs filed their response to the motion to dismiss and motion to compel. In their response, plaintiffs argued that the affidavit and reports were complete and sufficient and there was no legal basis for compelling the disclosure of plaintiffs' reviewing health professional. Further, plaintiffs argued that whether Dr. Meyer authored the reports in support of the refiled action was immaterial since the reports filed in support of the original complaint had never been challenged and the reports filed in support of the refiled complaint were nearly identical to those.

¶ 10 On March 18, 2014, Dr. Kooperman filed his reply to the motion to dismiss, and on March 25, 2014, Centegra Memorial Medical Center filed its reply to the motion to compel.

¶ 11 The initial hearing on the motion to dismiss and motion to compel took place on April 14, 2014. At that hearing, plaintiffs' counsel admitted that Dr. Meyer authored the reports that were filed in support of the original complaint as well as the reports that were filed in support of the refiled complaint. Plaintiffs' counsel further stated that prior to Dr. Meyer's death, he had communicated with Dr. Meyer on several occasions about the case and that the subtle changes in

the health professional's reports attached to the refiled complaint had been authorized by Dr. Meyer as consistent with his opinions. Despite plaintiffs' counsel's argument that section 2-622 of the Code does not require that the authoring health professional be alive at the time of filing the complaint and does not require that a signed version of the health professional's reports be maintained, the trial court ordered plaintiffs' counsel to provide it with some proof that Dr. Meyer authorized the changes made in the reports attached to the refiled complaint:

> "show me something that says he authored those changes or he wrote you any subsequent email or did something to show you that these are changes and he wants to add them. *** Because if you don't do that, counsel, then everything appears that somebody altered the 622 without actually consulting with a doctor, which circumvents the statute and perpetuates a fraud upon the Court."

At this hearing, plaintiffs' counsel requested leave to file the original reports of Dr. Meyer that were filed in connection with the original complaint, and the trial court denied this request.

¶ 12 The next hearing occurred on May 12, 2014, however, plaintiffs' counsel failed to appear for the hearing. The trial court then entered an order dismissing the case with prejudice.

¶ 13 That same day, plaintiffs' counsel filed a motion to reconsider the April 14, 2014 order or, in the alternative, grant plaintiffs leave to file Dr. Meyer's report filed in support of the original complaint or file an amended attorney affidavit, which would state that Dr. Meyer had authorized the amendments in the reports attached to the refiled complaint.

¶ 14 On June 11, 2014, plaintiffs filed a motion to reconsider and vacate the May 12, 2014 order dismissing their case with prejudice. Plaintiffs' motion stated that the failure to appear was due to an internal scheduling conflict. Plaintiffs further argued that the trial court's request

for information relating to the authoring health professional's identity was improper because section 2-622(e) proceedings had never commenced and defendants never asserted that anything in the health professional's reports attached to the refiled complaint was "made without reasonable cause" or was "untrue." See 735 ILCS 5/2-622(e) (West 2012). Plaintiffs again alternatively argued that they should be granted leave to file the health professional's reports that had been attached to the original complaint since those reports were never challenged.

¶ 15 On June 19, 2014, the trial court heard arguments on plaintiffs' motions to reconsider. Following arguments, the trial court judge denied plaintiffs' motions based on his belief that section 2-622 of the Code necessarily required that the reviewing health professional sign the written report submitted in support of a medical malpractice complaint and that plaintiffs maintain a copy of that signed report. See 735 ILCS 5/2-622 (West 2012). Plaintiffs' counsel again requested leave to file the reports attached to the original complaint, and that request was again denied.

¶ 16 Plaintiffs timely filed a notice of appeal seeking to appeal the trial court's April 14, 2014 order denying plaintiffs' request to file the original health professional's reports in support of the refiled case and ordering plaintiffs to produce proof that Dr. Meyer authored the reports filed in support of the refiled action; May 12, 2014 order dismissing the refiled action with prejudice; and June 19, 2014 order denying plaintiffs' motion to reconsider the April 14, 2014 order and motion to reconsider and vacate the May 12, 2014 order. For the reasons that follow, we affirm the trial court's orders.

¶ 17 ANALYSIS

¶ 18 The circuit court's determination of whether the plaintiff has complied with section 2-622(a) of the Code is subject to *de novo* review. *Moyer v. Southern Illinois Hospital Services*

Corp., 327 Ill. App. 3d 889, 895 (2002). The determination as to whether a complaint should be dismissed with or without prejudice for the plaintiff's failure to satisfy the requirements of section 2-622(a) of the Code is in the sound discretion of the circuit court. *Id.* at 894-95.

¶ 19 Failure to Comply with 622(a) of the Code

¶ 20 In this appeal, plaintiffs first argue that the trial court erred in dismissing their refiled action with prejudice because they complied with section 2-622 of the Code. Specifically, plaintiffs argue that there is no requirement in section 2-622 of the Code that the author of a 2-622 report must be alive at the time of filing the complaint, and no requirement in section 2-622 of the Code that plaintiffs have to retain a signed version of the 2-622 report in order for it to be sufficient. Plaintiffs argue that because the attorney affidavit attached to the refiled complaint asserts that an attorney consulted with the health professional who authored the 2-622 reports attached to the refiled complaint and that those reports reflected the health professional's opinions, there was no evidence that anyone altered the opinions in the reports without the consent of the health professional, in this case, Dr. Meyer. In response, defendants argue that the trial court was correct to dismiss the refiled action with prejudice because section 2-622 of the Code requires that the 2-622 author be alive at the time of filing the complaint and the trial court properly exercised its discretion in dismissing the refiled complaint with prejudice where this requirement was not met. For the reasons that follow, we affirm the trial court's finding that the reports attached to the refiled complaint fail to comply with the requirements of section 2-622 of the Code. See 735 ILCS 5/2-622 (West 2012).

¶ 21 Section 2-622 of the Code states, in relevant part:

> "(a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of

medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

1. That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and *other relevant material* involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action. If the affidavit is filed as to a defendant who is a physician licensed to treat human ailments without the use of drugs or medicines and without operative surgery, a dentist, a podiatric physician, a psychologist, or a naprapath, the written report must be from a health professional licensed in the same profession, with the same class of license, as

the defendant. For affidavits filed as to all other defendants, the written report must be from a physician licensed to practice medicine in all its branches. In either event, the affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit, but information which would identify the reviewing health professional may be deleted from the copy so attached.

* * *

(e) Allegations and denials in the affidavit, made without reasonable cause and found to be untrue, shall subject the party pleading them or his attorney, or both, to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with reasonable attorneys' fees to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal. In no event shall the award for attorneys' fees and expenses exceed those actually paid by the moving party, including the insurer, if any. In proceedings under this paragraph (e), the moving party shall have the right to depose and examine any and all reviewing health professionals who prepared reports used in conjunction with an affidavit required by this Section.

* * *

(g) The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619." (Emphasis added.) 735 ILCS 5/2-622 (West 2012).

¶ 22 Initially, we find that there is no language in section 2-622 of the Code that requires the health professional who authors the 2-622 report to be alive at the time the complaint is filed. Because courts lack legislative powers, we are not permitted to add words to a statute to change its meaning, and we will not interject provisions not found in the statute, however desirable or beneficial they may be. *People ex rel. Stocke v. 11 Slot Machines*, 80 Ill. App. 3d 109, 115 (1979); *In re Stella*, 353 Ill. App. 3d 415, 421 (2004) ("Under the guise of construction, a court may not supply omissions, remedy defects, annex new provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of language employed in the statute.").

¶ 23 While we recognize defendants' argument that section 2-622 of the Code is written in the present tense, which they argues implies that the author of the 2-622 report must be alive at the time the complaint is filed, as stated above, we do not believe the language of section 2-622 of the Code allows us to draw that conclusion. Further, while the requirements listed in the statute are written in the present tense—for example, that the health professional "is knowledgeable" or "is qualified by experience or demonstrated competence in the subject of the case"—there is no time reference in the statute as to when those requirements must be met. Therefore, even if defendants were correct in that the statute implies that the author of a 2-622 report must be alive, there is no indication from the statute when the author must be alive, whether it means at the time of drafting or otherwise. Accordingly, given the absence of any language in section 2-622 of the Code

stating that the author of a 2-622 report must be alive at the time the complaint is filed, we are without authority to read such a requirement into the statute. See *People ex rel. Stockes*, 80 Ill. App. 3d at 115; *In re Stella*, 353 Ill. App. 3d at 421.

¶ 24 Although we agree with plaintiffs that section 2-622 of the Code does not require that the author of a 2-622 report be alive at the time of filing a complaint, that does not end our analysis. We may affirm the decision of the trial court based on any reason found in the record because it is the judgment of the court not the reasons for the court's judgment that is under review. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 734 (2009) ("we may affirm the judgment of the trial court on any basis in the record, regardless of whether the trial court relied upon that basis or whether the trial court's reasoning was correct.").

¶ 25 We find the 2-622 reports attached to the refiled complaint fail to comply with the requirements of section 2-622(a) of the Code. 735 ILCS 5/2-622(a) (West 2012). Section 622(a) of the Code, in relevant part, requires that the attorney affidavit allege "that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing such action." 735 ILCS 5/2-622(a) (West 2012). At the time the complaint was refiled, the depositions of the parties, including all defendants, and the treating physicians were available. Dr. Meyer did not review these depositions, nor could he have reviewed them given that he had died by the time they were taken. Accordingly, the 2-622 reports authored by Dr. Meyer, in both 2009 and 2013, indicate that he reviewed the same records and documents before authoring each report, which did not include the depositions of the parties and treating physicians, which would

have been impossible given the date of his death. We find that the depositions of the parties, especially the defendants, and the treating physicians, would have been "relevant material" under section 2-622(a) of the Code that a health professional should have reviewed prior to authoring 2-622 reports. See 735 ILCS 5/2-622(a) (West 2012). Given that Dr. Meyer did not review the depositions of the parties or the treating physicians, a health professional who reviewed those depositions, including Dr. Meyer, could have come to conclusions that differed from those in Dr. Meyer's 2009 and 2013 reports. Where plaintiffs have failed to meet the requirements of section 2-622 of the Code, courts have affirmed dismissals of those cases. See *Tucker v. St. James Hospital*, 279 Ill. App. 3d 696, 702 (1996) (Where author of 2-622 report was not "knowledgeable in the relevant issues" and was not "qualified by experience or demonstrated competence in the subject of the case[,]" the trial court's dismissal of plaintiff's complaint with prejudice was affirmed); see also *Jacobs v. Rush North Shore Medical Center*, 284 Ill. App. 3d 995, 1000 (1996) (affirming dismissal of complaint with prejudice where 2-622 report failed to set forth with any particularity how the hospitals deviated from the standard of care applicable to them). As such, we find that the 2-622 reports attached to plaintiffs' refiled action did not comply with the requirements of section 2-622(a) of the Code. 735 ILCS 5/2-622(a) (West 2012).

¶ 26 Dismissal with Prejudice

¶ 27 Having found that the 2-622 reports attached to the refiled action failed to comply with section 2-622(a) of the Code, we must now determine whether the trial court abused its discretion when it dismissed plaintiffs' refiled action with prejudice without granting plaintiffs leave to amend the refiled complaint by attaching the 2-622 reports that had been attached to the original action. The determination as to whether a complaint should be dismissed with or without prejudice for the plaintiff's failure to satisfy the requirements of section 2-622(a) of the

Code is in the sound discretion of the circuit court. *Moyer*, 327 Ill. App. 3d at 894-95. The circuit court's decision will not be disturbed unless it is clear that it has abused its discretion. *Id*.; *Jacobs*, 284 Ill. App. 3d at 997 ("When the trial court dismisses a party because plaintiff has failed to satisfy the requirements of section 2-622, that ruling will not be disturbed unless it is clear that the trial court abused its discretion."). Further, whether to allow an amendment to a complaint is within the sound discretion of the circuit court. *Calamari v. Drammis*, 286 Ill. App. 3d 420, 435 (1997). The circuit court does not abuse its discretion in denying a party leave to amend a pleading if that amendment will not cure the defects in the original pleading. *Id*

¶ 28 We find that the trial court did not abuse its discretion when it dismissed the refiled complaint with prejudice without granting plaintiffs leave to amend.

> "Since the statute was enacted in 1985, Illinois reviewing courts have articulated two different standards for the circuit courts to utilize when exercising their discretion under section 2-622 in determining whether to allow a plaintiff to amend a complaint so that it complies with section 2-622 or whether to dismiss the complaint with prejudice for failure to comply with section 2-622. When a plaintiff requests an extension of the deadlines provided in section 2-622, the courts have allowed the plaintiff additional time if the plaintiff can show 'good cause' for his failure to timely comply with the deadlines. However, when a plaintiff requests leave to amend section 2-622 documents that are already filed, the courts have allowed the plaintiff to amend when there is 'no prejudice' to the defendant." *Fox v. Gauto*, 2013 IL App (5th) 110327, ¶ 21.

In this case, because plaintiffs are requesting leave to file the original 2-622 reports in an effort to cure the defects with the 2-622 reports attached to the refiled action, the trial court's dismissal will be reviewed under the "no prejudice" to the defendant standard. See *Fox*, 2013 IL App (5th) 110327, at ¶ 21. Granting plaintiffs leave to file the original 2-622 reports in support of the refiled action would not cure defects in the 2-622 reports already attached to the refiled action where Dr. Meyer still could not have reviewed the depositions of the parties and the treating physicians. Thus, granting plaintiffs leave to amend would cause prejudice to defendants where defendants would be forced to file another motion to dismiss based on the defects in the original 2-622 reports.

¶ 29 Where the court has allowed amendments to cure defects in the 2-622 reports, the plaintiffs have submitted a proposed amended 2-622 report which appeared to comply with the statute. See *Leask v. Hinrichs*, 232 Ill. App. 3d 332 (1992); *Thompson v. Heydemann*, 231 Ill. App. 3d 578 (1992); *Huff v. Hadden*, 160 Ill. App. 3d 530 (1987). Here, however, plaintiffs are requesting leave to amend the refiled complaint by attaching the original 2-622 reports, which also fail to comply with 2-622(a) where Dr. Meyer did not review the depositions of the parties or the treating physicians prior to authoring those 2-622 reports. As such, this case is more in line with those cases where the court has upheld the trial court's dismissal of a complaint with prejudice for failure to comply with section 2-622 of the Code. See generally, *Jacobs*, 284 Ill. App. 3d 995; *Cuthbertson v. Axelrod*, 282 Ill. App. 3d 1027 (1996); *Tucker*, 279 Ill. App. 3d 696; *Moss v. Gibbons*, 180 Ill. App. 3d 632 (1989). Accordingly, because plaintiffs' proposed amendment would not cure the defects in the 2-622 reports attached to the refiled action, we cannot say that the trial court abused its discretion when it dismissed plaintiffs' complaint with prejudice and denied plaintiffs leave to amend their complaint to attach the original 2-622 reports authored by Dr. Meyer. *Tucker*, 279 Ill. App. 3d at 704 ("The decision of whether to grant a medical malpractice

plaintiff leave to file an affidavit and report in accordance with section 2-622 is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of that discretion."); *Calamari*, 286 Ill. App. 3d at 435 (the circuit court does not abuse its discretion in denying a party leave to amend a pleading if that amendment will not cure the defects in the original pleading.).

¶ 30 CONCLUSION

¶ 31 For the reasons above, the trial court's orders dismissing plaintiffs' complaint with prejudice and denying plaintiffs leave to file an amended complaint are affirmed.

¶ 32 Affirmed.