2015 IL App (1st) 120465-U
No. 1-12-0465

THIRD DIVISION
December 16, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KEVIN McDOWELL, Individually and as Executor of the Estate of DAN McDOWELL, Deceased, SUSAN McDOWELL, as Mother and next friend of KEITH MOORE and KEARA MOORE, Minors, and KIWANIS THOMAS,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	No. 07 L 5246
v.	)	
OSF HEALTHCARE SYSTEM, d/b/a/ SAINT ANTHONY MEDICAL CENTER, and ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a ADVOCATE TRINITY HOSPITAL,	)	The Honorable Kathy M. Flanagan, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason, joined by Justice Lavin, specially concurred.

ORDER

¶ 1 *Held:* (1) In a re-filed action where the plaintiffs' *respondeat superior* claims against OSF Healthcare System based on *res ipsa loquitur* and alleging vicarious liability for the alleged negligence of any doctor not included in their section 2-622 report (735 ILCS 5/2-622 (West

2006)) had been dismissed in the original action and then the case was voluntarily dismissed, those same claims were barred by *res judicata*. (2) Regarding defendant Advocate Health and Hospitals Corporation, although the plaintiffs' additional *respondeat superior* claims based on agents/employees of Advocate were not barred by any previous dispositive order and were timely under section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217 (West 2006)), plaintiffs failed to comply with section 2-622 (735 ILCS 5/2-622 (West 2006)). Plaintiffs only included 2-622 reports addressing the alleged negligence of two other doctors, but did not include any 2-622 addressing its alleged negligence claim based on the conduct of a third doctor in its re-filed action. The circuit court's order limiting expert testimony on this basis was not an abuse of discretion, and the resulting summary judgment in favor of defendants was affirmed.

¶ 2 BACKGROUND

¶ 3 Plaintiffs, Kevin McDowell, individually and as the executor of the estate of Dan McDowell, deceased, Susan McDowell, as mother and next friend of Keith Moore and Keara Moore, Minors, and Kiwanis Thomas, filed their original complaint in this case in 2001. The case is based on the negligent treatment of Dan McDowell for his injuries suffered after an automobile collision on October 10, 1999, which led to his death. Upon Dan's admission to OSF Healthcare System d/b/a St. Anthony Medical Center (OSF), a CT scan was ordered by emergency room physician Dr. Stephen Bradley and was interpreted as normal by defendant OSF physician Dr. Scott White. Both doctors were alleged to be employees and agents of OSF. No subsequent CT scans or neurological tests were conducted on Dan at OSF.

¶ 4 Per Dan's family's request, on November 30, 1999, after spending one and a half months in Rockford at OSF, Dan was transferred to Advocate Trinity Hospital (Advocate) to be closer to home, family, and friends. At the time of his admission to Advocate, Dan was examined by Dr. Gregorio Aglipay, a surgeon, and was described as demonstrating mental status changes. Dr. Aglipay ordered a variety of treatments including a CT scan and gastrointestinal and neurological consultations, as well as other treatments. However, Dr. Aglipay failed to order any tests on an urgent basis, and the CT scan was not performed or interpreted for two days.

¶ 5 Once performed, the CT scan was interpreted by Dr. Kenneth Pierce as demonstrating a hemorrhage that was "recent appearing." Testimony of Dan's family members was that Dan had been dropped at OSF, though it was not documented in OSF records.

¶ 6 Dr. Aglipay informed plaintiff Kevin McDowell that his father was bleeding on the brain and that the only treatment option was immediate surgery. The surgery required that Dan be transferred to South Suburban Hospital. Dr. Raghu Singh evaluated Dan and performed the surgery. After Dan was brought to the recovery area of the hospital, a nurse woke Kevin late in the night to inform him that Dan was not doing well. The next day Dan died.

¶ 7 Plaintiffs filed their original action in 2001. The original action was comprised of 13 counts against (in relevant part) OSF, Dr. White, Advocate, Dr. Aglipay, and Dr. Singh. The complaint in the original action also named Dr. Bradley, Dr. Mitz, Dr. Pierce, and Dr. Ahmad as respondents in discovery but did not name them as defendants. Count I alleged negligence against Tiffany Kremstreiter, the driver of the vehicle who hit Dan's vehicle. Count II alleged wrongful death against Tiffany Kremstreiter. Count III alleged a survival claim against Tiffany Kremstreiter. Count IV alleged wrongful death against Dr. White and OSF. Count V alleged a survival claim against Dr. White and OSF. Count VI alleged wrongful death against Dr. Singh and Advocate. Count VII alleged survival against Dr. Singh and Advocate. Count VIII alleged wrongful death against Dr. Aglipay and Advocate. Count IX alleged survival against Dr. Aglipay and Advocate. Count X alleged wrongful death against OSF. Count XI alleged a survival claim against OSF. Count XII alleged wrongful death against Advocate. Count XIII alleged a survival claim against Advocate.

¶ 8 Plaintiffs alleged that Dr. White, and OSF through Dr. White as its agent, were negligent in reading the CT scan of Dan's head taken shortly after his admission to OSF on October 11, 1999, in failing to diagnose a brain contusion, and in failing to order follow-up scans.

¶ 9 Plaintiffs filed an amended complaint (not at issue in this case), and then filed a second amended complaint in the original action on August 30, 2005. The 12-count second amended complaint in the original action alleged the theory of *res ipsa loquitur* for the first time. The allegations of *res ipsa loquitur* were based on revelations in discovery that Dan was allegedly dropped while at OSF. In discovery, Dr. Aglipay stated that instead of relying upon the radiologist's report by Dr. Kenneth Pierce, which interpreted the CT scan as demonstrating a hemorrhage that was "recent appearing," he instead relied on an interpretation of the CT scan from a neurologist, Dr. Ahmad, who stated the hemorrhage was "subacute," meaning as long as a few weeks old. Plaintiffs' experts, Dr. Meyer and Dr. Pressman, as well as defendant neurosurgeon Dr. Singh, maintained that the subdural hematoma in Dan's CT scan was "acute" or recent, and occurred within 24 hours. Also, the radiology film report's "impression" section states that the right subdural hematoma is "recent appearing."

¶ 10 Dr. Raghu Singh, the neurosurgeon who treated Dan at Advocate Trinity Hospital, opined that his "interpretation was that [Dan] had chronic subdural hematoma with some acute component and he had midline shift from right to left." Dr. Singh further testified that "acute" means "there had been some bleeding that usually" will be seen "within 24 to 48 hours."

¶ 11 The timing of the subdural hematoma is an important issue in this case. Advocate and the physicians there place the timing of the subdural hematoma two weeks earlier, when Dan was hospitalized at OSF. Plaintiffs' expert and defendant Dr. Singh's characterization of the subdural hematoma as "acute," with 24-48 hours, would mean that this injury occurred at Advocate.

¶ 12 Because Dan could have sustained the subdural hematoma during the time he was hospitalized at OSF, and because there were allegations that Dan had been dropped while at OSF, plaintiffs added the allegations against OSF under the theory of *res ipsa loquitur*, that such an injury is not suffered in the absence of negligence.

¶ 13 Count I alleged wrongful death against Dr. White and OSF. Count II alleged a survival claim against Dr. White and OSF. Count III alleged wrongful death against OSF based on *res ipsa loquitur*. Count IV alleged a survival claim against OSF based on *res ipsa loquitur*. Count V alleged wrongful death against OSF for the acts of unnamed employees, agents or apparent agents. Count VI alleged a survival claim against OSF for the acts of unnamed employees, agents or apparent agents. Count VII alleged wrongful death against Dr. Singh and Advocate. Count VIII alleged a survival claim against Dr. Singh and Advocate. Count IX alleged wrongful death against Dr. Aglipay and Advocate. Count X alleged a survival claim against Dr. Aglipay and Advocate. Count XI alleged wrongful death against Advocate. Count XII alleged a survival claim against Advocate.

¶ 14 Counts III and IV alleged that Dan "sustained an injury from being dropped or otherwise injured" while at St. Anthony Medical Center and alleged OSF was liable based on *res ipsa loquitur*. Counts V and VI alleged that OSF was liable for the acts of unnamed employees, agents or apparent agents, who were negligent in the subsequent care of Dan's brain contusion and in transferring Dan on November 30, 1999 to another hospital that did not have proper facilities and in transporting Dan from his bed to an ambulance at the time of transfer.

¶ 15 Defendant OSF filed a motion to dismiss and/or strike paragraph 33 of Count I and Counts III, IV, V and VI of the second amended complaint in the original action pursuant to sections 2-615, 2-619, and 2-622 (735 ILCS 5/2-615, 2-619, 2-622 (West 2006)), arguing that

the new *res ipsa loquitur* counts were unsupported by a section 2-622 report and that the *res ipsa loquitur* counts were untimely and would surprise and prejudice OSF. OSF further argued that any allegations of negligence for the conduct of any agents and/or employees other than Dr. White should be stricken because only Dr. White was named in plaintiffs' section 2-622 certificate of merit.

¶ 16 On March 24, 2006, the circuit court (Judge Cunningham) entered a memorandum opinion and order granting defendant OSF's motion to dismiss and/or strike paragraph 33 of count I and counts III, IV, V and VI alleging *res ipsa loquitur* in plaintiffs' second amended complaint because the second amended complaint was not supported by a new 2-622 report to support those new claims. The court found, however, that counts VII and VIII of the prior first amended complaint expressly raised the possibility that OSF was negligent for the actions of its employees, and thus the court "[did] not agree that OSF/St. Anthony's would be surprised or prejudiced by the imposition of liability based on the negligence of its employees or agents other than Dr. White." But because the case had been pending for four and a half years, had been removed from the black line pool of cases three times, and there was a status date of July 28, 2006 and a trial date of August 28, 2006, the court ruled that it would be inappropriate to allow plaintiffs to replead and attach a new 2-622 report. The order stated that plaintiffs were not granted leave to replead.

¶ 17 Consistent with the court's March 24, 2006 order, on May 15, 2006, the circuit court (Judge Cunningham) entered an order limiting the testimony of Dr. Yablon, one of the plaintiffs' disclosed Rule 213 experts, to the alleged negligence of Dr. White alone.

¶ 18 Advocate did not file any dispositive motion in response to plaintiffs' second amended complaint in the original action.

¶ 19 On May 19, 2006, plaintiffs voluntarily dismissed OSF and Dr. White. The order granting the dismissal was "without prejudice to re-file." The matter was set for trial a number of times. On November 13, 2006, the day before the final trial date, plaintiffs voluntarily dismissed the remainder of their case "without prejudice to re-file."

¶ 20 Plaintiffs re-filed this action on May 21, 2007, against OSF based on the actions of its apparent agents, including Dr. White, and Advocate based on the actions of its apparent agents, Dr. Singh, Dr. Aglipay, and/or others, re-pleading the previous allegations from the original action.

¶ 21 On July 10, 2007, defendant Advocate filed a motion to dismiss pursuant to section 2-622 because plaintiffs' 2-622 report attached to the complaint did not mention Advocate.

¶ 22 On July 17, 2007, Advocate's motion to dismiss pursuant to section 2-622 was denied because the court ruled that "a separate 2-622 report against Advocate is unnecessary given the only allegations [sic] in [Plaintiff's] Complaint against Advocate are premised upon *respondeat superior*."

¶ 23 On October 11, 2007, defendant OSF moved to strike and dismiss the allegations and counts in the re-filed complaint pursuant to section 2-619 (735 ILCS 5/2-619 (West 2006)), Illinois Supreme Court Rule 273 (Ill. S. Ct. R. 273 (eff. July 1, 1967)) and section 2-622 (735 ILCS 5/2-622 (West 2006)) and to limit experts pursuant to Illinois Supreme Court Rule 219(e) (Ill. S. Ct. R. 219(e) (eff. July 1, 2002)).

¶ 24 On April 2, 2008, the court granted OSF's motion and ruled that all allegations in count I of the re-filed complaint that were based on any agent of employee of OSF other than Dr. White were stricken and dismissed, without leave to re-plead. The court also ruled that the involuntary dismissal of all claims directed against OSF in the prior action which were not based on its

vicarious liability for the conduct of Dr. White constituted a final adjudication on the merits. Further, the court ruled that because the dismissal was a final adjudication on the merits, the doctrine of *res judicata* applied and all previously stricken claims were barred in this action. The court also ruled that expert testimony was to be limited to opinions regarding OSF's vicarious liability for the conduct of Dr. White only.

¶ 25 On May 2, 2008, plaintiffs filed a motion to reconsider the court's April 2, 2008 order. The court denied this motion on June 9, 2008.

¶ 26 On August 13, 2009, plaintiffs supplemented their 213(f)(3) expert disclosures to include two additional witnesses: Kenneth Bennet, a surgeon; and Barry Pressman, a neuro-radiologist. Dr. Pressman was retained to interpret the CT scan and to opine regarding the time of the subdural hematoma, including the interpretation of the December 1, 1999 CT scan by Dr. Ahmad. Dr. Pressman opined that "[t]he failure to properly interpret the film is a deviation from the standard of care. Dr. Ahmad, the neurologist's interpretation of the film as demonstrating a sub-acute bleed is inaccurate."

¶ 27 Although the court originally denied the motions, it later reconsidered that ruling *sua sponte* and found that *res judicata* barred any claims against OSF except those premised on the conduct of Dr. White.

¶ 28 The court then struck plaintiffs' first amended complaint as a "nullity" and entered a briefing schedule on the previously denied motions to bar expert opinions and 213 disclosures, which sought to limit plaintiffs' experts to the conduct of Dr. White alone, and to bar the testimony of Dr. Pressman because his opinions involved new claims barred by prior orders and the statute of limitations.

¶ 29 On August 2, 2010, the court granted defendants OSF and Advocate's motions to strike and bar plaintiffs' 213(f)(3) disclosures.

¶ 30 On September 7, 2010, the court ruled that, with respect to OSF, plaintiffs' experts Dr. Schenk and Dr. Yablon "can only opine as to deviations of defendant Dr. White." The court ordered that "[w]ith regard to any deviations from the standard of care on radiology issues at Advocate, such evidence would be limited to defendants Aglipay and Singh under the doctrine of *respondeat superior*, in order to impose liability on Advocate." The court based this ruling on the prior July 17, 2007 order finding that a separate 2-622 report against Advocate was unnecessary because the only allegations in plaintiffs' re-filed complaint against Advocate were premised upon *respondeat superior*, and not on any institutional negligence against Advocate. The court then limited the testimony of plaintiffs' expert, Dr. Pressman, solely to opinions pertaining to Dr. Singh and Dr. Aglipay, and barred any opinions pertaining to Dr. Ahmad.

¶ 31 As a result of the court's orders, plaintiffs' claims against OSF were limited solely to the conduct of Dr. White based on apparent agency. Plaintiffs' claims against Advocate were limited to the conduct of Dr. Singh and Dr. Aglipay on the basis of apparent agency.

¶ 32 On January 9, 2012, summary judgment was granted to defendants OSF and Advocate, as the evidence demonstrated that OSF was not vicariously liable because there was no negligence on the part of Dr. White, and Advocate was not vicariously liable for any alleged negligence by defendants Aglipay and Singh because these defendants were not Advocate's agents/employees or apparent agents.

¶ 33 Plaintiffs appealed on February 8, 2012.

¶ 34 ANALYSIS

¶ 35 Plaintiffs appeal the entry of summary judgment against them, arguing that the circuit court erred because the court's previous orders limiting their claims and proofs were erroneously entered. Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). We review *de novo* an order granting summary judgment. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2013 IL 110505, ¶ 28 (citing *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010)).

¶ 36 Plaintiffs do not present any arguments concerning the court's rationale in entering summary judgment but, rather, argue that the summary judgment is based on errors in entry of the following interlocutory orders: the order of April 2, 2008 granting partial dismissal to OSF of its *res ipsa loquitur* claims and claims based on any agent/employee other than Dr. White based on *res judicata* and its order of February 23, 2010 reaffirming this order; the order of July 17, 2007 limiting plaintiffs' proofs regarding the negligence of any additional doctors other than Aglipay and Singh against Advocate for whom no 2-622 reports were filed; and the order of September 7, 2010 limiting plaintiffs' expert 213 opinions solely to the acts of defendant Dr. White as against OSF and to defendants Aglipay and Singh as against Advocate.

¶ 37 OSF's October 11, 2007 motion to strike and dismiss the allegations and counts in the re-filed complaint as barred by *res judicata* was brought pursuant to section 2-619 (735 ILCS 5/2-619 (West 2006)). We review the grant or denial of a motion to dismiss brought pursuant to section 2-619 *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

¶ 38 "The admission of expert evidence pursuant to Rule 213 is within the sound discretion of the trial court, and the court's ruling will not be disturbed absent an abuse of that discretion." *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2004).

¶ 39 Finally, "[t]he decision as to whether an action should be dismissed by reason of the plaintiff's failure to comply with the requirements of section 2-622 is a matter committed to the discretion of the trial court." *Cammon v. West Suburban Hospital Medical Center*, 301 Ill. App. 3d 939, 949 (1998).

¶ 40 We address each issue presented below under the appropriate standard of review, and make our ultimate determination regarding the propriety of summary judgment *de novo*. We first address plaintiffs' arguments concerning its claims against OSF and then plaintiffs' arguments concerning its claims against Advocate.

¶ 41 I. New Claims Against OSF Based On Agents/Employees Other Than Dr. White:

¶ 42 Plaintiffs first argue that the court's ruling barring any claims against OSF based on agents/employees other than Dr. White due to the *res judicata* effect of rulings in the original action was erroneous. "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). For *res judicata* to apply, the following elements must exist: "(1) an identity of the parties or their privies; (2) an identity of the causes of action; and (3) a final judgment on the merits." *Cabrera v. First Nat'l Bank of Wheaton*, 324 Ill. App. 3d 85, 92 (2001) (quoting *Conner v. Reinhard*, 847 F.2d 384, 394 (7th Cir. 1988)). *Res judicata*, or claim preclusion, refers to the preclusive effect that a final judgment on the merits has on the parties, in that it forecloses litigation of any claim that was, or could have been, raised in an earlier suit between the parties

or their privies. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). "[*R*]*es judicata* applies to all matters that were actually decided in the original action, as well as to matters that could have been decided." *Cooney v. Rossiter*, 2012 IL 113227, ¶ 18. The doctrine "promotes judicial economy by requiring parties to litigate all rights arising out of the same set of operative facts in one case." *Cooney*, 2012 IL 113227 at ¶ 35. It "also prevents a party from being unjustly burdened from having to relitigate the same case." *Id*. The burden of showing that the doctrine applies is on the party invoking the doctrine. *Hernandez v. Pritikin*, 2012 IL 113054, ¶ 41.

¶ 43 The first two requirements for *res judicata* are met in this re-filed case. There is an identity of the parties or their privies, as OSF was named in the prior action and in this re-filed action.

¶ 44 The re-filed complaint in this case with the new *res ipsa loquitur* claims also concerns the same cause of action. "[T]he filing of a complaint is considered a 'refiling' of a previously filed complaint if it contains the same cause of action as defined by *res judicata* principles." *Schrager v. Grossman*, 321 Ill. App. 3d 750, 755 (2000). "Separate claims are considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts." *Id*. "[A]ssertions of different kinds or theories of relief arising out of a single group of operative facts constitute but a single cause of action." *Id*. at 757 (quoting *River Park, Inc.*, 184 Ill. 2d at 315).

¶ 45 The issue is whether the third requirement for *res judicata* is met: a final judgment on the merits.

¶ 46 Plaintiffs argue that the prior orders entered by Judge Cunningham on March 24, 2006 based upon the 2-622 report and on May 15, 2006, limiting plaintiffs' expert testimony were not

final orders because they did not " 'dispose[] of the rights of the parties either with respect to the entire controversy or some definite and separate portion thereof.' " *Jackson v. Victory Memorial Hospital*, 387 Ill. App. 3d 342, 351 (2008). Plaintiffs argue that *res judicata* should not be applied to bar plaintiffs from any allegations regarding other agents/employees of OSF other than Dr. White because "only specific sub-allegations were struck [*sic*] in the original action." Plaintiffs argue that the doctrine of apparent agency is not an independent claim or separate cause of action but, rather, is merely a theory of recovery. Plaintiffs maintain that these orders did not "dispose[] of the rights of the parties either with respect to the entire controversy or some definite and separate portion thereof." *Id.*

¶ 47 OSF argues that Judge Cunningham's ruling granting OSF's motion to dismiss based on plaintiffs' failure to comply with section 2-622 as to any physician other than Dr. White is a ground for involuntary dismissal under section 2-619, and an involuntary dismissal under section 2-619 constitutes an adjudication on the merits for purposes of *res judicata*.

¶ 48 Illinois Supreme Court Rule 273 provides:

> "Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." Ill. S. Ct. R. 273 (eff. July 1, 1967).

¶ 49 The court in *DeLuna* explained:

> "*** Rule 273 is intended to curb the number of times a plaintiff can resurrect a dismissed action. [Citation.] If a plaintiff's action is involuntarily dismissed for a reason not expressly excepted by the rule, and if plaintiff does not procure leave of court to refile the complaint, or if a statute does not guaranty that opportunity to the plaintiff, then the

rule deems the dismissal a dismissal on the merits. That is the purpose of the rule." *DeLuna*, 185 Ill. 2d at 575.

¶ 50 The Illinois Supreme Court has specifically held that a dismissal for failure to comply with section 2-622 is an "adjudication on the merits" for purposes of *res judicata*. *DeLuna v. Treister*, 185 Ill. 2d 565, 575 (1999). See also *Sherrod v. Ramaswamy*, 314 Ill. App. 3d 357, 362 (2000) (holding that a dismissal based on the Illinois statutory physician's report requirement under section 2-622 operates as an adjudication on the merits under Supreme Court Rule 273).

¶ 51 Here, the court ruled in detail regarding new allegations against OSF agents and employees other than Dr. White in the second amended complaint in its March 24, 2006 memorandum opinion and order as follows:

> "While St. Anthony argues that it is surprised by and would be prejudiced by the allegation that other employees of St. Anthony may have been negligent, this Court notes that Counts VII and VII [*sic*] of the First Amended Complaint first raised that possibility 18 months ago. Thus, the Court does not agree that St. Anthony would be surprised or prejudiced by the imposition of liability based on the negligence of its employees or agents other than Dr. White. The Counts seeking to impose such liability, however, are not supported by the requisite 2-622 report. The previously attached reports make no mention of any other employee or agent of St. Anthony. They also do not indicate that the injury and death of Dan was the type of injury that does not occur but for negligence. Rather, the reports, specifically detail actions of Dr. White that contributed to the death of the Plaintiffs' decedent. As such, Counts III and IV which are the *res ipsa* counts are not supported by the requisite report and must be stricken. Further, the Court finds that the 2-622 reports attached to the previous complaints do not support the allegations in Counts

V and VI that aim to impose liability upon St. Anthony for the allegations put forth in Paragraph 34 of those Counts. At no point in any of the attached reports was Dr. White or any other St. Anthony employee criticized for the care for a brain contusion, the transfer of an unstable patient, or the manner in which Dan was transported. Without any such statement in any of the reports before the Court, Counts V and VI of the Second Amended Complaint must be dismissed.

*** The Court finds that due to the age of this case; the fact that it has been pending for nearly four and a half years; that i[t] has been removed from the black line pool of cases three times; that the parties currently have a status before Judge Maddox set for July 28, 2006, and the fact that the case is set for assignment for trial on August 28, 2006, it would not be appropriate to allow the Plaintiffs to replead and attach an appropriate 2-622."

¶ 52 This dismissal based on section 2-622 was a final adjudication on the merits, and Judge Cunningham's order expressly stated that "Plaintiffs are not granted leave to re[-]plead." Thus, concerning any OSF agents/employees other than Dr. White, the court's dismissal order of March 24, 2006 was a final adjudication on the merits and operates as a *res judicata* bar against raising the same claims against those defendants in this re-filed action.

¶ 53 Plaintiffs argue that these claims should not be barred by *res judicata* because Judge Cunningham expressly found that defendants would not be surprised by the assertion of allegations of negligence against it based on the conduct of other agents/employees and the court based its ruling solely on the length of time the case had been pending and the approaching trial date. Further, plaintiffs argue that defendants acquiesced in the voluntary dismissal of plaintiffs' original complaint without prejudice to re-file. Thus, plaintiffs argue, the application of *res*

judicata would be "fundamentally unfair," citing to *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 390 (2001). But plaintiffs take the court's comment about the proximity of the trial date out of context. Reading the court's statements in their context above, the court based its grant of OSF's motion to dismiss firmly on the failure of plaintiffs to comply with section 2-622. The court noted the quickly approaching trial date and length of the pendency of the case only in denying plaintiffs leave to file any new 2-622 reports.

¶ 54 Plaintiffs also maintain that Judge Cunningham's rulings were not final orders because the trial court's ruling in this re-filed action barred only sub-allegations of plaintiffs' negligence claims based on *res ipsa loquitur*. Plaintiffs rely on *Wilson v. Edward Hospital*, 2012 IL 112898, where the supreme court held that there was no final order where a grant of partial summary judgment merely dismissed a theory of recovery. The supreme court noted that a single cause of action may give rise to several theories of recovery, but that there was only one cause of action against the hospital – negligence. *Wilson*, 2012 IL 112898 at ¶¶ 25-26. Plaintiffs argue that, similarly, here the court only struck the counts in plaintiff's complaint based on the theory of *res ipsa loquitur*, which is not a separate cause of action but merely a theory of recovery for negligence. See *Imig v. Beck*, 115 Ill. 2d 18, 26 (1986). But "[a] judgment or order is 'final' if it disposes of the rights of the parties, either on the entire case or on *some* definite or separate part of the controversy." (Emphasis added.) *Dubina v. Mesirow Realty Development, Inc*., 178 Ill. 2d 496, 502 (1997).

¶ 55 Plaintiffs argue that such a non-final order does not become final upon voluntary dismissal of a suit, relying on *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 894 (2009), but we find *Piagentini* distinguishable. First, in *Piagentini*, no actual counts were dismissed; only certain design allegations within separate counts were dismissed. *Piagentini*, 387 Ill. App. 3d at

893. Here, on the other hand, not only was the *res ipsa loquitur* theory dismissed, paragraph 33 of count I and the entirety of counts III, IV, V and VI of the second amended complaint in the original action were dismissed by the court's March 24, 2006 order. Also, in *Piagentini* the plaintiff was given leave to replead, whereas in this case plaintiffs were denied leave to replead by the court's order of March 24, 2006. Claims dismissed without an opportunity to amend are final even if the case is not dismissed in its entirety. See *Hudson*, 228 Ill. 2d at 473-74 (citing *Rein v. David A. Noyes & Co*., 172 Ill. 2d 325, 337-38 (1996)).

¶ 56 Finally, plaintiffs argue that the prior court's ruling cannot be deemed final under the voluntary dismissal statute because the court's rulings did not occur within the context of a trial or hearing as provided under the statute. Plaintiffs rely on the holding in *Metcalfe v. St. Elizabeth's Hospital*, 160 Ill. App. 3d 47 (1987), where a plaintiff who voluntarily dismissed his complaint after a hearing on a motion to dismiss for failure to file a 2-622 certificate of merit was allowed to proceed with his re-filed action. The court in *Metcalfe* held that the hearing on the motion to dismiss was not the equitable equivalent of a trial, and no evidence was taken on the merits of the action, and so the plaintiff had an absolute right to voluntarily dismiss the action. *Metcalfe*, 160 Ill. App. 3d at 50. *Metcalfe* is clearly distinguishable, as the court in that case had not yet ruled on the motion to dismiss based on the lack of a 2-622 report when the plaintiff voluntarily dismissed that case (*Metcalfe*, 160 Ill. App. 3d at 49), whereas in this case the court had already granted the motion to dismiss without leave to replead before plaintiffs voluntarily dismissed the remainder of the original action.

¶ 57 Therefore, plaintiffs' claims against OSF based on *res ipsa loquitur* and on the conduct of any agent/employee other than Dr. White are barred by the prior court's dismissal order in the original action under *res judicata*. We affirm the portion of the court's order in this re-filed case

granting OSF's motion to dismiss paragraph 33 of count I and counts III, IV, V, and VI against OSF based on any employee/agent other than Dr. White, and we affirm the grant of summary judgment to OSF based on this ruling.

¶ 58 II. New Claim Against Advocate Based on Dr. Ahmad:

¶ 59 Regarding plaintiffs' claims against Advocate, we first note that Advocate did not file any dispositive motion in response to plaintiffs' second amended complaint in the original action, and so there is no *res judicata* preclusion of any claims against Advocate in this re-filed action.

¶ 60 Instead, plaintiffs argue that the court erred in its September 7, 2011, order limiting plaintiffs' proofs to the negligence of only Dr. Aglipay and Dr. Singh and barring "new claims" against Advocate based on the conduct of Dr. Ahmad because plaintiffs have always maintained claims of negligence against Advocate based on the actions of its employees and/or agents not limited to Dr. Ahmad. Plaintiffs argue that in this re-filed action they specifically alleged negligence against Advocate based on the conduct of Dr. Ahmad. Counts 7-10 of plaintiffs' complaint in this re-filed action against Advocate for wrongful death and survival under *respondeat superior* were based on the conduct of Dr. Aglipay and Dr. Singh. Counts 11 through 12 against Advocate for wrongful death and survival under *respondeat superior* were based on the conduct of unnamed employees and/or agents. Plaintiffs' re-filed complaint also specifically alleged negligence by Dr. Ahmad in the following allegation: "On or about December 1, 1999, Dr. AGLIPAY and Dr. Ahmad, an employee and/or apparent agent of ADVOCATE interpreted the film without the benefit of a radiologist's interpretation, as a subacute and chronic hemorrhage with no acute features."

¶ 61 Plaintiffs further argue that in any event they are not limited to the allegations pled in the original action and can assert new claims under section 13-217 (735 ILCS 5/13-217 (West

2010)). Section 13-217 operates as a savings statute and permits plaintiffs to proceed with new allegations in a timely re-filed action. Plaintiffs argue that their complaint and amended complaint in the re-filed action are not amended pleadings pursuant to section 2-616 which implicates the relation-back doctrine to analyze whether new claims relate back to the original pleading but, rather, their complaint in this case is considered a new action governed by section 13-217 (735 ILCS 5/13-217 (West 2010).

¶ 62 On this point, we agree. This case is a re-filed action after a voluntary dismissal, not an amended pleading. Under the voluntary dismissal statute, "the plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause." 735 ILCS 5/2-1009 (West 2010). Re-filings are governed by section 13-217 of the Code (735 ILCS 5/13-217 (West 2010)), and not section 2-616 (735 ILCS 5/2-616 (West 2006)). *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 398 Ill. App. 3d 773, 783 (2009). An action that is re-filed pursuant to section 13-217 is a new action, not a reinstatement of the old action. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 504 (1997). As this court recognized in *Gelber*, because a re-filed action is a new action, section 2-616 does not apply, and therefore, a relation-back analysis under *Porter* would be inappropriate. *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 398 Ill. App. 3d 773, 782 (2009).

¶ 63 After a voluntary dismissal, a plaintiff "may commence a new action within one year or within the remaining period of limitation, whichever is greater." 735 ILCS 5/13-217 (West 2010). Thus, section 13-217 operates as a "savings statute." *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 16 (citing *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497 (1998)). Where the plaintiff asserts new claims in a re-filed complaint based on a single cause of

action, the timeliness of those claims is governed by section 13-217. *Mabry*, 2012 IL App (1st) 111464 at ¶ 18. See also *Gelber*, 398 Ill. App. 3d at 783. Where a new claim is raised in the initial pleading in a re-filed action under 13-217, the claim is timely if it is brought either within the statute of limitations period or within one year of the prior voluntary dismissal. 735 ILCS 5/13-217 (West 2010). If a new claim is brought in the initial pleading in a re-filed action, and the re-filed action was filed within one year of a prior voluntary dismissal, the claim is timely. See *Gelber*, 398 Ill. App. 3d at 782 (held that a new claim for unjust enrichment was brought in the initial pleading in the re-filed action, which was filed within the extended one-year period under section 13-217, and was therefore timely). See also *Mabry*, 2012 IL App (1) 111464 at ¶ 20 (held that new claims for damages including pain and suffering and loss of consortium were timely because the re-filed action was timely filed under section 13-217 within one year of the prior voluntary dismissal).

¶ 64 Because this case is a re-filed case after a previous voluntary dismissal, it is considered a new action under section 13-217. It is not an amended pleading, and section 2-616(b) and the relation-back doctrine do not apply. Plaintiffs voluntarily dismissed their original cause of action on November 13, 2006. Plaintiffs re-filed this case on May 21, 2007, well within the one-year savings period under section 13-217. Plaintiffs' new negligence claim against Advocate based on the conduct of Dr. Ahmad is indeed timely.

¶ 65 Nevertheless, even though the claims are timely, we still must determine whether these claims were properly dismissed by reason of the plaintiffs' failure to comply with section 2-622 of the Illinois Code of Civil Procedure to support any claims against defendants Aglipay and Singh. See *Cammon v. West Suburban Hospital Medical Center*, 301 Ill. App. 3d 939, 948, 704 N.E.2d 731, 738 (1998) (after determining that the claims asserting vicariously liability against

the hospital were not time-barred, the court proceeded to determine whether these claims were properly dismissed by reason of the plaintiff's failure to comply with section 2-622 of the Code).

¶ 66 Advocate argues that the savings statute is a "red herring" and that Judge Flanagan's rulings in this re-filed action pertaining to Advocate "are premised upon the scope of the liability asserted against Advocate, which was clarified at the outset of the action in her July 17, 2007 order" and again on September 7, 2010 when Judge Flanagan struck expert opinions regarding physicians that were not supported by any 2-622 report.

¶ 67 We agree with Advocate, and this is the issue that is ultimately fatal to plaintiffs on appeal. Even though plaintiffs' claims against Advocate based on any alleged conduct by agents/employees other than Dr. Ahmad (Dr. Aglipay and Dr. Singh) are timely, they still fail because Advocate failed to file the required section 2-622 report with its complaint in this re-filed action. We may affirm a trial court's judgment on any grounds which the record supports. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 48 (citing *Water Tower Realty Co. v. Fordham 25 E. Superior, L.L.C.*, 404 Ill. App. 3d 658, 665 (2010)).

¶ 68 Section 2-622 requires that a plaintiff in a medical malpractice action must supplement his or her complaint with: (1) an attorney's affidavit certifying that he or she has consulted with a qualified health care professional in whose opinion there is a reasonable and meritorious cause for the filing of the action; and (2) a copy of that health professional's written report setting forth the reasons for his determination. 735 ILCS 5/2-622(a)(1) (West 2006); *Cammon*, 301 Ill. App. 3d at 948-49. Where a defendant is sued only for vicarious liability, a separate 2-622 report must be filed as to the individuals whose conduct forms the basis for such liability. *Cammon*, 301 Ill. App. 3d at 948. This includes any alleged conduct by unnamed agents/employees whose conduct forms the basis for vicarious liability. *Id.* A single report may suffice as to multiple defendants

"if the report is sufficiently broad, adequately discussing the deficiencies in the medical care rendered by each defendant and containing reasons in support of the conclusion that a reasonable and meritorious cause exists for filing an action against each defendant." *Id*. In this re-filed action, plaintiffs only included 2-622 reports addressing the alleged negligence of Aglipay and Singh. No supporting 2-622 report was filed alleging negligence supporting a cause of action against Dr. Ahmad. Plaintiffs failed to comply with section 2-622.

¶ 69 Plaintiffs nevertheless argue that the circuit court incorrectly relied on the earlier July 17, 2007 order in entering its September 7, 2010 order granting defendant Advocate's motion to strike and bar plaintiffs' 213(f)(3) disclosures other than against defendants Aglipay and Singh because the court's July 17, 2007 order did not specifically limit *respondeat superior* liability to only defendants Aglipay and Singh. The court ruled in its September 7, 2010 order that "a separate 2-622 report against Advocate Trinity was unnecessary because the only allegations in the Plaintiff's [sic] complaint against Advocate Trinity was premised upon *respondeat superior* for the actions of Defendants Aglipay and Singh," but the July 17, 2007 order actually stated only that "a separate 2-622 report against Advocate is unnecessary given the only allegations [sic] in [Plaintiff's] Complaint against Advocate are premised upon *respondeat superior*."

¶ 70 The problem with plaintiffs' argument on this point is that Advocate's motion to dismiss was based on the lack of a 2-622 report against *Advocate*, not on the lack of a 2-622 report against agents/employees other than defendants Aglipay and Singh. After this ruling, plaintiffs did not seek leave to amend their complaint or add any additional 2-622 affidavits and reports. The court was not presented with any question regarding *respondeat superior* liability against Advocate based on agents/employees other than Aglipay and Singh because there were no 2-622 reports based on any other agents/employees of Advocate.

¶ 71 It is the absence of any 2-622 reports to support any *respondeat superior* liability for Dr. Ahmad or any agents/employees of Advocate other than defendants Aglipay and Singh that is fatal to plaintiffs' attempt to raise any such claims in this re-filed case.

¶ 72 Plaintiffs argue in reply that section 2-622 should not function to bar plaintiffs from offering certain expert opinions and no order had ever been previously entered indicating plaintiffs' 2-622 report was insufficient, and that the pleading may be amended at any time to conform to the proofs. However, the requirement of section 2-622 is clear.

¶ 73 The circuit court did not abuse its discretion in its previous interlocutory rulings limiting expert testimony, and the court did not err in entering the resulting summary judgment order in favor of defendant Advocate.

¶ 74 CONCLUSION

¶ 75 Plaintiffs' claims against OSF alleging *res ipsa loquitur* and based on the conduct of any agent/employee other than Dr. White are barred by the prior court's dismissal order in the original action under *res judicata*. We affirm the portion of the court's order in this re-filed case granting OSF's motion to dismiss paragraph 33 of count I and counts III, IV, V, and VI against OSF based on any employee/agent other than Dr. White, and we affirm the grant of summary judgment to OSF based on this ruling.

¶ 76 Regarding defendant Advocate, although plaintiffs' additional *respondeat superior* claims based on agents/employees of Advocate were timely under section 13-217, plaintiffs failed to comply with section 2-622. Plaintiffs only included 2-622 reports addressing the alleged negligence of Aglipay and Singh. No supporting 2-622 report was filed alleging negligence supporting a cause of action against Dr. Ahmad.

¶ 77 We affirm the court's grant of summary judgment in favor of defendants OSF and Advocate.

¶ 78 Affirmed.

¶ 79 PRESIDING JUSTICE MASON, joined by JUSTICE LAVIN, specially concurring.

¶ 80 I agree that summary judgment in favor of OSF and Advocate should be affirmed and concur in the result. I write specially because I respectfully disagree with the analysis of the timeliness of the new claim against Advocate based on the alleged negligence of Dr. Ahmed and asserted by McDowell for the first time in the re-filed action commenced following voluntary dismissal.

¶ 81 As the order notes, McDowell never supported this new claim with the required affidavit of merit under 735 ILCS 5/2-622 (West 2006), either at the time the new action was filed or at any time thereafter. Further, after the new action was filed, McDowell specifically represented to the trial court that Advocate's vicarious liability was predicated solely on the conduct of Drs. Aglipay and Singh and, therefore, a separate affidavit of merit as to Advocate, based on the conduct of any other agents or employees, was unnecessary. It was not until more than two years after the new action was filed that McDowell first disclosed an expert opinion that Dr. Ahmed's conduct contributed to the decedent's injuries. Under these circumstances, whether or not the claim against Advocate based on Dr. Ahmed's conduct was timely when it was first asserted in the re-filed action, the trial court properly exercised its discretion to preclude McDowell from pursuing it. Thus, it is unnecessary for us to address the timeliness issue.

¶ 82 Nevertheless, the order concludes that because McDowell's new claim arising from the alleged negligence of Dr. Ahmed was filed within one year of the voluntary dismissal of his original action, it was timely under section 13-217 (735 ILCS 5/13-217 (West 2006)),

notwithstanding that it was first asserted long after the applicable statute of limitations. 735 ILCS 5/13-202 (West 2006) (two-year statute of limitations applicable to personal injury claims). I respectfully disagree.

¶ 83 The notion that new claims included in a complaint re-filed within one year of a voluntary dismissal are automatically timely is wrong as a matter of law. Section 13-217's savings clause is not designed to provide a plaintiff with an extended, independent statute of limitations after a voluntary dismissal. Rather, whether any new claims included in the re-filed action are timely depends on the court's assessment of whether they arise from the same core of operative facts as those asserted in the original action. See *Richter v. Prairie Farms Dairy, Inc.*, 2015 IL App (4th) 140613, ¶ 10 (determining that in re-filed case, plaintiff's new theories of recovery were timely because they "grew out of the same transaction or occurrence set up in the original pleading" and finding that, within the limitations period, defendant was aware of the relevant facts underlying plaintiff's claims and afforded sufficient opportunity to investigate them); see also *Tatara v. Peterson Diving Service*, 283 Ill. App. 3d 1031, 1038 (1996). Although the relation back provisions of section 2-616 (735 ILCS 5/2-616 (West 2006)) do not apply because the new case is not an amended pleading (*Apollo Real Estate Investment Fund, IV, LP v. Gelber*, 398 Ill. App. 3d 773, 782-83 (2009)), it is still necessary to evaluate the timeliness of any new claims asserted, wholly apart from determining that the new action was filed within one year of the voluntary dismissal.

¶ 84 A simple hypothetical illustrates the anomaly in the author's reasoning. If, instead of dismissing the 2001 case voluntarily in 2007, McDowell sought to amend the complaint to add allegations regarding Dr. Ahmed's conduct (accompanied by the requisite affidavit of merit), the court would have conducted a relation-back analysis under section 2-616 to determine whether

those allegations arose out of the same core of operative facts as those underlying the original claims. See *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 361 (2008) (claims in amended pleading related back to original complaint where allegations of medical negligence in both "were part of the same events leading up to the same ultimate injury.") If the new allegations did not relate back, the claim would be time-barred. *Id.* ("[A]n amendment which states an entirely new and distinct claim for relief based on completely different facts will not relate back.").

¶ 85 Here, under the author's analysis, when McDowell voluntarily dismissed his complaint in 2007, section 13-217 gave him *carte blanche* to include any new claims he chose in the new action as long as the action was re-filed within one year of the dismissal. Reasoning that courts do not utilize a relation back analysis in new cases filed after a voluntary dismissal, the author concludes that the only timeliness inquiry is whether the new case was filed within one year.

¶ 86 But in re-filed cases under section 13-217, courts still analyze whether any new claims or theories of recovery asserted arise out of the same core of operative facts as the original claims. *Richter*, 2015 IL App (4th) 140613, ¶ 10. If they do not, they are not timely. In other words, a voluntary dismissal and re-filing cannot revive claims that otherwise would have been time-barred if asserted in the original action. Any other result would obliterate the protection applicable statutes of limitations afford defendants against stale claims and would result in countless voluntary dismissals to obtain that benefit.

¶ 87 I express no view as to whether McDowell's claims arising out of Dr. Ahmed's alleged negligence arose out of the same core of facts as his original claims predicated on the conduct of Drs. Aglipay and Singh. The point is that a timeliness analysis entails more than a determination

that the new claims were included in the action re-filed within one year of the voluntary dismissal.

¶ 88 For the foregoing reasons, I do not join in the order's conclusion that the claim against Advocate predicated on Dr. Ahmed's conduct was timely solely on the ground that the claim was included in the re-filed action commenced within one year of the voluntary dismissal.