No. 123152

Appeal to The Supreme Court of Illinois

SCARLETT PALM,
Petitioner-Appellant,

v.

RUBEN HOLOCKER
Defendant-Appellee,

and

KARL BAYER,
Contemnor-Appellee.

Appeal from the Appellate Court
Third District, No. 3-13-0087

Appeal from Marshall County, Illinois
Case No. 16 L 5
Honorable Judge Thomas A. Keith and Michael P. McCuskey
Judges Presiding

BRIEF OF AMICUS CURIAE, ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL ON BEHALF OF DEFENDANT-APPELLEE, RUBEN HOLOCKER

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POINTS AND AUTHORITIES

INTRODUCTION

The issues to be decided in this appeal impact the rights of all individuals named as defendants in lawsuits throughout the State of Illinois. Accordingly, the Illinois Association of Defense Trial Counsel ("IDC"), whose member attorneys devote a significant portion of their time to representing individuals named as defendants in civil litigation, respectfully offers this amicus brief in support of the Defendant-Appellee.

This brief advises the Court of two points relevant to this appeal:

First, a ruling which requires a defendant to affirmatively waive his own physician-patient privilege, rather than one which allows a plaintiff to waive the privilege for him, is consistent with both the underlying purpose of the statute and several decades' worth of Illinois precedent.

Second, Plaintiff's interpretation of the physician-patient privilege renders the statute and its corresponding exceptions meaningless. Under Plaintiff's interpretation, no defendant would maintain their right to privacy and confidentiality in their medical records so long as an allegedly relevant physical or mental condition was pleaded in the plaintiff's complaint.

As a body of Illinois attorneys dedicated to representing Illinois defendants, the IDC has a significant stake in the outcome of this appeal, and has a unique perspective on these issues that may be helpful to the Court.

STATUTE INVOLVED

8-802. Physician and patient.

§ 8-802 No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only

* * *

(4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue[.]

(735 ILCS 5/8-802(4) (West 2016).

ARGUMENT

The sole issue before this Court is whether the Appellate Court correctly held that a plaintiff cannot waive another individual's statutory physician-patient privilege by naming them as a defendant in a lawsuit or by pleading allegations seeming to implicate their physical and/or mental well-being. Citing the "cardinal rule of statutory interpretation," Plaintiff argues the physician-patient privilege is clear and unambiguous, and that this Court need not look past the language of the statute to determine that the Appellate Court's ruling was flawed. Under Plaintiff's strained interpretation of the statute, the legislature's use of the phrase "an issue" means that "a relevant physical condition is not protected by the privilege if the patient is a party to the litigation" (See Appellant's Brief at p. 13).

Yet, multiple districts of the Appellate Court have analyzed this same language and reached a different conclusion. *See, e.g., Kraima v. Ausman*, 365 Ill. App. 3d 530, 536 (1st Dist. 2006); *Pritchard v. Swedish-American Hospital*, 191 Ill. App. 3d 388, 405 (2d Dist. 1989) (both holding that exception (4) requires a defendant to have affirmatively placed his physical condition at issue). At best, these cases are dispositive of the issue before this Court. At worst, these cases show that the statutory language at issue is subject to differing interpretations, thereby requiring an inquiry into the history and the purpose of the statute. *See Board of Education v. Regional Board of School Trustees*, 135 Ill. App. 3d 486, 490-91 (2d Dist. 1985) (noting that where differing interpretations are proffered, "legislative intent must be gathered not only from the language used, but also from the reasons for the enactment and the purposes to be thereby attained").

A deeper inquiry into the history and purpose of the physician-patient privilege statute reveals that Illinois law requires a patient to either explicitly or implicitly consent to the disclosure of his confidential medical records. Because a defendant does not and cannot consent to this disclosure solely by being named as a defendant in a lawsuit—a matter over which he has no control—the Appellate Court's decision should be affirmed.

I. Requiring a Defendant to Affirmatively Waive His Statutory Physician-Patient Privilege Is Consistent With Both the Underlying Purpose of the Statute and Existing Illinois Precedent.

In creating the physician-patient privilege statute, the Illinois legislature recognized that "members of society who approach a physician for treatment

should, and do, have a right to be free from the embarrassment and invasion of privacy that often accompanies the disclosure of confidential medical information." *Petrillo v. Syntax Laboratories, Inc.*, 148 Ill. App. 3d 581, 603 (1st Dist. 1986) (citing *People v. Bickham*, 89 Ill. 2d 1 (1982)). Indeed, as this Court recognized in *Kunkel v. Walton*, "the confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy." 179 Ill. 2d 519, 537 (1997).

For these reasons, this Court has expressly held that individuals in Illinois have a Constitutional privacy interest in the confidentiality of their medical records—an interest which may not be invaded in the absence of patient consent. *See Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997); *see also Kunkel*, 179 Ill. 2d at 540 (holding that a statute which required all plaintiffs to sign a blanket authorization for disclosure of medical records was unconstitutional because it prevented plaintiffs from making "a free and consensual decision").

The idea of "confidentiality absent patient consent" was first expressed in *Petrillo*, where the Appellate Court noted that disclosure of information normally protected by physician-patient privilege can be accomplished in one of two ways: "by either an express consent or one implied at law by the patient's conduct, such as the filing of a lawsuit." This rationale was quoted at length by this Court in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 457 (1997).

As the *Petrillo* court explained,

> "Confidentiality and patient consent are inextricably tied together; the relationship between a patient and his physician remains confidential only as long as a patient can rest assured that he must give his consent before any of the information disclosed during the physician-patient relationship is released to third parties."

Petrillo, 148 Ill App. 3d at 590.

The court continued,

> "[i]ndeed, at the very minimum, the confidential relationship existing between a patient and physician demands that information confidential in nature remain, *absent patient consent*, undisclosed to third parties. *If such were not the case, then no confidentiality between a patient and his physician in fact exists*." (Emphasis added.)

Id.

The *Petrillo* decision has been cited favorably by this Court on no fewer than five occasions. *See Burger v. Lutheran General Hospital*, 198 Ill. 2d 21 (2001); *Neade v. Portes*, 193 Ill. 2d 433 (2000); *Best*, 179 Ill. 2d 367; *Kunkel*, 179 Ill. 2d 519; *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205 (1994). Yet Plaintiff cites the *Petrillo* decision in her brief only to note the court's recognition of the fact that the privilege and the relevant exceptions applicable thereto, namely exceptions (2), (3), and (4), "reflect a sound public policy which respects both society's desire for privacy and its desire to see that the truth is reached in civil disputes." *Petrillo*, 148 Ill. App. 3d at 603. Indeed, the word "truth" is repeated throughout Plaintiff's brief *ad nauseam*.

Yet Plaintiff's brief wholly ignores the fact that privileges which protect certain matters from disclosure, such as the physician-patient privilege, are "not designed to promote the truth-seeking process but rather to protect some outside interest other than the ascertainment of truth at trial." *D.C. v. S.A.*, 178 Ill. 2d 551, 561-62 (1997). Indeed, "privileges are an exception to the general rule that the public has a right to every person's evidence," and often act to bar "what is clearly relevant and material information." *Id.*; *House v. SwedishAmerican Hospital*, 206 Ill. App. 3d 437, 444 (2d Dist. 1990).

A closer look at the *Petrillo* decision reveals, beyond doubt, that the Appellate Court was correct in its determination that a defendant must affirmatively place his health at issue in order to waive his physician-patient privilege. Directly after noting the balancing nature of the physician-patient privilege, the *Petrillo* court explained:

> *Of key importance is the legislature's determination that it be the patient who, by affirmative conduct (the filing of a lawsuit), consents to the disclosure of previously confidential medical information.*

Petrillo, 148 Ill. App. 3d at 603 (emphasis added).

Plaintiff's interpretation of the phrase "an issue," as that language is used in exception (4) to the physician-patient privilege statute, wholly removes a defendant's right to consent (either explicitly or implicitly) to the disclosure of his confidential medical records. Under Plaintiff's view of the statute, any plaintiff would be allowed to waive any defendant's physician-patient privilege

simply by suing him and later alleging he suffered from some physical or mental ailment that impacted his duty of care at the time of the occurrence. As a matter of law, it cannot be true that a defendant, such as Mr. Holocker, waives his physician-patient privilege simply by being named as a defendant in a lawsuit.

II. Plaintiff's Interpretation of Exception (4) to the Physician-Patient Privilege Statute Creates Absurd Results for Which the Legislature Could Not Have Intended.

Plaintiff also argues Defendant's physical condition is "an issue" because it defines the standard of care he has a duty to maintain. In support of this proposition, she cites the Restatement (Second) of Torts § 283C (1965), which states: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." She then cites to comment *c* of § 283C, which explains: "an automobile driver who suddenly and quite unexpectedly suffers a heart attack does not become negligent when he loses control of his car and drives it in a manner which would otherwise be unreasonable; but one who knows that he is subject to such attacks may be negligent in driving at all." *Id.* at comment *c*.

Initially, the IDC would be remiss if it failed to point out that this argument was never raised or considered in the appellate court. *See Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 428-29 (2002) (where a case is brought to the supreme court from the appellate court, questions which were not raised and argued in that court will not be considered by the supreme court, but will be treated as waived). Nevertheless, even assuming Plaintiff properly raised the

"duty of care" issue, her arguments related to the section's applicability to this Court's construction of the physician-patient privilege statute is flawed for a number of reasons.

First and foremost, Plaintiff's application of § 283C would render the physician-patient privilege statute meaningless. To explain, Plaintiff's basis for her belief that Defendant may suffer from blindness is her unsubstantiated hearsay assertion that a few weeks after the automobile accident, "someone claiming to know Ruben told Scarlett that Ruben was legally blind and did not report other collisions he was involved in out of fear he would lose his driving privileges" (Appellant's Brief at p. 6, citing R6). Utilizing § 283C, she argues that Defendant's blindness is "an issue" in this case because the scope of Defendant's duty depends on what a reasonable person with the same condition would do under the circumstances. For example, "[i]f Ruben is blind, his conduct must be judged by that of a reasonable blind person" (Appellant's Brief at p. 17).

On the surface, this argument appears to make sense. However, a deeper examination reveals that this same argument could be made in any case filed in any circuit court in Illinois. Notwithstanding the fact that Plaintiff has not pleaded any form of disability of physical impairment on the part of Defendant, she is correct in noting that nothing is stopping her from doing so upon remand. Under her interpretation of the statute, all a plaintiff would be required to do to ensure access to a defendant's medical records in an ordinary negligence case

would be to plead that the defendant suffered from any number of physical conditions or disabilities, thereby changing his duty of care.

Were Plaintiff's interpretation correct, parties (plaintiffs and defendants alike) would be allowed to bypass Illinois's physician-patient privilege statute to go on fishing expeditions in hopes of discovering information that either (1) helps their case; or (2) prejudices their opponent. As Justice Schmidt correctly noted below, such an interpretation would inevitably lead to parties feeling compelled to settle to avoid disclosing certain health conditions, procedures, or treatments that have nothing to do with their liability. Certainly the legislature did not intend to permit such unwarranted invasions of privacy. *Palm v. Holocker*, 2017 IL App (3d) 170087 at ¶ 28; *see also Best*, 179 Ill. 2d 367 (noting that individuals in Illinois have a Constitutional privacy interest in their confidential medical records).

More importantly, Plaintiff's position that "a relevant physical condition is not protected by the privilege if the patient is a party to the litigation" effectively eviscerates the privilege under any circumstance for individuals with disabilities. Utilizing Plaintiff's logic, an individual with a disability would automatically waive his right to confidentiality in his medical records solely by way of the fact that he suffers from a disability that changes the circumstances surrounding his duty of care in a negligence action.

Not only does such an interpretation run afoul of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* (which prohibits discrimination on the basis of disability), but it ignores the well-established rule of statutory

construction that a statute must be construed "in a manner that will avoid absurd, unreasonable, or unjust results that the legislature could not have intended." *People v. Hunter*, 2017 IL 121306, ¶ 28. Even assuming Plaintiff's construction of "an issue" constitutes a plain and ordinary interpretation of the language at issue in this case, as this Court stated in *Hunter*, "[w]here a plain or literal reading of a statute renders such results, the literal reading should yield." *Bank of N.Y. Mellon v. Laskowski,* 2018 IL 121995, ¶ 12.

A closer look as cases across the country which have recognized the validity of § 283C reveals that every court to have ever addressed the situation contemplated by comment c has done so under the circumstance where a party has affirmatively placed their physical condition at issue in the lawsuit. *See e.g., Borus v. Yellow Cab Co.*, 52 Ill. App. 3d 194, 201 (1st Dist. 1977) (plaintiff affirmatively placed her handicap at issue when she claimed she was not negligent in failing to prevent her coat from being caught in a taxicab door because her disability made her slow and awkward); *Moore v. Presnell*, 38 Md. App. 243, 245, 379 A.2d 1246, 1247-48 (Md. 1977) (defendant raised affirmative defense that she suffered a sudden and unexpected lapse of consciousness); *Warren v. Pinnix*, 241 So. 2d 662, 663 (Miss. 1970) (defendant raised affirmative defense that he suddenly lost consciousness due to a cerebral vascular incident, or stroke, which was not reasonably foreseeable); *Storjohn v. Fay*, 246 Neb. 454, 458, 519 N.W.2d 521, 526 (1994) (defendant raised affirmative defense that he suddenly lost consciousness, making the automobile accident unavoidable);

Cincinnati Insurance Co. v. Allen, 2008-Ohio-3720, ¶ 12 (Ct. App.) (defendant raised affirmative defense in automobile accident case that a sudden medical emergency caused him to lose consciousness); *McCall v. Wilder*, 913 S.W.2d 150, 152 (Tenn. 1995) (defendant moved for summary judgment on the basis that the automobile accident was an unavoidable consequence of a sudden emergency created when the decedent suffered a seizure while driving).

Applying the Third District's ruling in the instant matter to each of the cases listed above (and assuming those cases took place in Illinois), each plaintiff would have been given the opportunity to test the defendant's theory that a sudden unforeseeable health condition caused the allegedly tortious conduct by obtaining the defendant's medical records. *Palm*, 2017 IL App (3d) 170087 at ¶ 25. This is because a defendant who raises an affirmative defense on the basis of a medical condition implicitly consents to the disclosure of his medical records that relate to that medical condition. *See Petrillo*, 148 Ill. App. 3d at 602-03.

However, in the instant matter, and in all cases in which a defendant merely denies an allegation of negligence, the Illinois legislature has chosen to prioritize a patient's right to confidentiality. Were this Court to hold otherwise, it would be disregarding both the underlying purpose of the physician-patient privilege and years of Illinois precedent interpreting that privilege to require a patient's consent prior to disclosure of confidential medical records. As the court explained in *Petrillo*, "at the very minimum, the confidential relationship existing between a patient and physician demands that information confidential in nature

remain, absent patient consent, undisclosed to third parties. If such were not the case, then no confidentiality between a patient and his physician in fact exists." *Petrillo*, 148 Ill. App. 3d at 590.

CONCLUSION

For the foregoing reasons, ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL respectfully requests that the Appellate Court's decision be affirmed.

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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 number of words in this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 2,883 words.

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CERTIFICATE OF FILING AND PROOF OF SERVICE

I, Laura Guich, certify that on May 31, 2018 I electronically filed and transmitted the foregoing Brief of *Amicus Curiae*, Illinois Association of Defense Trial Counsel On Behalf Of Defendant-Appellee, Ruben Holocker with the Clerk of the Court by using the I2file system.

I further certify that the other individuals in this case, named below will be served on May 31, 2018 by transmitting a copy of same from my email address to the email addresses listed below:

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure [735 ILCS 5/1-109], I certify that the statements set forth in this **Certificate of Filing and Proof of Service** are true and correct, except as to matters therein stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

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