Illinois Trial Lawyers Association
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2011 MEDICAL MALPRACTICE TRIAL NOTEBOOK

"EMPTY CHAIR"/SOLE PROXIMATE CAUSE DEFENSE and RESPONDENTS in DISCOVERY

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"EMPTY CHAIR"/SOLE PROXIMATE CAUSE DEFENSE

Prefatory Note

The subjects contained in this chapter have traditionally not been discussed together in this ITLA treatise. However, the selective and skillful use of the "respondent in discovery" provisions contained in 735 ILCS 5/2-402 (West 2011), should significantly diminish the likelihood of a successful sole proximate cause defense in these most challenging lawsuits.

This statutory discovery provision provides a unique opportunity for the trial lawyer to depose her/his client's treating physicians and nurses at the earliest stages of the case. Carefully, deposing your client's treating physicians and healthcare providers as respondents in discovery allows the trial lawyer to accomplish several significant goals.

First, you are able to determine whether the physician or healthcare provider, as a respondent in discovery, has legal responsibility for your client's injury or death. If you determine that the respondent in discovery will not be converted to a defendant, his or her deposition allows you the opportunity to minimize the likelihood of that physician becoming the subject of the "empty chair"/sole proximate cause defense at the time of trial.

I. The "Empty Chair"

In the prosecution and trial of a medical negligence lawsuit, almost universally, medical defendants never admit negligence or proximate cause. Those critical issues are almost always tenaciously defended. In the rare instance where a medical defendant does admit negligence or the negligence of the defendant is apparent, the case is then vigorously defended on the issues of proximate cause and damages.

Almost universally, when even remotely possible, the proximate cause defense inherently also involves an attempt by the defense to blame a treating physician of the Plaintiff who is *not a party* to the lawsuit, or some medical condition of the Plaintiff *unrelated* to the medical condition alleged to have been negligently caused or treated by the defendant. Additionally, in the event the Plaintiff settles with one or more medical defendants anytime before closing argument, it is almost guaranteed that all remaining medical defendants will attempt to blame the settling defendant, no longer a party, for the injury or death of the Plaintiff.

The discussion in this chapter will primarily concentrate on the situation where the defense is attempting to blame the Plaintiff's injury or death on a physician or healthcare provider who is *not a party* to the lawsuit and is therefore not seated at the defense table at trial, i.e., "the empty chair". A key reason why the empty chair defense can potentially be so effective is because it is *not* necessary for the defense to prove that the conduct of the non-party physician or healthcare provider was negligent. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 514, 736 N.E.2d 1074, 249 Ill. Dec. 636 (2000).

The sole proximate cause defense is found in the long versions of IPI 12.04 and IPI 12.05. The last paragraph of IPI 12.04 states: "However, if you decide that the sole proximate cause of the injury to the Plaintiff was the conduct of *some person* other than the defendant, then your verdict should be for the defendant." ILL. PATTERN JURY INSTR. - CIVIL §§ 12.04 (West 2009) (emphasis added). The last paragraph of IPI 12.05 states: "However, if you decide that the sole proximate cause of injury to the Plaintiff was *something* other than conduct of the defendant, then your verdict should be for the defendant." IPJICIV § 12.05 (emphasis added).[1]

Following are the relevant jury instructions in full:

> **IPI 12.04 Concurrent Negligence Other Than Defendant's**
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> More than one person may be to blame for causing an injury. If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the Plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.
>
> [However, if you decide that the sole proximate cause of injury to the Plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.]

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[1] For a revealing example of the devastating effectiveness of a sole proximate cause defense see *Karsten v. McCray* 157 Ill.App.3d 1, 509 N.E.2d 1376 (2nd Dist., 1987); and for a more cogent discussion and analysis of *Karsten* see Philip H. Corboy, *Ex Parte Contracts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 LOY. U. CHI. L.J. 1001 (1989-90).

IPJICIV § 12.04

> **IPI 12.05 Negligence—Intervention of Outside Agency**
>
> If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the Plaintiff, it is not a defense that something else may also have been a cause of the injury.
>
> [However, if you decide that the sole proximate cause of injury to the Plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant.]

IPJICIV § 12.05.

Significantly, the first paragraphs of IPI 12.04 and 12.05 are extremely beneficial and helpful to the Plaintiff and her trial lawyer during closing argument and jury deliberations. Trial practice reveals that, generally, whenever the Plaintiff tenders the short form instruction (first paragraph, only) of IPI 12.04 and/or 12.05, the defense will object and tender the long form instruction (both paragraphs). Whether the full instruction is read and given to the jury will depend on many factors, not the least of which are the specific facts of the case and the skill of the Plaintiff's trial lawyer.

Therefore, the challenge to the trial lawyer is to prosecute the lawsuit during pre-trial discovery, and at trial, so that the sole proximate cause defense cannot be successfully raised or argued by the defense at trial; thereby preventing the jury from being given the long form of the IPI instructions.

II. Evidentiary Requirements

In a medical malpractice lawsuit, it is fundamental that the burden is on the Plaintiff to establish the proper medical standard of care, defendant's breach of the standard (negligence) and injury proximately caused by the defendant's negligence. *Johnson v. Loyola University Medical Center*, 384 Ill. App. 3d 115, 893 N.E.2d 267, 272, 323 Ill. Dec. 253 (1st Dist. 2008). However, the defendant has the burden to establish that the conduct of another person, or entity, was the *sole* proximate cause of Plaintiff's injury. *Baylie v. Swift & Company*, 283 Ill. App. 3d 421, 435, 670 N.E. 2d 772, 219 Ill. Dec. 94 (1st Dist. 1996).

In attempting to meet this burden, a defendant must introduce evidence that some other person or entity was the sole proximate cause of the Plaintiff's injury. *Ready v. United/Goedecke Services, Inc*, 238 Ill. 2d 582, ___ N.E.2d ___ , 2010 WL 4126244 at *5 (2010) (citing *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 444, 331, 910 N.E. 2d 549, 331 Ill. Dec 140 (2009)). *See also, Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 658 N.E. 2d 450, 212 Ill. Dec. 968 (1995)[2]

Although not a medical negligence case, *Ready* is the most recent proclamation of the Illinois Supreme Court on the sole proximate cause defense. *Ready*, 238 Ill. 2d 582, 2010 WL 4126244. In *Ready*, the Plaintiff presented a motion in limine to exclude evidence regarding the conduct of two settling defendants no longer parties to the case. The Court granted Plaintiff's motion and as a result, the defendant was barred from presenting this evidence and the use of the sole proximate cause defense. Significantly, without this evidence, the trial court refused defendant's jury instruction on sole proximate cause. After the jury returned a verdict for the Plaintiff, the defendant appealed.

On October 21, 2010, after a series of appeals and remands on the issue of whether defendants were entitled to present evidence to support a sole proximate cause defense, the Illinois Supreme Court expressed its final opinion in *Ready*. The Court re-affirmed its decision in *Nolan*, when it again held that a defendant is entitled to present evidence regarding the conduct of settling defendants, as the evidence relates to the remaining party defendant's sole proximate cause defense. *Ready*, 238 Ill. 2d 582, 2010 WL 4126244 at *5.

The Supreme Court in *Ready*, speaking through Mr. Chief Justice Fitzgerald, also reconfirmed its holding in *Leonardi* regarding the sufficiency of evidence necessary to justify the

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[2] In *Leonardi*, the Court stated,

> [A] defendant has the right not only to rebut evidence tending to show that defendant's acts are negligent and the proximate cause of claimed injuries, but also has the right to endeavor to establish by competent evidence that the conduct of a third person, or some other causative factor, is the sole proximate cause of Plaintiff's injuries.

Leonardi, 168 Ill. 2d at 101.

allowance of the sole proximate cause defense. *Id.* The Court stated:

> There must be some evidence in the record to justify an instruction, and the second paragraph of IPI Civil (2000) No. 12.04 should be given where there is evidence, *albeit slight and unpersuasive*, tending to show that the sole proximate cause of the accident was the conduct of a party other than the defendant.

Id. (emphasis added) (citing *Leonardi v. Loyola University*, 168 Ill. 2d 83, 101, 658 N.E.2d 450, 212 Ill. Dec. 968 (1995).

Although the Supreme Court in *Ready* concluded that it was error for the trial court not to give the long form IPI 12.04 instruction regarding the conduct of several settling defendants no longer parties to the case, the Court concluded that the error was *harmless*. The error was harmless because: "No reasonable jury would have concluded that United [the sole remaining defendant at trial] was not a proximate cause of the accident, and if United was a proximate cause, the settling defendants could not have been the sole proximate cause." *Ready*, 238 Ill. 2d 582, 2010 WL 4126244 at *7.

Trial Practice Suggestion: Significantly, it is *not* necessary that the defendant plead the sole proximate cause defense as an affirmative defense. *Leonardi*, 168 Ill.2d at 94. A general denial of negligence and causation in the answer to the complaint is sufficient to allow the defense to be raised and argued at trial. *Id.*

Therefore, the trial lawyer must always be mindful and aware throughout the litigation and trial that the defense is looming. The trial lawyer must always prepare Plaintiff's controlled expert physicians regarding the expected attempt by defense counsel to cast blame on non-party treating physicians or some other medical condition of the Plaintiff.[3]

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[3] See, *Petre v. Kucich*, 331 Ill. App. 3d 935, 771 N.E.2d 1084, 265 Ill. Dec. 125 (1st Dist. 2002). In *Petre*, the trial court erred in denying cross-examination of Plaintiff's medical expert concerning his opinion in discovery that the settling defendant physicians were negligent in failing to diagnose and treat Plaintiff. Where there was evidence tending to indicate that dismissed defendant physicians' failure to diagnose and treat Plaintiff's infection was the sole proximate cause of the resulting loss of Plaintiff's sternum and reconstructive surgery, long form IPI 12.04 is proper.

It is fundamentally crucial that the trial lawyer remember that the defense need *not* prove that the conduct of the empty chair/non-party physician or healthcare provider to have been negligent. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 514, 736 N.E.2d 1074, 249 Ill. Dec. 636 (2000). Therefore, neither the defendant nor the defense (or Plaintiff) controlled expert witness needs to express the opinion that a non-party treating physician was professionally negligent in allegedly causing the Plaintiff's injury or death. Whenever possible, blame will be cast upon others by the defense, without the "conduct" of the non-party physician being professionally negligent.

III. When the Sole Proximate Cause Instruction May Properly Be Given

As discussed above, a defendant is not automatically entitled to a sole proximate cause instruction. Rather, "there must be some evidence in the record to justify an instruction, and the second paragraph of IPI 12.04 should be given where there is evidence, albeit slight and unpersuasive, tending to show that the sole proximate cause of the accident was the conduct of a party other than the defendant." *Ready*, 238 Ill. 2d 582, 2010 WL 4126244 at *5 (citing *Leonardi*, 168 Ill.2d at 101).

A sole proximate cause instruction is proper, however, only when there is *competent* evidence that another person or condition was the sole proximate cause of Plaintiff's injury. *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 132, 679 N.E.2d 1202, 223 Ill. Dec. 429 (1997). In *Holton*, the sole proximate cause instruction was *rejected* because "defendant did not present evidence or argue that it was *only* the negligence of persons other than the hospital employees which proximately caused Plaintiffs' injury." *Id*. at 134.

In *Krklus v. Stanley*, 359 Ill. App. 3d 471, 295 Ill. Dec 746 (1st Dist. 2005), the undisputed cause of Krklus' death was a massive hemothorax caused by an aortic dissection. There was defense introduced evidence at trial that Krklus' uncontrolled high blood pressure may have caused his aortic dissection and that even if the aortic dissection had been diagnosed earlier, Krklus still would not have survived. The court noted that from the evidence, the jury could conclude that Krklus' uncontrolled high blood pressure was the sole proximate cause of his death. Therefore, the jury was properly given the long form of IPI 12.05.

Instead, defendant attempted to establish that *no* medical negligence occurred at all. The Court reasoned:

> A defendant is not automatically entitled to a sole proximate cause instruction whenever there is evidence that there may have been more than one, or concurrent, causes of an injury or where more than one person may have been negligent. Instead, a sole proximate cause instruction is not appropriate unless there is evidence that the *sole* proximate cause (not "a" proximate cause) of a Plaintiff's injury is conduct of another person or condition.

Id.

Trial Practice Suggestion: The Supreme Court's language in *Holton*, above, should serve to assist the trial lawyer in overcoming what sounds like a very minimal evidentiary burden ("where there is evidence, albeit slight and unpersuasive.") recited by the Court in *Leonardi* and *Ready*. *Leonardi*, 168 Ill.2d at 101;*Ready*, 238 Ill. 2d 582, 2010 WL 4126244 at *5.

When considering a pre-trial or pre-closing argument settlement with any defendant, the trial lawyer must be extremely mindful of the strategic effect the settlement will have regarding the likelihood of success against the remaining defendant(s). Once a good faith settlement is reached with a party defendant, it is probable that the long form IPI 12.04 will be given if tendered by the defense. See, *Petre v. Kucich*, 331 Ill. App. 3d 935, 265 Ill. Dec. 125, 771 N.E.2d 1084 (1st Dist. 2002); see also, note 2, *supra*.

Strategically, therefore, in the event a good faith settlement can be safely and strategically realized with one of the defendants *following* closing argument and submission of the case to the jury, it would be prudent to postpone settlement until that time. In this way, Plaintiff will enhance her chances of preventing the long form instruction of IPI 12.04 from being given to the jury. This is because at the time the jury receives the court's instructions all defendants remain potentially liable and are no longer *practically* capable of suggesting the sole proximate cause of the injury "was

the conduct of some person other than the defendant." IPJICIV § 12.04.[4]

Proof of nonparty negligence not required. It cannot be over emphasized that the sole proximate cause defense does not require proof that the nonparty physician was professionally negligent. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 514, 736 N.E.2d 1074, 249 Ill. Dec. 636 (2000). In *McPartlin*, the court held:

> [I]n the context of a medical negligence case, the sole proximate cause instruction requires only that the defendant present some evidence that the nondefendant is the sole proximate cause of the Plaintiff's injury. It is not necessary that the defendant also establish that the nondefendant's conduct was medically negligent.

Id. at 515.

The *McPartlin* court reasoned that IPI 12.04 contains no language requiring proof of negligence. The instruction clearly refers only to the "*conduct* of some person other than the defendant, not the negligent conduct of some person other than the defendant." *Id.* at 517 (emphasis added).

Trial Practice Suggestion: In the event the trial court denies Plaintiff's pre-trial motion *in limine* requesting that the defense be prohibited from introducing sole proximate cause testimony, Plaintiff's lawyer must object to this testimony during trial in order to preserve the error. *Krklus v. Stanley*, 359 Ill. App. 3d 471, 485, 833 N.E.2d 952, 295 Ill. Dec 746 (1st Dist. 2005); *See also, Ready v. United/Goedecke Services, Inc.*, 238 Ill. 2d 582, ___ N.E.2d ___, 2010 WL 4126244 (2010); *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 658 N.E. 2d 450, 212 Ill. Dec. 968 (1995).

Additionally, Plaintiff's lawyer should renew the motion at the close of Plaintiff's case in chief. Relying on *Ready*, Plaintiff should emphasize that, based upon the testimony and evidence established in Plaintiff's case in chief, "no reasonable jury" could conclude that the defendant's negligence was not a proximate cause of the injury. *Ready*, 238 Ill. 2d 582, 2010 WL 4126244 at 7.

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[4] This suggestion assumes the situation where all defendants have remained in the case at the time the jury begins its deliberations and the court has *not* given the long form IPI 12.04 instruction.

If successful, Plaintiff's lawyer will prevent the defense from diverting fault and blame away from the defendant during the defense's case.

If the Plaintiff's motion at the close of her case in chief is *unsuccessful*, the trial lawyer must raise a continuing objection to this line of defense sole proximate cause testimony during the defense case in order to preserve the issue for appeal. *Krklus*, 359 Ill. App. 3d at 485. Plaintiff's trial lawyer must again present the motion *in limine*, together with a motion for a directed verdict on the sole proximate cause issue, at the close of all of the evidence. The ultimate goal is to prevent the long form IPI instruction from being argued by defense counsel and given to the jury, and if unsuccessful, preserve the issue for appeal.

IV. Using Section 2-402: Respondent in Discovery[5]

Section 2-402 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-402 (West 2011), provides trial lawyers and their medical negligence clients with an extremely useful tool—the ability to name in the complaint physicians, hospitals and other healthcare providers as respondents in discovery. This statute allows Plaintiffs to include in the lawsuit respondents who may have potential information about the Plaintiff's case, even if the Plaintiff lacks sufficient basis to name the respondents as defendants or obtain an Illinois Code of Civil Procedure section 2-622 report from a health care professional.

The purpose of this statute is to provide Plaintiffs in medical malpractice actions with the ability to file a lawsuit "without naming everyone in sight as a defendant." *Bogseth v. Emanuel*, 261 Ill. App. 3d 685, 690, 633 N.E.2d 904, 199 Ill. Dec. 108 (1st Dist. 1994). In enacting 735 ILCS 5/2-402, the legislature "balanced the need to protect physicians from the increasing costs of medical malpractice insurance caused by the filing of frivolous lawsuits with the injured Plaintiff's need to determine the surrounding circumstances and involvement of each person." *Coyne v. OSF Healthcare System*, 332 Ill. App. 2d 717, 719, 773 N.E.2d 732, 265 Ill. Dec. 968 (3d Dist. 2002).

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[5] Recognition and gratitude are directed to **Adam Kruse**, Esq. associate at Walsh, Knippen, Knight & Pollock, *Chtd.* for his research, writing and contribution to this section of this chapter.

The statute requires the respondents to provide discovery to the Plaintiff, but the respondents have no corresponding rights against the Plaintiff, such as demanding discovery from the Plaintiff or moving to dismiss the case. [6]

Where a person or entity is named as a respondent, section 2-402 further gives the Plaintiff a 6-month period of time in which the statute of limitations is extended for converting those respondents into defendants, if warranted. If the respondents are to be named as defendants, this must be done through a motion filed *within 6 months after the case is filed*, unless the Plaintiff obtains a court ordered extension of the conversion deadline. There are grounds for extensions, but, as explained below, this 6 month deadline can occasionally become a trap for an unwary trial lawyer.

The current text of Section 2-402 provides the following, in pertinent part:

> The Plaintiff in any civil action may designate as respondents in discovery in his or her pleading those individuals or other entities, other than the named defendants, believed by the Plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action.
>
> Persons or entities so named as respondents in discovery shall be required to respond to discovery by the Plaintiff in the same manner as are defendants and may, on motion of the Plaintiff, be added as defendants if the evidence discloses the existence of probable cause for such action.
>
> A person or entity named a respondent in discovery may upon his or her own motion be made a defendant in the action, in which case the provisions of this Section are no longer applicable to that person.

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[6] The statute is silent on the subject of whether counsel for a respondent may ask questions during the depositions conducted by Plaintiff's trial lawyer. A logical argument can be, and often is, asserted that counsel for respondents have no right to ask questions of respondents whom they do not represent.

> A copy of the complaint shall be served on each person or entity named as a respondent in discovery.
>
> Each respondent in discovery shall be paid expenses and fees as provided for witnesses.
>
> A person or entity named as a respondent in discovery in any civil action may be made a defendant in the same action at any time within 6 months after being named as a respondent in discovery, even though the time during which an action may otherwise be initiated against him or her may have expired during such 6 month period. An extension from the original 6-month period for good cause may be granted only once for up to 90 days for (i) withdrawal of Plaintiff's counsel or (ii) good cause. *Notwithstanding the limitations in this Section, the court may grant additional reasonable extensions from this 6-month period for a failure or refusal on the part of the respondent to comply with timely filed discovery*.

735 ILCS 5/2-402 (emphasis added). The text of the statute goes on to set forth the form of the summons to be used to serve a respondent in discovery. A "Summons for Discovery" form can be obtained from the Clerk of the Circuit Court. The Plaintiff should issue the written and oral discovery requests with the summons. The requests may include any and all discovery provided for by Supreme Court Rule.

The statute gives Plaintiffs the ability to have the respondents compelled to comply with discovery. Service of the summons for discovery provides the court with full jurisdiction over a respondent in discovery. *Coyne v. OSF Healthcare System*, 332 Ill. App. 3d 717, 719 (3d Dist. 2002). Thus, a court can compel a respondent to answer discovery, just as if it were a defendant. *Id.* Likewise, a respondent in discovery is subject to the same procedural and discovery rules and safeguards as defendants. *Id.* This would include sanctions against an unwilling respondent.

A. **Extensions of the 6 Month Time Period:** The language of the statute lists several grounds for extending the six month period. However, a Plaintiff should pay close attention to the reasons for requesting the extension. The statute allows **one** extension, for **up to 90 days**, for [1] the withdrawal of the Plaintiff's attorney, or [2] good cause. Attempting to rely on "good cause" more than once is one of the traps of this statute. Because section 2-402 is a special

statutory action unknown at common law, the appellate court has held that trial courts have no discretion to grant any extension for "good cause" beyond the one 90-day extension. *Robinson v. Johnson*, 346 Ill. App. 3d 895, 907 (1st Dist. 2004).

Significantly, after the *Robinson* case was decided in 2004, the legislature amended Section 2-402 to deal with some of the harsh results that the *Robinson* decision could cause to Plaintiffs. In 2005, the legislature added the last sentence cited and emphasized above: "Notwithstanding the limitations in this Section, the court may grant additional reasonable extensions from this 6-month period for a failure or refusal on the part of the respondent to comply with timely filed discovery." Thus, it is clear that the statute's reference to "good cause" applies only if the respondent has fully complied with discovery. Significantly, if the respondent has not fully complied with discovery, the court may grant "additional reasonable extensions" notwithstanding the other limitations of section 2-402.

Trial Practice Suggestion: It is strongly encouraged that the trial lawyer includes a Production Request, Written Interrogatories, and specific deposition date with the summons and complaint served upon the respondent. In practice, there is often a significant time delay between placing the summons with the sheriff, service on the respondent and appearance of counsel for the respondent. This time delay increases in proportion with the number of defendants and respondents named in the complaint.

Once counsel for the respondent contacts the Plaintiff's lawyer, be sure to inquire whether the respondent's attorney actually received the written discovery from her respondent client. Often, the written discovery is lost somewhere between the sheriff's department, the respondent, the respondent's insurance company, and counsel for the respondent.

If an extension of the statutory 6 month time period is needed, it is helpful to be able to advise the court that Plaintiff served the written discovery on the respondent with the summons and complaint, and the respondent took many months to answer the written discovery. It is not uncommon for the Plaintiff's trial lawyer to need to initiate supplemental written discovery after the original discovery answers are received from the respondent. If so, propound the supplemental discovery immediately.

Start efforts to schedule the respondent's deposition as soon as counsel for the respondent contacts Plaintiff's lawyer. Once the

respondent has satisfactorily complied with written discovery, the respondent's deposition should be taken. This process often takes more than the statutory 6 month time period. Often, the respondent's deposition testimony warrants Plaintiff's initiation of additional written and oral discovery. If appropriate, initiate the discovery immediately.

Plaintiff should be diligent where a respondent timely submits discovery answers, but for some reason the Plaintiff still is not in a position to determine the appropriateness of filing a motion to convert by the end of the 6 month conversion period. For example, if a case has multiple respondents, and one respondent complies with discovery but the others do not, the co-respondents' noncompliance would not be a valid basis for extending the compliant respondent's conversion time past one 90 day extension.

Additionally, where a respondent submits discovery answers with objections or unresponsive answers, the trial lawyer should file a motion to compel the respondent to fully comply with the discovery request as soon as possible. Otherwise, a Plaintiff could end up in a position of having to rely on the one "good cause" extension instead of several extensions available for "failure or refusal on the part of the respondent to comply (with discovery)." 735 ILCS 5/2-402.

Plaintiff's lawyer must also take care to properly diary/calendar the conversion deadline, and any extensions, just the same as a statute of limitation. It is now established that the 6-month conversion period in section 2-402 is considered a statutory limitation period. *Robinson*, 346 Ill. App. 3d at 905. If the conversion period expires and the Plaintiff has not filed a motion to convert or secured an extension, the court loses jurisdiction and the respondent is out of the case, unless the statute of limitations has not expired as to that party.

Significantly, *Illinois Supreme Court Rule 183 does not allow motions for extensions of time after the 6 month (or extended) conversion period expires*. *Robinson*, 346 Ill. App. 3d at 905. An additional caveat is to be sure to re-calendar/diary the new conversion deadline each time an extension is obtained.

B. Motion to Convert a Respondent to a Defendant: When a Plaintiff wants to convert a respondent into a defendant, the motion to convert only needs to be *filed* before the conversion deadline. The motion must be actually filed in the office of the Clerk of Court within the 6 month (or extended) time period.

Mailing the motion to defense counsel within the 6 month (or extended) time period is not sufficient. *Knapp v. Bulun*, 2009 WL 1905167 (1st Dist. 2009) The motion does not need to be presented and actually heard before the deadline expires. *Clark v. Brokaw Hosp.*, 126 Ill. App. 3d 779, 783 (4th Dist. 1984). Additionally, although *not* the recommended practice, the statute does not require that a respondent in discovery be given notice of a motion-to-convert for the conversion to be valid. *Medjesky v. Cole*, 276 Ill. App. 3d 1061, 1064 (4th Dist. 1995).

Plaintiff must seek leave of court to convert a respondent into a defendant. *Medjesky*, 276 Ill. App. 3d at 1064. Before granting leave, the court must hold an evidentiary hearing to review the discovery materials showing that a Plaintiff now has probable cause to name the respondents as defendants. *Allen v. Thorek Hosp.*, 275 Ill. App. 3d 695, 703 (1st Dist. 1995). There is no requirement, though, that a Plaintiff obtain any discovery from a respondent prior to converting the respondent to a defendant. *Long v. Matthew*, 336 Ill. App. 3d 595, 602-03 (4th Dist. 2003). Thus, the court does not have to confine its analysis to what was obtained in discovery from that particular respondent. *Id.*

C. Requirements for Conversion: The standard for conversion, as set forth in Section 2-402, is "if the evidence discloses the existence of probable cause for such action" i.e., conversion. 735 ILCS 5/2-402. "Probable cause under section 2-402 will be established where a person of ordinary caution and prudence would entertain an honest and strong suspicion that the purported negligence of the respondent in discovery was a proximate cause of the Plaintiff's injury." *Jackson-Baker v. Immesoete*, 337 Ill. App. 3d 1090, 1093 (3d Dist. 2003). "However, the evidence need not rise to the level of a high degree of success on the merits or the evidence necessary to defeat a motion for summary judgment in favor of the respondents in discovery, nor is the Plaintiff required to establish a *prima facie* case against the respondent in discovery." *Id.*[7]

The appellate court has held that "the probable cause requirement of section 2-402 should be *liberally construed*, to the end that controversies may be determined according to the substantive rights of the parties." *Williams v. Medenica*, 275 Ill. App. 3d 269, 273 (1st Dist. 1995). The probable cause requirement

[7] In practice, it is not common for the evidentiary hearing to include live testimony from witnesses. Generally, the court will rely upon the written motion and attachments such as a Section 2-622 healthcare report, attorney affidavit and any appropriate depositions.

is not meant to create a substantive defense. *Jackson-Baker*, 337 Ill. App. 3d at 1095. *A motion to convert accompanied by a proposed amended complaint, with a Section 2-622 affidavit and health care professional's report, has been deemed sufficient. Williams*, 275 Ill. App. 3d at 273-74. However, compliance with section 2-622 is not a prerequisite to obtain conversion. *Jackson-Baker*, 337 Ill. App. 3d at 1095.

Section 2-402 can be an extremely useful tool for medical malpractice Plaintiffs. It provides Plaintiff with the power of all discovery tools available, together with the ability to secure assistance from the Court. However, because it is a "special statutory action" unknown to common law, the statute's terms must be strictly complied with.

Trial lawyers who name respondents in discovery are well-advised to read the *Robinson* case and other cases that recite and establish the parameters of this statute, and proceed as diligently as possible in obtaining discovery from the respondents.

Trial Practice Suggestion: Occasionally, counsel for a respondent physician will insist that Plaintiff pay a "reasonable fee" to the respondent physician as a requirement for presenting the physician for her or his deposition. There is no authority requiring the Plaintiff to pay a respondent in discovery physician his or her usual deposition testimony charge.

The respondent in discovery statute does not require a fee, other than a statutory witness fee, to be paid to the physician respondent for her or his deposition. In fact, the statute provides that "a person or entity so named as a respondent in discovery shall be required to respond to discovery by the Plaintiff in the same manner as are defendants." 735 ILCS 5/2-402 (West 2011) Undeniably, a defendant physician does not receive a fee for her deposition testimony.

Moreover, the committee comments to Supreme Court Rule 204 further support the non-payment of a deposition fee to a respondent physician. ILCS S. Ct. Rule 204, committee comments (West 2011). The comments specify that subsection (c), which provides for the payment of a reasonable fee to physicians for their deposition testimony, does *not* apply to physicians who are respondents in discovery. *Id.* Specifically, the comment states,

> paragraph (c) is made applicable only to "nonparty" physicians. The protection afforded a physician by

> paragraph (c), including the payment of a fee for time spent, has no application to a physician who is a party to the suit. Such protection should likewise be unavailable to nonparty physicians who are closely associated with a party, such as physicians who are stockholders in or officers of a professional corporation named as a defendant, *or a physician who is a respondent in discovery*.

Id. (emphasis added). Therefore, Plaintiff need not pay a physician named as a respondent in discovery any more than the statutory mileage expenses and witness fee for his or her deposition testimony. In practice, these statutory expenses and fees are generally not requested by the respondents.

Conclusion

Prosecuting, advocating and trying the Plaintiff's medical negligence case must be done in a thoughtful and skillful manner, using all available legal and statutory resources. In this way, you will enhance your client's opportunity to prevent or successfully defeat the sole proximate cause defense and secure full and fair justice for your client.

Long ago, society conferred upon our learned profession an exclusive franchise to counsel our clients on the law. The law and trial practice suggestions contained in this chapter should assist and empower you in your counsel and advice to your Plaintiff clients.