No. 128651

IN THE SUPREME COURT OF ILLINOIS

CAROL CLEETON, as Independent Administrator of the Estate of Donald Cleeton, Deceased, *Plaintiff-Appellee,* v. SIU HEALTHCARE, INC., CHARLENE YOUNG, F.N.P., ABDULLAH AL SAWAF, M.D., SIU PHYSICIANS & SURGEONS, INC. d/b/a SIU MEDICINE, an Illinois Corporation, and ASHLEY KOCHMAN, R.N., *Defendants,* and MEMORIAL MEDICAL CENTER, MOUHAMAD BAKIR, M.D., JESSICA FARLEY, NAUMAN JAHANGIR, M.D., HANNAH PURSEGLOVE, M.D., NATALIE MAHONEY, M.D., JONATHAN RODERICK DUTT, M.D., and SHIPLA CHAKU, M.D., *Respondents in Discovery,* (Mouhamad Bakir, M.D., Appellee)	Appeal from the Illinois Appellate Court Fourth Judicial District No. 04-21-0284 There Heard on Appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, No. 2016 L 002470 The Honorable Raylene Grischow, Judge Presiding.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Sufficiency of Dr. Minore's Certificate of Merit with Respect to Section 2-622 is Not at Issue

In his brief, Bakir argues "the court, not the plaintiff" determines if section 2-622 has been complied with. Resp. Br. p. 19. However, the sufficiency of Dr. Minore's certificate of merit as it pertains to section 2-622 is not at issue in this appeal: Bakir filed no motion to dismiss the complaint for failure to comply with section 2-622 or argued at any time that Dr. Minore's certificate of merit would not have been sufficient had plaintiff filed her complaint against Bakir at the outset relying upon Dr. Minore's certificate of merit. In fact, Bakir does not argue in his brief that the certificate of merit *is* insufficient pursuant to 2-622. Rather, Bakir argues that the plaintiff cannot rely upon the sufficiency of the unchallenged certificate of merit because no court has held it is sufficient.

Notably, the cases cited by Bakir regarding challenges to section 2-622 do not involve disputes as to the sufficiency of a 2-622 certificate of merit; rather, both *McAlister v. Schick* (147 Ill.2d 84, 93 (1992)) and *DeLuna v. St. Elizabeth's Hosp.* (147 Ill.2d 68, 72 (1992)) involve challenges to the constitutionality of 2-622, and in both cases the plaintiff failed to file a certifying physician's report in their entirety. Thus, in *McAlister v. Schick,* when the court held the judge alone has power to dismiss the cause if he finds the complaint to be insufficient, the court's ruling was in the context of explaining why 2-622 did not unconstitutionally usurp the judicial power of the courts. *McAlister,* 147 Ill.2d at 92-93. Similarly, the court in *DeLuna v. St. Elizabeth's Hosp.* statement that a health professional submitting a 2-622 certificate "does not exercise a judicial power" was emphasizing that 2-622 did not allow a physician to wield judicial power. *DeLuna,* 147 Ill.2d at 72.

Neither the trial nor appeals court addressed whether Dr. Minore's certificate of

merit was sufficient to meet the requirements to file a medical malpractice cause of action against Bakir pursuant to 2-622 during their 2-402 analysis. Importantly, unlike a motion to convert under 2-402, the Healing Arts Malpractice Act does not require the court to enter a finding that the section 2-622 certificate of merit and medical report are sufficient prior to filing a complaint for medical malpractice. Healing Arts Malpractice Act, 735 ILCS 5/2-622 (West 2006). Bakir has waived an argument based upon the insufficiency of Dr. Minore's section 2-622 certificate of merit under section 2-622 by failing to make such challenge before the lower court.

II. The Plaintiff Presented Sufficient Evidence Necessary Pursuant to 2-402 to Establish Probable Cause to Convert Bakir from a Respondent in Discovery to a Defendant

Section 2-402 allows a plaintiff to convert a respondent in discovery to a defendant "if the evidence discloses the existence of probable cause for such action." 735 ILCS 5/2-402 (West 2006). Illinois appellate courts have continuously held that the burden of establishing probable cause under section 2-402 is low. *Moscardini v. Neurosurg., S.C.*, 205 Ill. Dec. 855, 860 (1994). The plaintiff need only show a person of ordinary caution and prudence would entertain an honest and strong suspicion that the purported negligence of the respondent in discovery was a proximate cause of the plaintiff's injury. *Ingle v. Hospital Sisters Health System*, 98 Ill. Dec. 325, 329 (1986).

It is certainly the burden of the plaintiff to present evidence to establish probable cause to convert a respondent in discovery to a defendant. However, "evidence" for purposes of a section 2-402 motion to convert is not limited to the evidence admissible at a trial. *Moscardini*, 205 Ill. Dec. at 859. Rather, for purposes of a probable cause hearing, evidentiary standards are relaxed and the court may consider evidence that would not

otherwise be admissible at trial. *Id.* In fact, as set forth in plaintiff's brief, the court in *Moscardini v. Neurosurg, S.C.* held it was "virtually inconceivable" that the legislature intended to require a plaintiff to produce evidence greater than that required to file a medical malpractice suit under section 2-622 in order to convert a respondent in discovery to a defendant pursuant to section 2-402. Pl. Br. pp. 22-23, *Moscardini,* 205 Ill. Dec. at 860.

In his brief, Bakir argues plaintiff should not be allowed to rely on evidence in context of a motion to convert that she could not rely upon in future. Resp. Br. 29. However, Bakir's contention is contrary to established caselaw with regards to evidence admissible at a probable cause hearing.

Plaintiff set forth the evidence she presented in support of her motion to convert on pages 26 through 29 of her Brief before this court and, for brevity's sake, will not reiterate the evidence herein. In summary, the plaintiff presented the report of Dr. Minore, as well as relevant portions of plaintiff's medical records, the Medtronic emergency procedures, and the testimony of Bakir. Pl. Br. pp. 26-29. Notably, the emergency procedures and testimony of Bakir both establish the signs and symptoms associated with baclofen withdrawal, and Bakir's testimony establishes his own familiarity with these signs and symptoms. When the medical records are reviewed in correlation with the emergency procedures and the testimony of Bakir as to his knowledge of the signs and symptoms of baclofen withdrawal, the records document Donald was experiencing signs and symptoms that Bakir was aware were indicative of baclofen withdrawal. Dr. Minore based his opinion that Bakir "deviated from the standard of care by his failure to timely recognize the differential diagnosis of Baclofen Withdrawal Syndrome, order treatment consistent with

the Medtronic Emergency Procedures…and order the administration of Intrathecal Baclofen in a timely manner" on the hospital records which showed Donald was suffering signs and symptoms of baclofen withdrawal. C112-13.

In his brief, Bakir states Dr. Minore's certificate of merit lists the incorrect arrival time in the ICU. Resp. Br. p. 21. Dr. Minore's certificate of merit sets forth the time of arrival as 12:01 p.m., whereas the records indicate Donald arrived in the ICU at approximately 10:00 a.m. C112, 296, 363-364, 918. Bakir fails to state how the inaccurate arrival time set forth in his report negates Dr. Minore's opinions. Dr. Minore opined Bakir failed to timely diagnose and treat baclofen withdrawal syndrome. C113. Bakir fails to show how *additional* time caring for Donald would change or invalidate Dr. Minore's opinion that he failed to act in a timely manner.

In its decision, the appellate court held that the plaintiff had failed to establish the standard of care against which Bakir's conduct is to be measured. A10. Specifically, the appellate court held "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." A11. First, the court erroneously implied Bakir's consults with multiple specialists were relevant to his standard of care. Certainly, the fact Bakir consulted other specialist may be relevant to the standard of care; however, no testimony has indicated the standard of care required him to consult with specialists; nor that consulting with specialists somehow alleviated his duty of care to Donald. In fact, it is the duty of every doctor licensed and practicing in Illinois to "possess and use the knowledge, skill, and ordinary care used by a reasonably careful doctor." IPI Civil, No. 105.01. Failure to act as a

reasonably careful doctor, even when consulting with various specialists, falls below the standard of care of a reasonably well qualified doctor.

Second, Dr. Minore did set forth the standard of care for a pulmonary critical care specialist presented with a patient like Donald, by stating how Bakir had deviated from the standard of care. The court citing no authority, has indicated a statement of how the standard of care has been violated does not set forth the standard of care to which a physician's conduct is to be measured. A12-13. However, courts of appeal in other cases have allowed plaintiff to convert a respondent in discovery to a defendant relying on similar statements regarding deviation of the standard of care without outright stating what the standard of care required. *See Williams v. Medenica*, 211 Ill. Dec. 619, 620, 622 (1995) ("plaintiff's medical records fail to reveal appropriate antibiotic coverage for any ongoing infectious process reflecting similar deficiency in the care afforded to the plaintiff resulting in an infection of his knee"), *Long v. Mathew*, 270 Ill. Dec. 776, 784 (2003) (x-rays were interpreted by the radiologists, the x-ray interpretation was not noted by any of the physicians who subsequently treated the patient, and the radiologists failed to interpret and/or report the x-ray studies independently, which would have revealed the cause for the decedent's symptoms). In those cases, the court noted that although the expert's certificate of merit was not as well phrased as it could have been, it was minimally sufficient to support conversion of the respondent in discovery to a defendant. *Williams v. Medencia*, at 621-22, *Long v. Mathew*, at 784. The court's ruling with regards to Dr. Minore's expression of the standard of care is contrary to the prior rulings of Illinois courts.

The evidence presented by the plaintiff herein is akin to that found sufficient to establish probable cause pursuant to 2-402 by prior appellate courts. *See Moscardini v.*

Neurosurg, S.C. 206 Ill. Dec. 855 (1995), *Williams v. Medenica*, 211 Ill. Dec. 619 (1995), *Long v. Mathew*, 270 Ill. Dec. 776 (2003), *Ingle v. Hospital Sisters Health System*, 96 Ill. Dec. 325 (1986). In each of the aforementioned cases, the court considered whether the evidence was "minimally sufficient" to convert the respondent in discovery to a defendant. Plaintiff's evidentiary burden to convert pursuant to 2-402 is extremely low and requires presentation of only minimal evidence to establish probable cause.

Respondent has argued the lower courts were entitled, and in fact required, to consider all the evidence presented in evaluating whether probable cause existed pursuant to 2-402 to convert Bakir to a defendant – including exculpatory evidence presented by respondent. Resp. Br. p. 23. However, allowing the court to balance the evidence presented would be contrary to well established law. A showing of probable cause does not require evidence sufficient to present evidence sufficient to survive a motion for summary judgement against the respondent in discovery. *Ingle v. Hospital Sisters Health System*, 95 Ill. Dec. 325, 329 (1986). To establish entitlement summary judgement, a party must show by the evidence on file, that there is no genuine issue of material fact and said party is entitled to judgement as a matter of law. *Addison v. Whittenberg*, 124 Ill. Dec. 571, 574 (1988). Any disputes as to interpretation of evidence in a summary judgement hearing are construed against the moving party. *Id.*

If the court is allowed, or in fact required, to hear all evidence at a 2-402 hearing, including defendant's exculpatory evidence, the plaintiff is held to a standard far beyond that necessary to survive summary judgement. Not only would plaintiff be required to prove her entitlement to a judgement against defendant based on undisputed evidence; she would be required to irrefutably prove her case at the pleading stage. Nothing in the

judicial or legislative history indicates either the courts or legislature intended to place such a high burden on the plaintiff.

Furthermore, a plaintiff need not present a *prima facie* case against the respondent in discovery to be entitled to convert him to a defendant pursuant to 2-402. *Ingle* at 330. To present *prima facie* case, a plaintiff must present "at least some evidence on every essential element of the cause of action." *Sullivan v. Edward Hosp.* 282 Ill. Dec. 348, 363 (2004).

Bakir has argued, and the lower courts have held, that plaintiff must establish evidence as to each and every element of her claim of malpractice against Bakir in order to show she is entitled to convert him from a respondent in discovery to a defendant. By definition, the courts have required, contrary to the well-established law, that plaintiff present a *prima facie* case against Bakir in order to show her entitlement to convert him from a respondent in discovery to a defendant. Prior cases have made it clear plaintiff's burden to convert a respondent in discovery to a defendant does not reach so high.

III. The Extension of the Statute of Limitations Conferred on Plaintiff by 2-402 Does Not Warrant Placing an Additional Evidentiary Burden to Convert a Respondent in Discovery to a Defendant

Section 2-402 does confer one benefit upon a plaintiff to entice her to join physicians as respondents in discovery rather than defendants: an extension of the statute of limitations. 735 ILCS 5/2-402 (West 2006). However, the benefits of 2-402 are not exclusively conferred upon the plaintiff. The potential respondent in discovery also benefits from plaintiff's utilization of the statute; namely, he is not named as a defendant and charged with malpractice at the outset of the case. *Id.* In fact, the legislative purpose of enacting 2-402 was to allow plaintiffs in medical malpractice cases to involve treating

physicians in the discovery process without burdening such physician with the label of "defendant." *Moscardini v. Neurosurg, S.C.,* 206 Ill.Dec. 855, 859 (1994).

Bakir argues, without citation to authority, "The added benefit to plaintiff from the longer statute of limitations can come with additional requirements." Resp. Br. p. 20. While Bakir does cite *Knapp v. Bulun,* (392 Ill.App.3d 1018, 1024 (1st Dist. 2000)), for the contention that extension of the statute of limitations requires "[s]crupulous adherence to the requirements of section 2-402" as a condition precedent to converting a respondent in discovery to a defendant, that case addresses a failure to comply with technical pleading requirements, namely appropriate service on the respondent in discovery, and not an evidentiary matter. *See Knapp v. Bulun,* 392 Ill.App.3d 1018 (2000). Bakir does not explain how such "scrupulous adherence" applies to the evidentiary burden placed on the plaintiff to convert a respondent in discovery to a defendant or what "additional requirements" this court should place on the plaintiff during a 2-402 motion verses filing a complaint pursuant to section 2-622.

Furthermore, 2-402 requires conversion from a respondent in discovery within six months of naming the respondent in discovery, with the possibility for short extensions. 735 ILCS 5/2-402 (West 2006). It does not, in all situations, lead to a six-month extension of the statute of limitations by six months. In fact, in this case, the statute of limitations to file a medical malpractice suit against Bakir would have expire two years after his treatment of Donald – or on October 30, 2019. Plaintiff filed her lawsuit naming Bakir as a respondent in discovery on February 13, 2019. C37-55. Plaintiff's final deadline to move to convert Bakir to a defendant, after being granted a 90-day extension, was November 13, 2019 – only fourteen days after the expiration of the statute of limitations. C90. As such, the

plaintiff in this case did not receive the benefit of an extra six months after the expiration of the statute of limitations to file a lawsuit against Bakir. The plaintiff received an extra two weeks after the expiration of the statute of limitations, during which time no discovery took place, to move to convert Bakir from a respondent in discovery to a defendant.

Furthermore, this case involves multiple defendants and respondents in discovery. In addition to Bakir, plaintiff has named four individual defendant, twelve additional individual respondents in discovery, and multiple facilities and medical groups as either defendants or respondents in discovery. Between February 13, 2019 and November 13, 2019, plaintiff had exchanged discovery with each of these defendants and respondents in discovery. Plaintiff was still in the process of deposing fact witnesses in this matter as of November 13, 2019. No discovery or witness disclosure deadlines had been set by the circuit court and no party had disclosed any independent expert witnesses. Notably, the deposition of neither Bakir nor Dr. Minore had been taken as of November 13, 2019. Although nine months had passed since plaintiff filed her lawsuit, and named Bakir as a respondent in discovery, the parties were still in the early stages of litigation and actively participating in fact discovery. While a plaintiff is not required to engage in any discovery with a respondent in discovery prior to filing their motion to convert (*Long v. Mathew*, 270 Ill. Dec. 776, 781 (2003)), in this case the plaintiff had participated in significant fact finding in an effort to determine whether any respondent in discovery, including Bakir, should be rightly converted to a defendant.

Nothing within the language of 2-402, nor the legislative or judicial history supports Bakir's contention "he added benefit to plaintiff from the longer statute of limitations" (Resp. Br. p. 20) requires or warrants plaintiff to meet an evidentiary burden greater than

the evidence presented by the plaintiff in this case to convert a respondent in discovery to a defendant.

IV. The Legislative Intent of Section 2-402 Supports Reversal of the Lower Courts' Rulings

Respondent Bakir argues in his brief that "[e]liminating "frivolous" lawsuits is one purpose of the statute" to support his argument that a 2-402 motion to convert should be analyzed in terms of the elements of the cause of action plaintiff has asserted. Resp. Br. p. 16, 36. Bakir has interpreted the purpose of "eliminating frivolous lawsuits" as the legislature enacting Section 2-402 to prevent frivolous lawsuits against physicians *after* they have been named as respondents in discovery. However, this interpretation of the legislative intent of 2-402 is erroneous.

The legislative history of 2-402 indicates it was created to "provide plaintiff's attorneys with a means of filing medical malpractice suits without naming everyone in sight as a defendant." *Moscardini v. Neurosurg, S.C.*, 206 Ill.Dec. 855, 859 (1994), citing *Clark v. Browkaw Hospital*, 81 Ill.Dec. 781 (1984). The legislature wanted to allow, and in fact encourage, plaintiffs in medical malpractice cases to involve treating physicians, who may either be liable for plaintiffs' injuries or have information regarding the case, in the litigation without burdening them with the label of "defendant." *Id.* Notably, the legislature believed naming potentially liable physicians as defendants for purpose of obtaining discovery from them in a medical malpractice suit contributed to the "spiraling costs of medical malpractice insurance." *Id.*

Bakir cites no caselaw which supports his contention that 2-402 was enacted with the intent of deterring frivolous lawsuits by placing an increased burden on the plaintiff moving to convert a respondent in discovery to a defendant verses a plaintiff who filed suit

against the physician at the outset. In fact, courts in Illinois have reasoned "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 as defendants. *Ingle v. Hospital Sisters Health System*, 96 Ill.Dec. 325, 328 (1986). The courts have further reasoned plaintiffs would continue to name physicians as defendants rather than respondents in discovery if a high burden was required to convert respondents to defendants. *Id.*

In enacting 2-402, the legislature provided plaintiffs with options: file suit against a defendant or name him as a respondent in discovery. The legislature wanted to encourage naming potential physician defendants as respondents in discovery, not for the benefit of the plaintiff, but for the benefit of physicians, and the medical community as a whole, in order to curb malpractice insurance costs. To continue to encourage plaintiffs to choose to name physicians as respondents in discovery rather than defendants, the burden to convert such respondents to defendants should be found to be no higher than the burden to name the physician as a medical malpractice defendant at the outset pursuant to 2-622.

Contrary to Bakir's argument, upholding the lower court's interpretation of the burden required to convert a respondent in discovery to a defendant would not support the legislative intent of 2-402 to prevent the filing of frivolous lawsuits. Rather, requiring the plaintiff to present substantially more evidence to convert a respondent in discovery to a defendant than to name him in her initial complaint will not only thwart the legislature's intent of preventing the filing of frivolous lawsuits against potentially liable physicians, but will essentially gut 2-402 rendering it an unused and unusable statute.

CONCLUSION

For the reasons set forth herein, and in the Brief and Appendix of Appellant, the Appellant respectfully requests the Supreme Court of Illinois reverse the judgement of the Court of Appeals, Fourth District and remand this matter to the Circuit Court for the Seventh Judicial Circuit, Sangamon County, with direction to allow plaintiff to convert Mouhamad Bakir, M.D. from a respondent in discovery to a defendant.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages 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, and the certificate of service, is 11 pages.

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned certifies that the foregoing Brief of Appellant we electronically filed with the Illinois Supreme Court on **December 30, 2022**, and on that date a copy of the same was sent via electronic mail to the following counsel of record at the e-mail addresses below:

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