2015 IL App (2d) 141132-U
No. 2-14-1132
Order filed October 21, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RONALD SCHROFF Plaintiff-Appellant, v. ADVOCATE CONDELL MEDICAL CENTER, Defendant-Appellee (Michael J. Quinn, M.D., David Foosaner, M.D., Greenleaf Orthopaedic Associates, Defendants.)	)	Appeal from the Circuit Court of Lake County. No. 12-L-475 Honorable Christopher C. Starck, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in denying plaintiff leave to file his second amended complaint. First, the claims in the proposed amendment were not time-barred, because they "grew out of the same transaction or occurrence set up in the original pleading." 735 ILCS 5/2-616(b) (West 2014). Second, the proposed amendment satisfied the applicable factors governing amendments of pleadings. See 735 ILCS 5/2-616(a) (West 2014); *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 355-56 (2002) (setting forth factors in applying section 2-616(a)).

¶ 2 Plaintiff, Ronald Schroff, appeals the judgments of the trial court (1) denying his motion for leave to file a second amended complaint; (2) granting defendant, Advocate Condell Medical Center's (Condell), motion to strike portions of plaintiff's affidavit filed in opposition to Condell's motion for summary judgment on count IV of plaintiff's first amended complaint; and (3) granting summary judgment in favor of Condell on count IV of the first amended complaint. For the following reasons, we hold that the court erred by denying plaintiff leave to file his second amended complaint. This moots the remaining issues on appeal. We reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff and his wife entertained guests on the evening of May 29, 2010. In the early morning hours of May 30, plaintiff conceived the idea of riding his motorized dirt bike around the block. As he came around the block and approached his house, he collided with a parked vehicle and fell to the ground. He immediately felt pain on the right side of his body and was unable to rise on his own. His wife drove him to the emergency room of Condell's facility, where he reported knee and pelvic pain to hospital personnel. Later that morning, plaintiff underwent knee surgery at Condell. Following the surgery, plaintiff complained to hospital personnel of persistent pelvic pain. Plaintiff was not treated at Condell for any pelvic condition. Plaintiff's pelvic pain continued after his discharge from Condell, and several weeks later he was diagnosed with a fractured hip socket. He eventually underwent a hip replacement.

¶ 5 We chronicle in some detail the procedural progression of this case, since it bears on the several factors, particularly timeliness, that a court must consider in deciding whether to allow an amended pleading. See 735 ILCS 5/2-616(a) (West 2014); *Clemons v. Mechanical Devices Co.*,

202 Ill. 2d 344, 355-56 (2002) (setting forth factors in applying section 2-616(a)) (citing *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992)).

¶ 6 On June 21, 2012, plaintiff, who was *pro se* at the time, filed his original five-count complaint. He named four defendants: Dr. Michael Quinn, Dr. David Foosaner, Greenleaf Orthopaedic Associates (Greenleaf), and Condell. Plaintiff alleged as follows. When he arrived at Condell on May 30, 2010, his "obvious and patent" injuries included "an injury to his right hip." Quinn "was called in by [Condell's] staff and he assumed the role of primary physician attending to the [p]laintiff's injuries." Diagnostic images were taken of plaintiff's right knee and hip. Foosaner, "a radiologist on staff at Condell," read the images and "noted that there were fractures of the [right] acetabulum [hip socket] of an indeterminate age, but he did not suggest correlating clinically." Quinn performed surgery on plaintiff's right knee but did not treat his right hip. After his discharge from Condell on June 2, plaintiff continued treatment with Quinn at the offices of Greenleaf, Quinn's employer. Quinn saw plaintiff on June 4, June 14, and June 25, 2010. On the third date, Quinn "first diagnosed the [p]laintiff as suffering from a fractured acetabulum with shortening of the right leg." Quinn informed plaintiff that he needed immediate surgery because the fracture had gone untreated for such a long period. Quinn referred plaintiff to an orthopedic specialist, who eventually had to perform a total hip replacement on plaintiff because of avascular necrosis, or tissue death. As a result of the hip replacement, plaintiff became permanently disabled and incapable of continuing with his work as a laborer in the construction industry.

¶ 7 Count I of the original complaint named Foosaner and alleged that he was negligent for failing to discern that the hip fracture was acute and required treatment. Count II named Condell and alleged that, as Foosaner's employer, it was liable on an agency basis for his negligence.

Count III named Quinn and alleged that he was negligent for failing to discover plaintiff's hip injury before June 25, 2010. Count IV named Greenleaf, Quinn's employer, alleging that it was liable on an agency basis for his negligence. Count V alleged negligence of Condell on the basis that Quinn was its "ostensible agent."

¶ 8 On July 24, 2012, Foosaner filed a motion to dismiss the complaint because the limitations period had expired and because plaintiff failed to comply with section 2-622(a)(1) of the Code of Civil Procedure (Code) (735 ILCS 5/2-622(a)(1) (West 2014)), which requires that a plaintiff alleging medical malpractice file an affidavit stating that he has obtained from a health professional an opinion that there is a "reasonable and meritorious cause for the filing of such action." On August 13, attorneys filed an appearance for plaintiff. On August 28, the trial court permitted plaintiff to file *instanter* his affidavit stating that he was unable to obtain an opinion from a health care professional as to the merit of his claims, and that the limitations period on his claims would run before he could obtain such an opinion. The trial court allowed plaintiff 30 days to obtain such an opinion and also gave him until October 27 to respond to Foosaner's motion to dismiss.

¶ 9 On October 5, plaintiff's counsel filed an affidavit to which he attached an opinion from a board-certified orthopedic surgeon that the complaint had a reasonable and meritorious basis.

¶ 10 On October 24, the trial court entered its first case management order pursuant to Supreme Court Rule 218(c) (eff. Oct. 4, 2002). The court "entered and continued generally" Foosaner's motion to dismiss. The court directed plaintiff to "file an amended complaint by November 7" and allowed defendants 28 days thereafter to plead or otherwise answer. The court set the following additional dates and deadlines: (1) plaintiff was to disclose the identity and testimony of his witnesses by May 3, 2013; (2) defendants were to disclose the identity and

testimony of their witnesses by July 5, 2013; and (3) all discovery was to be completed by September 20, 2013.

¶ 11 Plaintiff, now represented by counsel, filed his first amended complaint on November 7. Plaintiff named the same four defendants: Quinn, Foosaner, Greenleaf, and Condell. The complaint had four counts—one fewer than the original complaint because plaintiff combined into one count the claims against Condell. The complaint alleged the same conduct by Foosaner and Quinn, who according to plaintiff were the "agent[s], apparent agent[s] or ostensible agent[s] of Condell." However, plaintiff did not exclude the possibility that other individuals at Condell might have treated plaintiff. For instance, in the complaint's general allegations, plaintiff asserted that, upon his arrival at its emergency room, Condell "through *its employees, agents and servants* *** provided emergency medical care and admitted the [p]laintiff to its facility as an inpatient." (Emphasis added). Plaintiff also alleged that "Dr. Quinn *and other employees, agents and servants of Condell* directed that x-rays and other tests and studies of [plaintiff] be obtained for purposes of diagnosing the nature and extent of his injuries and conditions for which he sought treatment." (Emphasis added.) Similarly, in count IV of the first amended complaint, which alleged vicarious liability of Condell, plaintiff asserted as follows:

> "28. At all times relevant hereto, [Condell] was acting through its *employees, agents or servants, including, but not limited to *** Dr. Quinn and Dr. Foosaner*.
>
> 29. At all times mentioned herein, and in particular during the periods that [plaintiff] was under the professional care of [Condell], it then and there became and was the duty of [Condell], *through its authorized agents, servants and employees, including but not limited to *** Dr. Quinn, Dr. Foosaner, and others*, to exercise that degree of care in providing hospital services and facilities, and to supervise the medical care

rendered through its medical staff as that required of similar institutions duly licensed and accredited.

30. Notwithstanding the aforesaid duty, [Condell], *through its duly authorized agents, servants and employees including but not limited to *** [Quinn and Foosaner], and others,* negligently and carelessly committed one or more of the following wrongful acts or omissions:

(a) Negligently and carelessly failed to recommend further studies of the [p]laintiff's right acetabulum after reviewing the results of the x-ray of the right pelvis take [*sic*] on May 30, 2010;

(b) Negligently and carelessly failed to diagnose the presence of an undisplaced fracture to the [p]laintiff's right acetabulum at any time from May 30, 2010 to June 25, 2010;

(c) Negligently and carelessly failed to treat an undisplaced fracture to the [p]laintiff's right acetabulum at any time from May 30, 2010 to June 25, 2010; and,

(d) Were otherwise negligent and careless."

¶ 12 The discovery exchanged among the parties included an "Emergency Department Chart" (emergency chart) chronicling plaintiff's treatment at Condell's emergency room on May 30, 2010. Precisely when plaintiff received the emergency chart in discovery is unknown from the record, but the parties agree that plaintiff received it at some point before he moved to file his second amended complaint. The emergency chart reflects that plaintiff arrived at Condell at approximately 3 a.m. on May 30. A patient history was taken by "MHA," which, according to the report's legend, stands for "Manish Acharya M.D." Under the section entitled "Non-Drug

Orders" appears a list of treatments and tests ordered by Acharya. Included in the list are x-rays of plaintiff's chest, cervical spine, right knee, right elbow, and pelvis. Immediately following the "Non-Drug Orders," in a section entitled "Results," is this notation by Acharya:

> "X-ray of affected area Knee—3 views—this film was independently reviewed by me as the initial reviewer (MHA 05/30/2010 05:55)
>
> There is a questionable fracture involving the affected area knee films (MHA 05:55)
>
> The x-ray shows an area over the tibial plateau which has a questionable irregularity will [*sic*] recommend follow up and re-examination (MHA 5:55)."

The chart does not reflect any interpretation of any other x-ray.

¶ 13 Between November 2012 and March 2013, defendants filed their answers to the first amended complaint. Greenleaf first entered its appearance in the proceeding in February 2013.

¶ 14 On March 27, 2013, the parties all joined in a motion to modify the court's Rule 218 deadlines. The parties noted that, since Greenleaf did not appear until February 2013, defendants had not yet answered all discovery. That same day, the court issued its second Rule 218 order. The court imposed the following dates/deadlines: (1) disclosure of plaintiff's witnesses by August 15, 2013; (2) disclosure of defendants' witnesses by October 31, 2013; (3) depositions of plaintiff's experts by September 30, 2013; (4) depositions of defendants' experts by December 15, 2013; (5) completion of all discovery by January 1, 2014; and (6) jury trial on March 3, 2014.

¶ 15 Plaintiff was deposed on April 10 and July 12, 2015. On July 23, 2013, plaintiff filed a motion to compel the deposition of Foosaner, alleging that he was vexatiously delaying the proceedings. Plaintiff claimed that, due to Foosaner's delay, plaintiff was unable to comply with the discovery deadlines set forth in the court's March 27 order. The same day as plaintiff's

motion, the court entered a revised Rule 218 order with the following dates/deadlines: (1) disclosure of plaintiff's witnesses by November 21, 2013; (2) disclosure of defendants' witnesses by January 7, 2014; (3) "all defendants to be deposed by 9/20/13"; (4) completion of all discovery by March 2, 2014; and (5) trial on May 5, 2014.

¶ 16 On July 25, 2013, Foosaner asked the court to strike the motion to compel. He was deposed on August 13, mooting the motion to compel. He testified that, in May 2010, he was employed by a corporation that contracted with Condell to provide radiology services. Foosaner explained that when an emergency room (ER) physician orders an x-ray during the evening shift, the ER physician will typically interpret the x-ray and make a preliminary finding for the radiologist to review when he comes on shift in the morning. If the radiologist coming on shift disagrees with the preliminary finding, he will notify the ER physician. In difficult cases, the ER physician on the evening shift will immediately contact the on-call radiologist for his interpretation.

¶ 17 Foosaner testified that, when he arrived at Condell at 7 a.m. on May 30, 2010, he began reviewing x-rays that the ER physician(s) had previously ordered. Though Foosaner was aware that Acharya had ordered x-rays of plaintiff, Foosaner was unable to find in plaintiff's records any preliminary radiological finding by Acharya. In his radiology report, which he dictated at 8:10 a.m., Foosaner found that plaintiff's x-rays showed "trauma about the right acetabulum of indeterminate age." Foosaner could not tell whether there was a fracture. He saw "evidence of healing." Foosaner considered the finding positive but not acute. Since what he saw on the image was "somewhat subtle," and he was unsure what finding, if any, Acharya had made, Foosaner decided to fax his finding immediately to the emergency room.

¶ 18 Foosaner testified that, though the majority of orthopedic surgeons interpret x-ray images, Foosaner was not sure whether Quinn had reported any finding regarding plaintiff's pelvic x-ray. Foosaner did not discuss plaintiff's case with Quinn.

¶ 19 Quinn was deposed on September 1, 2013. He testified that, in May 2010, was employed by Greenleaf, which was under contract with Condell to provide orthopedic services. On the morning of May 30, 2010, Acharya phoned Quinn, who was the on-call orthopedist. Acharya told Quinn that the "primary reason" for the call was Acharya's concern about plaintiff's right knee. Acharya explained that he ordered x-rays of plaintiff's knee and believed that the images were negative. Quinn could not recall whether he discussed any other x-rays with Acharya. When Quinn arrived at Condell, he reviewed "whatever was available" about plaintiff's case. His review included x-rays of plaintiff's right knee, right elbow, chest, cervical spine, and pelvis. Quinn found all the images negative except for the right knee. Quinn could not recall whether the records he reviewed on May 30 indicated that Acharya had himself reviewed the pelvic x-ray. After reviewing the x-rays, Quinn recommended surgery for the knee, which he performed later on the morning of May 30. Quinn saw plaintiff for follow-up appointments in June 2010. On June 25, Quinn discovered that plaintiff's right hip socket was fractured.

¶ 20 Quinn was shown Foosaner's radiology report faxed to Condell's emergency room at 8:10 a.m. on May 30. Quinn stated that he did not recall seeing the report on May 30 or any time afterwards in May or June 2010.

¶ 21 On September 24, 2013, the trial court entered an order setting a Rule 218 case management conference for November 6.

¶ 22 On November 6, 2013, the court entered yet another revised Rule 218 order. This one retained the trial date of May 5, 2014. The court extended the deadline for disclosure of

witnesses to December 31, 2013 (plaintiff) and February 21, 2014 (defendants). The deadline for completion of all discovery was April 1, 2014.

¶ 23 On November 15, 2013, Condell filed its motion for summary judgment on count IV of plaintiff's first amended complaint, which alleged that Condell was vicariously liable for the conduct of Quinn and Foosaner. Condell argued that the undisputed material facts showed that it did not act in a manner that would lead a reasonable person to conclude that Quinn or Foosaner were its employees or agents. See *Gilbert v. Sycamore Hospital*, 156 Ill. 2d 511, 525 (1993) (setting forth the elements of vicarious liability of a hospital for the acts of physicians). Condell asserted that it provided, and plaintiff signed, consent forms by which he acknowledged, as a condition of consent to treatment, that the physicians providing medical services at Condell were not its employees but rather independent contractors. Condell attached copies of the signed forms to its motion. One form, entitled "Health Care Consent" (consent for treatment) was dated May 29, 2015, [1] and signed by Brandy, plaintiff's wife, but not by plaintiff. Another form, dated May 30, 2015, and signed by both Brandy and plaintiff, was entitled "Consent to Operate/Invasive Procedure" (consent for surgery).

¶ 24 On December 27, 2013, plaintiff both responded to the motion for summary judgment and filed a motion for leave to file a second amended complaint. Plaintiff opposed the summary judgment motion with his affidavit. Regarding the consent for treatment, he averred that he was never personally presented with such a form while at Condell's emergency room, even though he was "alert and lucid, and could have signed a consent for treatment had [he] been asked to do so." Plaintiff also denied that he gave Brandy authorization to sign the consent for treatment. As

[1] The date is erroneous, as plaintiff was admitted to Condell in the early hours of May 30, 2010.

for the consent for surgery, plaintiff averred that he did not understand the form to mean that "the physicians who provide treatment at [Condell] are not employees or agents of the hospital." Plaintiff also claimed that he interpreted the form to apply only to his knee surgery.

¶ 25 Plaintiff also attached a partial transcript of Acharya's deposition, which was taken on December 9, 2013 (the record contains no complete copy of the deposition). Acharya testified that, after examining plaintiff upon his admission to Condell's emergency room on May 30, 2010, Acharya ordered x-rays of plaintiff's chest, pelvis, cervical spine, right elbow, and right knee. The only image Acharya interpreted as positive was the right knee. Acharya was shown what counsel described as a "document provided *** with some of the [x-ray images] and not in the main medical record." Acharya acknowledged that on, this "document" (which, we note, does not appear in the record), he recorded his finding that the x-rays were all negative except for the right knee. Acharya was also shown a radiology report from Foosaner that was faxed to Condell's emergency room at 8:10 a.m. on May 30. Acharya did not recall whether he saw the report on May 30. Acharya noted the possibility that he was off his shift before the radiology report arrived.

¶ 26 Like the two prior complaints, the proposed second amended complaint focused on the failure to diagnose plaintiff's fractured hip socket. In its general allegations, the complaint added assertions about the medical care Acharya provided plaintiff in Condell's emergency room. Specifically, plaintiff alleged that Acharya "ordered several x-rays including a knee and pelvic x-ray," that he "read the knee x-ray as showing a tibial plateau fracture of the right knee," and that he read the pelvic x-ray as negative. Plaintiff also alleged that, though Foosaner faxed his radiology report (positive for trauma to the right acetabulum) to Condell's emergency room, Acharya did not recall receiving the fax and Quinn did not receive the fax.

¶ 27 The second amended complaint added two new counts: counts V and VI. Count V alleged that Condell was vicariously liable for Acharya's failure to diagnose a hip fracture. Count VI alleged institutional negligence of Condell based on its failure to inform plaintiff, Acharya or Quinn of Foosaner's positive finding on plaintiff's pelvic x-ray.

¶ 28 In neither its motion to amend nor its reply in support thereof did plaintiff contest, as Condell claimed, that the limitations period for his action had expired as of his motion to amend. See 735 ILCS 5/13-212(a) (West 2014) ("[N]o action for damages for injury or death against any physician *** or hospital duly licensed under the laws of this State *** arising out of patient care shall be brought more than 2 years after the date on which the after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first ***."). Plaintiff asserted, rather, that the additional allegations satisfied the exception in section 2-616(b) of the Code (735 ILCS 5/2-616 (West 2014)) for claims that "grew out of the same transaction or occurrence set up in the original pleading." Plaintiff also contended that the amendment was appropriate under the general standards for amendments set forth in section 2-616(a) of the Code (735 ILCS 5/2-616(a) (West 2014)). See *Clemons*, 146 Ill. 2d at 273 (setting forth factors for a court to consider in applying section 2-616(a)) (citing *Loyola Academy*, 146 Ill. 2d at 273-74).

¶ 29 On January 7, 2014, Condell filed an emergency motion to strike portions of plaintiff's affidavit as inconsistent with his deposition testimony.

¶ 30 On February 8, the court held a hearing on plaintiff's motion to file a second amended complaint and Condell's motion to strike portions of plaintiff's affidavit. No transcript of the hearing appears in the record. On February 11, the court issued its written order denying

plaintiff's leave to file his second amended complaint. The order stated no reason for the denial. The February 11 order also continued Condell's motion to strike.

¶ 31 Plaintiff moved for reconsideration of the denial of leave to amend. The motion was heard on May 7, 2014. In denying the motion to reconsider, the court reasoned that the additional allegations in the second amended complaint did meet section 2-616(b)'s criteria because they presented "a whole knew [*sic*] theory" and so "would "redirect [the] course in [the] litigation." The court also held that the amendment did not satisfy section 2-616(a)'s standards because plaintiff was aware of the grounds for the additional allegations "long before now" and there would be "grave prejudice" to defendants in permitting the amendment. On May 28, the court entered its order denying the motion to reconsider.

¶ 32 Subsequently, on July 9, the court granted both Condell's motion to strike portions of plaintiff's affidavit and its motion for summary judgment on count IV of the first amended complaint. On October 15, the court found that there was no just cause for delaying enforcement and/or appeal of the judgments entered on February 11, May 28, and July 9, 2014. Plaintiff filed a notice of appeal from those judgments.

¶ 33 II. ANALYSIS

¶ 34 As it is dispositive of this appeal, we address first plaintiff's contention that the trial court erred in denying him leave to file his second amended complaint. We agree with plaintiff that the denial was erroneous.

¶ 35 In analyzing the motion to amend, the trial court applied subsections (a) and (b) of section 2-616 of the Code. Those provisions state:

> "(a) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or

> defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim.
>
> (b) The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." 735 ILCS 5/2-616(a), (b) (West 2014).

¶ 36 The general policy of our courts is to favor amendments. "In Illinois, courts are encouraged to freely and liberally allow the amendment of pleadings." *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). "Amendments should be liberally allowed to permit parties to fully present their cases and to further the interests of justice." *McDonald v. Lipov*,

2014 IL App (2d) 130401, ¶ 47. "The right to amend, however, is neither absolute nor unlimited." *Id.* "The decision to grant leave to amend a complaint rests within the sound discretion of the trial court and we will not reverse such a decision absent an abuse of that discretion." *Id.* An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 94.

¶ 37 As below, plaintiff does not dispute that the limitations period for his action had passed before he sought leave to file his second amended complaint. See 735 ILCS 5/13-212(a) (West 2014) (two-year limitations period for actions against a physician or hospital "arising out of patient care"). Since plaintiff's amendment would be barred unless it meets the exception set forth in section 2-616(b) of the Code, we apply that provision first.

¶ 38 Under section 2-616(b), plaintiff's amendment is permissible if the claims it asserts "grew out of the same transaction or occurrence set up in the original pleading" (735 ILCS 5/2-616(b) (West 2014)). In *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343 (2008), a medical malpractice case, the supreme court resolved a split among appellate courts on how to construe the operative language of section 2-616(b). The court began with these general observations on the policy behind section 2-616(b):

> "The purpose of the relation-back doctrine of section 2–616(b) is to preserve causes of action against loss by reason of technical default unrelated to the merits. [Citations.] Courts should therefore liberally construe the requirements of section 2–616(b) to allow resolution of litigation on the merits and to avoid elevating questions of form over substance. [Citations.] Additionally, both the statute of limitations and section 2–616(b) are designed to afford a defendant a fair opportunity to investigate the

> circumstances upon which liability is based while the facts are accessible. [Citation.] Thus, it has been stated that the rationale behind the 'same transaction or occurrence' rule is that a defendant is not prejudiced if his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him. [Internal quotation marks omitted.] A court should consider the entire record, including depositions and exhibits, to determine whether the defendant had such notice. [Citation.]." *Id.* at 355.

¶ 39 The supreme court noted that appellate courts were "divided over how broadly or narrowly to interpret" the operative language of section 2-616(b). *Id.* at 364. The court observed, however, that "[d]espite the differing results in cases interpreting section 2-616(b), the statute has one guiding element, which is notice to the defendant." *Id.* at 354. The court settled upon a test utilized by the federal courts in judging the propriety of amendments to pleadings under the federal rules. Under this test,

> "new factual allegations will be considered to relate back where there is a 'sufficiently close relationship' between the original and new claims, both in temporal proximity and in the general character of the sets of factual allegations and where the facts are all part of the events leading up to the originally alleged injury." *Porter*, 227 Ill. 2d at 359 (quoting *In re Olympia Brewing Co. v. Securities Litigation*, 612 F. Supp. 1370, 1372-73 (N.D. Ill. 1985)).

¶ 40 The court also phrased the test in this way:

> "a new claim will be considered to have arisen out of the same transaction or occurrence and will relate back if the new allegations as compared with the timely filed allegations

> show that the events alleged were close in time and subject matter and led to the same injury." *Id.* at 360.

Regarding the concept of notice, the court remarked that section 2-616(b) itself serves as a kind of notice: "Section 2-616(b) itself was largely designed to notify a party that claims will be asserted that grow out of the general fact situation set forth in the original pleading." *Id.* at 362.

¶ 41 The court cited a string of appellate court decisions that applied section 2-616(b) in medical malpractice cases. See *Porter*, 227 Ill. 2d at 363-64 (citing cases). The court saw no need to determine which cases utilized criteria consistent with what the court ultimately adopted, as its decision "should provide adequate guidance for future cases." *Id.* at 364. In this appeal, the parties discuss some of the pre-*Porter* cases specifically mentioned by the supreme court, *e.g.*, *Grove v. Carle Foundation Hospital*, 364 Ill App. 3d 412 (2006), *McCorry v. Gooneratne*, 332 Ill. App. 3d 935 (2002), and *Weidner v. Carle Foundation Hospital*, 159 Ill. App. 3d 710 (1987). Following the court's suggestion in *Porter*, we decline to utilize these cases for their interpretation of section 2-616(b). *Porter* provides all the illumination we need on the section's substantive standard. Moreover, the case has significant factual parallels to the present case.

¶ 42 *Porter* was an appeal from the denial of the plaintiff's motion for leave to file his second amended complaint. The plaintiff filed his original complaint on March 25, 2002. He alleged that, on January 12, 2001, at 8:30 a.m. he was brought to the emergency room of Decatur Memorial Hospital (the Hospital) following a traffic accident in which he suffered a spinal cord injury. Various tests and procedures were done on the plaintiff between his admission to the hospital on the morning of January 12 and the spinal surgery that neurosurgeon Dr. Marie Long performed on him at 10 p.m. the next day.

¶ 43 Count I of the complaint named Dr. Oliver Dold and alleged the following negligence of Dold in his treatment of the plaintiff's spinal cord injury:

> "(1) ordered a discontinuance of the plaintiff's C collar and spine board prior to the performance of [an] MRI; (2) discontinued spinal immobilization prior to fully appreciating [plaintiff's] spinal injury; (3) failed to obtain a timely MRI scan on January 12, 2001; and (4) failed to appreciate decreasing blood pressure and leg function as signs and symptoms of further spinal injury." *Porter*, 227 Ill. 2d at 347.

The plaintiff alleged that these wrongful acts or omissions caused him further spinal cord injury, resulting in loss of function in his legs. *Id.* Count II of the original complaint named the Hospital as a respondent in discovery, asserting that the Hospital had essential information about additional defendants that should be named in the action. *Id.*

¶ 44 The parties continued to conduct discovery. On September 9, 2002, six months after he filed his original complaint, the plaintiff took the deposition of Long, who performed surgery on the plaintiff on January 13, 2001, the day after his admission to the Hospital. Long testified that, on January 12, a CT scan of the plaintiff's cervical spine was taken at the Hospital and interpreted by Dr. Gordon Cross, a radiologist. Long stated that, when she reviewed the CT scan on January 13, she saw an insignificant cervical fracture, which, in her opinion, did not explain the neurological deficits the plaintiff was experiencing. *Id.*

¶ 45 On January 6, 2003, the plaintiff filed his first amended complaint, which repeated the allegations against Dold and now named the Hospital as a defendant. More specifically,

> "[t]he first amended complaint alleged that, as a result of the wrongful acts and omissions of the Hospital, plaintiff's diminishing neurological function went undiagnosed and untreated, causing him to lose extremity function. Specifically, plaintiff alleged that

around noon on January 12, 2001, Dr. Dold ordered neurological checks for plaintiff every hour and that those checks were to be performed by Hospital personnel. Plaintiff further alleged that the Hospital, through its employees and agents, breached its duty of care by failing to (1) perform thorough neurological checks every hour as ordered by Dr. Dold, (2) record complete spinal assessments as part of hourly neurological checks, (3) record extremity strength as part of hourly neurological checks on January 13, 2001, from 1 a.m. to 6 a.m., and (4) report diminishing neurological status to the attending neurosurgeon." *Id.* at 348.

¶ 46 On June 21, 2004—over two years after he filed his original complaint—the plaintiff moved for leave to file a second amended complaint. The amendment sought, first, "to add a new allegation to count I against Dr. Dold, alleging that he failed to recognize a fracture of the cervical spine on the CT scan preformed on January 12, 2001." *Id.* at 348. Second,

"[t]he proposed second amended complaint *** added a third count, which was directed against the Hospital. The third count alleged that plaintiff underwent a CT scan of the cervical spine on January 12, 2001, which was read and interpreted by Dr. Gordon Cross, a radiologist. Plaintiff asserted that Dr. Cross was an apparent agent of the Hospital. Plaintiff further alleged that the Hospital, through its agents and employees, breached its duty of care by one or more of the following acts or omissions: (1) failed to properly interpret the CT scan of plaintiff's cervical spine; (2) failed to appreciate cervical fractures revealed on that CT scan of the cervical spine; and (3) misread and misinterpreted the CT scan of the cervical spine. Finally, plaintiff alleged that as a result of these wrongful acts and omissions, his diminishing neurological function went undiagnosed and untreated, causing plaintiff to lose extremity function." *Id.* at 348-49.

¶ 47 The Hospital objected to the motion for leave to amend. The Hospital noted that the limitations period for the malpractice action had passed since the filing of the first amended complaint. Not only had the limitations period expired, argued the Hospital, but count III (directed against the Hospital), did not relate back to the original counts because it constituted a new and different claim. The trial court denied leave to amend, and the appellate court found no abuse of discretion. *Id.* at 350-51.

¶ 48 The supreme court disagreed that count III did not relate back to the claims asserted in the first amended complaint. The court began its analysis by noting the breadth of the first amended complaint, which, in the court's words,

> "alleged that the Hospital provided personnel, including nurses, aides, attendants *and others* for the care and treatment of patients, including plaintiff. One of the allegations of negligence in that complaint was that the Hospital, through its employees and agents, failed to report diminishing neurological status to the attending neurosurgeon. The complaint further alleged that as a direct result of this wrongful act, plaintiff's diminishing neurological function went undiagnosed and untreated, causing plaintiff to lose extremity function." (Emphasis in original.) *Id.* at 361.

By comparison, the court noted that count III of the second amended complaint "added allegations that essentially alleged that an agent of the Hospital, Dr. Cross, misread and misinterpreted the CT scan of plaintiff's spine and that, as a result, plaintiff's diminishing neurological function went undiagnosed and untreated, causing plaintiff to lose extremity function." *Id.*

¶ 49 The court found "a sufficiently close relationship between the two allegations to show that the later allegations grew out of the same transaction or occurrence set up in the earlier one." *Id.* The court explained:

> "The two allegations were part of the same events leading up to the same ultimate injury for which damages are sought. They were closely connected in both time and location. They were also similar in character and general subject matter, as they involved allegations of medical malpractice that resulted in failure to appreciate plaintiff's diminishing neurological status. Furthermore, the Hospital was on notice from the earlier allegation that plaintiff was asserting negligent treatment by the employees and agents of the Hospital in failing to appreciate and report diminishing neurological status. We believe that the Hospital should have been aware that this would include any procedure or test—including a CT scan—performed by agents or employees of the Hospital that might have impacted their ability to appreciate and report on plaintiff's diminishing neurological status in the critical hours of January 12, 2001, leading up to plaintiff's surgery the next day." *Id.* at 361-62.

¶ 50 The court found it insignificant that neither the plaintiff's original nor first amended complaint mentioned a CT scan.

> "[W]e find that the allegation in plaintiff's second amended complaint about Dr. Cross' reading of the CT scan was an amplification that grew out of the earlier allegation about failing to report diminishing neurological function, both of which arose out of the same transaction or occurrence. Thus, we find that the Hospital had sufficient notice of the new allegations and was not prejudiced thereby." *Id.* at 363.

¶ 51 Before applying *Porter* to the facts of the present, we identify the crux of its holding. The court found a sufficiently close relationship between the existing and supplemental allegations because, first, the allegations were closely related in subject matter. The first amended complaint contained the open-ended allegation that the Hospital "through its employees and agents, failed to report diminishing neurological status to the attending neurosurgeon" (*Porter*, 227 Ill. 2d at 361). Thus, though the first amended complaint identified one actor, Dold, and his alleged negligence, the complaint left open the possibility that *other* employees or agents of the Hospital were negligent for failing to ascertain and report the plaintiff's diminishing neurological function. This rendered the Hospital on notice that the plaintiff might identify other individuals who contributed to the Hospital's negligence in assessing the plaintiff's neurological condition. The plaintiff did just that by later identifying Cross and his negligent misreading of the CT scan, this allegation being (like the allegation regarding Dold) a specification of the broader negligence claim. Second, the amendment was closely linked in time with the existing allegations. All of the alleged conduct occurred within the roughly two-day period between the plaintiff's admission to the Hospital on the morning of January 12 and his surgery on the evening of January 13.

¶ 52 Likewise here, a close connection in subject matter and time existed between the allegations of the first amended complaint and the allegations that plaintiff sought to add in the second amended complaint. First, as to subject matter, count IV of the first amended complaint (naming Condell), alleged that "[Condell] through its duly authorized agents, servants and employees *including but not limited to* *** [Quinn and Foosaner], and others, negligently and carelessly committed one or more of the following wrongful acts or omissions:

(a) Negligently and carelessly failed to recommend further studies of the [p]laintiff's right acetabulum after reviewing the results of the x-ray of the right pelvis take [*sic*] on May 30, 2010;

(b) Negligently and carelessly failed to diagnose the presence of an undisplaced fracture to the [p]laintiff's right acetabulum at any time from May 30, 2010 to June 25, 2010;

(c) Negligently and carelessly failed to treat an undisplaced fracture to the [p]laintiff's right acetabulum at any time from May 30, 2010 to June 25, 2010; and,

(d) Were otherwise negligent and careless." (Emphasis added.)

The broader claim of negligence here was that Condell failed to diagnose and treat the fracture to plaintiff's hip socket. Plaintiff specifically identified Quinn and Foosaner as negligent individuals, but plaintiff expressly pled that Condell's negligence with respect to his hip fracture was *not* limited to the acts or omissions of Quinn and Foosaner. The broader allegation of negligence regarding plaintiff's treatment was given specificity with the allegations citing Quinn and Foosaner, and counts V and VI of the second amended complaint were simply further specification. First, count V alleged that Acharya misread plaintiff's hip x-ray. This allegation, like the one alleging that Quinn misread the same x-ray, detailed how Condell was, through its employees and agents, negligent in failing to ascertain and treat plaintiff's fractured hip. Count V also has a close temporal link with the allegations in the first amended complaint. Acharya's negligent failure to diagnose the broken hip is alleged to have occurred on the same morning that Quinn misread the x-ray.

¶ 53 As for count VI, we disagree with the trial court and Condell that it presents a novel theory that Condell could not have anticipated. Count VI does differ from the other counts in

that it alleges administrative rather than diagnostic negligence, specifically that Condell was at fault for failing to insure that Quinn, Acharya and plaintiff were informed of Foosaner's radiological report, which he claimed to have faxed to Condell's emergency room. The difference is not consequential. The first amended complaint broadly asserted a negligent failure by Condell to diagnose and treat plaintiff's broken hip. The allegation was not limited to *diagnostic* failures, even though that was the specific kind of negligence alleged of Quinn and Foosaner. The court in *Porter* admonished against "tak[ing] too narrow a view of the 'same transaction or occurrence' language" in section 2-616(b). *Porter*, 227 Ill. 2d at 362. The "transaction or occurrence" set up by the first amended complaint was plaintiff's stay at Condell, during which his fractured hip could have been but was not treated. Out of this same transaction or occurrence grew counts V and VI of the second amended complaint.

¶ 54 For these reasons, we hold that the trial court abused its discretion in holding that the claims stated in counts V and VI of the second amended back were time-barred. In light of the supreme court's holding in *Porter*, we conclude that no reasonable person would take the trial court's view that the counts did not grow out of the same transaction or occurrence as the existing allegations.

¶ 55 We next determine whether the amendment was permitted under section 2-616(a) of the Code. Section 2-616(a) operates as an independent potential bar to amendment. See *Clemons*, 202 Ill. 2d at 355 (applying sections 2-616(a) and 2-616(b) separately to determine propriety of proposed amendment). "The factors to be considered in determining [under section 2-616(a)] whether or not to permit an amendment to the pleadings are whether: (1) the proposed amendment would cure a defect in the pleadings; (2) the proposed amendment would prejudice or surprise other parties; (3) the proposed amendment is timely; and (4) there were previous

opportunities to amend the pleading." *Id.* at 355-56 (citing *Loyola Academy*, 146 Ill. 2d at 273-74).

¶ 56 The first factor is inapplicable. There is a difference between curing a defect and adding additional theories of recovery. See *Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748, ¶ 33. The second amended complaint does the latter. See *Clemens*, 202 Ill. 2d at 356 (reversing trial court's refusal to allow amended complaint even though the reviewing court found the first factor inapplicable).

¶ 57 We need not address the factors in any particular order, and move next to factor (4), concerning whether plaintiff had prior opportunities to amend. Condell cites the principle that " 'amendment should not be allowed where the matters asserted were known by the moving party at the time the original pleading was drafted and for which no excuse is offered in explanation of the initial failure.' " *Freedberg v. Ohio National Insurance Co.*, 2012 IL App (1st) 110938, ¶ 41 (quoting *Trans World Airlines, Inc. v. Martin Automatic, Inc.*, 215 Ill. App. 3d 622, 628 (1991)). The parties disagree over whether plaintiff had the necessary information to add counts V and VI prior to Acharya's deposition. We analyze the counts in turn, beginning with count V, which alleges vicarious liability for Acharya's negligence in reading the pelvic x-ray. Condell claims that "the medical records," specifically the emergency chart, "show, quite clearly, that Dr. Acharya ordered the radiographic testing, and reviewed [the] imaging." Thus, according to Condell, plaintiff could have sought the amendment after receiving the emergency chart in discovery (which was some time before he moved to file the second amended complaint).

¶ 58 We disagree. In fact, though the emergency chart indicates that Acharya ordered several x-rays, including a pelvic x-ray, the chart records only his interpretation of the x-ray of plaintiff's

right knee. Consequently, plaintiff could not have known from the emergency chart that Acharya also read plaintiff's pelvic x-ray. Though Acharya apparently did record his interpretation of the pelvic x-ray in another document, which was referenced at his deposition, there is no indication when plaintiff received that document in discovery.

¶ 59 Alternatively, Condell claims that, if the emergency chart did not inform plaintiff that Acharya read his pelvic x-ray, then surely Quinn's and Foosaner's deposition did, yet plaintiff waited months after the last of those depositions to seek his amendment. We disagree with Condell's characterization of the deposition testimony. The earlier deposition was Foosaner's, which occurred in August 2013. When Foosaner testified that Acharya, as the "ordering physician," would have reviewed the x-rays he himself ordered, Foosaner was simply making a presumption based on experience and practice, for in fact he was unable to locate any preliminary finding by Acharya before he made his own finding. We do not fault plaintiff for not using Foosaner's deposition as a basis for alleging that Acharya was negligent in reading plaintiff's pelvic x-ray. Discovery was still unclear as to whether Acharya even read the pelvic x-ray, much less what interpretation he rendered.

¶ 60 Matters were hardly cleared up with Quinn's deposition in September 2013. Quinn testified that when Acharya phoned him on May 30, Acharya explained plaintiff's accident, expressed concern about plaintiff's right knee, and shared his opinion that the x-ray of that joint was negative. Quinn did not recall whether he discussed any other x-rays with Acharya. Quinn also could not recall whether the records he reviewed on May 30 indicated that Acharya reviewed the pelvic x-ray. Thus, after Quinn's deposition, uncertainty remained as to what, if any, interpretation Acharya gave of the pelvic x-ray. Plaintiff was justified in letting discovery unfold further before deciding whether to allege negligence of Acharya in connection with the

pelvic x-ray. Not until Acharya's December 2013 deposition was it revealed that Acharya had indeed read the pelvic x-ray and found it negative. Plaintiff submitted his second amended complaint 18 days—a reasonable period—following Acharya's deposition.

¶ 61 We likewise find that plaintiff lacked prior opportunities to amend his complaint to add count VI's claim of institutional negligence, which alleged Condell's failure to insure that Foosaner's x-ray findings were conveyed to plaintiff, Acharya, and Quinn. Foosaner testified in his deposition that he faxed his radiology report to Condell's emergency room. Foosaner, however, did not speak to whether his fax was received, and so plaintiff at this point had no reason to believe that the report was not received as intended. In the coming months, plaintiff deposed Quinn and Acharya—two potential recipients of Foosaner's report. Quinn testified that he did not recall seeing the report on May 30. Plaintiff justifiably refrained from alleging institutional negligence until he could determine (by deposing Acharya) whether the report was at least received by Acharya. For these reasons, then, we hold that factor (4) favors plaintiff.

¶ 62 Regarding factor (3), timeliness, Condell claims that the additional counts were untimely "because they were proposed after two years of litigation, upon near completion of Rule 213(f)(2) discovery, only 4 months from trial, and only 2 months before Condell was required to disclose [Rule] 213 information." Contrary to Condell's overstatement, 18 months—not 24—passed in the case before plaintiff moved to file his second amended complaint. Also, however much Condell emphasizes that discovery deadlines were imminent when plaintiff sought to amend, the overriding fact is that discovery was still underway, carrying the potential to change the shape of the litigation. Exemplifying this potential was Acharya's deposition. It was not taken until 18 months after the litigation began, but it conveyed important information not previously disclosed, such as that Acharya read plaintiff's pelvic x-ray and that he did not recall

receiving Foosaner's faxed radiology report. In our view, therefore, the proper date from which to reckon the timeliness of the amendment is the date of Acharya's deposition, and there is no question in our minds that the interval of 18 days from the deposition to the submission of the second amended complaint was reasonable. Consequently, factor (3) favors plaintiff.

¶ 63 The final factor is factor (2), concerning whether the amendment caused Condell surprise or prejudice. On the question of surprise, our analysis is essentially the same as our analysis of whether the amendment was proper under section 2-616(b) of the Code, where the overarching question was notice to Condell. See *supra* ¶¶ 52-54; *Porter*, 227 Ill. 2d at 354 (the "guiding element" in judging a proposed amendment under section 2-616(b) is "notice to the defendant"). Plaintiff's first amended complaint put Condell on notice that plaintiff was claiming that Condell, acting through its employees and agents---including but not limited to Quinn and Foosaner—was negligent for failing to treat plaintiff's broken hip. Not only did these general terms obviously leave open the possibility of negligence by other employees or agents of Condell (such as Acharya), they did not limit the negligence to diagnostic mistakes, but could encompass administrative errors as well. Apropos to counts V and VI, Acharya's deposition revealed, for the first time in the case, that he had read plaintiff's pelvic x-ray and that he did not recall receiving Foosaner's radiology report while at Condell on May 30, 2010.

¶ 64 On the question of prejudice, Condell asserts that, in order to contest counts V and VI, it will need to obtain experts in emergency medicine, "a medical specialty wholly separate from orthopedics or radiology," and in hospital administration. If—as Condell asserts—counts V and VI are additional claims distinct from the existing claims, then Condell will not have wasted its prior work on the case. As for the *added* work Condell projects, it is the consequence of the

natural evolution of a case through the course of discovery, which was not yet completed when plaintiff sought his latest amendment.

¶ 65 Condell also insists that the amendment is disallowed under section 2-616(a) because "any evidence supporting the new claims *** cannot be deemed 'inextricably intertwined' with what was previously required." Condell draws the phrase "inextricably intertwined' from the following remarks in *Grove*, 364 Ill. App. 3d at 418:

> "Amendments conform the pleadings to the proofs, and are allowed pursuant to section 2–616(c), if the evidence that supports the amendments is 'inextricably intertwined' with evidence relating to other alleged acts and omissions already alleged in the original complaint. [Citation.] Thus, the focus is on whether the amendment alters the nature and quality of proof required for the defendant to defend itself. [Citation.]."

As can be seen, *Grov*e was discussing section 2-616(c), which provides a mechanism for a plaintiff to amend his pleadings in order to conform them to the proof. See 735 ILCS 5/2-616(c) (West 2014). We, however, are applying section 2-616(a), which has different criteria. Therefore, the comments in *Grove* are inapposite.

¶ 66 Since the applicable factors under section 2-616(a) overwhelmingly favor the amendment, and the policy of our courts is to "freely and liberally allow the amendment of pleadings" *(Lee*, 152 Ill. 2d at 467), we hold that the trial court abused its discretion in disallowing the amendment. Consequently, we reverse the trial court's judgment and remand with directions for the court to allow plaintiff to file his second amended complaint. Condell and the other defendants may then answer or plead in accord with the applicable rules of procedure. In light of this resolution, we need not address plaintiff's contentions regarding the striking of

portions of his affidavit or the summary judgment entered on count IV of his first amended complaint.

¶ 67 III. CONCLUSION

¶ 68 For the foregoing reasons, we reverse the judgment of the circuit court of Lake County and remand this case for further proceedings.

¶ 69 Reversed and remanded.