Case No. 128651

In the

Supreme Court of Illinois

CAROL CLEETON, as independent administrator
of the Estate of DONALD CLEETON, deceased,

Plaintiff-Appellant,

vs.

SIU HEALTHCARE, INC., ET AL..,

Defendants,

and

MEMORIAL MEDICAL CENTER, ET AL.,

Respondents in discovery-
(MOUHAMAD BAKIR, M.D.,
Appellee)

On Appeal from the Appellate Court
of Illinois, Fourth District, Appeal No. 04-21-0284

On Appeal from the Circuit Court of the Seventh Judicial Circuit,
Sangamon County, Illinois
No. 16 L 002470
Hon. Raylene Grishow, Judge Presiding

AMICUS CURIAE BRIEF OF ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT

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ARGUMENT

I. THE APPELLATE COURT'S DECISION MUST BE REVERSED LEST PLAINTIFFS REVERT TO SUING "EVERYONE IN SIGHT"

The appellate court erred when it found plaintiff failed to establish probable cause Dr. Bakir committed medical malpractice. *Cleeton v. SIU Healthcare, Inc.*, 2022 IL App (4th) 210284-U, ¶ 33. This decision must be reversed. Failure to do so will fundamentally change the way plaintiffs' attorneys file suits: more doctors, nurses, and technicians will be sued, medical malpractice insurance rates will rise, and the usefulness of section 2-402 will evaporate overnight.

Section 2-402 of the Civil Practice Law (735 ILCS 5/2-402)(West 2017) "was enacted to ensure that medical malpractice litigation does not become overly burdensome to potential defendants, while allowing plaintiffs to obtain relevant information from those who possess it. (See *Clark v. Brokaw Hospital* (1984), 126 Ill.App.3d 779, 783.) In *Clark*, the court stated:

> ""The legislative history of section 2-402 indicates that its purpose was to provide plaintiff's attorneys with means of filing medical malpractice suits without naming everyone in sight as a defendant. It was believed that the label of "defendant" in a medical malpractice suit contributed to the spiraling cost of medical malpractice insurance.'"

Moscardini v. Neurosurg, S.C., 269 Ill.App.3d 329, 335 (2nd Dist. 1994).

The statute was designed to put an end to the practice of "naming everyone in sight." As such, it benefitted doctors. No longer would so many of them be branded with the "Scarlet D." Instead, a plaintiff could designate a doctor as a respondent in discovery and, if the evidence disclosed a reasonable basis to convert him to a defendant, the plaintiff could make a motion showing probable cause.

The plaintiff's brief provides an excellent and compelling recitation of the case law the courts use to determine whether probable cause has been shown, so we will not reiterate it here. It is sufficient to say the bar is set quite low for courts to find probable cause to convert a respondent in discovery to a defendant. And it is low for a reason. As explained in *Ingle v. Hospital Sisters Health System*, 141 Ill.App.3d 1057 (4th Dist. 1986):

> "The purpose of encouraging plaintiffs to name medical providers as respondents-in-discovery rather than defendants will not be served if a high degree of likelihood of success is necessary to be shown before such respondents can be named defendants. If that is required, plaintiffs will continue the practice of naming as defendants most of those who have provided medical

services to them at or about the time of the alleged injury." *Ingle,* 141 Ill.App.3d at 1062.

"Section 2-402 was adopted to deter a plaintiff from this wholesale joinder of defendants." 4 Richard A. Michael, Illinois Practice, Civil Procedure Before Trial §29:6 (2021). "Under the rigorous provisions of Rule 137 providing sanctions for pleadings that to the best of the pleader's knowledge formed after reasonable inquiry are not well-grounded, use of the wholesale joinder approach rather than [use of respondent in discovery] renders the pleader vulnerable to the imposition of sanctions." *Id.*

Plaintiffs will not use section 2-402 to designate respondents in discovery if a high degree of likelihood of success is necessary to be shown before a respondent can be converted to a defendant. Thus, plaintiff attorneys will be vulnerable to sanctions by adopting the "wholesale joinder of defendants" approach. Given the facts of this case —a timely motion to convert, a proposed amended complaint, an attorney affidavit of merit, and a report of a board-certified medical doctor which enumerates several breaches of the standard of care—if those are not sufficient to convert a respondent to a defendant, the alarm will sound and plaintiff attorneys throughout the state will hear it loud and clear: Don't name anyone as a respondent, and if you do, do so at your own peril! The purpose which the statute was designed to

avoid—"indiscriminate naming of defendants contributed to the spiraling costs of malpractice insurance"—will be frustrated beyond repair. See 4 Richard A. Michael, Illinois Practice, Civil Procedure Before Trial §29:6 (2021).

II. THE APPELLATE COURT ERRED IN DEMANDING PLAINTIFF MAKE A *PRIMA FACIE* CASE

The appellate court's probable cause analysis was flawed. It required the plaintiff to show a *prima facie* case in order to require that the respondent be made a defendant. It recited the elements which form the plaintiff's burden of proof. *Cleeton*, 2022 IL App (4th) 210284-U, ¶25. But, the plaintiff is not required to show a *prima facie* case in order to require that respondents be made defendants. *Ingle*, 141 Ill.App.3d at 1065.

The court found "no evidence on the standard of care." *Id.*, ¶32. This ignores the introductory language of Chapter 105.00 to the Illinois Pattern Instructions (Civil), *i.e.*, "[t]he same general standard of care applies to all professionals, that is, the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances." Illinois Pattern Jury Instructions, Civil, Introduction to Ch. 105.00 (hereafter IPI Civil). Indeed, the duty instruction itself mirrors that statement, "A doctor must possess and

use the knowledge, skill, and care ordinarily used by a reasonably careful doctor." This is the doctor's duty. The remainder of that instruction discusses how a doctor breaches that duty. "The failure to do something that a reasonably careful doctor would do, or the doing of something that a reasonably careful doctor would not do, under circumstances similar to those shown by the evidence, is 'professional negligence.'" IPI Civil, No. 105.01.

In this case, the appellate court ignored the certificate of merit filed by Dr. Minore. In it, Dr. Minore enumerated the ways which the respondent breached the standard of care: "[Respondent] deviated from the standard of care by his failure to timely recognize the differential diagnosis of Baclofen Withdrawal Syndrome, order treatment consistent with the Medronic Emergency Procedures received at [the hospital] at approximately 10:44 a.m. on October 30, 2017, and order the administration of Intrathecal Baclofen in a timely manner." *Cleeton*, 2022 IL App (4th) 210284-U, ¶31.

The appellate court opined that this was insufficient to 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.

Dr. Minore's certificate of merit explicitly states three ways in which the respondent breached the standard of care. Implicit in those

criticisms are the standards of proper conduct. For example, if the respondent deviated from the standard of care by his failure to timely recognize the differential diagnosis of Baclofen Withdrawal Syndrome, then the standard of care must require the respondent to timely recognize the differential diagnosis of Baclofen Withdrawal Syndrome. The same can be said for the other two deviations.

Furthermore, the appellate court took an exceptionally narrow view of what it deemed evidence of the standard of care. It said, "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." But Dr. Minore based his opinions "upon a review of the medical records provided by [the hospital]." *Id.* So, the expert didn't make these opinions in a vacuum or without regard to circumstances similar to those shown by the evidence; rather, they were based on the facts of this case, the medical records describing the events of this case, and the particular patient in this case. The appellate court required far too much from the plaintiff. Ultimately, not even a detailed recitation of how the respondent deviated from the standard of care from a board-certified pain-management doctor who implants Baclofen pumps was

enough to satisfy what the same appellate court admitted was a "low threshold." *Id.*, ¶24.

III. CONCLUSION

This *amicus curiae*, the Illinois Trial Lawyers Association, respectfully requests that this court reverse the decision of the appellate court. The probable cause requirement of section 2-402 is to be liberally construed, to the end that controversies may be determined according to the substantive rights of the parties. *Coley v. St. Bernard's Hosp.*, 281 Ill.App.3d 404, 408 (1st Dist. 1996). Here, the appellate court demanded nothing less than a *prima facie* case to be shown. That is the wrong standard to apply to a motion to convert a respondent to a defendant. If this appellate decision is affirmed, plaintiff attorneys will cease to rely on section 2-402 and will instead take refuge in "naming everyone in sight" for fear that a respondent might not be converted if the plaintiff honestly believes he should be. The Illinois Trial Lawyers Association hopes to avoid that practice. And we believe the medical community joins us in that hope. Therefore, we respectfully ask the court to reverse the appellate court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b), and Rule 345. The length of this brief is **1517 words**, excluding words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a).

/s/ David F. Monteleone
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