

## Civil Practice and Procedure

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# Two Birds, One Stone: Decision Addresses Standards for Good Faith Findings and Common-Interest Exception

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The Illinois Appellate Court First District recently delivered a ruling impacting: (1) good-faith findings in partial settlement agreements in civil litigation; and (2) the common-interest exception to the waiver of attorney-client privilege. In *Ross v. Illinois Central Railroad Company*, the First District reversed the circuit court’s finding of a good faith settlement between the plaintiff and a third-party defendant doctor. *Ross v. Illinois Cent. R.R. Co.*, 2019 IL App (1st) 181579, ¶ 47. It also reversed a related discovery order that applied the common-interest exception to prevent waiver of the attorney-client privilege. *Id.* This unusual marriage of usually disparate issues may have an important impact on Illinois civil practice.

### Facts of the Case

In *Ross*, the plaintiff, a railroad employee, sued his former employer under the Federal Employers Liability Act for injuries he allegedly sustained while attempting to board a moving train. *Id.* ¶ 1. The defendant railroad filed a third-party complaint for contribution against the plaintiff’s doctor, alleging he performed unnecessary treatment that significantly aggravated the plaintiff’s injuries. *Id.* In support of its third-party complaint, the railroad filed an affidavit by its expert physician alleging that the third-party defendant doctor violated the standard of care by providing excessive and unnecessary treatment that was actually harmful to the plaintiff. *Id.* ¶ 7. The plaintiff and the third-party defendant doctor entered into settlement negotiations and eventually agreed to settle any claim for contribution by the doctor for injuries suffered by the plaintiff. *Id.* ¶ 14. The agreement did not mention the liens the doctor held against the plaintiff for unpaid medical bills. *Id.* The settlement was for \$25,000 even though the doctor billed the plaintiff for nearly \$1.25 million in medical treatment over multiple years. *Id.* ¶ 15. The doctor had up to \$1 million in insurance coverage. *Id.* ¶ 14.

In anticipation that a settlement may soon be reached, the railroad served the plaintiff and the doctor with discovery requests seeking “all documents or communications,” including “joint defense agreements” between the doctor, or his counsel, and the plaintiff, or his counsel. *Id.* ¶ 18. The doctor objected to the requests on the grounds that the communications were attorney-client privileged and that the communications between the doctor, the plaintiff, and their respective attorneys did not waive the privilege. *Id.*

The doctor’s objection to the requests made clear that he and the plaintiff had not entered into a joint defense agreement, or any other agreement, other than the settlement agreement. *Id.* The railroad next moved to compel discovery and the doctor moved to quash the subpoenas. *Id.* The circuit court ordered the doctor and the plaintiff to submit privilege logs and to submit documents for an *in camera* inspection. *Id.*

After briefing and argument, the circuit court sustained the doctor's objections and concluded that the common-interest exception applied to prevent waiver of the attorney-client privilege. *Id.* The circuit court based its ruling on the recent opinion in *Selby v. O'Dea*, 2017 IL App (1st) 151572.

After the settlement was reached, the third-party defendant doctor moved for a finding that the settlement was entered into in good faith and sought dismissal of the defendant railroad's contribution claim against him. *Ross*, 2019 IL App (1st) 181579, ¶ 16. The circuit court granted the motion and found that the settlement was entered into in good faith. *Id.* ¶ 19. Because the finding cut off any liability the doctor may have for the plaintiff's injuries or recovery, the court dismissed the third-party complaint for contribution against the doctor, with prejudice. *Id.* ¶ 20. The railroad appealed.

### The Court's Good-Faith Finding Holding

The court held that the circuit court's good-faith finding was an abuse of discretion and reversed the dismissal order. *Id.* ¶ 26. It applied a totality-of-the-circumstances analysis in its review; keeping in mind the public policies of the encouragement of legitimate settlements and the equitable apportionment of damages among tortfeasors. *Id.* It reviewed the amount paid, the amount the settling defendant could pay (considering insurance coverage), the amount of the plaintiff's claims, and the defenses of the settling and non-settling defendants. *Id.* ¶ 27.

The court found that the strongest evidence of a lack of good faith was the amount the doctor paid compared to what could have been his fair share of liability. *Id.* The railroad estimated that the plaintiff's claim, including the liens for the medical bills, future earnings, and loss of pension benefits, totaled over \$3.5 million. *Id.* ¶ 28. The doctor paid \$25,000 and had insurance coverage of \$1 million available. *Id.* There was evidence in the record from the railroad's expert regarding the doctor's deviations from the standard of care and treatment of the plaintiff. *Id.* ¶ 29. At the time of settlement, there was also testimony in the record from the plaintiff's own expert that many of the plaintiff's symptoms could have actually been caused by the doctor's treatment. *Id.* ¶ 11. The court concluded that the plaintiff had a potential claim of several million dollars where the plaintiff's own expert testified there may be liability from the third-party doctor, and in light of the facts, a \$25,000 settlement was not in good faith.

The court next addressed the amount of liens that remained pending. *Id.* ¶ 32. The doctor could have easily recouped the \$25,000 he paid to the plaintiff as long as the plaintiff could recover at least that much from railroad. *Id.* The doctor argued that the purpose of the Contribution Act (Act) is to encourage settlements. However, the court rejected that argument because the purpose of the Act is to encourage settlement of the entire litigation. *Id.* ¶ 34. The court opined that, with the settlement, the plaintiff cannot settle the lawsuit with the railroad for anything less than the amount of the doctor's outstanding liens. *Id.* Considering that the railroad insisted those liens were attributable to the doctor's own deviations of the standard of care, the settlement made the remaining case between the plaintiff and the railroad even more difficult to settle—in contravention of the policy behind the Act to encourage settlements of entire lawsuits. *Id.*

The court found further support in its conclusion that the good-faith finding was an abuse of discretion by looking at the relationship between the plaintiff and the doctor. *Id.* ¶ 35. There was testimony in the record of a strong affinity and close relationship between the plaintiff and the doctor; to the point where the plaintiff's own expert opined that the plaintiff had developed psychological dependence on the doctor. *Id.* The plaintiff did not seek a second opinion when he was confronted with criticism of the doctor's treatment. *Id.* There was also evidence that the doctor acknowledged altering some of his office notes in response to the criticisms and subpoenas of his records. *Id.* The court found that this additional testimony supported the conclusion that the settlement was not made in good faith. *Id.*

With the reversal, the lawsuit returns to the circuit court with the doctor remaining as a third-party defendant. *See id.* ¶¶ 47-48.

### The Court's Holding on the Common-Interest Exception

Traditionally, attorney-client communications are protected from disclosure. *Id.* ¶ 38. When a client discloses a privileged communication to a third party, however, that communication is no longer privileged and is discoverable or admissible in litigation. *Id.* An exception to discoverability exists when “parties with a common interest in defeating a litigation opponent” share information with each other to further that common interest. *Id.* This is the “common interest doctrine” that can be used to defend against a claim that the attorney-client privilege was waived. *See Selby*, 2017 IL App (1st) 151572, ¶ 71 (recognizing the common-interest exception to the waiver rule in Illinois).

The doctor successfully argued to the circuit court that the common-interest exception prevented a waiver of privilege when he and the plaintiff shared lawyer-client communications during their settlement negotiations. *Ross*, 2019 IL App (1st) 181579, ¶ 43. The court disagreed; holding that some form of agreement between the parties must exist to invoke the exception. *Id.* ¶ 43. In doing so, the court cited to *Selby*, where the parties conferred with each other only after executing a written joint defense confidentiality agreement. *Id.*; *see also Selby*, 2017 IL App (1st) 151572, ¶¶ 2, 36, 74. The court reiterated the *Selby* holding that direct client-to-client communications are protected by the common-interest exception to the waiver rule when they: (1) occur pursuant to a common interest agreement; (2) are in furtherance of that common interest; and (3) take place with counsel present. *Ross*, 2019 IL App (1st) 181579, ¶ 43; *Selby*, 2017 IL App (1st) 151572, ¶ 103.

On appeal, the doctor argued that no prior agreement to share privileged communications is necessary, so long as the communications relate to a common interest shared by the parties. *Ross*, 2019 IL App (1st) 181579, ¶ 44. The court rejected that argument, holding that even when a common interest exists between parties, the client must have an agreement with the receiving party at the time of the disclosure that the information exchanged will be treated as privileged. *Id.* “A disclosure in the absence of such an agreement is simply inconsistent with the desire to maintain the confidentiality of the privileged communication.” *Id.*

With the reversal, the court remanded this issue back to the circuit court where the railroad will likely obtain the documents and communications between the plaintiff and the defendant doctor relating to their settlement negotiations. *See id.* ¶¶ 47-48.

### Conclusion

The *Ross* holding reinforces the principle that when an amount paid in a settlement agreement is a small fraction of the amount a settling defendant could pay and would likely pay after a verdict, the settlement is likely not made in good faith and defense counsel should consider challenging that settlement. The importance of challenging settlements not made in good faith is that they can lead to a larger set-off. The *Ross* holding also makes clear that when separate lawyers represent parties with a common interest in a litigated or non-litigated matter, and they exchange information concerning the matter, those communications are not privileged unless an agreement to maintain confidentiality is in place at the time of the exchange. While the court did not answer the question of whether that agreement must be in writing, having



a written agreement in place prior to exchanging communications is the surest way to ensure that the communications remain privileged.

### About the Authors

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