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Civil Practice and Procedure

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No *Petrillo* Violation for Meeting by Hospital Defense Counsel with Retired Nurse

Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581 (1st Dist. 1986) is often invoked in medical malpractice lawsuits to bar disclosure of privileged information. A recent Illinois Appellate Court Second District opinion illustrates how case-specific facts operated to defeat successful use of the *Petrillo* doctrine. In *Caldwell v. Advocate Condell Medical Center*, 2017 IL App (2d) 160456, the plaintiff unsuccessfully sought reversal of a defense jury verdict claiming a *Petrillo* violation where counsel for the defendant hospital met *ex parte* with its retired nurse before her evidence deposition.

Factual Background

On April 22, 2013, Judith Caldwell arrived home to find that Jeanette DeLuca, age 92, had injured one of her eyes. *Caldwell*, 2017 IL App (2d) 160456, ¶ 15. Following DeLuca's office examination, Caldwell and her husband took DeLuca to defendant Condell Medical Center where she was admitted for emergent eye surgery. *Id.* ¶ 16. DeLuca had surgery under general anesthesia that concluded early on the morning of April 23, 2013. *Id.* ¶ 23. Later that morning, DeLuca asphyxiated when she choked while eating her breakfast. *Id.* ¶ 1.

Caldwell filed a medical malpractice lawsuit against Condell. She claimed that Condell, through its unidentified agents, was vicariously liable for the death of DeLuca for failing to monitor DeLuca post-operatively, failing to ensure that DeLuca had recovered from surgery sufficiently to consume food, and allowing DeLuca to eat food without ensuring that DeLuca had her dentures in her mouth. *Id.* ¶ 3.

Trial Testimony

At trial, the central issue was whether DeLuca had her upper denture and lower partial plate in place when she was served breakfast on April 23, 2013. *Id.* ¶¶ 13-39. Caldwell testified that DeLuca had her upper and lower dentures in place prior to surgery, and that DeLuca never ate food without her dentures. *Id.* ¶¶ 16-17. Nurse Bella Patseyevsky testified that Deluca removed only her upper denture before surgery. *Id.* ¶ 22.

After surgery, Deluca was taken to the post-anesthesia care unit. DeLuca had her upper dentures in place when she was discharged from the PACU and was taken back to her hospital room. *Id.* ¶¶ 23-24. DeLuca's vital signs were recorded on nine occasions from 12:45 a.m. to 6:30 a.m. and DeLuca walked with assistance to and from the bathroom. *Id.* ¶¶ 25-28. Medical staff ordered pancakes for DeLuca at her request and there was no concern regarding DeLuca's ability to eat her breakfast. *Id.* at ¶¶ 29-30. Patient-care technician Christina Riek checked on Deluca following delivery of her breakfast and testified that nothing looked out of place. *Id.* ¶ 31. When Riek returned to check DeLuca's vital signs, she noticed that DeLuca did not look right, and summoned the rapid-response team. *Id.* ¶ 32.

Nurse manager Kathleen Likosar went to DeLuca's room where she found DeLuca unresponsive and performed a mouth sweep to clear DeLuca's airway. Likosar removed Deluca's upper denture and a piece of pancake. *Id.* ¶¶ 33-34. Nurse Awit also responded to DeLuca's room and saw Likosar remove DeLuca's upper denture. There was no testimony or charting in the record that established that DeLuca's lower partial plate had ever been removed. *Id.* ¶ 39.

Trial Court Rulings

Likosar provided her video evidence deposition on February 12, 2016. *Id.* ¶ 6. Likosar retired from Condell on January 5, 2016 and was not employed by Condell on the deposition date. *Id*. ¶ 33. During Likosar's deposition, Condell's attorney objected to questions from the plaintiff's attorney based on attorney-client privilege about conversations between Likosar and Condell's attorney. *Id.* ¶ 6. Likosar did not answer the questions and the plaintiff's attorney did not seek a ruling on Condell's objection. *Id*.

The plaintiff moved to bar introduction of Likosar's video evidence deposition on the bases that (1) Condell failed to properly notice Likosar's video evidence deposition; and (2) based on the failure of Likosar to answer questions about her pre-depositon meeting with Condell's attorney. *Id*. ¶ 7. Plaintiff's counsel argued that no attorney-client privilege existed between Condell and Likosar because Likosar was not a Condell employee at the time of her evidence deposition. *Id*. Plaintiff's counsel did not raise a *Petrillo* objection. *Id.* ¶ 75.

In response, Condell demonstrated that it provided sufficient notice of Likosar's evidence deposition, but agreed to forgo use of the video portion of Likosar's evidence deposition at trial. Condell also argued that an attorney-client relationship existed because Likosar was an agent of Condell for whose conduct Condell could be held liable, and because Likosar was insured by Condell's self-insured trust. *Id.* ¶ 9.

The trial court denied the plaintiff's motion to bar Likosar's evidence deposition based on lack of notice. The trial court also found that Likosar was an agent and insured of Condell, and that Likosar's retirement was not relevant to whether an attorney-client relationship existed between Condell and Likosar. *Id.* ¶ 10.

The jury returned a verdict for Condell and the trial court denied the plaintiff's post-trial motions. *Id.* ¶ 47.

Appellate Court Opinion

The plaintiff's arguments focused on the trial court's failure to bar the evidence deposition testimony of nurse Likosar. The plaintiff advanced three arguments in this regard.

First, the plaintiff maintained that the trial court should have barred Likosar's evidence deposition because Condell failed to satisfy the formal notice requirements under Illinois Supreme Court Rule 206(a). *Id.* at ¶ 62. The appellate court quickly dismissed this argument, citing the emails exchanged between the parties' attorneys setting Likosar's evidence deposition for February 12, 2016. Further, the court observed that the plaintiff's attorney appeared for the evidence deposition and while there was a dispute as to whether Condell technically complied with the formal notice requirements for the video portion of Likosar's evidence deposition, Condell resolved the issue by agreeing to read Likosar's testimony to the jury without presenting the video portion. *Id.* ¶¶ 65-66.

The plaintiff next argued that the trial court should have barred Likosar's evidence deposition based on the lack of attorney-client privilege between Condell and Nurse Likosar. *Id.* ¶ 68. The plaintiff maintained that there was no attorney

client privilege because Likosar was not an employee of Condell at the time of her evidence deposition because she had retired from Condell in January 2016. *Id.*

The court rejected the plaintiff's argument based on two reasons. First, under Illinois Supreme Court Rule 201(b)(2), "All matters that are privileged against disclosure at trial, including privileged communications between a party or his agent and the attorney for the party, which are privileged against disclosure through any discovery procedure." *Id.* ¶ 69. Second, the attorney-client privilege extends to communications between an insurer and its insured. *Id.* ¶ 71.

Applying these two principles, the court cited the undisputed affidavit of Likosar, which established that Likosar was an agent of Condell, and that she was an insured under Condell's self-insured trust. *Id.* ¶¶ 9, 72. In affirming the trial court ruling, the court also noted that Likosar's retirement was irrelevant to the status of Likosar as Condell's agent where Likosar's conduct could have given rise to vicarious liability on the part of Condell. *Id.*

Finally, Caldwell argued that Likosar's evidence deposition should have been barred due to an alleged *Petrillo* violation committed by Condell's attorney when she met with Likosar *ex parte* prior to her evidence deposition. *Id.* ¶ 75. At the outset, Caldwell conceded that she did not raise a *Petrillo* violation before the trial court. In its discretion, the appellate court overlooked Caldwell's forfeiture of the *Petrillo* claim. *Id.* ¶¶ 78-79.

The court went on to hold that the *ex parte* meeting fell within an exception to the *Petrillo* doctrine so as not to bar admission of Likosar's evidence deposition. Citing *Morgan v. County of Cook*, 252 Ill. App. 3d 947, 952 (1st Dist. 1993), the court observed that where a hospital is sued solely on a theory of vicarious liability, the defendant hospital's attorney may meet *ex parte* with the plaintiff's caregivers whose negligence the plaintiff sought to impute to the hospital. *Caldwell*, 2017 IL App (2d) 160456, ¶ 77.

The court went on to cite *Burger v. Lutheran General Hospital*, 198 Ill. 2d. 21, 58 (2001), which extended *Morgan* to the plaintiff's caregivers who were not identified as defendants in the complaint. *Caldwell*, 2017 IL App (2d) 160456, ¶ 77. In dismissing the plaintiff's argument, the court noted that it was clear that there was no *Petrillo* violation. *Id.* ¶ 80. The court cited the plaintiff's complaint, wherein she alleged that Condell was liable for the alleged negligent conduct of its unidentified nurses and patient-care technicians related to their care of DeLuca. *Id.* ¶¶ 77, 80. The court held that there was no *Petrillo* violation where Likosar was one of the plaintiff's care-givers at the time of the alleged occurrence, and that Likosar was an insured of Condell at the time of the occurrence. *Id.*

Practical Takeaways

In summary, the *Caldwell* court applied the well-established holdings in *Morgan* and *Burger* to hold that an *ex parte* meeting between a medical defendant's attorney and the defendant's former employee does not constitute a *Petrillo* violation where the alleged vicarious liability of the defendant is based on the conduct of the former employee.

Caution is always the appropriate manner to approach communications with the medical professionals who were involved in treating the plaintiff. Though the *Caldwell* decision was favorable for the defense, such caution should continue to be observed because of the narrow scope of the exception to the *Petrillo* doctrine applied in this case.

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Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

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