Petrillo

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Discovery Reform in the Wake of Petrillo

Prior to the 1995 Tort Reform Amendments, the case of Petrillo v. Syntex Laboratories, Inc., 148 Ill.App.3d 581, 499 N.E.2d 952 (1st Dist. 1986), cert.den’d. 113 Ill.2d 584, 505 N.E.2d 361 (1987), governed the manner in which defense attorneys conducted discovery related to medical issues, specifically discovery pertaining to physician deposition and trial testimony and record production. Under the original guidelines of Petrillo, the plaintiff’s attorney was allowed to privately meet with, discuss and review all aspects of the pending case with the plaintiff’s treating physician while defense counsel was prohibited from ex parte communications with the plaintiff’s treating doctor and could discover her opinions only during a deposition.

Petrillo has since been construed to warrant the sanctioning of defense counsel for merely contacting a doctor’s office to schedule a deposition without the prior consent of the plaintiff’s attorney. This disparity between the rules applied to plaintiff and defense counsel has been great and the defense bar has always pulled the short stick.

This area of discovery became so heated that the Petrillo issues were addressed in the General Assembly’s Civil Justice Reform Act of 1995. The statute requires a plaintiff to sign a consent form allowing defense counsel to privately inter alia, speak with health care providers. However, within months of the enactment of tort reform legislation, various Illinois trial courts ruled that the amendments seeking to modify Petrillo violate the Illinois Constitution on multiple fronts. Therefore, any attorney representing either party in a case in which an individual’s medical condition is at issue, related to issues of damages or pursuant to a malpractice action, must tread lightly. This article will examine some of the issues arising under Petrillo from its inception to the current, albeit tenuous, status of the tort reform statute.

Historical Background

While most personal injury attorneys are familiar with the holding in the Petrillo case, many may be unaware of the nature of the appeal. Therefore, a brief case overview follows.

In 1978 and 1979, Syntex Laboratories, Inc., produced and distributed an infant formula known as Neo-Mull-Soy and Cho-Free. The plaintiff, Michael Petrillo, filed suit against Syntex in 1980 alleging that as a result of consuming Neo-Mull-Soy, he was injured. Petrillo’s action was consolidated for discovery purposes with twenty five other plaintiffs’ cases alleging similar injuries subsequent to the ingestion of Syntex’s formulas.

Discovery in the consolidated actions proceeded, and on May 18, 1984, Thomas F. Tobin, one of the defense attorneys for Syntex Laboratories, Inc., informed the trial court that he had engaged in ex parte conferences with one of Petrillo’s treating physicians. The plaintiffs moved to bar all defense counsel, including Tobin or any other agent of Syntex, from engaging in any future ex parte conferences with the plaintiffs’ treating physicians. Holding that public policy favored physician-patient confidentiality and the fiduciary nature of the
relationship between the patient and the treating physician, the trial court barred the defense counsel from further ex parte conferences with the plaintiffs’ treating physicians.

Defense counsel pressed the issue, and on November 28, 1984 informed the trial court that he intended to engage in ex parte conferences with another treating physician in the case, contending that the trial court had erred in its previous ruling which barred him from engaging in such conferences. The trial court found Attorney Tobin to be in direct contempt of court, and on December 28, 1984, fined him the sum of $1.00.

On appeal, Tobin, on behalf of the Petrillo defendants, argued that the “taking of the deposition of a treating physician to obtain that physician’s opinion is costly, inefficient, and will cause scheduling problems for both defense counsel, as well as for the plaintiff’s treating physician.” The court quickly put those arguments to rest stating that the opinions of the plaintiff’s treating physicians could be inexpensively obtained by simply sending interrogatories pursuant to Supreme Court Rule 212 and/or using Supreme Court Rule 214 to obtain any and all relevant medical records from a treating physician.

In upholding the trial court’s order, the appellate court in Petrillo determined that, “[T]he relationship between a patient and [their] physician remains confidential only as long as the patients can rest assured that [they] must give [their] consent before any of the information disclosed during the physician-patient relationship is released to third parties.” Petrillo, 499 N.E.2d at 958-59. Moreover, the court held that a patient’s implicit consent is obviously and necessarily limited to the release of that medical information relative to the lawsuit which can be obtained pursuant to the methods of discovery authorized by Illinois Supreme Court Rule 201(a). (87 Ill.2d R. 201(A)):

[A] patient certainly does not, by simply filing suit, consent to his physician discussing that patient’s medical confidences with third parties outside court authorized discovery methods, nor does he consent to his physician discussing the patient’s confidences in an ex parte conference with the patient’s legal adversary. Petrillo, 499 N.E.2d at 959.

When a plaintiff files a lawsuit, the plaintiff generally consents to the disclosure of all medical information which is relevant to the condition placed at issue in the lawsuit. The confidential relationship between a patient and his physician remains intact inasmuch as the consent for release of information is limited only to the issues raised in the lawsuit. A patient’s consent can be either express, i.e., written waiver, or implied by the patient’s conduct. Petrillo, 499 N.E.2d at 959. Not surprisingly, this early determination that consent can be implied continues to be at the forefront of tort reform, and it is one of the key issues currently awaiting determination by the Illinois Supreme Court.

The appellate court found that the Petrillo trial court’s order prohibiting the defense attorneys’ ex parte conversations with the plaintiffs’ treating physicians regarding the mental or physical condition of patients was a precisely drawn means of serving compelling state interests and protecting the patients’ rights of privacy as well as the confidential and fiduciary relationship between patient and physician. Petrillo, 499 N.E.2d at 971.

**Hospitals are Barred from Speaking to Their Employee-Physicians**

The rules set forth in Petrillo appeared to be straight-forward, barring defense counsel from having ex parte communications with any of plaintiff’s treating physicians. However, members of the Illinois bar quickly realized that the impact of the court’s holding in Petrillo was far greater than originally supposed.
Two years later, the First District restricted a hospital’s defense counsel from having ex parte communications with treating physicians. In the case of Ritter v. Rush Presbyterian-St. Luke’s Medical Center, 177 Ill.App.3d 313, 532 N.E.2d 327 (1st Dist. 1988), the appellate court held that a defendant hospital was prohibited from communicating with a patient’s treating physicians despite the fact that the physicians were also members of the hospital staff. The court held that agency principles applicable to the relationship between a hospital and an employee physician do not outweigh public policy considerations underlying the physician-patient privilege.

Importantly, the court in Ritter acknowledged in dicta that when a patient seeks to hold a hospital vicariously liable for the malpractice of an employee physician (an issue not specifically raised by the Ritter facts), a court order which would prohibit the defendant hospital from speaking with the plaintiff’s treating physicians for whose conduct the vicarious liability stems, would “effectively prevent the hospital from defending itself by barring communication with the physician for whose conduct the hospital is allegedly liable.” Ritter, 532 N.E.2d at 330.

Despite the fact that the Ritter court recognized the necessity of allowing defense attorneys in certain instances to hold ex parte discussions with certain treating physicians the limitations set forth in Petillo became even more restrictive in Mondelli v. Checker Taxi Co., Inc., 197 Ill.App.3d 258, 554 N.E.2d 266 (1st Dist. 1990).

**Ex Parte Conversations with Non-Treaters are Barred**

In Mondelli, the plaintiff was involved in an automobile collision with a Checker taxicab and another vehicle. The injured plaintiffs, including Ms. Mondelli, were transported to the emergency room of St. Elizabeth Hospital where they were each x-rayed and discharged. Subsequent to her release, Ms. Mondelli sought minimal follow-up care with a neurologist, Dr. Dupre. To defend the damages only case, the defendant, Checker Taxi, retained Dr. Marshall Matz as an expert medical witness. During discovery, the plaintiff learned that Dr. Matz shared office space with Dr. Dupre but had never treated the plaintiff, nor had he had any discussions with Dr. Dupre about the patient’s condition or treatment. Nevertheless, the trial court, upon plaintiff’s motion, barred defendant’s expert, Dr. Marshall I. Matz, from testifying at trial citing a violation of the physician-patient privilege enunciated in Petillo.

The appellate court found that a confidential and fiduciary relationship existed between Dr. Matz and the plaintiff based upon the facts that Dr. Dupre was a professional associate in Dr. Matz’s business office; Dr. Matz’s name was listed on the office letterhead in conjunction with Dr. Dupre; that both Dr. Dupre and Dr. Matz specialized in neurosurgery and had the same telephone number. Accordingly, the court held that “Dr. Dupre’s status as a treating, consulting physician must be imputed to Dr. Matz, requiring application of the Petillo rule concerning any ex parte communications between defense counsel and Dr. Matz.” Mondelli, 554 N.E.2d at 271, citing Ritter v. Rush Presbyterian, 177 Ill.App.3d 313, 532 N.E.2d 327 (1988).

A mere professional association was now enough to create a physician-patient relationship. Interestingly, the court stated “it would be disastrous if we were to open up a line of cases that would allow this [distancing theory] because then it becomes a question of distance, and the test does not become the doctor-patient relationship anymore, but a question of ... the quality and extent of the relationship.” Mondelli, 554 N.E.2d at 271.

The Mondelli court chose not to address the defense’s reason for calling Dr. Matz, ruling that they had already determined that he was a treating physician due to his association with Dr. Dupre. Instead, the Court relied on Petillo and its progeny and found that the Petillo limitations refer to “potential”
harm to the physician-patient relationship and protect against the fact that confidences “might be revealed in ex parte communications between defense counsel and the plaintiff’s treating physicians.” Mondelli, 554 N.E.2d at 272, relying on Yates v. El-Diery, 160 Ill.App.3d 198, 203, 513 N.E.2d 519 (1987). Moreover, measures such as protective orders and motions in limine which limit the physician’s testimony under these circumstances are insufficient to remedy “the potential of breaches of trust that will occur should defense counsel be given an unfettered right to engage in ex parte conferences with a patient’s treating physician.” Mondelli, 554 N.E.2d at 272, citing Petrillo v. Syntex Laboratories, Inc., 499 N.E.2d at 966.

With the court’s holding in Mondelli, the rules of Petrillo were broadened to prohibit an ex parte conference between a plaintiff’s treating physician and defense counsel, regardless of what information is revealed at the time of the conference and notwithstanding whether the conference was found to violate the physician-patient privilege.

The Defense is Granted Some Relief

Four years after the inception of the Petrillo limitations, in the case of Morgan v. County of Cook, 252 Ill.App.3d 947, 625 N.E.2d 136 (1st Dist. 1993), the defense bar was granted relief. The Morgan court held that “if a plaintiff attempts to hold a hospital vicariously liable for the conduct of his own treating physician, the defendant hospital is included within the physician-patient privilege, and the patient has impliedly consented to the release of his medical information to the defendant hospital’s attorneys. Thus, in such a situation, ex parte conferences between defense counsel and a plaintiff’s treating physician are permissible.” Id. at 140. (Emphasis added.)

The Morgan court relied upon and adopted the Ritter court’s dicta that “[w]hen a patient seeks to hold a hospital vicariously liable for the negligence or malpractice of an employee physician, exclusion of the hospital from the physician-patient privilege would ... effectively prevent the hospital from defending itself by barring communication with the physician for whose conduct the hospital is allegedly liable.” Morgan, 625 N.E.2d at 139. See also, Teston v. Dreyer Medical Clinic, 238 Ill.App.3d 883, 605 N.E.2d 1070 (2d Dist. 1992), appeal granted, 149 Ill.2d 661, 612 N.E.2d 524 (1993). It should be noted that, if the plaintiff fails to allege that a specific doctor is negligent, then Petrillo cannot be used to preclude the defendant hospital from conducting ex parte conferences with treating physicians for whom liability may be imputed.

The Morgan court considered the decision of the Second Division in Almgren v. Rush Presbyterian, 240 Ill.App.3d 585, 608 N.E.2d 92 (1st Dist. 1992), appeal granted, 149 Ill.2d 647, 612 N.E.2d 510 (1993) which had also recently decided the issue of ex parte communication by a hospital’s attorneys when the hospital is charged with vicarious liability of a treating physician. Unlike the Morgan court, the Almgren Court barred the communication between hospital’s counsel and its employee-physician based upon the fact that psychiatric treatment was at issue. The Mental Health and Developmental Disability Confidentiality Act, 740 ILCS 110/1 et seq. (1992) provided a statutory bar to such disclosures in ex parte communications. Notably, neither psychiatric treatment nor any other statute preventing disclosure was at issue before the Morgan court, and therefore, the Morgan court was allowed to circumvent the apparently disparate conclusion in Almgren.

Under a theory of vicarious liability for the acts of a hospital’s agents, the treating physician does not speak as a plaintiff’s legal advocate as much as that physician is the plaintiff’s legal adversary:

We do not believe, in such a situation where the plaintiff’s physician’s alleged negligent treatment is purported to be the cause of the plaintiff’s injuries, that the confidentiality of any
medical information the physician may have learned during his allegedly negligent treatment of the plaintiff outweighs the defendant’s right to effectively defend itself [or] unfettered communication with the physician for whose conduct the hospital is allegedly liable.

Morgan, 625 N.E.2d at 142, citing Ritter, 532 N.E.2d at 330.

Finally, in limited circumstances, ex parte communications between defense attorneys and plaintiff’s treating physicians were appropriate. This point is vital in defending against claims of vicarious or direct liability.

The Tort Reform Amendments Related to Petrillo

Under the Act, six procedural changes to the issues related to physician-patient privilege were created. First, the plaintiff, upon request, is required to sign a consent form (or release) authorizing release of health care information in the form of written documentation, as well as to permit counsel for any party to engage in ex parte interviews with treating physicians. However, the amendment does not provide any obligation on the part of a health care provider to give ex parte interviews to any person. Thus, the defense counsel may have to resort to a discovery deposition where treating doctors are uncooperative. Second, the Act gives defense counsel the right to seek an order to mandate that a treating physician produce requisite records. Third, the consent form (release) has a 28 day production provision which, again, if violated, may result in defense counsel obtaining a court order to have the records produced or request that the case be dismissed. Fourth, the plaintiff’s attorney may be given relief that the disclosure will be limited. Fifth, the plaintiff waives all rights of privilege to all medical information, records, and communications with respect to all attorneys (or insurers), parties to the action, and medical witness testimony. Sixth, health care practitioners are permitted complete freedom to consult with their employers, their employer’s attorneys, and their own attorney and insurers regarding the care and treatment rendered to the plaintiff.

Importantly, less than one year after the effective date of these amendments, the constitutionality of the reforms was questioned. Judge Gillis of the Circuit Court of Cook County ruled in seven cases which were placed on a special calendar before him that these amendments attempted to create consent by operation of law. The court found that the legislature is without power to legislate a waiver of the physician or patient privilege. Relying heavily on Petrillo, the court found that a person’s medical background is especially private when compared with a system which requires complete disclosure of all the medical records for a plaintiff’s lifetime. (See also, Calabrese v. Marjorie J. Neese, No. 95 L 3397 (Cook County) (Ill.App.Crt. 1st Dist.))

Other circuit courts ruled that the mandatory consents reported by the Act (735 ILCS 5/8-2003) were an unconstitutional attempt to selectively waive the physician-patient privilege in violation of the separation of powers as well as the due process and equal protection clauses of the Illinois Constitution. The court found the provisions violate a plaintiff’s fundamental rights of privacy and access to the courts. Under Illinois Supreme Court Rule 201, et seq., the judiciary has the duty, power and authority to supervise discovery and litigation and thus, protect the patient, the physician, as well as the parties to a lawsuit. (87 Ill.2d R. 201(A)).

Conclusion

Currently, the Illinois Circuit Courts are split on the issue of the constitutionality of the tort reform amendments which address the physician-patient privilege. Various Circuit Courts in the counties of Ogle, Winnebago, Rock Island, LaSalle and Madison have found that the amendments contained within the legislation relating to Petrillo and the physician-patient privilege are constitutional, while the Circuit Courts in the counties of Cook, DuPage, Champaign, Jefferson and Macon have held, in
large part, that the amendments are not constitutional. The Supreme Court took an appeal from Macon County, which has been briefed and argued, and is *Kunkel v. Walton*, Gen. No. 81176, currently pending on the Advisement Docket.

The Illinois Supreme Court has also taken appeals in cases with the broader scope of the constitutional issues relating to the entire Tort Reform Act. *Best v. Taylor Machine Works*, No. 96 L 167 (Madison County) and *Jonathan Isabell v. Union Pacific Railroad Co.*, No. 96 L 182 (Madison County). These two cases challenge the constitutionality of the Civil Justice Reform Amendments Act of 1995, Public Act 89-7, in its entirety and under multiple provisions of the Illinois Constitution.

The Supreme Court issued a stay order, effective January 23, 1997, on the other Circuit Courts’ orders which found that the tort reform amendments were unconstitutional. That stay will be in effect until the Supreme Court rules on the *Best* and *Isabell* cases unless *Kunkel* is decided first. Until these cases are resolved, defense counsel must proceed very cautiously. To do otherwise risks having expert opinion witnesses important to the defendant’s case barred at the time of trial.

**About the Author**

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