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Medical Malpractice and Supreme Court Watch

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Not So Fast: Physician Respondents in Discovery May Have a Good Argument to Beat a Motion to Convert to a Defendant So Long as the Supreme Court Agrees

Often, a plaintiff's lawyer will name a respondent in discovery when that lawyer is unsure of that respondent's involvement in the case. This authority derives from a statute, 735 ILCS 5/2-402. The statute states that the "plaintiff in any civil action may designate as respondents in discovery in his or her pleading those individuals or other entities, other than the named defendants, believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action." 735 ILCS 5/2-402.

In a medical negligence case, expert testimony is needed to address and explain the complex medical care and treatment. A defense attorney cannot assume the plaintiff has correctly presented even basic information or elements of the case—particularly with a client named as a respondent in discovery.

On motion, the respondent in discovery may be converted into a defendant if the evidence discloses the existence of probable cause for such action. *Id.* Perhaps there is a strong basis to convert the respondent in discovery into a defendant. Perhaps there is no basis, as the physician had no liability in the care and treatment of the plaintiff. Or perhaps the physician's potential liability lies somewhere in between. Careful analysis of the evidence put forth by the plaintiff may reveal a lack of sufficient evidence to support a motion to convert a respondent in discovery into a defendant.

Section 2-402 allows a plaintiff to convert a respondent in discovery into a defendant where the evidence discloses the existence of probable cause for such action. According to the courts, "the evidence necessary to establish the requisite probable cause need only be such as would lead a person of ordinary caution and prudence to believe or entertain an honest and strong suspicion that his injury was the proximate result of the tortious conduct of the respondent in discovery." *Williams v. Medenica*, 275 Ill. App. 3d 269, 272 (1st Dist.1995) (citing *Froehlich v. Sheehan*, 240 Ill. App. 3d 93, 100 (1st Dist. 1992); *Ingle v. Hosp. Sisters Health System*, 141 Ill. App. 3d 1057, 1062 (4th Dist. 1986)).

Recently, the Illinois Appellate Court Fourth District affirmed a lower court's ruling denying the plaintiff's motion to convert a respondent in discovery physician into a defendant in *Cleeton v. SIU Healthcare, Inc.,* 2022 IL App (4th) 210284-U, ¶ 29, *appeal allowed*, No. 128651, 2022 WL 5028974 (Ill. Sept. 28, 2022). In its ruling, the appellate court set forth the probable cause standard required. While *Cleeton* is an unpublished opinion, pursuant to the amended Illinois Supreme Court Rule 23(e)(1), unpublished opinions can be cited for persuasive purposes.

The appellate court reasoned that the plaintiff failed to establish the proper standard of care by which to measure this particular respondent in discovery's conduct, and therefore, the court found that the plaintiff did not establish probable cause for successfully converting this physician from a respondent in discovery into a defendant. The appellate court specifically found plaintiff failed to establish the proper standard of care for a pulmonary critical care specialist and, as

a result, failed to meet the probable cause threshold necessary to convert the physician from a respondent in discovery into a defendant.

The appellate court described probable cause as a "low threshold." *Cleeton*, 2022 IL App (4th) 210284-U, ¶ 24. The evidence "need not rise to the level of a high degree of likelihood of success on the merits or the evidence necessary to defeat a motion for summary judgment in favor of the respondents in discovery, nor is the plaintiff required to establish a *prima facie* case against the respondent in discovery." *Id*. ¶ 24 (citing *Williams v. Medenica*, 275 Ill. App. 3d 269, 272 (1st Dist. 1995).

What was the reasoning of the appellate court that concluded the plaintiff failed to meet the low threshold to establish probable cause in favor of converting this respondent in discovery physician? The appellate court looked to the language in the plaintiff's expert's certificate of merit required by 735 ILCS 5/2-622 that purported to set forth the standard of care for this respondent in discovery physician. Medical malpractice cases are typically more complicated than other negligence-based actions; they require more evidence than, say, a motor vehicle collision case. For medical malpractice cases, courts have decided that expert medical testimony is required. *Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 112 (2004) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 241-42 (1986)).

The facts of *Cleeton* are as follows: The respondent in discovery at issue was a pulmonary critical care specialist. *Cleeton*, 2022 IL App (4th) 210284-U, ¶ 24. The subject case arose from a multi-count medical malpractice action arising from the care and treatment of Donald Cleeton over a series of days by several medical professionals at various medical facilities. *Id*. ¶ 11. Cleeton, a quadriplegic, had received an implanted programmable pump and catheter that delivered baclofen to manage his spasticity. *Id.* ¶ 4. During a routine presentation to the SIU Neurology clinic to have the pump refilled, the nurse attempting the procedure had to make several attempts to reach the pump's port and ultimately require assistance to complete the refill.

Four days after his pump was refilled, Cleeton presented to the emergency department of another facility with complaints of abdominal pain and headache, the onset of which followed having his pump refilled. *Id.* ¶ 6. While the pump was determined to be functioning properly that evening, Cleeton's providers did not consider a malfunction in the catheter that delivered the baclofen from the pump to Cleeton's spinal canal until approximately one hour before Cleeton's death. *Id.* ¶ 13. Cleeton's autopsy revealed a number of holes in the catheter that had caused Cleeton to experience baclofen withdrawal. *Id.* ¶¶ 5, 10.

After admission, a pulmonary critical care specialist, Dr. Mouhamad Bakir (the respondent in discovery at issue in this appeal), was consulted. By the next morning, he became the decedent's managing physician. Prior to October 30, 2017, Dr. Bakir had never had a patient who potentially was experiencing baclofen withdrawal syndrome. *Id.* ¶ 7. The plaintiff's decedent told Dr. Bakir about the issues with the pump refill in the days prior, and Dr. Bakir reviewed the decedent's chart and consulted cardiology, neurology, neurosurgery, and the baclofen pump team. *Id.* Later that day, October 30, 2017, the plaintiff's decedent died from baclofen withdrawal syndrome. *Id.* ¶ 8. Notably, the appellate court states that "[a]s a pulmonary critical care specialist, Dr. Bakir was aware of baclofen, but the baclofen pump was not part of his intensive care and pulmonology practice

The plaintiff filed suit, naming as defendants a hospital, surgery group, four doctors/nurses, and Medtronic, the manufacturer of the baclofen pump; and naming nine parties as respondents in discovery including Dr. Bakir. *Id.* ¶ 11. Dr. Bakir had treated Cleeton upon his transfer to the intensive care unit just prior to his death. *Id.* ¶ 7. Following initial discovery in the lawsuit, the plaintiff filed a motion to convert Dr. Bakir from a respondent in discovery to a defendant pursuant to section 2-402 of the Illinois Code of Civil Procedure. *Id.* ¶ 12. The plaintiff included with its motion a certificate of merit authored by a medical doctor, who opined that Dr. Bakir deviated from the standard of care by failing to recognize Cleeton's baclofen withdrawal and failing to administer baclofen in a timely manner. *Id*. ¶ 12.

The issue was briefed, and the motion was denied, holding that the standard of care set out in the plaintiff's expert's Rule 2-622 certificate of merit "did not set forth the standard of care by which Dr. Bakir's conduct must be measured." *Id.* ¶ 16. The appellate court affirmed, finding that the plaintiff did not establish probable cause that Dr. Bakir committed medical negligence. *Id.* ¶ 32.

This opinion is certainly helpful for defense attorneys; understanding how the court got here is key.

The opinion tells us that the standard of care requires defendants to act with the same degree of knowledge, skill, and ability an ordinarily careful professional would exercise under similar circumstances. *Id.* ¶ 28.

The plaintiff's expert, Dr. Minore, the reviewing physician, stated the following in the Rule 2-622 certificate of merit:

> It is my opinion within a reasonable degree of medical certainty based upon a review of the medical records provided by Memorial Medical Center, that Mouhamad Bakir, M.D., deviated from the standard of care by his failure to timely recognize the differential diagnosis of Baclofen Withdrawal Syndrome, order treatment consistent with the Medtronic Emergency Procedures received at Memorial Medical Center at approximately 10:44 a.m. on October 30, 2017 and order the administration of Intrathecal Baclofen in a timely manner.

Id. ¶ 31. The appellate court stated in *Cleeton* that while the plaintiff explains *how* Dr. Bakir deviated from the standard of care, she fails to establish *what* the actual standard of care is for a pulmonary critical care specialist.

The appellate court interpreted the language in the Rule 2-622 certificate of merit to mean that the standard by which Dr. Bakir needed to comply was set forth in the Medtronic Emergency Procedures documents. The appellate court's opinion is clear: "the Medtronic emergency procedure documents do not establish the standard of care for measuring Dr. Bakir's conduct." *Id.* ¶ 30. "In his certificate of merit, Dr. Minore did not expressly set forth the standard of care for a pulmonary critical care specialist treating a critically ill patient with a baclofen pump in the intensive care unit and where the physician had consulted multiple specialists regarding that patient's care." *Id.* ¶ 29.

Subsequently, the Illinois Supreme Court granted plaintiff's leave to appeal. Plaintiff argues in their leave to appeal that the Fourth District previously defined probable cause for purposes of conversion to defendants under Section 2-401 as a "low threshold" in *McGee v. Heimberger,* 287 Ill. App. 3d 242, 249 (4th Dist. 1997). Further, that in *Cleeton*, the Fourth District relied upon *Sullivan v. Edward Hospital*, 209 Ill. 2d 100 (2004) to state that while medical records may show a deviation from the standard of care, establishing the standard of care "generally requires" expert witness testimony.

In medical malpractice lawsuits, there are often many different medical professionals involved in the care and treatment of the plaintiff. It is essential to be conscious of the specialty within the medical field of your respondent in discovery client, as the standard of care outlined in the Rule 2-622 certificate of merit may not address the standard of care in that field, as *Cleeton* makes clear. It is important to assess a physician's report at the beginning of a case and analyze it at each and every step of discovery. The failure to establish the standard of care to satisfy the "low threshold" of probable cause at the outset can serve to defeat a plaintiff's motion to convert a respondent in discovery physician into a defendant. But, be cautious, as additional interest exists for whether the Supreme Court will uphold a heightened standard of probable cause, should the heightened standard in practice incentivize naming potentially negligent physicians as defendants at the initial pleading, instead of naming the physicians as respondents in discovery.

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