

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Margaret Smith,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 L 62008
	)	
Advocate Health Care Network d/b/a	)	
Advocate Lutheran General Hospital,	)	
an Illinois not-for-profit corporation,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION AND ORDER**

Illinois law distinguishes between amending a defective pleading and filing a new cause of action. In this case, the plaintiff seeks leave to file an amended complaint adding a previously dismissed cause of action not supported by a sufficient physician's report. Given those failings, the plaintiff's motion to file an amended complaint must be denied.

**Facts**

On March 4, 2018, Margaret Smith was admitted to Advocate Lutheran General Hospital. Medical records indicate that Advocate considered Smith a high risk for falling. On March 12, 2018, Smith fell while showering and broke her wrist.

On March 11, 2020, Smith filed a single-count medical negligence cause of action against Advocate. Smith attached to her complaint an attorney's affidavit and a report pursuant to the Code of Civil Procedure. *See* 735 ILCS 5/2-622. On October 28, 2020, Advocate filed a motion to dismiss the complaint because a physician's assistant, not a physician, drafted the section 622 report and it failed to indicate that Smith had a meritorious cause

of action. On December 7, 2020, this court granted the motion without prejudice and gave Smith until January 8, 2021 to file an amended complaint and amended section 622 report.

January 8, 2021 came and went with Smith having failed to file an amended complaint, an amended section 622 report, or a motion seeking an extension of time. On February 5, 2021, Advocate filed a renewed motion to dismiss Smith's complaint with prejudice because Smith had failed to comply with this court's December 11, 2020 order.

On February 9, 2021, Smith filed a motion for leave to file a first amended complaint. Smith's attorney indicated that he had taken over responsibility for the file and had to conduct additional investigation into Smith's causes of action. Smith's motion attached the proposed first amended complaint raising two causes of action. Count one, designated "negligence," was similar to the purported medical negligence count in the original complaint. Count two was brought under the Premises Liability Act.

On February 11, 2021, Advocate renewed its motion to dismiss. Rather than brief the motion, Smith filed a motion for leave to file a first amended complaint. This court advised Smith to re-submit a motion eliminating the Premises Liability Act cause of action. On February 16, 2021, Smith filed a revised first amended complaint containing a single cause of action for premises negligence. On March 16, 2021, Advocate answered the revised first amended complaint.

On June 2, 2021, Smith filed a motion for leave to file a second amended complaint. The proposed pleading contains two causes of action. Count one is designated "negligence," and alleges that Advocate owed Smith a duty to take appropriate precautions given her high risk of falling. Smith claims Advocate breached its duty by failing to: (1) monitor and supervise Smith; (2) provide safe shower facilities for a high-risk fall patient; and (3) provide an attendant to care and supervise Smith. The physician's report supporting this cause of action states that Advocate and its staff

knew Smith was at a high risk for falling and that it and they were negligent in failing to monitor Smith. Count two is designated “negligence premises.” This cause of action alleges that Advocate breached its duty of ordinary care owed to a business invitee by failing in a variety of ways to maintain the premises in a safe manner and to warn of the changes in elevation within the shower area.

On July 1, 2021, Advocate filed its brief in opposition to Smith’s motion for leave to file. On July 23, 2021, Smith filed her reply.

### Analysis

Advocate presents two arguments. The first is that Smith’s time for filing her amended complaint expired on January 8, 2021 as required by this court’s December 7, 2020 order. Smith responds that Code of Civil Procedure authorizes the filing of her second amended complaint because it is not barred by the lapse of time under any statute or contract. 735 ILCS 5/2-616(b). What Smith’s argument overlooks is that her lapse of time resulted from a failure to comply with a court order, not a statute or contract.

Smith’s argument that additional investigation was needed before filing the second amended complaint is confounded by the original and subsequent pleadings. The substantive allegations of medical negligence are nearly identical in both the original and the proposed second amended complaint. The original physician assistant’s report and the new physician’s report are also nearly identical. Given this close identity, it is not surprising that Smith has failed to explain what additional investigation she needed to produce what are essentially the same allegations and opinions.

Quite simply, Smith has failed to provide a reasonable excuse for her failure to file timely an amended pleading. By now, Smith’s physician’s report is more than one-and-a-half years too late. For this reason, alone, Smith’s motion for leave to file a second amended complaint should be denied.

Advocate's second argument is based on the Code of Civil Procedure. Advocate correctly points out that amended pleadings may be allowed "on just and reasonable terms. . . ." 735 ILCS 5/2-616(a). While Illinois statutory and case law support a liberal policy of allowing amendments, a party does not have an absolute right to amend a complaint. *Grove v. Carle Found. Hosp.*, 364 Ill. App. 3d 412, 417 (4th Dist. 2006). Rather, a trial court's ruling on a motion to amend is a matter of discretion. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 351 (2002). A trial court abuses its discretion if disallowing the amendment would not "further the ends of justice." *W.E. Erickson Constr. v. Chicago Title Ins. Co.*, 266 Ill. App. 3d 905, 911 (1st Dist. 1994) (citing *Maus v. Marathon Petroleum Co.*, 229 Ill. App. 3d 864, 868 (5th Dist. 1992)). To determine whether an amendment furthers the ends of justice, courts are to consider four factors: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S&S Roof Maint., Inc.*, 146 Ill. 2d 263, 273 (1992).

As to the first factor, Smith implicitly concedes that her proposed second amended complaint does not cure any defects in the first amended complaint, but, rather, seeks to add a cause of action for medical negligence. Such a procedural move is not permitted under the *Loyola* analysis. See *Jones v. O'Brien Tire & Battery Serv. Cntr., Inc.*, 374 Ill. App. 3d 918, 937 (5th Dist. 2007) (distinguishing between adding cause of action and curing defective pleading); *Mason v. American Nat'l Fire Ins. Co.*, 295 Ill. App. 3d 199, 203 (4th Dist. 1998) (same). Specifically, Smith's proposed second amended complaint changes nothing in the existing premises cause of action. Had Smith wanted to correct a defect, she would have identified the deficiency and made the correction. She has failed to do so.

If Smith intended to cure a deficiency in her previous physician's section 622 report, she has, again, failed. The new report provides only a general opinion as to alleged failures of Advocate's staff, yet fails to identify a single individual who allegedly breached a standard of care. As to Advocate, the report repeats the same general opinion, but fails to cite any policies or procedures Advocate allegedly breached. Ultimately, the report is irrelevant as to Advocate because Smith did not bring specific institutional negligence claims against Advocate. For all these reasons, Smith has failed to meet the first *Loyola* factor.

The second factor—focusing on prejudice to the opposing party—is considered the most important. *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 525 (1st Dist. 2007). Discovery in this case has only recently started, thus, the prejudice to Advocate does not lie in its inability to prepare for a new legal theory on the eve of trial. *Cf. Miller v. Pinnacle Door Co.*, 301 Ill. App. 3d 257, 261 (4th Dist. 1998). Rather, the prejudice to Advocate comes in the repeated delays associated with Smith attempting and failing to present a cause of action for medical negligence. To allow Smith to file an amended complaint at this point would effectively nullify this court's December 7, 2020 order and require a third delay in these proceedings for the sole purpose of requiring Smith to file an adequate section 622 physician's report. The second *Loyola* factor plainly shows that Advocate would be prejudiced in what has already become an unsuccessful iterative process.

As to the third factor, whether the proposed amendment was timely, this court need not repeat its earlier discussion as to Smith's untimeliness in filing a second amended complaint. Smith has failed to meet this *Loyola* factor.

In this case, the fourth *Loyola* factor is closely tied to the third. Smith had every opportunity since the filing of this case to file a motion for an extension of time to file a proper section 622 report. Further, deficiencies in Smith's physician's reports should have been obvious given that a physician's assistant drafted the first one in violation of the statutory requirements, and the latest

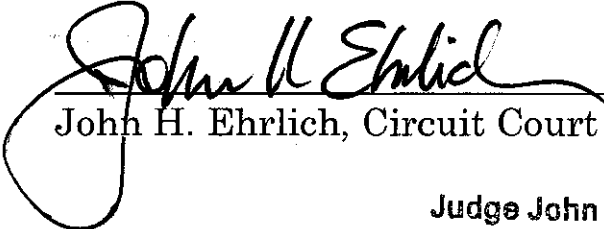
one, as with the first, fails to identify specific persons who breached a standard of care. Even after the January 8, 2021 deadline to file an amended pleading and section 622 physician's report, Smith did nothing. Indeed, rather than ask this court for an extension of time, Smith filed a motion for leave to file a second amended complaint and failed to provide any justification for the request. Smith fails to meet the fourth *Loyola* factor.

In sum, Smith has failed to meet any of the four *Loyola* factors and has failed to provide an explanation for failing to file a motion for an extension of time. The inexorable conclusion is this court is well within its discretion to deny Smith's motion for leave to file a second amended complaint and order this case to proceed based on the first amended complaint and Advocate's answer.

### Conclusion

For the reasons presented above, it is ordered that:

1. The plaintiff's motion for leave to file a second amended complaint is denied; and
2. The parties are to submit an agreed case management order no later than September 23, 2021.

  
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John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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