No. 128651

IN THE SUPREME COURT OF ILLINOIS

CAROL CLEETON, as Independent Administrator of the Estate of DONALD CLEETON, deceased,	On Appeal from the Illinois Appellate Court, Fourth Judicial District
Plaintiff-Appellant,	Appellate Docket no. 04-21-0284
v.	There Heard on Appeal from the Seventh Judicial Circuit, Sangamon County, Illinois
SIU HEALTHCARE, INC., et al,	Docket No. 16 L 002470
Defendant,	The Honorable Raylene Grishow, Judge Presiding
and	
MEMORIAL MEDICAL CENTER, et al,	
Respondents in discovery – (MOUHAMAD BAKIR, M.D.,	
Appellee.)	

AMICUS CURIAE BRIEF OF ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL ON BEHALF OF RESPONDENT IN DISCOVERY-APPELLEE MOUHAMAD BAKIR M.D.

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Points and Authorities

Introduction

In somewhat panic-stricken terms, Carol Cleeton and amicus curiae Illinois Trial Lawyers Association argue that the appellate court's order will "gut section 2-402," setting off a state-wide alarm that naming anyone as a respondent in discovery will heretofore be "at your peril!" *Cleeton, p. 36; ITLA, p.3*. These exclamations not only overstate the holding's impact, but its sound public policy and procedural underpinnings.

Following six months (or more) of discovery of a non-party's relevant actions, Section 2-402's conversion requirement of a probable-cause hearing has to actually mean something. Conversion is a separate procedural process than the filing of a section 2-622 affidavit; section 2-402 requires the plaintiff to show "evidence," and allows the respondent to challenge that evidence. Fundamentally, a party or its expert's written recitation of a pattern jury instruction is not "evidence" of the applicable standard of care allegedly breached by the prospective defendant.

A trial court holding parties to burdens of proof is not cause for alarm or a sea-change rendering section 2-402 "useless," as Cleeton and ITLA inveigh. *Cleeton, p. 36.* The appellate order does not create public-policy or civil-procedure panic, and should be affirmed.

Argument

A. The conversion process for a respondent in discovery requires actual "evidence" of potential liability, and plaintiff's strict adherence to its requirements.

Cleeton and ITLA barely recognize section 2-402's myriad benefits to plaintiffs as a special statutory action. The respondent in discovery process grants "unilateral discovery by the plaintiff, a right unknown at common law, and makes the six-month time requirement an inherent element of the right." *Knapp v. Bulun*, 392 Ill.App.3d 1018, 1024 (2009).

A plaintiff is, effectively, granted the right to pursue discovery, for six months after the statute of limitations runs, from persons not a party to the litigation and whose knowledge of issues in the case is limited – both of the plaintiff's activities as well as the alleged negligence of the defendant physicians. All of that discovery is undertaken with plaintiff's informed eyes strategically trained on whether to ultimately proceed against the respondent. Plaintiff even secures the extra benefit of not compensating the respondent physician as if she were merely produced for deposition as a non-party treater.

Therefore, this broad grant of rights to discovery, and ultimately the ability to convert a respondent to defendant, requires "scrupulous adherence" to its requirements as a condition precedent to the plaintiff's right to seek a remedy. *Knapp, supra; Robinson v. Johnson*, 346 Ill.App.3d 895, 902-03 (2003). In light of the exclusive right to discovery and an extension of the statute of limitations, "The

requirements of section 2-402 are not mere 'hoop-jumping' or empty formalism." *Torrijos v. International Paper Co.*, 2021 IL App (2d) 191150 ¶97.

Consequently, the trial and appellate courts' orders reasonably imposed section 2-402's requirements on Cleeton, who failed to produce any evidence of the standard of care Dr. Bakir was alleged to have breached. The decisions lined up the necessary scrupulous adherence to the section's evidentiary requirements and must be affirmed.

B. Evidence adduced at the required probable-cause hearing must be measured against the elements of the medical malpractice cause of action, or it is reduced to mere repetition of the section 2-622 affidavit requirement.

The Cleeton and ITLA briefs emphasize that the quantum of evidence necessary to establish probable cause to convert a respondent in discovery is low, and the IDC does not quibble with those common-law statements. However, neither Cleeton nor ITLA discuss what is at actually at issue: whether Cleeton established, with evidence, the standard of care of care Dr. Bakir is alleged to have breached.

Furthermore, the appellate court correctly recognized that "what is sufficient to establish probable cause depends on the nature and complexity of the case, … and a medical malpractice case may require a significantly greater amount of 'evidence' than a negligence action based on a motor vehicle collision." *Cleeton v. SIU Healthcare*, 2022 IL App (4th) 210284-U ¶25 (cleaned up). Cleeton could not

simply jump to the alleged violations of the standard of care without first establishing the standard of care.

Nevertheless, Cleeton and ITLA insist that the process of reviewing evidence – the substantial evidence necessary to find probable cause of medical malpractice – against the actual elements of the cause of action somehow requires a *prima facie* showing or imposes a test for "a high degree of success" on the merits before allowing conversion. *ITLA, pp. 3-4*. Their analysis misses the mark.

The probable cause process is more akin to a section 2-615 motion, where a complaint is found deficient by virtue of a failure to plead an element of the cause of action. Plaintiff cannot recover on a complaint that fails to state a claim, and there is no weighing of evidence.

The trial court's analysis here likewise did not weigh evidence as if resolving a defendant's motion for summary judgment, and nothing in the appellate order leaves that impression either. The court was simply left without evidence of Dr. Bikar's "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," the first element of a medical malpractice cause of action. *Cleeton v. SIU Healthcare, Inc.*, 2022 IL App (4th) 210284-U ¶29.

The trial court's decision thus had nothing to do with weighing evidence or raising the threshold of evidence, as Cleeton and ITLA contend. It had to do with

the absence of evidence to support an element of the claim, which is and always has been fatal to that claim.

In the absence evidence on a legal element of the claim, the trial court reasonably resolved that on the evidence presented Cleeton could not establish "an honest and strong suspicion that her injury was the proximate result of the tortious conduct" of Dr. Bikar. ¶¶*24, 29*. How could she? She was missing evidence to support an element of her claim. This isn't "require[ing] far too much from the plaintiff," it is requiring the bare minimum. *ITLA, p. 6*.

And ultimately, what is the purpose of the respondent in discovery statute's allowance of discovery if the trial court does not compel the plaintiff to present the discovered information in order to establish probable cause for all of the medical malpractice elements? A bland, fact-deprived recitation of the standard of care found in a pattern jury instruction is not "evidence," and not does not establish probable cause for the required "honest and strong suspicion" that this particular, prospective defendant – Dr. Bikar, by name – proximately caused the plaintiff's injuries.

Section's 2-402's utility will not come to an end simply by requiring a plaintiff to provide some evidence of every medical malpractice element before allowing conversion. The appellate court must be affirmed.

Conclusion

This amicus curiae, the Illinois Association of Defense Trial Counsel, respectfully requests that that this court affirm the appellate court's order.

Respectfully submitted,

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Rule 341(c) Certificate of Compliance

I certify that this brief conforms the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, and the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to brief under Rule 342 (a), is six pages.

Respectfully submitted,

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