

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

Victor M. Gonzalez, Administrator)	
of the Estate of Roger Gonzalez,)	
deceased,)	No. 15-cv-00776
)	
Plaintiff,)	Judge Philip G. Reinhard
)	Magistrate Judge Iain D. Johnston
vs.)	
)	Jury Demanded
Wexford Health Sources, Inc.,)	
Arthur Davida, M.D., Dr. Stephen Israel,)	
and Dr. Roderick L. Matticks.)	
)	
Defendants.)	

**DEFENDANTS, WEXFORD HEALTH SOURCES, INC. and
ARTHUR DAVIDA M.D.'s, RESPONSE TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE SIXTH AMENDED COMPLAINT**

NOW COME Defendants; WEXFORD HEALTH SOURCES, INC. and ARTHUR DAVIDA M.D (collectively "Defendants"), through their attorneys, BOLLINGER CONNOLLY KRAUSE LLC, and for their Response to Plaintiff's Motion for Leave to File Sixth Amended Complaint (Dkt. 230) state as follows:

1. That Plaintiff's Fifth Amended Complaint (Dkt. 200) was filed on January 29, 2019, asserting, among other claims, a state law claim for medical malpractice against Defendants and Defendant, Dr. Stephen Israel.
2. That on April 28, 2020, Plaintiff filed his Motion for Leave to File Sixth Amended Complaint (Dkt. 230) ("Motion for Leave"), seeking leave to dismiss Defendant Israel as well as making new allegations against Defendant Wexford, including new allegations against Dr. Vipin Shah, a physician employed by Defendant Wexford, including:

39. Dr. Vipin Shah, a physician employed by defendant Wexford and acting within the scope of that employment, attended to plaintiff's decedent at Robinson following his return from Crawford Memorial Hospital."

40. Dr. Shah did not meet the standard of care, as explained in the expert report previously disclosed to defendants.
41. As a result of this breach of duty, the condition of plaintiff's decedent worsened, causing him to experience great pain and suffering and resulting in his death. (Dkt. 230-1, ¶¶ 39-41).

I. Plaintiff's Motion for Leave is untimely and unfairly prejudices Defendants

3. That prior to filing his Motion for Leave, Plaintiff's Expert, Dr. Edward Monico, was deposed with no opinions disclosed as to any allegations against Dr. Shah made for the first time in Plaintiff's proposed Sixth Amended Complaint.

4. That prior to filing his Motion for Leave, Defendants disclosed two experts with Rule 26(a)(2)(B) reports: Dr. Arnold Berns, Dr. Dina Paul.

5. That prior to filing his Motion for Leave, Defendants produced Rule 26(a)(2)(C) witness disclosures.

6. In order to fully defend Plaintiff's new allegations against Defendant Wexford, Defendants would need to re-depose Plaintiff's Expert, Dr. Monico, as to Plaintiff's new allegations, supplement their Rule 26(a)(2)(B) expert witness disclosures and reports, and supplement their Rule 26(a)(2)(C) witness disclosures.

7. Accordingly, Plaintiff's untimely Motion for Leave prejudices Defendants by unreasonably delaying litigation and adding exorbitant costs to fully defend against Plaintiff's proposed Sixth Amended Complaint, and Plaintiff's Motion for Leave should be denied.

8. Should this Honorable Court grant Plaintiff's Motion for Leave, Defendants respectfully request 30 days to re-depose Plaintiff's expert as to new allegations and supplement their Rule 26(a)(2)(B) and 26(a)(2)(C) disclosures.

II. Plaintiff's Proposed Sixth Amended Complaint fails to comply with the requirements of 735 ILCS 5/2-622

9. Plaintiff's Proposed Sixth Amended Complaint brings claims against Defendant Davida for negligence under state law and claims against Defendant Wexford for negligence under state law and the theory of *respondeat superior* liability.

10. When a plaintiff asserts a negligence action against health care workers, such as in this case, he must also comply with the requirements of 735 ILCS 5/2-622. Section 2-622 provides, in part: "[i]n any action, whether in tort, contract, or otherwise, in which plaintiff seeks damages for injuries or death by reason of medical malpractice, hospital, or other healing art malpractice ... [the plaintiff] shall file an affidavit" from a medical professional indicating that the case has merit. 735 ILCS 5/2-622. Failure to file an affidavit pursuant to § 2-622 is cause for dismissal under 735 ILCS 5/2-619 pursuant to 735 ILCS 5/2-622.

11. The United States Court of Appeals for the Seventh Circuit has implicitly held that 735 ILCS 5/2-622 is a substantive law that should apply to medical malpractice claims brought in federal courts. *Sherrod v. Lingle*, 223 F.3d 605 (7th Cir. 2000). The purpose of the requirement is to "minimize frivolous malpractice suits." *Id.* at 613. "A certificate and report must be filed 'as to each defendant who has been named in the complaint ...; failure to abide by this requirement' shall be grounds for dismissal." *Lingle*, 223 F.3d at 613 (finding that that the district court's dismissal without leave to amend was proper, and adding that "dismissal is mandatory....").

12. The majority of Illinois Federal Courts have ruled in favor of applying the statute. *See, e.g., Ibscher v. Snyder*, 2003 U.S. Dist. LEXIS 12507, 2003 WL 21696197 (N.D.Ill. 2003) (dismissing two medical malpractice counts for plaintiff's failure to comply with § 2-622); *Smith v. Gottlieb*, 2002 U.S. Dist. LEXIS 13313, 2002 WL 1636546 (N.D. Ill. 2002) (applying § 2-622 to dismiss medical malpractice cause of action before court on basis of diversity jurisdiction); *Wilson v. Formigoni*, 1992 U.S. Dist. LEXIS 17584, 1992 WL 345399

(N.D. Ill. 1992)(finding that § 2-622 is "substantive" and not "procedural," and dismissing three medical malpractice counts in § 1983 cause of action for plaintiffs failure to comply with § 2-622's requirements); *Landstrom v. Illinois Dep't of Children & Family Services*, 699 F. Supp. 1270 (N.D. Ill. 1988), *affirmed* 892 F.2d 670 (7th Cir. 1990)(dismissing a pendent medical malpractice count in § 1983 case for plaintiff's failure to comply with § 2-622); *Thompson v. Kishwaukee Valley Medical Group*, 1986 U.S. Dist. LEXIS 19587, 1986 WL 11381 (N.D.Ill. 1986)(holding plaintiff's failure to comply with § 2-622 requires dismissal in federal court).

13. Plaintiff has not attached an affidavit to his proposed Sixth Amended Complaint as required by § 2-622, and the affidavit attached to his Fifth Amended Complaint makes no reference to claims against Dr. Shah.

14. For the above-stated reasons, Plaintiff has failed to comply with the pleading requirements of 735 ILCS 5/2-622 and Plaintiff's Motion for Leave should be denied.

WHEREFORE, Defendants, WEXFORD HEALTH SOURCES, INC. and ARTHUR DAVIDA M.D., respectfully request that this Honorable Court deny Plaintiff's Motion for Leave to File Sixth Amended Complaint, or, in the alternative, respectfully request 30 days to re-depose Plaintiff's expert and supplement their Rule 26(a)(2)(B) and Rule 26(a)(2)(C) disclosures and for any further relief this Honorable Court deems fair and just.

Respectfully submitted,

By: /s/Anthony M. DeLongis
One of the Attorneys for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2020, I caused the foregoing document to be filed electronically with the Clerk of the Court through ECF. All of the participants in the case are registered CM/EFC users and will be served by the CM/EFC system.

By: /s/Anthony M. DeLongis