Aylward Affirms Petrillo Progeny: Defense Counsel May Not Speak Ex Parte With Employees Unless Conduct is Basis for Liability

In its recent opinion in *Aylward v. Settecase and Midwest Physicians Group, Ltd.*, the Illinois Appellate Court for the First District affirmed the trial court’s decision barring counsel for the defendant medical clinic from engaging in *ex parte* communications with certain clinic employees. *Aylward v. Settecase*, No. 1–10–1939, 2011 WL 1679845 (Ill. App. 1st Dist. Apr. 29, 2011). Applying the principles of *Petrillo* and its progeny, the court held that the defense attorneys for the clinic may not speak *ex parte* with the plaintiff’s treating physicians who are employees and/or agents of the clinic, even if the physician is an employee or agent of the defendant, unless the treating physician’s conduct is a basis of that defendant’s liability. *Id.*, *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d at 581 (1986).

The physician-patient privilege is the foundation of the holding in *Petrillo*. In that case, which alleged products liability and not medical negligence, the plaintiff suffered injuries from allegedly defective baby food. Counsel for the defendant participated in *ex parte* communications with the plaintiff’s treating physicians, none of whom were alleged to have provided negligent care. The court found that a patient’s medical information provided to and gathered by physicians will not be disclosed to third parties without the patient’s consent. Therefore defense counsel is prohibited from engaging in *ex parte* communications with a plaintiff’s treating physicians. *Morgan v. County of Cook*, 252 Ill. App. 3d 947, 956 (1st Dist. 1993); *Petrillo*, 148 Ill. App. 3d at 581.

The defendants in *Aylward* were the plaintiff’s primary care physician and the physician’s employer, a multi-specialty clinic. *Aylward*, 2011 WL 1679845, at *1. The plaintiff was diagnosed with lung cancer in February 2007. His lawsuit alleged that the defendants should have diagnosed his cancer two years earlier. While the plaintiff was the physician’s patient, he also received care and treatment from several other employees of the clinic. The plaintiff alleged the clinic was liable based upon the conduct of “its agents, servants and/or employees.” But the complaint did not include the names of any other clinic employees other than the physician.

During discovery, counsel for the clinic sent a letter to the plaintiff’s attorney requesting permission to speak to various employees to discuss the care they had provided. The plaintiff’s counsel objected, asserting the care provided by the non-defendant employees was not the basis of the allegations in the complaint. Defense counsel then filed a motion for leave to engage in *ex parte* communications with these employees. Prior to a ruling on the motion, the plaintiff amended his complaint to allege negligence against the clinic only for the actions of the named physician defendant. The plaintiff removed the language from the original complaint alleging the clinic’s liability was “through its agents servants and/or employees” conduct. *Id.* at *2. The trial court granted the defendant’s motion for leave, and the plaintiff filed a motion to reconsider. The
court granted the motion to reconsider, prohibiting counsel for the clinic from engaging in \textit{ex parte} communications with the requested employees.

The defendants then appealed pursuant to Illinois Supreme Court Rule 308. The trial court certified the following question, which the First District accepted: “(w)hether counsel for co-defendant multi-specialty clinic, in a malpractice action, can communicate \textit{ex parte} with its employees whose actions may be the basis for liability against the clinic.” \textit{Aylward}, 2011 WL 1679845, at *1.

The \textit{Aylward} defendants argued that their attorneys should be allowed to engage in \textit{ex parte} communications with the clinic employees who were not alleged to be negligent in the original complaint because their care and treatment could be the basis for liability in the future. Specifically, the plaintiff might be allowed to add new claims pursuant to \textit{Porter v. Decatur Memorial Hospital}, 227 Ill. 2d 343, 882 N.E. 2d 583 (2008). \textit{Id.} at *2. In \textit{Porter}, the plaintiff sued his physician and the hospital alleging medical malpractice. After years of discovery and after the statute of limitations had passed, the plaintiff amended his complaint to add new claims against the hospital. Over the hospital’s objection, the trial court allowed the amendment, finding that the new claims related back to the original timely-filed complaint. On appeal, the Illinois Supreme Court agreed with the plaintiff, holding that a new claim against a defendant may be brought after the statute of limitations has expired, as long as the new claim bears a “sufficiently close relationship” with the original claim, both temporally and in general character with the factual allegations. \textit{Porter}, 227 Ill. 2d at 359.


The plaintiff in \textit{Ritter} was a patient at the defendant hospital when she fell from a gurney, sustaining injuries. \textit{Ritter}, 177 Ill. App. 3d at 315. The plaintiff brought a claim against the hospital alleging that its employee, a CT technician, was negligent. The defendant disclosed to the plaintiff that the hospital’s risk manager had engaged in \textit{ex parte} communications with staff physicians who treated the plaintiff subsequent to the fall. The plaintiff then moved to bar any further \textit{ex parte} communications with treating physicians, including those employed by the defendant hospital. The trial court granted the plaintiff’s motion to bar \textit{ex parte} communications. Defense counsel, however, proceeded to speak with five of the plaintiff’s treating physicians in preparation for trial. The trial court found the defendant in contempt for violating the order, assessed monetary fines, and also prohibited the defendant from calling the five physicians as witnesses at trial. The jury returned a verdict in favor of the plaintiff.

The defendant appealed, arguing that the trial court erred in prohibiting \textit{ex parte} communications with its staff physicians. The appellate court affirmed, finding that “this case involves only the alleged negligence of a nonphysician-employee of the hospital. As such, any justification to extend the physician-patient privilege to [the hospital], were plaintiff’s lawsuit based on the alleged negligence or malpractice of a physician-employee, is absent here.” \textit{Ritter}, 177 Ill. App. 3d at 330. The court also indicated that the hospital was not barred from speaking with its employee whose actions were alleged to be negligent, and it is therefore able to defend itself from liability.

Citing \textit{Petrillo} and \textit{Ritter}, the court in \textit{Testin v. Dreyer Medical Clinic} also held that defense counsel is prohibited from \textit{ex parte} communications with its medical staff who treated the patient but were not alleged to be negligent. \textit{Testin v. Dreyer Medical Clinic}, 238 Ill. App. 3d 883, 605 N.E.2d 1070 (2d Dist. 1992). In \textit{Testin}, the plaintiffs filed a lawsuit against the plaintiff-wife’s physician and his clinic employer following a gynecological procedure. The defendant clinic filed a motion to engage in \textit{ex parte} communications with one of its employee physicians who treated the plaintiff after the gynecological procedure and whose care was not at issue. The trial court denied the motion. The appellate court affirmed, finding that although he was an employee of the clinic, the plaintiff did not waive the physician-patient privilege with respect to this subsequent treating physician. Thus, \textit{ex parte} communications were prohibited because his care was not at issue in the lawsuit.
In *Morgan v. County of Cook*, 252 Ill. App. 3d 947, the First District applied the same analysis as in *Ritter* and *Testin*. It allowed for *ex parte* communications with the plaintiff’s treating physician because his care was at issue in the case, even though he was not a named defendant at the time of trial. In *Morgan*, the plaintiff filed suit against several physicians and a hospital alleging medical negligence following an injury to his leg. At the time of trial, the plaintiff had properly served only one of the defendant physicians, and dismissed the others. In preparation for trial, counsel for the defendant hospital held *ex parte* communications with one of the treating physicians who was dismissed from the case. The plaintiff then filed a motion *in limine* to bar this physician’s testimony pursuant to *Petrillo*. The trial court granted the motion.

On appeal, the defendant argued that the testimony was improperly barred because a hospital should not be prohibited from speaking with a physician for whose conduct it is being held liable. *Morgan*, 252 Ill. App. 3d at 952. The appellate court agreed and reversed the trial court’s ruling. It found that unlike *Petrillo*, where the plaintiff’s “mental or physical condition” was the primary issue, the conduct of the treating physician to whom defense counsel wished to speak is a component of the hospital’s alleged liability. *Id.* at 956. The court recognized that while the physician was no longer a named defendant, the plaintiff was still attempting to hold the hospital vicariously liable for his actions.

Based on these cases, the *Aylward* court rejected the notion that *Porter* created any prejudice for a clinic or hospital defendant in a medical malpractice case. *Aylward*, 2011 WL 1679845, at *5. The First District stated that there was no indication that the plaintiff would seek to add allegations against the clinic for the actions of any other health care provider, and even if he did, “it is far from a foregone conclusion that he would be able to do so.” *Id.* The appellate court noted that any amendments to a complaint must be approved by the court after considering four factors, including whether the parties would be prejudiced or surprised by the new claims. The court also said that there are many safeguards that could be provided to a defendant who must now defend new theories of liability, including allowing for more time and re-opening discovery.

Before a lawyer defending a hospital or clinic speaks to an employee, it must be determined whether the employee’s conduct is a basis of that defendant’s liability. If the employee is not specifically identified in the complaint, defense counsel is prohibited from holding *ex parte* communications with that employee. However, the dicta in *Aylward* appears to allow communications with employees when the plaintiff alleges negligence against the hospital or clinic based upon the conduct of its “agents, servants, and/or employees.” *Id.* Of course, the safest route is to obtain a court order prior to speaking with employees if there is any question as to whether their conduct is the subject of the lawsuit.

**About the Author**

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