General No. 123152

IN THE
SUPREME COURT OF ILLINOIS

SCARLETT PALM,	)	On Appeal from the Appellate Court
	)	of Illinois, Third District
Plaintiff-Appellant,	)	Case No. 3-17-0087
	)	
v.	)	
	)	There heard on appeal from the
RUBEN HOLOCKER,	)	Circuit Court of the Tenth Circuit,
	)	Marshall County, Illinois
Defendant-Appellee.	)	Case No. 2016 L 5
	)	
KARL BAYER,	)	Honorable Thomas A. Keith and
	)	Honorable Michael P. McCuskey,
Contemnor-Appellee.	)	Judges Presiding

BRIEF OF DEFENDANT-APPELLEE AND CONTEMNOR-APPELLEE, KARL BAYER

ORAL ARGUMENT REQUESTED

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I. POINTS AND AUTHORITIES

II. INTRODUCTARY PARAGRAPH

This matter is on appeal from the Third District Opinion in *Palm v Holocker,* 2017 IL App (3rd) 170087. In *Palm*, the Third District vacated a finding of direct civil contempt for noncompliance with a discovery order. This contempt was invited by Karl Bayer, Contemnor-Appellee, as part of a proper procedure to seek immediate appeal of a discovery order which was not otherwise subject to interlocutory appeal as a matter of right. The particular discovery dispute regarded whether the Defendant has put his health at issue such that the Plaintiff might discover and obtain Defendant's medical records. The Third District found the Defendant did not, by the mere fact of being a defendant, make his health an issue in the litigation or forfeit his physician-patient privilege. Therefore, Defendant's health, and discovery of his privileged medical information, were not to be part of the lawsuit against him. From that holding, Plaintiff appeals.

III. ISSUE PRESENTED FOR REVIEW

1. The issue presented to this Supreme Court for consideration is whether and under what circumstances a defendant puts his physical condition at issue in litigation so as to waive the physician-patient privilege and open his health records to discovery.

IV. STATUTES INVOLVED

Sec. 8-802. Physician and Patient. 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… (Source: P.A. 98-954, eff. 1-1-15; 98-1046, eff. 1-1-15; 99-78, eff. 7-20-15.)

V. FACTS

The Plaintiff filed her complaint on June 22, 2016. C0001-0002. The Plaintiff alleged that she was a pedestrian and that the Defendant failed to keep a proper lookout, failed to stop at a stop sign, and failed to yield the right of way to the Plaintiff. C0001-0002. The Complaint contains of one count: simple negligence while driving an automobile. The Defendant filed his answer and affirmative defense. C0013-0016. The Defendant claimed that the Plaintiff was guilty of comparative negligence but did not, in his answer or affirmative defense, claim that his physical condition impeded his ability to observe the Plaintiff, follow the rules of the road, or drive his vehicle. C1003-1006. The Plaintiff thereafter served upon Defendant interrogatories and a request for production. C0021. The Defendant answered the interrogatories with the exception of Interrogatory Nos. 21 and 22 which requested health care information and the reasons for which the Defendant had been treated during the previous ten years. C0041-0047:

> 21. State the name and address of any physician, ophthalmologist, optician or other health care professional who performed any eye examination of you within the last five (5) years, and the dates of each such examination.
>
> **ANSWER:** The Defendant objects to the question as it violates HIPAA, doctor-patient privilege, and the Defendant has not placed his medical condition at issue in this matter.

22. State the name and address of any physician or other health care professional who examined and/or treated you within the last ten (10) years, and the reason for such examination and/or treatment.

ANSWER: The Defendant objects to the question as it violates HIPAA, doctor-patient privilege, and the Defendant has not placed his medical condition at issue in this matter.

The Plaintiff filed a Motion to Compel and Strike Defendant's Objections to these Interrogatories. C0048-0051. Plaintiff argued that because Defendant required a physician's permission to operate a vehicle, any information regarding his health was relevant. C0048-0049. Plaintiff further argued that the broad scope of discovery in Illinois overcame Defendant's privilege objection. C-0049-0050. The court heard argument on the matter. R-0001 – R-0012. The court entered an order compelling the Defendant to provide answers to the Plaintiff's Interrogatory Nos. 20, 21, and 22 and further directed the Secretary of State to provide any and all medical information in its possession regarding the Defendant. C0058.

The Defendant refused to comply with the court's order and the Plaintiff filed a motion for sanctions pursuant to Supreme Court Rule 219. C0073-0077. Defendant filed his response to said motion on January 12, 2017. C0083-0086. After the Plaintiff's reply, C0088-0091, the court ruled that counsel for Defendant was in direct civil contempt and that said contempt could be purged by complying with its September 20, 2016 court order. C0103-0106. The court thereafter filed an order clarifying its January 17, 2017 ruling regarding the sanctions imposed for the failure to answer medical interrogatories. C0107.

From the orders of January 17, 2017 and January 25, 2017, this Defendant appealed. A united Third District panel reversed the trial court's orders on December 11,

2017 in its published opinion, *Palm v Holocker*, 2017 IL App (3rd) 170087. The appellate court held that under Section 8-802(4), defendants maintain their physician-patient privilege until they waive it by affirmatively placing their health at issue. *Palm* at ¶16. The Court observed that the complaint against Holocker was for his negligent driving: "he either drove negligently or he did not. If Holocker possessed a valid license and operated his vehicle as a reasonably prudent person would, then he is not liable for Palm's injuries regardless of his health or vision. If Holocker drove negligently and proximately caused Palm's injuries, then he is liable. He has not asserted a defense or any other affirmative matter that attributes his driving to a health condition." *Palm* at ¶26. Absent the defendant using his or her health as a defense to the charge of negligent driving, the court could not "imagine any automobile accident case in which a plaintiff could not argue that a defendant's negligent driving might be related to a vision or other health related problem, thereby requiring disclosure of defendant's medical records." *Palm* at ¶28. The Court rejected the Plaintiff's argument that possible relevance equates with being "an issue" with regard to the exception set forth in 8-802(4). Palm at ¶22.

As will be shown below, the plaintiff continues to argue that relevance overcomes the physician patient privilege in an injury case.

VI. ARGUMENT

Standard of Review

Generally, discovery rulings are reviewed for an abuse of discretion, but the applicability of a privilege is reviewed de novo. *Klaine v. S. Ill. Hosp. Servs.*, 15 N.E.3d 525 (5th Dist. 2014); *Cangelosi v Capasso*, 366 Ill.App.3d 225, 227, 851 N.E.2d 954 (2nd Dist. 2006)

Illinois Public Policy Protects the Privacy Rights of Patients

Illinois has a strong and broad public policy in favor of protecting the privacy rights of individuals with respect to their medical information. See *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581, 587, 499 N.E.2d 952 (1st Dist. 1986) (public policy is found in a state's constitution and statutes). Illinois law recognizes an individual's right to privacy and confidentiality in health care and medical records in the Medical Patient Rights Act, 410 ILCS 50/3(d), the Hospital Licensing Act, 210 ILCS 85/6.17(d), the AIDS Confidentiality Act, 410 ILCS 305/1, the evidentiary privilege regarding communications between physician and patient (735 ILCS 5/8-802), and an exemption to a Freedom of Information Act request where the request seeks patient records (5 ILCS 140/7). *Coy v. Washington County Hosp. Dist.,* 372 Ill.App.3d 1077, 866 N.E.2d 651, 657, (5th Dist. 2007). Public policy should forbid conduct that tends to harm an established and beneficial interest of society, the existence of which is necessary for the good of the public, even though that conduct is not expressly prohibited by a state's statute. *Petrillo v. Syntex Laboratories, Inc*., 148 Ill.App.3d 581, 587, 499 N.E.2d 952 (1st Dist. 1986); *Coy v. Washington County Hosp. Dist*., 372 Ill.App.3d 1077, 866 N.E.2d 651 (5th Dist. 2007).

The importance of a patient's right to privacy in his or her medical information has also been recognized in numerous judicial opinions. See *Parkson v. Central DuPage Hospital*, 105 Ill.App.3d 850, 853-54, 435 N.E.2d 140 (2nd Dist. 1982) (a hospital is mandated to assert the physician-patient privilege to ensure that the patients' records will be protected in accordance with the intention of the statute); *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581, 588, 499 N.E.2d 952 (1st Dist. 1986) (an ex parte

conference between defense counsel and a plaintiff's treating physician jeopardizes the sanctity of the physician-patient relationship and, therefore, is prohibited as being against public policy); *Reagan v. Searcy*, 323 Ill. App.3d 393, 398, 751 N.E.2d 606 (5th Dist. 2001) (the medical records of non-parties are protected by the physician-patient privilege). Individuals have a right to, and an expectation of, privacy related to their medical information, and this right and expectation of privacy is reflected in our public policy. *Coy v. Washington County Hosp. Dist*., 372 Ill.App.3d 1077, 866 N.E.2d 651, 657 (5th Dist. 2007).

The physician-patient privilege is codified in Section 8-802 of the Code of Civil Procedure. *Tomczak v. Ingalls Memorial Hospital*, 359 Ill.App.3d 448, 452, 834 N.E.2d 549 (1st Dist. 2005). The privilege is designed to help patients feel comfortable when making disclosures to their physicians and to protect their privacy from invasion. *Tomczak*, 359 Ill.App.3d at 452, 834 N.E.2d 549; *Giangiulio v. Ingalls Memorial Hosp*., 365 Ill.App.3d 823, 850 N.E.2d 249,257 (5th Dist. 2006).

As will be shown in the arguments below, the Defendant has not placed his condition at issue such as to waive the privilege or come within its exceptions, nor can a plaintiff's pleadings put a defendant's health at issue such that the privilege yields. Further, the mere fact that a discovery request can be made does not require that said request overcomes the public policy of the state protecting the information sought after. Finally, neither relevance nor materiality to the issues sought to be proved will forfeit a defendant's privacy under Illinois Law. If any lawsuit against a patient opens up their records to scrutiny, then the public policy for the privilege no longer exists. Any plaintiff having a theory that the defendant's records may hold information that may be relevant to

liability would be able to obtain all of a defendant's medical information against his will. No court in Illinois has ever made such a holding.

A. THE PHYSICIAN PATIENT PRIVILEGE IS NOT WAIVED, AND THE EXCEPTION TO THE PRIVILEGE IN 8-802(4) DOES NOT COME INTO PLAY UNLESS DEFENDANT PLACES HIS PHYSICAL CONDITION AT ISSUE.

Illinois case law is clear that in a civil action concerning personal injury, it is the defendant only that can make his or her health an issue in the case. There is no conflict among the civil cases and the line of criminal cases which note that a defendant's health is at issue when the statute under which he is charged makes the physical condition an element of the offense.

i. In a civil action, it is the defendant who must inject his health at the time of the accident into the lawsuit for it to be an issue in the litigation.

The Defendant answered the Plaintiff's complaint and denied liability. In Mr. Holocker's affirmative defense, he alleged comparative negligence on the part of the Plaintiff. Nothing that the Defendant has done in defending this matter has put his physical condition at issue. Therefore, the physician-patient privilege has not been waived. *Kraima v. Ausman*, 365 Ill.App.3d 530, 850 N.E.2d 840 (1st Dist. 2006); *Pritchard v. Swedish American Hospital*, 191 Ill.App.3d 388, 547 N.E.2d 1279 (2nd Dist. 1989). Both of these cases are still good law, were logically decided, and do not conflict with any other appellate case law.

In *Kraima*, the plaintiff filed a wrongful death action against the doctor who performed surgery on the plaintiff's wife. 850 N.E.2d at 842. The doctor testified at his deposition that he had been diagnosed with arthritis which caused him to stop performing

surgery. *Id.* The plaintiff thereafter amended her complaint alleging that the defendant was physically limited by arthritis when he performed surgery on the plaintiff's wife in August of 2000. 850 N.E.2d at 843. The Circuit Court ordered the defendant to produce a copy of a medical disability claim that he had submitted to his employer. *Id.* The trial court found that the disability file contained facts and information that went to the issue the plaintiff sought to establish with respect to defendant's physical limitations. *Id.* Upon defendant's refusal to produce said file, counsel for the defendant was found in contempt and an appeal ensued. *Id.*

The Appellate Court rejected the plaintiff's claim on appeal that the defendant had placed his physical condition at issue. 850 N.E.2d at 846. Neither the plaintiff's pleading nor the defendant's testimony at his deposition admitting a diagnosis of arthritis served *either* to put the defendant's health at issue or waive the physician-patient privilege. *Id*. Of note, neither did the defendant's filing his separate disability claim for benefits waive the privilege for *Kraima's* unrelated civil action.

In *Pritchard v. Swedish American Hospital*, 191 Ill.App.3d 388, 547 N.E.2d 1279 (2nd Dist. 1989), plaintiffs brought an action for medical malpractice against Swedish American Hospital and several of its doctors. The trial court ordered disclosure of health information regarding one of the defendant physicians. 191 Ill.App.3d at 392, 547 N.E.2d at 1280. On appeal, the plaintiffs argued that the exception to the physician-patient privilege applied (now at 735 ILCS 5/8-802 (4)) for "all actions brought by or against the patient…wherein the patient's physical or mental condition is an issue." 191 Ill.App.3d at 404, 547 N.E.2d at 1288. The *Pritchard* court noted that "for this exception to apply, the patient, Dr. Runstrom, *rather than the plaintiffs*, must have affirmatively

placed his physical condition at issue." 191 Ill.App.3d at 405, 547 N.E.2d at 1289. The court concluded that Dr. Runstrom, in merely defending the complaint against him, had not placed his physical condition at issue. Dr. Runstrom's health, like Dr. Ausman's, was not an issue absent his making it an issue to be decided in the litigation.

Civil cases wherein the defendant's health was found to be "an issue" similarly looked to whether the defendant had, by affirmative pleading, put his health at issue, a fact to be decided by the litigation. *Doe v. Weinzweig,* 28 N.E.3d 895 (1st Dist. 2015); *Burns v. Grezeka*, 155 Ill.App.3d 294, 299. 508 N.E.2d 449 (2nd Dist. 1987). The case of *Doe v. Weinzweig,* 28 N.E.3d 895 (1st Dist. 2015), is an illustration of a defendant affirmatively placing his physical condition at issue. In *Doe,* the plaintiff filed a complaint alleging that the defendant had infected her with a communicable disease. 28 N.E.3d at 898. The defendant filed a motion to dismiss which attached medical records containing a lab report and an affidavit that he had undergone a battery of tests and received negative test results for the disease. 28 N.E.3d at 899. The Appellate Court held that by the defendant's filing an affidavit regarding his physical health and submitting medical records and reports, he had put his physical condition at issue in the litigation. The court found that the defendant had gone far beyond merely denying the allegations of the plaintiff's complaint. 28 N.E.3d at 902.

Similarly, in in *Burns v. Grezeka*, 155 Ill.App.3d 294, 299. 508 N.E.2d 449 (2nd Dist. 1987), the defendant administrator of decedent's estate had plead in an affirmative defense that decedent's physical condition, not negligence, had caused the accident. "In its answer, defendant alleged as an affirmative defense that Kinzey had suffered from a sudden illness which was the proximate cause of the collision." *Burns* v. *Grezeka,* 155

Ill.App.3d at 296. The trial court granted summary judgment for the defendant on this issue and the Appellate Court reversed. The *Burns* court observed:

> Both parties acknowledge that an unforseeable sudden illness which renders a driver incapable of controlling his vehicle is an "Act of God" and can preclude tort liability for a resulting collision. (See Hoggatt v. Melin (1961), 29 Ill.App.2d 23, 31, 172 N.E.2d 389.) However, we cannot say that the evidence demonstrates as a matter of law in this case that the rupture of Kinzey's aneurysm caused the accident.

Through the affirmative defense, and the motion for summary judgement based upon the medical evidence of the decedent driver's health, the medical condition was certainly put "at issue" by the defense.

If Dr. Ausman's testimony that he had arthritis, coupled with the plaintiff's complaint in *Kraima,* did not trigger the exception to physician/patient privilege, neither does Holocker's interrogatory answer concerning his diabetes. The defendant herein has most assuredly not put his physical condition at issue or made his condition "an issue." In the present action, the Defendant has answered an interrogatory disclosing that he needed a doctor's letter to drive. However, even the information with the Secretary of State's Office is confidential and not open to discovery. The Illinois Motor Vehicle Code provides that:

> (625 ILCS 5/6-908) (from Ch. 95 1/2, par. 6-908)
>
> Sec. 6-908. Confidential information. As provided in subsection (j) of Section 2-123 of this Code, all information furnished to the Secretary or Board, the results of all examinations made at their direction, and all medical findings of the Board shall be confidential and for the sole use of the Board and the Secretary which may have access to the same for the purposes as set forth in this Act. Except as provided in this Section, no confidential information may be open to public inspection or the contents disclosed to anyone, except the person under review, and then only to the extent necessary to comply with a request for discovery during the hearing process, unless so directed by a court of competent jurisdiction. If the Secretary receives a medical report regarding a driver that does not address a medical condition contained in a previous medical report, the

> Secretary may disclose the unaddressed medical condition to the driver or his or her physician, or both, solely for the purpose of submission of a medical report that addresses the condition. (Source: P.A. 97-229, eff. 7-28-11.)

The Defendant did not, however, assert any physical or mental condition that impaired his driving as a defense to the lawsuit. Furthermore, as pointed out below, the Plaintiff cannot, by pleadings, force the Defendant to either put his physical condition at issue or waive the physician-patient privilege. If such could be done by mere allegations of a plaintiff, one must wonder, along with the Third District, whether there would ever be a case without medical discovery and depositions regarding the defendant's health at the time of the accident.

ii. In the criminal line of cases, courts have uniformly held that the defendant's physical condition is "an issue" when the defendant's physical or mental condition at the time of the crime is an element of the offense to be proven.

The confusion of the Plaintiff between "relevant to litigation" and "an issue in the litigation" explains why Plaintiff cannot reconcile the allegedly "disparate" holdings of DUI and criminal prosecution and civil injury litigation with respect to the physician-patient privilege. Plaintiff posits that *Kraima* and *Prichard* and no longer good law in light of more recent holdings in *People v. Krause*, 273 Ill.App.3d 59, 651 N.E.2d 744 (3rd Dist. 1995) or *People v. Botsis*, 388 Ill. App. 3d 422, 902 N.E.2d 1092 (1st Dist. 2009).

The plaintiff argues that because there is no "affirmatively placed in issue" requirement tagged onto the language of 8-802(4), possible "relevance" is what must

make defendant's physical condition an issue[1]. As pointed out above, in *Burns v. Grezeka*, 155 Ill.App.3d 294, 299 (2nd Dist. 1987), the defendant plead its driver's health condition as an issue in its affirmative defense. Why, then, is there a difference between the criminal and DUI cases? And why has the plaintiff put her condition at issue merely by filing suit? The difference between "relevant to" and "an issue in" explains.

Courts have often commented, when ruling on issues of privilege, that confidential records would indeed be relevant and material to the issues involved. Unfortunately for plaintiffs, privileges often act to bar what is clearly relevant and material information to a case. *House v. Swedish American Hospital*, 206 Ill.App.3d 437, 564 N.E.2d 922 (2nd Dist. 1990); *Laurent v. Brelji*, 74 Ill.App.3d 214, 392 N.E.2d 929 (4th Dist. 1979). Implicit in every privilege is the assumption that the privileged matter may indeed be highly probative of the issues in dispute. *Laurent*, 74 Ill.App.3d at 217, 392 N.E.2d at 931. Because "relevance" alone clearly cannot overcome a privilege, "relevance" and "at issue" are not the same.

In the context of a DUI or a reckless homicide, an element of the charges themselves are based upon the criminal defendant's physical condition. In all of the cases cited by Plaintiff, *People v. Botsis*, 388 Ill. App. 3d 422, 902 N.E.2d 1092 (1st Dist. 2009); *People v. Popeck*, 385 Ill. App. 3d 806, 899 N.E.2d 324 (4th Dist. 2008); *People*

[1] Plaintiff complains in her brief that she never "affirmatively placed her condition at issue" and appears to complain that defendant's discovery into her physical condition before, during, and after the accident is salacious and unfair. However, Illinois has long held that the plaintiff's filing of suit for personal injuries waives physician-patient privilege, see *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581, 499 N.E.2d 952 (1st Dist. 1986). The change in Plaintiff's physical condition (allegedly for the worse) caused by the accident is an element of the Plaintiff's cause of action. Additionally, Plaintiff is as free as Defendant to object if she perceives over-reaching on the part of Defendant's discovery request or subpoena.

v. Wilber, 279 Ill.App.3d 462, 664 N.E.2d 711(4th Dist. 1996); *People v. Nohren*, 283 Ill.App.3d 753, 670 N.E.2d 1208 (4th Dist. 1996); and *People v. Krause*, 273 Ill.App.3d 59, 651 N.E.2d 744 (3rd Dist. 1995), the courts discussed precisely why the defendant's physical condition was an element of the particular offense charged.

In *Botsis*, the charges involved aggravated reckless driving and reckless homicide. 902 NE 2d at 1094. The court discussed the criminal definition of recklessness as it pertained to the charges. 902 NE 2d at 1097. In ruling on whether the exception in 8-802(4) applied, Judge Wolfson held that "[b]ecause his physical and mental condition during the crash is relevant in determining the issue of recklessness, the privilege exception applied to defendant's disclosures to the paramedics on the scene, Drs. Dahman, and Saifuku, as well as to his related medical records." It was the criminal statute under which the defendant was charged that put his condition at issue as an element of the offense.

In *People v. Popeck*, 385 Ill.App. 3d 806, 899 N.E.2d 324 (4th Dist. 2008), the court noted the history of medical records being discoverable and admissible in a DUI prosecution and stated "a DUI is an *`action brought against the patient' in which the patient's physical or mental condition is an element of the offense and therefore at issue." Nohren,* 283 Ill.App.3d at 762, 670 N.E.2d at 1214, quoting 735 ILCS 5/8-802 (4.1), (9) (West Supp.1995). Section 8-802(4), therefore, allows release of medical information other than written results of blood-alcohol test." *Popeck*, 899 N.E. 2d at 327 (*Emphasis Added*). In accord are *People v. Wilber*, 279 Ill.App.3d 462, 468, 664 N.E.2d 711(4th Dist. 1996) ("Further, *because defendant's mental and physical conditions are directly at issue in a DUI case*, his statement to the paramedics that he "had 6 to 8 beers prior to the

collision" falls within the exception (*emphasis added*)) and *People v. Nohren*, 283 Ill.App.3d 753, 670 N.E.2d 1208 (4th Dist. 1996) (as quoted in *Popeck, above*); *People v. Krause*, 273 Ill.App.3d 59, 62, 651 N.E.2d 744, (3rd Dist. 1995) (patient's mental and physical "condition," which is *irrefutably an element of the offense* and an issue in any prosecution for driving under the influence).

In *Krause,* the Third District was the first appellate court to recognize the applicability of the 8-802(4) exception to physician-patient privilege to DUI prosecutions. Multiple courts have followed this distinction, up and through the First District case of *People v. Botsis*, 388 Ill. App. 3d 422, 902 N.E.2d 1092 (1st Dist. 2009), cited by the plaintiff in her brief. As the Plaintiff points out, the First District also ruled in *Kraima v. Ausman*, 365 Ill.App.3d 530, 850 N.E.2d 840 (1st Dist. 2006). In fact, *Kraima* was cited favorably by Justice Wolfson, in his *Botsis* decision, 902 N.E. 2d at 1101, and he cited as well the Third District's *Krause* decision. 902 N.E. 2d at 1102. The plaintiff implies that the First District *Botsis* decision tacitly overruled the First District *Kraima* decision. If *Kraima* and *Krause* conflict, how can they both be cited for support in the *Botsis* opinion?

One explanation is that Justice Wolfson was unaware of the facts of the *Kraima* decision when he cited it in support of his *Botsis* opinion. This is doubtful, as he was a concurring justice in the *Kraima* opinion. *Kraima,* 850 N.E. 2d at 846 (Reversed and remanded. GARCIA, P.J., and WOLFSON, J., concur.) It seems incongruous for the Plaintiff to suggest that in the *Bostis* opinion, Judge Wolfson both cited for support and overruled *Kraima,* a decision upon which he concurred three years earlier, and then forgot to mention that he was overruling himself.

The difference between the lines of cases is the answer to the question: "How does the party's physical condition become an issue?" In the criminal line of cases, it becomes an issue if the defendant's physical condition at the time of the offense is an element of the offense charged. In civil cases, it becomes an issue if the defendant makes it an issue by pleading an "affirmative" act. This is simply illustrated by observing, as the appellate court herein did, that the Defendant's driving was either negligent or not, regardless of Holocker's physical condition. However, had Holocker been charged with a DUI, the state could only prove him guilty if they proved a particular physical condition, i.e., impairment by drugs or alcohol.

As illustrated above, there is no conflict between the holdings of *Krause* and its progeny in the criminal arena and the civil cases which hold that the mere filing of a suit in negligence against a defendant does not put defendant's physical condition at issue. *Pritchard v. Swedish American Hospital*, 191 Ill.App.3d 388, 547 N.E.2d 1279 (2nd Dist. 1989)[2] and *Kraima v. Ausman*, 365 Ill.App.3d 530, 850 N.E.2d 840 (1st Dist. 2006) both deal directly with the issue of whether a defendant in a civil case puts his physical condition "at issue" solely by virtue of being a defendant. *Krause* and its lineage deal

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[2] *In Re Anders*, 304 Ill.App.3d 117, 123 (2nd Dist. 1999) is similarly not inapposite. The elements of proof that the state had to meet for a finding under the sexually violent persons commitment act put Ander's physical condition at issue. The court did not discuss the 8-802 (4) exception in the context of a civil case and did not analyze the exception at all. Therefore, it can hardly be argued that *In Re Anders* overruled *Pritchard v. Swedish American Hospital.* The entirety of Anders' discussion is:

> "Section 8-802 provides, in pertinent part: "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 * * * wherein the patient's physical or mental condition is an issue * * *." 735 ILCS 5/8-802(4) (West 1994). *Here, respondent's mental condition was an issue that was the subject of the commitment proceedings.* "

(Emphasis Added.)

with criminal cases wherein defendant's mental and physical "condition," is *an element of the offense* with which the defendant is charged. Were Holocker to file an affirmative defense of "act of God" or "medical emergency" then he would have the burden of proof on an issue in the case. Plaintiff would then be entitled to discovery on that issue in order to test defendant's allegations and proofs.

Contrary to the plaintiff's contention, both *Kraima* and *Pritchard* discussed the plain language of the exception, but answered the question for a civil case: "How does a defendant's physical condition become an issue?" It is not the *Kraima* and *Pritchard* courts' misreading of *Petrillo* that lead them to a differing conclusion about when a civil defendants' physical condition is at issue, but an understanding of the proper question to ask: "How does a party's physical condition become an issue in this particular proceeding?"[3] Because there is no inconsistency, this Court need not choose between the reasoning of the criminal and DUI line of cases and the civil. There are no disparate results. In this matter, a civil suit against a defendant involving negligence, the defendant only puts his physical condition at issue by an affirmative act of pleading. Otherwise, any defendant's physical condition is always at issue in any auto accident case, because it may be relevant. That is not the standard, and the Third District Appellate Court was correct in its reversal of the trial court's decision.

[3] Note that the Appellate Court in *Kraima*, the Supreme Court in *D.C. v. S.A.,* 178 Ill.2d 551, 687 N.E.2d 1032 (1997) and the Illinois Supreme Court Rules are of a singular mind on this issue. Illinois Supreme Court Rule 215(d)(1) (effective March 28, 2011) came with Committee Comments noting that, "[M]ere allegations are insufficient to place a party's mental or physical condition 'in issue.'"

iii. An issue does not equate to relevance, and plaintiff's pleadings cannot make defendant's heath "an issue."

As pointed out by the Appellate Court, plaintiff's arguments render the language "wherein the plaintiff's physical or mental condition is an issue" meaningless. If the "plain language" of the exception means what plaintiff asserts, the phraseology "(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" would not need "wherein the patient's physical or mental condition is an issue…" to modify it in any fashion. The exception could merely end at the word "estate." It cannot mean "relevance" because privileges often prohibit discovery of what might be relevant. Citation to Black's Law Dictionary aside, Holocker's health did not "give rise to this particular lawsuit." Further, the Plaintiff attempts to artfully change the *Botsis* and *Krause* holdings. Both cases hold that the defendant's physical or mental condition was an element of the charge, not *relevant to* an element of the charge. If the State fails to prove Botsis' mental condition required for recklessness under the statute, it fails to prove its charge. If the State fails to prove Krause's physical condition at the time of the offence, "impaired," then it fails to prove its charge. Note the consistency with the holdings in the civil line of cases. If *Weinzweig* fails to prove an element of his defense, his health at the time of his relations with the plaintiff, he fails to prove his pleaded defense that he was healthy and could, therefore, not given plaintiff a communicable disease. *Doe v. Weinzweig,* 28 N.E.3d 895 (1st Dist. 2015). If *Grezeka* fails to prove an element of her "act of God" defense, that her decedent driver passed from an unexpected aneurysm, she fails to prove her affirmative defense. In neither *Doe v Weinzweig* nor *Burns v. Grezeka* does the plaintiff's cause of action rely on discovery of the defendant's

health or of direct proof of same at the time of the occurrence, and in neither case could the defendant ask for judgment because the plaintiff failed to prove defendant's health as an element of the cause of action.[4]

Plaintiff cites the Restatement for her argument that "**Ruben's physical condition is an issue because it defines the standard of care he has a duty to maintain**," but the Defendant has not sought to alter his standard of care due to his physical or mental condition as if he was a minor or entitled to some other special consideration. This argument was not presented to the trial or the appellate courts. Perhaps this argument has been or should be waived. Defendant Holocker further would point out to this court that the element of "duty" and standard of care are certainly not "an issue" right now in this case, because the Plaintiff has failed to plead any duty or standard of care whatsoever in her complaint. C0013-0016. However, this argument is specious for other reasons.

Plaintiff's argument assumes an infinitude of gradations of duty based upon a defendant's physical condition. Is the defendant 40, 50, 70? Is the defendant's blood pressure low or high? Are his reflexes strong or weak? Is the strength of his hips, knees, or legs sufficient to apply the brakes? Are his arms strong enough and his reflexes fast enough to avoid a collision? The appellate court herein rightly asked whether there would be any case in which the defendant's physical health would *not* be an issue. What about a premises liability case? Could the defendant see the defect, did some physical condition prevent him from repairing or repairing properly or repairing fast enough?

[4] Were the defendant in either case asking the court for judgment because the plaintiff could not prove they were "unhealthy" at the time of the occurrence while rejecting a plaintiff's request for discovery, then the defendant would be using the privilege as a sword as opposed to a shield, and the case would be into *D.C. v. S.A.,* 178 Ill.2d 551, 687 N.E.2d 1032 (1997) territory.

This argument is the same as all of plaintiff's other arguments, garbed in different clothing: because Holocker was in an accident, his health is at issue down to a molecular level because his health may affect his driving.

8-802(4) provides that it is only an issue if Holocker puts it out there as an issue. By page 28 of Plaintiff's brief, she has substituted "relevant" for "at issue," and one might well ask why, if "at issue" is the same as "relevant," the legislature did not simply use that term in 8-802(4).

Plaintiff further asserts that the dictionary definition of "issue" is a point in dispute. Plaintiff never elucidates how a point in dispute becomes a point in dispute or "an issue" other than claiming that it is relevant. However, as the appellate court pointed out, if merely filing suit obviated the privilege, the legislature would have simply stated that the privilege doesn't apply to any party in litigation.

Nor has the Plaintiff explained how her asserted interpretation does not result in the exception swallowing the rule. Given Plaintiff's argument, it is hard not to imagine how any defendant's physical, mental, or emotional condition would not automatically become "an issue" in any litigation concerning any matter brought by any plaintiff. "In evaluating the credibility of a witness, you may consider that witness' ability and opportunity to observe, memory…" IPI 2d 1.01. Was relevance the consideration, would not a party's physical condition be relevant to their ability to observe or their memory? Might not a party's physical condition be automatically relevant in any case involving the party's ability to react, mentally or physically, to what was happening? Therefore, in litigation, as the court pointed out, either the defendant's physical condition is always at issue and the words "at issue" mean nothing, or "at issue" qualifies what or how the

defendant's physical condition becomes "a point in dispute." The appellate court quite reasonably considered that it becomes a point in dispute (to use the plaintiff's term) when the physical condition of the defendant is made a part of the defense.

As succinctly summarized by the panel in this matter, when the defendant puts forth his or her physical condition as an element of the defense, the plaintiff has the right to test the claim's merit by obtaining the defendant's medical records, just as defendants have the right to contest plaintiffs' personal injury claims by obtaining plaintiffs' medical records. *Palm v Holocker,* 2017 IL App (3d) 170087 (2017) at ¶25. As Holocker has not asserted a defense or any other affirmative matter that attributes his driving to a health condition, his health is not an issue in the case, and Plaintiff is foreclosed from invading his medical privacy. *Palm v Holocker*, 2017 IL App (3d) 170087 (2017) at ¶26. A plaintiff cannot waive someone else's privilege by merely filing a lawsuit or making certain allegations. *Palm v Holocker*, 2017 IL App (3d) 170087 (2017) at ¶24. In accord, *D.C. v. S.A.,* 178 Ill.2d 551, 687 N.E.2d 1032 (1997) (pleadings, which may be amended or abandoned at any time, are a poor vehicle with which to put a party's physical or mental condition at issue, "[p]laintiff may amend his complaint at any time to drop this allegation." 687 N.E.2d at 1032).

Note that the Appellate Court in *Kraima*, the Supreme Court in *D.C. v. S.A.,* 178 Ill.2d 551, 687 N.E.2d 1032 (1997) and the Illinois Supreme Court Rules are of a singular mind in this regard. Illinois Supreme Court Rule 215(d)(1) (effective March 28, 2011) came with Committee Comments noting that, "[M]ere allegations are insufficient to place a party's mental or physical condition 'in issue.'" The plaintiff's efforts to make anything of the phraseology of "at issue" versus "an issue" or "in issue" do nothing to

dull the point that merely filing a complaint (which makes allegations!) does not waive someone else's privilege. The Committee Comments could have said that "[M]ere allegations are insufficient to [***make or place***] a party's mental or physical condition [***an or at***] issue." Or the legislature could have made the exception to physician patient privilege read "wherein the patient's physical or mental condition is [***in or at or an***] issue…" and the sentences would still be grammatically correct without any change in meaning. Plaintiff spends two pages making irrelevant distinctions while missing the point. Neither case law nor the Supreme Court Rules allow mere allegations to overcome a medical privilege. If mere allegations are insufficient to put a defendant's physical condition at issue under Supreme Court Rule 215, then mere allegations are insufficient to put his condition at issue under Supreme Court Rule 213 interrogatories.

As noted above, the *Kraima* court specifically rejected a plaintiff's efforts to put defendant's medical condition at issue by filing an amended complaint which alleged that the defendant knew he had arthritis and was physically limited. 850 N.E.2d at 843. The Illinois Supreme Court has also recognized that pleadings, which may be amended or abandoned at any time, are a poor vehicle with which to put a party's physical or mental condition at issue. *D.C. v. S.A.,* 178 Ill.2d 551, 687 N.E.2d 1032 (1997). In *D.C. v. S.A.* the plaintiff's mental health records were the subject of a discovery dispute. The defendant asserted that said records would show that the pedestrian/vehicle accident was caused by the plaintiff's attempted suicide. 178 Ill.2d at 555. Though the Supreme Court, in that specific instance, found that the plaintiff could not use his privilege as a sword as opposed to a shield, it discussed at length defendant's argument that pleadings in this vehicle v. pedestrian case put plaintiff's mental health at issue. In this case, the

Defendant is not claiming excuse for his driving based on a physical condition he refuses to disclose. Holocker is not using the privilege as a sword.

As shown, even were the Plaintiff to plead that the Defendant's physical health contributed to his negligence, causing the accident, the public policy underpinning Illinois's physician-patient privilege would not cede. As seen above, when the Defendant does not interject his physical condition into a controversy, the Plaintiff cannot, by way of pleading or argument, interject Defendant's physical condition into the proceedings. Similarly, the mere ability to seek discovery of relevant and material information (or what one asserts may be relevant and material information) does not make that information discoverable such as to overcome a privilege as will be shown below.

B. THAT A QUESTION MAY BE ASKED DOES NOT MAKE THE ANSWER DISCOVERABLE.

The case of *House v. Swedish American Hospital,* 206 Ill.App.3d 437, 564 N.E.2d 922 (2nd Dist. 1990), illustrates that neither the Code of Civil Procedure nor Supreme Court Rules overcome a patient's medical privilege under Illinois law. In *House*, the plaintiff filed an action against the defendant alleging that a fellow patient at the hospital inflicted injuries upon her. 206 Ill.App.3d at 439, 564 N.E.2d at 924. The plaintiff sought any and all documents concerning the incident in question and also all documents or writings relating to the condition of the patient who assaulted the plaintiff. 206 Ill.App.3d at 339. The court denied the plaintiff access to the medical records of the patient and excluded other evidence from trial. It thereafter directed a verdict in favor of the hospital. 206 Ill.App.3d at 439.

The plaintiff appealed, arguing that its production request was appropriate as it was authorized under Section 8-402 of the Code of Civil Procedure and under Supreme Court Rule 201. 206 Ill.App.3d at 441-442, 564 N.E.2d at 925. The Code provided, in pertinent part, that "Circuit courts shall have power, in any action pending before them…to require the parties, or either of them, to produce books or writings in their possession…which contain evidence pertinent to the issue." Supreme Court Rule 201, also relied upon by the plaintiff, provided that "A party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts."

The plaintiff asserted that the records of the patient were discoverable under these provisions and thus, any information concerning defendant's knowledge contained in the medical records would be relevant to the case. *Id.* Though purportedly allowed by the broad scope of discovery as set forth in Supreme Court Rule 201 and Section 8-402 of the Code of Civil Procedure, the court agreed with defendant that the physician-patient privilege protected the patient's medical records from being disclosed. 206 Ill.App.3d at 443-444, 564 N.E.2d at 926.

The plaintiff's petition for leave suggested that the appellate court's ruling somehow nullified form interrogatories approved by this Supreme Court. This is patently untrue. Though the suggested interrogatories under Supreme Court Rule provide that the Plaintiff may ask for Defendant's health information, they do not in themselves vitiate the

Defendant's privilege. *House v. Swedish American Hospital,* 206 Ill.App.3d 437, 564 N.E.2d 922 (2nd Dist. 1990). Even a cursory examination, from the Plaintiff's perspective, of the Supreme Court Rule interrogatories would indicate that this is so. For example, the form interrogatories numbers 16 and 17 request the contents of conversations with any person regarding the occurrence complained of and the statements made by any person regarding the occurrence. The fact that these interrogatories are suggested in no way also suggests that the plaintiff waives the husband and wife privilege, 735 ILCS 5/8-801, clergy privilege, 735 ILCS 5/8-803, accountant's privilege, 225 ILCS 450/27, or the attorney-client privilege, nor would anyone suggest that a defendant's Fifth Amendment privilege is waived by the mere fact of a lawsuit being filed against him. *Orlove v. Novick*, 78 Ill.App.3d 1141, 398 N.E.2d 170 (1st Dist. 1979). The plaintiff/appellee would argue "the fact that the questions are in the form interrogatories in no way means that the privilege is a nullity," and the plaintiff would be exactly right. In the case herein, the form questions of defendant in no way nullify any privileges that defendant may have.

The Appendix to Rule 213 discusses the use of interrogatories and provides that "[a] party may combine form interrogatories with other interrogatories, subject to applicable limitations as to number. *A party shall avoid propounding a form interrogatory which has no application to the case."* S. Ct. R. 213 Appendix (emphasis added). Therefore, the Plaintiff's argument that obviating certain interrogatories where the defendant's health is not an issue somehow contradicts the spirit or intent of the

Supreme Court Rules is specious, as the Supreme Court itself has recognized that not all form interrogatories propounded will have application to every case.[5]

As indicated, the Defendant's privilege of keeping his medical records and physical condition confidential, if he has not placed them at issue, is not overcome by the scope, breadth, and liberality of discovery. Illinois law has long recognized that though information might be relevant and material, and even extremely helpful, it will not overcome the bulwark of Plaintiff's privilege.

C. RELEVANCE AND MATERIALITY TO AN ACTION DO NOT OVERCOME PRIVILEGE.

Courts have often commented, when ruling on issues of privilege, that confidential records would indeed be relevant and material to the issues involved. Unfortunately for plaintiffs, privileges often act to bar what is clearly relevant and material information to a case. *House v. Swedish American Hospital*, 206 Ill.App.3d 437, 564 N.E.2d 922 (2nd Dist. 1990); *Laurent v. Brelji*, 74 Ill.App.3d 214, 392 N.E.2d 929 (4th Dist. 1979). Implicit in every testimonial privilege is the assumption that the privileged matter may indeed be highly probative of the issues in dispute. *Laurent*, 74 Ill.App.3d at 217, 392 N.E.2d at 931.

Even if the Plaintiff were to demonstrate to this court that denial of the information sought would foreclose the Plaintiff from proving a meritorious case, the

[5] Plaintiff, in her petition for leave, appeals to the supposed practice of merely having a secretary or paralegal print out form interrogatories as support for her argument that the decision should be reversed. "These interrogatories are routinely served throughout Illinois, requesting medical information from both plaintiffs and defendants… These form interrogatories will now draw objections as a matter of course based on the Opinion's holding, complicating discovery throughout the state." PLA at 10-11. It should rather be a caution to practitioners to heed the advice of the Supreme Court that *a party shall avoid propounding a form interrogatory which has no application to the case.*

physician-patient privilege would stand. *Woodard v. Krans*, 234 Ill.App.3d 690, 700, 600 N.E.2d 477, 484 (2nd Dist. 1992): "Indeed, even were there no Section 2-622, the statutory restrictions on discovery of information regarding Dr. Krans' own treatment or the methods the Hospital took to protect its patients might well foreclose plaintiff from proving an otherwise meritorious case. However, as is true of exclusionary rules generally, the restrictions on discovery represent a considered judgment that interests of litigants such as plaintiff here must yield to other interests, in this case confidentiality, privacy and candid peer review within medical institutions. See *Pritchard*, 191 Ill.App.3d at 399, 404, 138 Ill. Dec. 658, 547 N.E.2d 1279."

Though Illinois case law deals with any number of privileges, there is no Appellate Court law which holds that the breadth of discovery or the search for relevant information can overcome a privilege. It is extremely clear from review of the Appellate Court decisions, no matter which privilege is concerned, that relevance and materiality cannot overcome Illinois public policy as set forth in Illinois case and statutory authority. As the Supreme Court observed in *D.C. v. S.A.*, relevancy and centrality are not decisive of whether a recipient has introduced such conditions as an element of his or her claim or defense. *D.C. v. S.A.,* 178 Ill.2d 551, 687 N.E.2d 1032, 1040 (1977).

D. THE APPELLATE COURT OPINION DOES NOT VIOLATE ANY RULES OF STATUTORY CONSTRUCTION; THE PHYSICIAN – PATIENT PRIVILEGE NEED NOT BE READ IN PLAINTIFF'S FAVOR

When one ignores the obvious difference between how a party's physical condition becomes an issue in a particular case, one can torture out various violations of statutory construction. However, as pointed out above, the plaintiff's construction does not answer the question, "Why is the dependent clause in the statute?" As my fifth-grade

teacher, Mrs. Monkemeyer, would point out, the dependent clause relies upon the independent clause for its context. The sentence, "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" is an independent clause and a complete sentence that stands on its own, and the dependent clause "**wherein the patient's physical or mental condition is an issue" ("wherein" being the subordinating conjunction)** is reliant on the independent clause to form a complete thought and relies on the former for its context. This is not a list of two things, as the Plaintiff supposes [patient/party + relevance]. This is one thing, and that is a suit wherein the patient's physical or mental condition is an issue. A DUI involves, as an element of proof, the defendant's physical condition was impaired. The Plaintiff's suit involves duty, breach of duty, proximate cause, and damages. It is completely unreliant upon proof of any aspect of the defendant's physical condition. The appellate court was right. If the Plaintiff's arguments were true, there is no need for the phrase "**wherein the patient's physical or mental condition is an issue."**

Plaintiff argues that statutes in derogation of common law must be strictly construed, which is a true statement as a general proposition of statutory construction. For principles of general statutory construction, she cites several cases that, while analyzing the privilege, do not do so in the context of a defendant in a personal injury case. She then misapplies a property rights case concerning statutory easements into an

alleged general rule that this court must construe the physician-patient privilege in a manner favorable to her arguments. This is not the case.

Plaintiff cites a case concerning the privilege in connection with a Department of Professional Regulation subpoena (*People ex rel. Dept. of Professional Regulation* v. *Manos,* 202 I11.2d 563, 570 (2002), and a case concerning regulations of the distribution of natural gas for a general proposition concerning statutory construction. (*Adams* v. *Northern Illinois Gas Co.,* 211 Ill.2d 32, 69 (2004)).

Beyond this analytical error, she further implies that her "right" to Defendant's medical records and information is the common law interest affected by the physician-patient privilege. However, no case is cited that the physician-patient privilege embodied by Section 735 ILCS 5/8-802 of the Code of Civil Procedure was enacted in derogation of Plaintiff's common law right to put Defendant's physical condition on trial. Rather, it was enacted because Illinois has a strong and broad public policy in favor of protecting the privacy rights of individuals with respect to their medical information. See *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581, 587, 499 N.E.2d 952 (1st Dist. 1986). This public policy is evident in multiple statutory protections related to personal health information. See Medical Patient Rights Act (410 ILCS 50/3(d), the Hospital Licensing Act (210 ILCS 85/6.17(d), the AIDS Confidentiality Act (410 ILCS 305/1), an evidentiary privilege regarding communications between physician and patient (735 ILCS 5/8-802), and an exemption to a Freedom of Information Act request where the request seeks patient records (5 ILCS 140/7).

Finally, no one has any vested right in a rule of evidence either in a civil or criminal matter. *People v. Love*, 310 Ill. 558, 563, 142 N.E. 204, 206 (1923). Even had

the privilege been codified in order to curtail a plaintiff's right of access to defendant's medical records, plaintiff ultimately loses no cause of action or other property right. With the above in mind, all of the Plaintiff's "12 errors of statutory construction" are, in fact, the Plaintiff misperceiving the issue in this case in 12 different ways.

E. THE COURT SYSTEM WILL CONTINUE TO WORK JUST FINE IF THIS COURT UPHOLDS DEFENDANTS' PHYSICIAN/PATIENT PRIVILEGE.

As noted, the Plaintiff in her petition for leave to appeal argued that secretaries everywhere were sending out form interrogatories that would be affected by this decision. Now in her brief, it is the thousands of drivers on Illinois roads who will suffer should Defendant's medical records remain privileged. Defendant-appellee has not commented on Plaintiff's other assertions not on the record or supported in the record, but Counsel for the Defendant has been successfully asserting privilege in answer to the form motor vehicle interrogatories since they were first published, and both plaintiffs and defendants and the public have done fine. Plaintiff proposes that judges throughout the state take on in camera review or protective orders for virtually every single defendant in every single injury case in order that plaintiffs can fish for issues. "So, Mrs. Kravits, the pain from your bunions kept you from applying the brakes as well as you might, isn't that true?" "Dr. Fishbone, you've examined the defendant's medical records, do you have an opinion within a reasonable degree of medical certainty whether Mrs. Kravits' bunions prevented her from stopping her vehicle in time?" As the Third District noted, either Mrs. Kravitz stopped her vehicle on time or she did not. She is no more liable if she didn't stop her vehicle because of her bunions or because of her negligence. A cottage industry of

medical record discovery, in camera examinations, and motions in limine is in the package along with Plaintiff's interpretation of 8-802(4).

VII. CONCLUSION

WHEREFORE, THE DEFENDANT-APPELLANT AND CONTEMNOR-APPELLANT RESPECTFULLY REQUEST THAT DECISION OF THE THIRD DISTRICT APPELLATE COURT BE AFFIRMED.

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APPELLANT

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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) 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), is 30 pages.

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General No. 123152

IN THE
SUPREME COURT OF ILLINOIS

SCARLETT PALM,	)	On Appeal from the Appellate Court
	)	of Illinois, Third District
Plaintiff-Appellant,	)	Case No. 3-17-0087
	)	
v.	)	
	)	There heard on appeal from the
RUBEN HOLOCKER,	)	Circuit Court of the Tenth Circuit,
	)	Marshall County, Illinois
Defendant-Appellee.	)	Case No. 2016 L 5
	)	
KARL BAYER,	)	Honorable Thomas A. Keith and
	)	Honorable Michael P. McCuskey,
Contemnor-Appellee.	)	Judges Presiding

NOTICE OF FILING / CERTIFICATE OF SERVICE

Please take notice that on May 25, 2018, the Defendant-Appellee submitted his **BRIEF OF DEFENDANT-APPELLEE AND CONTEMNOR-APPELLEE, KARL BAYER** electronically to the Supreme Court of Illinois for filing.

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that a copy of this Notice and the Response Brief were served on the below listed attorney of record, by mailing three copies thereof with proper first class postage affixed thereon at Elgin, Illinois, before 5:00 p.m. on May 25, 2018.

Christopher H. Sokn
KINGERY, DURREE, WAKEMAN & O'DONNELL ASSOC.
416 Main Street, Suite 915
Peoria, IL 61602-1166

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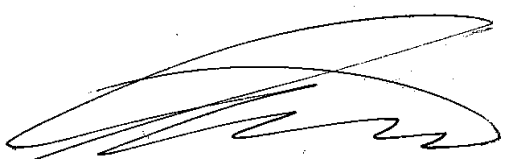
5/30/2018 1:25 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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.



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