IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

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IN THIS ISSUE

This article discusses a recent Illinois Appellate Court decision which addressed the issue of whether hospital counsel is barred from meeting with a formerly employed nurse in connection with an action alleging medical malpractice.

Illinois Appellate Court Addresses Ex Parte Communications between Hospital Counsel and Formerly Employed Nurse

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In its recent decision in *Caldwell v. Advocate Condell Medical Center*, 2017 IL App (2d) 160456, the Illinois Appellate Court, Second District, addressed issues relating to *ex parte* communications between a hospital's attorney and a formerly employed nurse who provided care to the plaintiff's decedent. Among other issues, the court considered whether such *ex parte* communications were protected by attorney-client privilege and whether they constituted *Petrillo* violations. Ultimately, the court reached the reasonable conclusion that the *ex parte* (outside the presence of plaintiff's attorney) communications were privileged and allowed under the *Petrillo* doctrine.

Background

The decision includes a very detailed set of facts, but for purposes of discussing the issues addressed in this article, a limited discussion of the facts suffices. The decedent, Jeannette DeLuca (DeLuca), was admitted to the hospital late one evening for emergency surgery on her eye. *Caldwell*, 2017 IL App (2d) 160456. The surgery was completed just after midnight, and DeLuca was returned from the PACU to her room on a medical/surgical floor around 12:45 A.M. *Id.* DeLuca had no issues through the night, and ordered breakfast the next morning around 6:30 A.M. A rapid-response call was then placed at 7:20 A.M., and the responding nurses discovered pieces of the breakfast in the patient's mouth. DeLuca had experienced a choking incident and died due to asphyxiation.

The plaintiff then filed suit alleging that the hospital's agents failed to adequately monitor DeLuca postoperatively, failed to ensure she had recovered from surgery sufficiently to eat, and allowed her to eat without ensuring her dentures were in her mouth. Specifically, the issue regarding the dentures related to whether DeLuca's lower partial plate was ever removed for surgery, and if so, whether it was replaced at the time of choking.

One witness in the case was Kathleen Likosar (Likosar), who was the nurse manager on DeLuca's floor and a member of the rapid response team. When Likosar was presented for her discovery deposition, she was still employed by the hospital. During Likosar's discovery deposition, the hospital's attorney objected to questions about *ex parte* communications between Likosar and the hospital's attorney on the basis of attorney-client privilege.

Shortly before trial, the hospital's attorney contacted plaintiff's counsel to inform him that Likosar was retiring and moving out of state, so the hospital's attorney intended to take her evidence deposition. Similar to the discovery deposition, plaintiff's counsel again objected to hospital counsel's assertion of attorney-client privilege for *ex parte* communications with Likosar.

The plaintiff then moved to bar Likosar's evidence deposition due to the attorney-client privilege assertion, among other reasons. The plaintiff argued that attorney-client privilege was improperly asserted because Likosar was not a member of the hospital's control group and not an employee at the time of the evidence deposition. The trial court denied this motion and allowed Likosar's evidence deposition to be introduced at trial.

The jury returned a verdict in favor of the hospital, and the plaintiff appealed. Among other issues, the plaintiff argued that Likosar's evidence deposition should not have been allowed at trial because: (1) the hospital's attorney improperly asserted attorney-client privilege for communications with Likosar, and (2) the hospital's attorney violated the *Petrillo* doctrine by engaging in *ex parte* communications with Likosar after she retired from the hospital.

Attorney-Client Privilege

On appeal, the plaintiff argued that there was no attorney-client privilege between the hospital's attorney and Likosar, and therefore, the trial court erred in allowing the evidence deposition to be presented at trial. The basis of the plaintiff's argument was that attorney-client privilege could not apply because Likosar was no longer a hospital employee when certain *ex parte* communications occurred before her evidence deposition, and Likosar was never a part of the hospital's control group. The plaintiff also argued that the insurer-insured privilege could not apply, despite the fact that Likosar was covered by the hospital's self-insured retention. The plaintiff asserted this was true because Likosar never provided care before DeLuca went into distress, Likosar was never sued individually, and the statute of limitations had run.

The appellate court pointed out that the hospital never claimed Likosar was part of its control group, and never asserted this as a basis of the privilege. Instead, the court pointed out that "[a] nonparty insured may assert the attorney-client privilege if the insured made the statement at issue when the possibility existed that [the insured] would be made a defendant in lawsuits that might arise as a result of the [incident]." Because Likosar was an agent of the hospital and insured under its self-insured trust, the court found the *ex parte* communications between Likosar and the hospital's attorney privileged. The fact that Likosar was no longer employed by the hospital at the time of trial was irrelevant to her status as an agent of the hospital when care was rendered.

***Petrillo* Doctrine**

The plaintiff next contended that the pre-evidence deposition *ex parte* communications between the hospital's attorney and Likosar violated the *Petrillo* doctrine, which prohibits defense counsel from communicating with a healthcare provider *ex parte*. As a result of this alleged violation of the *Petrillo* doctrine, the plaintiff

argued the evidence deposition should be barred.

In making this argument, the plaintiff's reliance on *Baylaender v. Method*, 230 Ill. App. 3d 610, 594 N.E.2d 1317 (1st Dist. 1992), was clearly misplaced because hospitals operate under the Hospital Licensing Act, 210 ILCS 85/1, *et seq.* This issue was addressed by the Illinois Supreme Court in *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21 (2001). In *Burger*, the Illinois Supreme Court upheld a provision of the Hospital Licensing Act providing:

> The hospital's medical staff members and the hospital's agents and employees may communicate, at any time and in any fashion, with legal counsel for the hospital concerning the patient medical record privacy and retention requirements of this Section and any care or treatment they provided or assisted in providing to any patient within the scope of their employment or affiliation with the hospital.
>
> *Burger*, 198 Ill. 2d at 44, citing 210 ILCS 85/6.17(e).

Following the *Burger* decision, another provision was added to the Hospital Licensing Act, providing that:

> Notwithstanding subsections (d) and (e), for actions filed on or after January 1, 2004, after a complaint for healing art malpractice is served upon the hospital or upon its agents or employees, members of the hospital's medical staff who are not actual or alleged agents, employees, or apparent agents of the hospital may not communicate with legal counsel for the hospital or with risk management of the hospital concerning the claim alleged in the complaint for healing art malpractice against the hospital except with the patient's consent or in discovery authorized by the Code of Civil Procedure or the Supreme Court rules.

210 ILCS 85/6.17(e-5). Even under this provision, a hospital's attorney is allowed to communicate *ex parte* with members of the medical staff who were employees, agents, or alleged agents at the time of the subject care. The only purpose of subsection (e-5) is to prohibit *ex parte* communications between hospital counsel and members of the medical staff who were independent contractors (*i.e.*, non-employees).

For instance, the Senate's sponsor of the legislation adding subsection (e-5) stated that:

> Now, the – the Trial Lawyers initially wanted a bill that would completely overturn the Supreme Court['s *Burger*] opinion. Based on my reading of the opinion, I think the [*Burger*] court was correct in wanting to protect the hospital's ability to interview its own employees when an adverse event had occurred without intrusion by a

> plaintiff's attorney, because that would be necessary for issues of public health. On the other hand, it appears that some hospitals were abusing this by then interviewing non-employees, independent contractors, who for other purposes of litigation they denied as having any agency or – responsibility over, but they still wanted the same protection in terms of being able to interview them ex parte.

Ill. 93rd Gen. Assemb., Reg. Sess., Sen. Trans., p. 135, Apr. 8, 2003. Similarly, the House of Representative's sponsor of the same legislation indicated that subsection (e-5):

> deals with the circumstance in which a medical malpractice case has already been filed against the hospital. This Bill provides that defense counsel cannot speak with physicians who are not otherwise agents in the case.

Ill. 93rd Gen. Assemb., H.R. Trans., p. 235, May 21, 2003.

Pointing to *Burger*, the *Caldwell* court found that *ex parte* communications between the hospital's attorney and Likosar were appropriate due to the employment relationship that existed at the time Likosar cared for DeLuca. The fact that Likosar was no longer employed by the hospital at the time of her evidence deposition was irrelevant.

Conclusion

Like any other employer, a hospital commonly experiences turnover in its employees, including its employed physicians and nurses. This may be for any number of reasons, such as retirement, relocation, or simply other opportunities. In *Caldwell*, the appellate court appropriately applied relevant statutory and decisional law in determining that a hospital's attorney is allowed to communicate with a physician or nurse employed by the hospital at the time care was rendered to a patient-plaintiff, even if the employment relationship later ended. In reaching this conclusion, the court provided a certain level of comfort to defense attorneys, who constantly must consider the potential reach of the *Petrillo* doctrine.

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