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Supreme Court Watch

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Waiver of the Physician-Patient Privilege–When is a Patient's Physical or Mental Condition "An Issue" in an Action?

Palm v. Holocker, No. 123152, 3d Dist. No. 3-17-0087

The plaintiff (Pedestrian) was injured when the defendant (Driver) struck Pedestrian with his vehicle at a crosswalk. *Palm v. Holocker*, 2017 IL App (3d) 170087, ¶ 3. Pedestrian sent Driver the motor vehicle interrogatories provided in the appendix to Illinois Supreme Court Rule 213. *Palm*, 2017 IL App (3d) 170087, ¶ 5; Ill. S. Ct. R. 213, Appendix. In response, Driver disclosed that, for "diabetic reasons," he needs, but does not have, a letter of approval from his physician in order to drive. *Palm*, 2017 IL App (3d) 170087, ¶ 6. Driver objected to the following interrogatories:

> 21. State the name and address of any physician, ophthalmologist, optician or other health care professional who performed any eye examination of you within the last five years and the dates of each such examination.
> 22. State the name and address of any physician or other health care professional who examined and/or treated you within the last 10 years and the reason for such examination and/or treatment.

Id. ¶ 7.

At a hearing on Pedestrian's motion to compel, Pedestrian argued that Driver's health and vision were relevant to the case because he drove his vehicle into Pedestrian and because Driver had numerous collisions and traffic citations. *Id*. ¶¶ 9, 11, 27. Driver's attorney (Contemnor) argued that Driver should not have to respond to these two interrogatories because doctor-patient privilege protects private health information regardless of relevance unless Driver affirmatively places his health at issue in the litigation. *Id*. ¶ 9. The circuit court granted Pedestrian's motion to compel. *Id*. The circuit court held Contemnor in civil contempt when he refused to respond to the interrogatories. *Id*. ¶ 12. The circuit court reasoned that Pedestrian had the right to the interrogatory answers because she had reasonable cause to think that sight problems could be related to the accident. *Id*. Contemnor appealed.

Reviewing the case *de novo*, the Illinois Appellate Court, Third District, reversed the motion to compel order, vacated the contempt sanction, and remanded. *Id*. ¶¶ 18, 33. The third district first explained that it would address the ultimate issue of whether privilege applies at all as opposed to whether privilege applies only to these two specific interrogatories. *Id*. ¶ 16.

Second, the third district explained that section 8-802 protects medical records from disclosure without the patient's consent. *Id*. ¶ 19; 735 ILCS 5/8-802. This doctor-patient privilege is subject to certain exceptions. *Palm*, 2017 IL App (3d) 170087, ¶ 20. Of note, the privilege is inapplicable "in all actions brought by or against the patient . . . wherein the patient's physical or mental condition is an issue." *Id*. (*citing* 735 ILCS 5/8-802(4)). To determine what it means for a patient's physical or mental condition to be "an issue," the third district examined the privilege's purpose. The third

district noted that the purpose of section 8-802 is to encourage free disclosure between doctors and patients and to protect the patient from embarrassment and invasion of privacy. *Palm*, 2017 IL App (3d) 170087, ¶ 21. Moreover, the privilege strikes a balance between the interest in protecting confidentiality and the interests served by disclosure. *Id*.

The third district stated that it would be impractical to conclude that the privilege exception applies if a physical or mental condition was merely relevant to litigation because there is no interest served in disclosing irrelevant information. *Id.* ¶ 22. According to the third district, if the legislature had intended to require the disclosure of all relevant private health information, it could have stated that the privilege does not apply during litigation. *Id*.

The third district next examined Rule 215(d)(1), which states that a party's mental or physical condition must be "placed in issue" before a court can order a physical or mental examination. *Id.* ¶ 23. A comment to Rule 215 states that "[m]ere allegations are insufficient to place a party's mental or physical condition 'in issue.'" *Id*. The third district reasoned that "in issue" does not mean "relevant." *Id*. Therefore, the third district concluded that the exception to Rule 804 "applies only where a defendant affirmatively presents evidence that places his or her health at issue" and "[a] plaintiff cannot waive someone else's privilege by merely filing a lawsuit or making certain allegations." *Id.* ¶ 24.

In this case, the third district stated, the issue is whether or not Driver was negligently operating his vehicle. *Id*. ¶ 27. Driver did not use his physical or mental condition as a defense and therefore did not affirmatively place his health at issue. *Id.* ¶¶ 25, 26. Therefore, Driver's medical records have no bearing on the issue of liability. *Id.* ¶ 26.

Finally, the third district noted that, if plaintiffs could waive a defendant's doctor-patient privilege by making certain allegations, some defendants could feel compelled to settle a case simply to avoid the disclosure of their medical records. *Id.* ¶ 28. This result would be an unwarranted invasion of privacy. *Id*. Pedestrian appealed.

Pedestrian first argues that the third district's opinion is contrary to the rules of statutory interpretation. Courts can look at legislative intent when interpreting statutes, but only after determining that the statute's language is vague or ambiguous on its face. Here, Pedestrian argues, the meaning of "an issue" is clear on its face. An "issue" is a "point in dispute between two or more parties." Black's Law Dictionary (10th ed. 2014). A "dispute" is a "conflict or controversy, esp. one that has given rise to a particular lawsuit." *Id*. And a "controversy" is a "justiciable dispute." *Id*. Therefore, according to Pedestrian, doctor-patient privilege does not apply when a party's medical condition is a point in a justiciable dispute. Moreover, because relevant matters are points in a justiciable dispute, a party's medical condition is "an issue" if it is relevant to the dispute.

Pedestrian further argues that the doctor-patient privilege is in derogation of common law and is therefore limited to its express language. However, the third district's opinion improperly expanded the statute beyond its express language. Pedestrian also argues that the opinion wrongly limits her common law right to relevant medical records and expands evidentiary privileges, which should be narrowly construed.

Pedestrian next argues that the third district improperly relied on comments to Rule 215 to interpret Rule 802. The issue before the third district was what "an issue" means in Rule 802. Rule 215(d) states that a trial court may order an impartial medical exam when "conflicting medical testimony, reports or other documentation has been offered as proof and the party's mental or physical condition is thereby placed in issue." Ill. S. Ct. R. 215(d)(1). The comments to Rule 215 state that "[m]ere allegations are insufficient to place a party's mental or physical condition 'in issue.'" Ill. S. Ct. R. 215(d)(1), Committee Comments (adopted Mar. 28, 2011). Pedestrian argues that the reason that the comments state that allegations are insufficient in Rule 215 is because the Rule requires proof in the form of conflicting medical testimony, reports or other documentation. Therefore, Rule 215 itself requires more than mere allegations. According to Pedestrian,

the third district improperly ignored the context in which Rule 215 uses the phrase "in issue" when it transplanted the definition to the phrase "an issue" in Rule 802.

Pedestrian next argues that the opinion conflicts with other decisions that hold that the exception to the doctor-patient privilege applies to a party's relevant medical condition. For example, in *People v. Botsis*, 388 Ill. App. 3d 422 (1st Dist. 2009), defendant lost consciousness while driving and defendant's history of losing consciousness and his doctor's instruction not to drive was admitted in a reckless homicide case. *Botsis*, 388 Ill. App. 3d at 425-28. The first district stated that defendant's physical and mental condition during the crash was relevant in determining recklessness. *Id*. at 435. According to Pedestrian, under the third district's reasoning, defendant's history of losing consciousness and his doctor's instruction not to drive would have remained privileged because defendant did not raise them as affirmative defenses. Therefore, defendant would have been found not guilty of reckless homicide.

In *People v. Krause*, 273 Ill. App. 3d 59 (3d Dist. 1995), the third district reversed a trial court's order excluding statements regarding alcohol consumption made to paramedics by defendant in a DUI case. In *Krause*, the third district held that Rule 802(4), "plainly refers to the patient's mental and physical 'condition,' which is irrefutably an element of the offense and an issue in any prosecution for driving under the influence." *Krause*, 273 Ill. App. 3d at 62. Here, Pedestrian argues, the third district's opinion would render the statements to the paramedics privileged because relevance to an "element of the offense" has no impact on the privilege.

Pedestrian then takes issue with the third district's statement that if "an issue" means "relevant," the legislature could have simply stated in Rule 802(4) that the privilege does not apply during litigation. Pedestrian notes that Rule 802(4) has two requirements. First, the patient must be a party to the litigation. Second, the medical condition must be relevant. Therefore, there is a balance struck between protecting a non-party's information and disclosing relevant medical conditions of parties.

Pedestrian next argues that Driver's medical condition is relevant to the litigation because driving with an uncontrolled medical condition that impairs the ability to drive is conduct that is negligent, reckless, or intentionally dangerous. Under the third district's opinion, dangerous drivers could conceal facts that show they cannot drive safety and avoid liability or criminal charges.

Pedestrian also disagrees with the third district's concern that plaintiffs will use the disclosure of medical information that has nothing to do with liability as leverage to get defendants to settle cases. Pedestrian argues that if a medical condition has nothing to do with liability, it will never come into evidence. Moreover, trial courts are able to manage issues related to relevance without barring the discovery of relevant medical information.

Finally, Pedestrian argues that the third district's opinion implicitly holds that the form motor vehicle interrogatories are improper. Under the opinion, if a defendant does not raise an affirmative defense based on a medical condition, that defendant does not have to answer two of the form interrogatories. According to Pedestrian, this will fundamentally alter civil and criminal cases that are brought due to a defendant's negligent, reckless, or intentional refusal to manage a medical condition or follow a medical direction.

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Can a Vicariously Liable Defendant Obtain Contribution from Another Vicariously Liable Defendant When These Defendants are Vicariously Liable For the Acts of the Same Agent?

Sperl v. Henry, No. 123132, 3d Dist. No. 3-15-0097

A truck driver (Driver) caused a fatal accident. *Sperl v. Henry*, 2017 IL App (3d) 150097, ¶ 1. Driver, the lessee of the truck (Lessee), and the freight broker (Broker) were sued for wrongful death and personal injuries. *Sperl*, 2017 IL App (3d) 150097, ¶¶ 1, 9. Driver admitted negligence and liability, and Lessee admitted liability and "united" negligence with Driver. *Id*. Broker denied liability and sought contribution from Driver and Lessee. *Id*. The trial court severed Broker's claim for contribution. *Id*. The jury found that there was an agency relationship between Driver and Broker and, therefore, Broker was variously liable for Driver's negligent conduct. *Id*. The jury entered a multi-million dollar verdict against the three defendants, jointly and severally. *Id*. Broker appealed and the verdict was affirmed. *Id*. ¶ 10.

Broker paid the judgment in full and filed an amended consolidated cross-claim for contribution against Lessee under the Joint Tortfeasor Contribution Act (Act). *Id*. ¶¶ 14-15; 740 ILCS 100/0.01. Section 2 of the Act states:

> (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.
> (b) The right of contribution exists only in favor of a tortfeasor who has paid more than his *pro rata* share of the common liability, and his total recovery is limited to the amount paid by him in excess of his *pro rata* share. No tortfeasor is liability to make contribution beyond his own *pro rata* share of the common liability.

740 ILCS 100/2 (a-b). "The *pro rata* share of each tortfeasor shall be determined in accordance with his relative culpability." 740 ILCS 100/3.

Lessee opposed contribution and argued, in part, that liability and fault could not be apportioned under the Act because both Lessee and Broker were each entirely liable for Diver's negligence under the doctrine of vicarious liability. *Sperl*, 2017 IL App (3d) 150097, ¶ 18. The trial court found that Lessee and Broker were equally at fault for the accident and therefore Lessee was responsible for one half of the amount paid by Broker. *Id*. ¶¶ 21-22. Broker appealed.

Reviewing the case *de novo*, the third district reversed the award of contribution to Lessee. *Id*. ¶¶ 26, 61. The Third District first discussed Section 2(a) of the Joint Tortfeasor Contribution Act, which provides "[t]he right of contribution exists only in favor of a tortfeasor who has paid more than his *pro rata* share of the common liability, and his total recovery is limited to the amount paid by him in excess of his *pro rata* share." *Id*. ¶ 27 (*citing* 740 ILCS 100/2(b)). The third district further explained that the "*pro rata* share of the common liability" is determined by the extent to which that tortfeasor "proximately caused the injury." *Sperl*, 2017 IL App (3d) 150097, ¶ 27 (*citing Heinrich v. Peabody*

International Corp., 99 Ill. 2d 344, 349 (1984)). In the case of vicarious liability, however, liability is based solely on the principal's relationship with the agent as opposed to the principal's negligent acts. *Sperl*, 2017 IL App (3d) 150097, ¶ 28. Therefore, the third district explained, the principal is not a wrongdoer or tortfeasor under the Act. *Id*.

Applying this reasoning to the facts of the case, the Third District noted that Lessee and Broker were both 100% vicariously liable for Driver's negligent acts, but were not found to be at fault in fact. *Id*. ¶ 29. Therefore, under the Act, Lessee and Broker are not tortfeasors and their relative fault cannot be compared. *Id*. Moreover, because both Lessee and Broker are 100% at fault for Driver's actions, "neither would pay more than it's *pro rata* share of the common liability even if it paid the entire judgment." *Id*. The third district held that where two principals are vicariously liable for the actions of the same agent who was the sole cause in fact of the accident, the Act provides no remedy. *Id*.

The third district next addressed Broker's contention that Lessee admitted its own negligence at trial and was therefore more than vicariously liable. *Id*. ¶¶ 30-31. Broker pointed to the following examples to support its argument. First, during the opening statement, Lessee's attorney stated, "my clients have admitted their negligence." *Id*. ¶ 31. Second, during cross-examination, Lessee stated that it had "conceded negligence." *Id*. Third, during argument about jury instructions, Lessee's attorney argued that Driver and Lessee should be listed together on the jury form because "there had been a 'united' admission of negligence and liability and 'the same admission of negligence and liability' had been made as to both defendants." *Id*. Fourth, during argument on the contribution claims, Lessee's attorney stated that Lessee admitted "fault" and "all the negligence." *Id*. Fifth, during closing argument, Lessee's counsel stated that they had made omissions and mistakes. *Id*. Finally, the jury instructions stated that Lessee had "admitted they were negligent, and the negligence was a proximate cause of injuries to the plaintiffs." *Id*. The third district found that Lessee's statements merely served to acknowledge that Lessee was negligent to the same extent as Driver and not that Lessee committed independent acts or omissions that caused the accident. *Id*. ¶¶ 32-34.

The third district then examined Broker's claim that the Illinois Appellate Court rejected the argument that a vicariously liable defendant cannot be held responsible for contribution in *Equistar Chemicals, L.P. v. BMW Constructors, Inc.*, 353 Ill. App. 3d 593 (3d Dist. 2004). *Sperl*, 2017 IL App (3d) 150097, ¶ 36. The third district found *Equistar* distinguishable because, first, *Equistar* involved the application of the Workers' Compensation Act, which was a dispositive. *Id*. ¶¶ 38-39. Second, *Equistar* involved the construction and application of a settlement agreement with an agent that did not expressly release the agent's principal from liability. *Id*. ¶¶ 39, 41. Third, in *Equistar* a tortfeasor sought contribution from a principal who was vicariously liable for the acts of a different tortfeasor. *Id*. ¶ 40. Here, the third district noted, there is one tortfeasor (Driver) and Lessee and Broker are both vicariously liable for that tortfeasor's negligence. *Id*. Therefore, the third district held that "a principal who is vicariously liable for the negligent conduct of its agent may not seek contribution under the Act against another principal who is vicariously liable for the same conduct of the same agent where (1) the agent is the only tortfeasor who is at fault in fact and (2) there is no evidence that either of the principals was at fault in fact." *Id*. ¶ 42.

Justice Schmidt filed a dissent. *Id*. ¶ 63. Of note, he argues that the majority's interpretation of the Act is overly technical and achieves an unjust result. *Id*. ¶ 64. Rather, Justice Schmidt argues that the Act does not apply only to tortfeasors or, alternatively, that Broker and Lessee are vicarious tortfeasors who share a common debt. *Id*. ¶¶ 65-66.

Justice Schmidt also argues that the majority confuses joint and several liability with concept of *pro rata* share under the Act. *Id*. ¶ 67. Driver, Broker, and Lessee are each 100% liable to pay the judgment under joint and several liability. *Id*. ¶ 68. However, Justice Schmidt argues, that does not mean two blameless principals that share a common agent should not share common liability. *Id*. Rather, they should be equally responsible for the purposes of contribution and

Lessee's *pro rata* share is 50%. *Id*. Finally, Justice Schmidt notes that, because a co-principal would have no rights or remedies under the Act, the majority's opinion will reduce any incentive for a principal to quickly pay a judgment or settle a case. *Id*. ¶ 70. Broker appealed.

Broker first notes that the language of the Act supports contribution rights as between two vicariously liable defendants. The Act states that there is "a right of contribution among" jointly liable defendants. 740 ILCS 100/2(a). Because Broker and Lessee are jointly liable, Broker argues, section 2(a) presumptively establishes a right to contribution. Section 2(b) of the Act establishes a right of contribution in favor of the defendant "who has paid more than his *pro rata* share of the common liability." 740 ILCS 100/2(b). *Pro rata* share is determined by "relative culpability." 740 ILCS 100/3. Here, Broker argues, because defendants were determined equally at fault, Broker is entitled to 50% contribution.

Broker then references Justice Schmidt's dissent in support of its argument that equity requires contribution under these facts. The purpose of the Act is the "equitable duty to share liability for the wrong done." *Doyle v. Rhodes*, 101 Ill. 2d 1, 14 (1984). Moreover, the Act works to encourage settlements. The majority's decision results in no shared liability and it reduces the incentive for a co-principal to pay a judgment or settlement.

Broker next argues that Lessee conceded negligence on multiple occasions and that these statements were judicial admissions that could not be controverted by the trial court or appellate court. In light of the judicial admissions, Lessee is not simply a vicariously liable and blameless defendant. Therefore, Broker, who has no fault, is entitled contribution in the entire amount from Lessee.

About the Author

M. Elizabeth D. Kellett is a partner at *HeplerBroom LLC*. Ms. Kellett is a litigation attorney with a primary emphasis in the defense of complex, multi-party civil cases and class actions, including all aspects of product liability, particularly pharmaceutical drugs and devices. Prior to joining *HeplerBroom*, Ms. Kellett practiced law in Washington, D.C. and represented institutions of higher learning in administrative hearings and proceedings before the U.S. Department of Education. She also represented insurance and financial corporations and individuals in proceedings before the Securities and Exchange Commission, civil and criminal litigation, and in matters of corporate governance and compliance. Ms. Kellett earned her B.A. from Georgetown University in Washington D.C. in 2002 and her J.D. from Georgetown University Law Center in 2006.

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