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Medical Malpractice Law

Dede K. Zupanci and Leslie M. Odom
HeplerBroom LLC, Edwardsville

The Right to Privacy versus the Right to Assistance of Counsel: Balancing the *Petrillo* Doctrine in Medical Malpractice Cases

For nearly 30 years, Illinois courts have adhered to the *Petrillo* doctrine in personal injury cases. *Petrillo v. Syntex Laboratories, Inc*., 148 Ill. App. 3d 581 (1st Dist. 1986). The *Petrillo* doctrine prevents defense counsel in personal injury cases from communicating *ex parte* with the plaintiff's treating healthcare providers. *Petrillo,* 148 Ill. App. 3d at 596. The purpose of the *Petrillo* doctrine is to protect the plaintiff's right to privacy. *Id*. at 590. The doctrine poses difficult questions in medical malpractice cases where a treating healthcare provider is employed by the defendant.

The Illinois Appellate Court First District recently issued a ruling involving the *Petrillo* doctrine in *McChristian v. Brink*. In this case, a podiatrist and his practice group were sued for medical malpractice. *McChristian v. Brink*, 2016 IL App (1st) 152674, ¶5. On appeal, the court answered this question of first impression: whether defense counsel for the podiatrist and the practice group could have *ex parte* communications with plaintiff's current podiatrist who was also a member of the practice and considered a member of the control group. *McChristian*, 2016 IL App (1st) 152674, ¶ 1. The appellate court issued a ruling narrowly tailored to the facts of the case. *Id*. ¶ 33. In reaching its decision, the court considered the history of the *Petrillo* doctrine and the unique way it is applied in medical malpractice cases. *Id*. ¶¶ 25-28.

The *Petrillo* Doctrine

In *Petrillo*, 25 plaintiffs brought a consolidated suit against a distributor of infant formula. *Petrillo*, 148 Ill. App. 3d at 584-85. Defense counsel wanted to speak with the plaintiffs' treating physicians. *Id*. at 585. Plaintiffs' counsel filed a motion, asking the court to bar any *ex parte* communications between defense counsel and plaintiffs' treating physician. *Id*. The trial court granted the plaintiffs' motion, and an appeal to the First District followed. *Id*. On appeal, the defendant argued that when a plaintiff files a personal injury suit and places his mental and physical health at issue, he waives the physician-patient privilege. *Id*. at 584.

The appellate court noted that public policy favors preserving the sanctity of the physician-patient privilege. *Id*. at 588. Of course, the patient can waive that privilege. *Id*. at 591. By filing suit, the patient is implicitly consenting to the release of medical information related to the lawsuit. *Id*. However, the First District noted that the patient's implicit consent is limited, and the physician's ability to disclose the patient's information should only extend as far as the patient has specifically consented. *Id*. Allowing counsel for the defense to speak *ex parte* with the plaintiff's physician could allow the physician to divulge more information than the patient has consented to release. *Id*. at 591. Thus, defense counsel cannot engage in *ex parte* conferences with the patient's physician. *Id*. at 591-92. The appellate court ruled that defense counsel could speak with the plaintiff's treating physicians only through "*court authorized methods of discovery*." *Id*. at 595 (emphasis in the original).

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Petrillo Applied in Medical Malpractice Cases

The *Petrillo* doctrine created a quandary in personal injury cases where the defendants were entities who provided medical treatment to the plaintiff. For example, in *Ritter v. Rush-Presbyterian-St. Luke's Medical Center*, the plaintiff sought treatment at a hospital for a bleeding ulcer. *Ritter v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 177 Ill. App. 3d 313, 315 (1st Dist. 1988). While waiting for a CT scan, the patient fell from a gurney and developed a subdural hematoma. *Ritter*, 177 Ill. App. 3d at 315. Immediately prior to the fall, technicians removed restraints from the gurney and left the plaintiff unattended. *Id*. The plaintiff sued the hospital. *Id*. To prepare for trial, the hospital's risk manager spoke with four doctors who treated the plaintiff. *Id*. The plaintiff's counsel moved to bar further communication between the hospital and Plaintiff's treating physicians, including those who were employed by the hospital. *Id*. at 316. The court granted the plaintiff's motion and when counsel for the hospital subsequently spoke with the plaintiff's physicians, the court sanctioned the hospital. *Id*.

The appellate court agreed that the *Petrillo* doctrine barred contact between the hospital's attorneys and the plaintiff's physicians regarding the lawsuit. *Id*. at 317-321. The court noted that the plaintiff was not suing the hospital because of any negligence by her treating physicians. *Id*. at 318. If treatment by the plaintiff's physicians was the subject of the lawsuit, then barring communication between those physicians and the hospital's attorneys would "effectively prevent the hospital from defending itself." *Id*. at 317-18. However, because the plaintiff was suing the hospital for the acts of non-physician employees related to her fall, there was no justification for abandoning the physician-patient privilege and allowing the hospital attorneys to speak with the plaintiff's treating physicians. *Id*. Five years after *Ritter*, the First District held that when a plaintiff alleges that a hospital is vicariously liable for the conduct of the plaintiff's treating physician, then counsel for the hospital may have *ex parte* contact with that physician. *Morgan v. Cnty. of Cook*, 252 Ill. App. 3d 947, 954-55 (1st Dist. 1993).

Following *Morgan*, the Illinois General Assembly added a provision to the Hospital Licensing Act, which provided:

> [T]he hospital's medical staff members and the hospital's agents and employees may communicate, at any time and in any fashion, with legal counsel for the hospital concerning the patient medical record . . . and any care or treatment they provided or assisted in providing to any patient within the scope of their employment or affiliation with the hospital.

210 ILCS 85/6.17(e). This provision was challenged in *Burger v. Lutheran General Hospital,* a medical malpractice case where the plaintiff alleged the hospital was liable for the negligent treatment she received from various staff members of the hospital. *Burger v. Lutheran Gen. Hosp.,* 198 Ill. 2d 21, 25-27 (2001). The plaintiff contended that the new provision in the Hospital Licensing Act violated her right to privacy. *Burger,* 198 Ill. 2d at 27. The Illinois Supreme Court rejected the argument, noting that *Petrillo* protected the patient's expectation that her information would not be disclosed to a third party. *Id*. at 57. Information exchanged between hospital employees and hospital counsel is hospital property and was already known to the hospital before the plaintiff filed suit. *Id*. Simply because the patient files a lawsuit does not allow the patient to "validly claim any greater expectation of privacy after the lawsuit is filed than prior to its filing." *Id*. at 58. In reaching this decision, the Supreme Court discussed the *Petrillo* doctrine at length and held that allowing hospital counsel to speak with hospital staff members regarding litigation did not violate *Petrillo*. *Id*. at 59-60.

McChristian v. Brink

In *McChristian*, the plaintiff underwent bunion removal surgery with the defendant podiatrist (Dr. A). *McChristian*, 2016 IL App (1st) 152674, ¶ 1. During the surgery, Dr. A implanted hardware into her left foot. *Id*. ¶ 6. The plaintiff subsequently developed an infection in her left foot, and Dr. A and his partner (Dr. B) jointly performed surgery to remove the infected hardware. *Id*. Dr. B continued to treat the plaintiff following the hardware removal procedure. *Id*.

In the subsequent suit against Dr. A and his practice group, the defendants disclosed Dr. B as an expert witness who would testify on their behalf on the topics of liability, causation, and damages. *Id*. ¶ 8. Dr. A and the practice group filed a motion for protective order, asking the court to allow *ex parte* communications between Dr. B and defense counsel. *Id*. ¶ 9. The court granted the motion, and the plaintiff appealed. *Id*. ¶ 10.

The appellate court noted that on appeal, the parties were asking it to "triage two well-established privileges: (1) the doctor-patient privilege and (2) the attorney-client privilege." *Id*. ¶ 18. The plaintiff supported her arguments with language from *Petrillo* and a "litany of cases, which have embraced *Petrillo* to its fullest extent" to protect doctor-patient confidence. *Id*. ¶ 21. Essentially, the plaintiff asked the court to find the physician-patient privilege outweighed Dr. B's right to counsel in the suit against his practice group. *Id*.

In contrast, counsel for the defendants stressed "the significance of preserving the attorney-client privilege." *Id*. ¶ 22. The defendants asked the court to compare the facts of *McChristian* to those in *Burger* and find that if information exchanged between hospital employees and hospital counsel did not qualify as "third party communications under *Petrillo*," then information exchanged between members of the practice group and its counsel should also not be considered third party communication. *Id*. ¶ 25. The appellate court quoted the Illinois Supreme Court holding in *Burger*, noting that "the hospital is not a third party with respect to its own medical information, which is compiled by the hospital's own caregivers." *Id*. ¶ 26 (citing *Burger*, 198 Ill. 2d at 57). Of course, the practice group is not a hospital, but the court classified it as a "corporation which provides medical care as a group." *McChristian*, 2016 IL App (1st) 152674, ¶ 26. The appellate court agreed that the practice group was not a third party to the plaintiff's medical information. *Id*.

The court also noted that the plaintiff created a conflict of interest when she sought treatment from a different doctor within the group, because what she had told Dr. A was already in the practice group's possession. *Id*. This conflict grew deeper when she filed suit against the practice group. *Id*. As a result, the appellate court concluded that Dr. B would be at an extreme disadvantage if he could not speak privately with counsel for his practice group. *Id*. Thus, the court held that *Petrillo* did not preclude Dr. B from speaking *ex parte* with counsel for the practice group. *Id*. at ¶ 27.

However, the appellate court noted that the *ex parte* communication granted in this case was "the exception, rather than the rule." *Id*. ¶ 30. The defendants had identified Dr. B as an expert who would testify regarding the plaintiff's injuries. *Id*. ¶ 8. Before counsel for the defendants could have *ex parte* communication with Dr. B, the plaintiff's counsel could depose Dr. B on the issue of damages. *Id*. ¶ 31. The court gave very specific instructions: after Dr. B's deposition on the issue of damages, defense counsel could speak with him regarding liability and causation issues, including whether Dr. A, or any other member or employee of practice group, deviated from the standard of care when treating the plaintiff. *Id*. Then, Dr. B could be deposed on the issues of liability and causation. *Id*. The court explained that by making these conditions, it was balancing the plaintiff's right to privacy with Dr. B's right to counsel. *Id*.

In comparing *McChristian* to an earlier appellate decision, it appears that Dr. B's status as member of the defendant limited liability company (LLC) and a member of the LLC's control group was essential in the First District's ruling in *McChristian. Id*. ¶ 27. In *Aylward v. Settecase*, the plaintiff sued her physician and her physician's practice group.

Aylward v. Settecase, 409 Ill. App. 3d 831, 831-32 (1st Dist. 2011). The issue on appeal was whether counsel for the defendant physician and defendant physicians' group could speak with other employees of the group. *Aylward*, 409 Ill. App. 3d at 832. The appellate court ruled that because the plaintiff was not suing the physicians' group for the acts of any other employees, defendant's counsel could not speak with those other employees. *Id.* at 838.

The distinction in *McChristian* is that Dr. B was not just an employee of the physicians' group, but a member of the corporate entity and the control group. *McChristian*, 2016 IL App (1st) 152674, ¶ 1. It was *his* right to counsel that was balanced with the plaintiff's right to privacy. *Id*. ¶ 27. The appellate court concluded that "Petrillo does not preclude *ex parte* communications with the individuals who serve as the corporate heads and who are decision makers of the accused medical or podiatry corporation." *Id*.

Conclusion

The *Petrillo* doctrine presents unique considerations in medical malpractice litigation. In cases where the plaintiff sought treatment from multiple employees of a defendant healthcare entity, one option is to consider separate counsel for the other employees. In practice, defense counsel can expect that *Petrillo* issues in medical malpractice cases will continue to be resolved by considering the specific facts of each case in light of the defendant's right to counsel *and* the plaintiff's right to privacy.

About the Authors

Dede K. Zupanci is a partner in the Edwardsville office of *HeplerBroom LLC*. Her practice focuses on the defense of medical malpractice actions, as well as other healthcare litigation. She is a 2002 graduate of Saint Louis University School of Law.

Leslie M. Odom is an associate at *HeplerBroom LLC*. She focuses her practice on healthcare defense litigation and regulatory matters, including medical malpractice, nursing home liability, hospital regulation and compliance, nursing home administrative law proceedings, and healthcare facility premises liability. Ms. Odom has defended hospitals, nursing homes, physicians, nurses, and mental health professionals.

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