

Illinois Trial Lawyers Association
Education Fund

2012 MEDICAL MALPRACTICE TRIAL NOTEBOOK

Chapter 17

“EMPTY CHAIR”/SOLE PROXIMATE CAUSE DEFENSE

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“EMPTY CHAIR”/SOLE PROXIMATE CAUSE DEFENSE

I. THE EMPTY CHAIR

In medical negligence lawsuits, defendants almost never admit negligence or proximate cause. These critical issues are always tenaciously defended. Even in the rare instance where a medical defendant does admit negligence or the negligence of the defendant is apparent, the case is still vigorously defended on the issues of proximate cause and damages.

Almost universally, even when only remotely possible, the proximate cause defense commonly 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, there is substantial risk that one or more of the remaining medical defendants will attempt to blame the settling, former defendant for the injury or death in the case. 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 (2000).

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”.

The jury instructions for the sole proximate cause defense are found in the second paragraphs of IPI 12.04 and IPI 12.05.

IPI 12.04 Concurrent Negligence Other Than Defendant’s

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.] (Emphasis added)

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.] (Emphasis added)

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 usually 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 given to the jury will depend on many factors, not the least of which is 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.

II. PLEADING AND 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 (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 (1st Dist. 1996).

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 v. Loyola University of Chicago*, 168 Ill. 2d 83, 658 N.E.2d 450 (1995).

Significantly, it is *not* necessary that the defendant plead the sole proximate cause defense as an affirmative defense. 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. *Leonardi*, 168 Ill. 2d at 94.

Trial Practice Suggestion: Since the defendant need not plead sole proximate cause as a defense, 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 for defense counsel's attempts to cast blame on non-party treating physicians or some other medical condition of the Plaintiff. *Petre v. Kucich*, 331 Ill. App. 3d 935, 771 N.E.2d 1084 (1st Dist. 2002). *Krklus v. Stanley*, 359 Ill. App. 3d 471, 833 N.E.2d 952 (1st Dist. 2005).

It is also *not* necessary for the defense to prove that the conduct of the empty chair/non-party health care provider was negligent.

[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.

McDonnell v. McPartlin, 192 Ill. 2d 505, 515, 736 N.E.2d 1074 (2000).

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. Since the defense need not prove the empty chair was negligent, it is not required that any witness express the opinion that a non-party treating physician was professionally negligent in allegedly causing the Plaintiff's injury or death.

In order 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, 939 N.E.2d 417 (2010) (citing *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 444, 910 N.E.2d 549 (2009)).

The *Ready* Court re-affirmed its decision in *Nolan*, holding that a defendant is entitled to present evidence regarding the conduct of settling defendants as it relates to that defendant's sole proximate cause defense. 238 Ill. 2d 582.

The Supreme Court in *Ready* also reconfirmed its holding in *Leonardi* regarding the sufficiency of evidence necessary to justify the allowance of the sole proximate cause defense:

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).

The *Ready* Court concluded that it was error for the trial court not to give the long form IPI No. 12.04 instruction regarding the conduct of several settling former defendants, but that the error was *harmless* because no reasonable jury would have concluded that the sole remaining defendant at trial was not a proximate cause of the accident, and if that defendant was a proximate cause, the settling defendants could not have been the sole proximate cause. *Ready*, 238 Ill. 2d 582.

III. WHEN THE SOLE PROXIMATE CAUSE INSTRUCTION MAY PROPERLY BE GIVEN

A defendant is not automatically entitled to a sole proximate cause instruction. It is proper *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 (1997). "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 (citing *Leonardi*, 168 Ill.2d at 101).

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 34. 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.*

Once a good faith settlement is reached with a party defendant, the long form IPI 12.04 is much more likely to be given if tendered by the defense. *See Petre v. Kucich*, 331 Ill. App. 3d 935, 771 N.E.2d 1084 (1st Dist. 2002). When considering a pre-trial (or pre-closing argument) settlement with less than all the defendants in a multi-party case, the trial lawyer must be extremely mindful of the negative strategic effect the settlement could have regarding the likelihood of success against the remaining defendant(s).

Strategically, therefore, it may be preferable that a good faith settlement be safely and strategically realized with a defendant *following* closing argument and submission of the case to the jury. In this way, the long form instruction of IPI 12.04 cannot properly be given to the jury based on the conduct of the soon-to-be settling defendant, as the settling defendant is already on the verdict form. 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.

Trial Practice Suggestion: In the event the trial court denies Plaintiff’s pre-trial motion *in limine* to prohibit the defense from introducing sole proximate cause evidence or argument, Plaintiff’s lawyer must object to all such evidence during trial in order to preserve the error. *Krklus v. Stanley*, 359 Ill. App. 3d 471, 485, 833 N.E.2d 952 (1st Dist. 2005); *see also Ready v. United/Goedecke Services, Inc.*, 238 Ill. 2d 582, 939 N.E. 2d 417 (2010); *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 658 N.E.2d 450 (1995).

Plaintiff’s lawyer should also renew the motion *in limine* 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. 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 denied, the trial lawyer must raise a continuing objection to the defense sole proximate cause evidence during the defense case in order to preserve the issue for appeal. *Krklus*, 359 Ill. App. 3d at 485. At the close of all of the evidence, Plaintiff’s trial lawyer must again present the motion *in limine*, together with a motion for a directed verdict of the sole proximate cause issue. The ultimate goal is to prevent the long form IPI instruction from being given to the jury and argued by defense counsel, and if not, to preserve the issue for appeal.

IV. IMPROPER TO INTRODUCE EVIDENCE OR IMPLY THAT “EMPTY CHAIR” SETTLED WITH THE PLAINTIFF

The general rule is that evidence of settlement and compromise is barred because it is not relevant and is prejudicial; and the prejudice outweighs the defendant’s right to cross-examine regarding settlement in order to attack bias and credibility of the settling party. *Barkei v Delnor Hosp.*, 176 Ill. App. 3d 681, 696, 531 N.E.2d 413 (2d Dist. 1988).

The principle that it is relevant on cross examination to inquire into the motives, bias, prejudice, or interest of a witness in order to test credibility was not applicable where there was no indication of bias

on the part of the settling doctor who did not stand to gain financially in the case against Hospital, was not bound by the settlement agreement to testify in favor of the plaintiff, and whose testimony did not change as a result of the agreement with plaintiffs. *Barkei v. Delnor*, 176 Ill. App. 3d at 695.

V. PREVENTING IMPROPER SUGGESTION OF SOLE PROXIMATE CAUSE AS TO SUBSEQUENT TREATMENT

Defendants sometimes improperly assert that a subsequent treating health care provider is an “empty chair” sole proximate cause. However, this is not the law, as IPI 30.23 states:

If a defendant negligently causes injury to the plaintiff, then the defendant is liable not only for the Plaintiff’s damages resulting from that injury, but is also liable for any damages sustained by the plaintiff arising from the efforts of health care providers to treat the injury or condition caused by the defendant even if that health care provider was negligent.

This instruction can serve as a basis for a motion *in limine* before trial and can inoculate Plaintiff from anything that occurs during trial involving subsequent treating physician “empty chairs”. This instruction should be tendered by plaintiff in any case in which the jury might have been exposed to such evidence or innuendo.

RESPONDENTS IN DISCOVERY

I. GENERALLY

Persons and entities named as respondents in discovery can be hailed to court without limitation on the scope of discovery and shall be required to respond in the same manner as are defendants. *Zangara v. Advocate Christ Medical Center*, 2011 IL App (1st) 091911, ¶32 (citing *Brown v. Jaimovich*, 365 Ill. App. 3d 329, 333-4, 847 N.E.2d 870 (2006); *Allen v. Thorek Hospital*, 275 Ill. App. 3d 695, 699-701, 656 N.E.2d 227 (1995)).

735 ILCS 5/2-402 is an extremely useful tool—the ability to name physicians, hospitals and other healthcare providers as respondents in discovery. This statute allows Plaintiffs to include in the lawsuit, health care providers who may have information about the Plaintiff’s case, particularly in situations in which the Plaintiff lacks sufficient basis to name them as defendants.

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, 908 (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. 3d 717, 719, 773 N.E.2d 732, 734 (3d Dist. 2002).

The current text of Section 2-402 provides 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.

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 written and oral discovery request with the summons. The requests may include any and all discovery provided for by Supreme Court Rule.*

The statute gives Plaintiffs the ability to compel the respondents to comply with discovery. It is strongly encouraged that the trial lawyer includes with the summons and complaint served upon the respondent, a production request, written interrogatories, and a notice for deposition with a specific date. 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.

Once counsel for the respondent contacts the Plaintiff's lawyer, be sure to inquire whether the respondent's attorney received the written discovery from her/his respondent client. Often times the written discovery is lost somewhere between the sheriff's department, the respondent, the respondent's insurance company, and counsel for the respondent. Start efforts to schedule the respondent's deposition as soon as counsel for the respondent contacts Plaintiff's lawyer.

Service of the summons with discovery provides the court with full jurisdiction over a respondent in discovery. *Coyne v. OSF Healthcare*

System, 332 Ill. App. 3d 717, 719 93d 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. *Respondents have no corresponding rights against the Plaintiff, such as demanding discovery from the Plaintiff or moving to dismiss the case.* The statute is silent on the subject of whether counsel for respondents may ask questions during the depositions conducted by Plaintiff's lawyer. A logical argument can be asserted that counsel for respondents have no right to ask questions of respondents whom they do not represent.¹

Plaintiff is not required to pay a respondent in discovery a fee beyond the statutory witness fee for her or his deposition. Illinois Supreme Court Rule 204, committee comments to subsection (c) state that the rule for the payment of a reasonable fee to physicians for their deposition testimony does *not* apply to physicians who are respondents in discovery.

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.*

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)

Selective and skillful use of the “respondent in discovery” provisions contained in 735 ILCS 5/2-402 (West 2011), can significantly diminish the likelihood of a successful “empty chair”/sole proximate cause defense in many cases.

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

¹ Generally, the depositions of the plaintiff and defendant(s) will not be conducted until the discovery pertaining to all respondents has concluded and the time period for conversion has ended.

First, if not ascertainable solely from the records, you are able to determine whether the healthcare provider has legal responsibility for your client's injury or death and then convert that respondent-provider to defendant status.

Second, the respondent will generally testify that she/he was not negligent; thereby minimizing a future potential "empty chair".

Third, the respondent physician will be much more willing to provide *honest* testimony, rather than testimony that will speciously attempt to assist a defendant or other health care provider. The reason this almost universally occurs is because the respondent physician does not want to be converted to a defendant. Fourth, you can secure significant paper discovery (i.e., policies, procedures, guidelines, records) from respondent hospitals and clinics.

Trial Practice Suggestion: If you are not going to convert a hospital or corporate respondent to a defendant, you may need future trial testimony of an employee (i.e., nurse, technician, hospitalist) employed by the hospital. Consider negotiating an agreement with counsel for the hospital and employee that the employee will be voluntarily produced at Plaintiff's request at time of trial.

II. EXTENSIONS OF THE 6 MONTH PERIOD

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 language of the statute lists several grounds for extending the six month period. However, Plaintiff's trial lawyer should pay close attention to the reasons for requesting the extension. The statute allows for **one** extension, for **up to 90 days**, for [1] the withdrawal of the Plaintiff's attorney, or [2] good cause.

In *Robinson v. Johnson*, 346 Ill. App. 3d 895, 907, 809 N.E.2d 123, 133 (1st Dist. 2003), the court held that because section 2-402 is a special statutory action unknown at common law, trial courts had no discretion to grant any extension for "good cause" beyond the one 90-day extension. The General Assembly subsequently amended Section 2-402 in 2005 to avoid *Robinson's* harsh results, adding: "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 unlimited “additional reasonable extensions” notwithstanding the other limitations of section 2-402.

Trial Practice Suggestion: When drafting court orders allowing for extensions of the statutory respondent conversion time period, it is recommended that the reason for the extension (good cause, or failure to comply with timely filed discovery) be specified in the order. Factually, the extension may be for “good cause” as to one respondent and due to discovery non-compliance as to another respondent. Therefore, specificity regarding the basis for the extension and the specific respondent(s) extension applies to is critical, because only *one* “good cause” extension is statutorily permissible.

Plaintiff’s trial lawyer must also take care to properly diary/calendar the conversion deadline, and any extensions, just the same as a statute of limitations. 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. However, if the statute of limitations has not expired as to that respondent, she could still be sued outside of the statutory respondent provision.

Significantly, *Illinois Supreme Court Rule 183 does not allow motions for extensions of time after the 6 month (or extended) conversion period expires. Robinson, supra.*

III. PROCEDURE FOR A MOTION TO CONVERT A RESPONDENT TO A DEFENDANT

A Plaintiff must seek leave of court to convert a respondent to a defendant. *Medjesky v. Cole*, 276 Ill. App. 3d 1061, 1064 (4th Dist. 1995).

Motions to convert need to be *filed* with the Clerk of Court before the conversion deadline. Merely mailing the motion to defense counsel within the 6 month (or extended) time period is not sufficient. *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 911 N.E.2d 541 (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, 467

N.E.2d 652, 654 (4th Dist. 1984); *Torley v. Foster McGraw*, 116 Ill. App. 3d 19, 452 N.E.2d 7 (1st Dist. 1983).

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).

IV. 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; *Medjesky v. Cole*, 276 Ill. App. 3d 1061, 659 N.E.2d 47 (4th Dist. 1995).

The federal district courts of Illinois have previously determined that Section 2-402 of the Illinois Code of Civil Procedure is a state procedural statute which does not apply in federal court based on the Erie doctrine analysis. See *Stull v. YTB Intern., Inc.*, No. 10-600-GPM, 2011 WL 3702424 (S.D. Ill. Sept. 8, 2010) (slip op.); *Morris v. Health Professionals, Ltd.*, No. 10-01227, 2011 WL 573799 at 9 (C.D. Ill. February 15, 2011) (unreported). However, a recent memorandum and order written by the Honorable Michael J. Reagan sitting in the United States District Court for the Southern District of Illinois defined Section 2-402 as *substantive* law to be used in the federal courts where there is no possibility of inconsistency with federal law. Judge Reagan’s memorandum and opinion set the stage for the substantive use of 2-402 in federal court cases when he denied the defendant doctor’s 12(b)(6) motion to dismiss and allowed Plaintiffs to convert a respondent in discovery to a defendant pursuant to 2-402. See *Boothe v. Marshall Browning Hospital, et al*, 12-cv-025-MJR-SCW, Memorandum and Order, Issued October 31, 2012.

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) (need not demonstrate a high likelihood of success on the merits, need not be sufficient to defeat a motion for summary judgment, and need not establish a *prima facie* case).

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, 787 N.E.2d 874, 877 (3d Dist. 2003).

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.*

The probable cause requirement 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.

Compliance with section 2-622 is not a prerequisite to obtain conversion. *Jackson-Baker*, 337 Ill. App. 3d at 1095; *Moscardini v. Neurosurg, S.C.*, 269 Ill. App. 3d 329, 336-37 (2d Dist. 1994).

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 that a Plaintiff obtain any discovery from a respondent before converting the respondent to a defendant. *Long v. Matthew*, 336 Ill. App. 3d 595, 602-03, 783 N.E.2d 1076, 1082 (4th Dist. 2003). Thus, on a conversion motion, the court does not have to confine its analysis to what was obtained from that particular respondent. *Id.*

V. SUING A RESPONDENT DIRECTLY WITHOUT A MOTION TO CONVERT

Section 2-402 is irrelevant to motions to add defendants made within the limitations period for a cause of action, even if the plaintiff previously named the new defendant as a respondent in discovery. *Flores v. St. Mary of Nazareth Hosp.*, 149 Ill. App. 3d 371, 375-376 (1st dist. 1986).

Section 2-402 on its face does not apply to situations in which the limitations period for the underlying cause of action has not run. Thus, the six-month period must be construed *only to extend, and never to foreshorten, the limitation period.* *Alan v. Thorek Hospital*, 275 Ill. App. 3d 695, 656 N.E.2d 227 (1st Dist. 1995); *Flores v. St. Mary of Nazareth Hosp.*, 149 Ill. App. 3d 371, 375-76 (1st Dist. 1986).