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Civil Practice and Procedure

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Browning v. Advocate: Many Lessons to be Learned

"A mockery of a form of trial." That is how, at oral argument, Justice Lavin described the trial in *Browning v. Advocate Health and Hospital Corp.*, 2023 IL App (1st) 221430.

In a case that is either an anomaly or which portends the conduct of future trials, plaintiffs' counsel used a pre-trial ruling finding that certain treating physicians were the agents of the defendant hospital to have read large portions of those doctors' discovery depositions read as evidence pursuant to Ill. R. Evid. 801(d)(2)(D) and Ill. S. Ct. R. 212(a)(2). The defendants were not able to call those doctors live to explain their deposition testimony until weeks later. A unanimous panel of the Illinois Appellate Court, First District found the trial court erred in finding agency such that the discovery deposition testimony should not have been admitted as admissions. However, the majority of the court, in an opinion written by Justice Hyman, ruled that there was no prejudice to the defendant based upon the delay in presenting live testimony and allowed the $49 million verdict to stand. In dissent, Justice Lavin stated "[t]he majority's conclusion that this was not sufficient evidence of prejudice is disingenuous at best." *Browning*, 2023 IL App (1st) 221430, ¶ 94.

Proceedings in the Trial Court

In February 2015, Joseph Browning was admitted to Advocate Lutheran General Hospital ("Advocate") after medical imaging revealed an inflamed gallbladder. *Browning v. Advocate Health and Hosp. Corp.*, 2023 IL App (1st) 221430, ¶ 8. Dr. Resnick, an Advocate employee, removed the gallbladder. *Id*. After the surgery, Browning developed various symptoms and was taken to the ICU for a suspected sepsis infection, where several specialists treated him. Browning remained in the ICU for almost two weeks and doctors disagreed about the source of the sepsis. *Id*. ¶¶ 9-10. Eventually, a CT scan revealed a hole in the abdomen, requiring surgery. *Id*. ¶ 13. The surgery revealed that much of the small bowel needed to be removed as it was ischemic and necrotic. *Id*. ¶ 14. Browning underwent surgeries in the following weeks performed by Dr. Resnick and eventually underwent a bowel transplant at a non-Advocate hospital. *Id*. ¶¶ 15-16.

In 2016, the Brownings sued Advocate, Dr. Resnick and another physician, alleging medical negligence and loss of consortium claims. *Id*. ¶ 18. The Brownings asserted that the defendants should have known that the infection was a known postoperative complication and should have taken measures to prevent it. *Id*. Moreover, the Brownings alleged that the standard of care was violated by waiting eleven days before the second surgery, as the bowel was damaged beyond repair by that point. *Id*. The Brownings amended their complaint to add the treating physicians and their respective employers, alleging that those physicians acted as Advocate's agents or apparent agents when treating Browning. *Id*. ¶ 20.

Between January 2018 and March 2019, the physicians who treated Browning at Advocate were presented for their discovery depositions. The physicians were not represented as a consequence of the rule in *Petrillo v. Syntex Labs., Inc.*, 148 Ill. App. 3d 581 (1986) (barring *ex parte* communications between a plaintiff's treating doctor and defense counsel

as a violation of the doctor-patient relationship.") *Id*. ¶¶ 21, 94. Following those depositions, Advocate amended its answer, admitting that four treating physicians were apparent agents, but denying agency as to the other physicians. *Id*. ¶ 21. Plaintiffs subsequently dismissed all named physicians except Dr. Resnick. *Id*.

In December 2018, plaintiffs issued a deposition request seeking to depose individuals knowledgeable about the relationship between Advocate and Advocate Physician Partners (APP) to determine whether APP controlled treatment decisions at Advocate. *Id*. ¶ 23. Advocate moved to strike the rider and refused to respond to it. After several extensions, the Brownings moved for discovery sanctions. *Id*. ¶ 24.

In June 2020, the Brownings filed a third amended complaint to allege that certain treating physicians and Advocate belonged to APP. *Id*. ¶ 25. The Brownings also moved for partial summary judgment that certain physicians were Advocate's apparent agents. *Id*. The motion judge granted the motion for sanctions against Advocate, "debarred" Advocate from "maintaining any defense or argument" about the apparent agency of non-employee doctors, and, after initially denying the motion for summary judgment finding a question of fact, the court then granted summary judgment on the issue of agency as now required by the sanctions order. *Id*. ¶¶ 25-26.

Before trial, the Brownings moved *in limine* to have portions of the discovery depositions of ten of the physicians read to the jury as admissions of a party's agent. *Id*. ¶ 28. Advocate did not object to the testimony of three of the physicians, but objected to the other seven on grounds of inadmissible hearsay, as they were not agents of Advocate at the time of the deposition. The trial judge granted the Brownings' motion. *Id*.

At trial, the defendants objected to the use of physicians' discovery depositions as substantive evidence. *Id*. ¶ 32. The objections were overruled and the jury found for plaintiffs. *Id*. ¶ 35. The jury awarded the plaintiff $49.25 million. *Id*. The defendants moved for a new trial, arguing that the court abused its discretion in imposing the discovery sanction and that the sanction turns inadmissible testimony into admissible testimony. *Id*. The trial court denied the motion and the defendants appealed. *Id*. ¶ 36.

Majority Decision

On appeal, defendants argued that the discovery deposition testimony of seven physicians was inadmissible hearsay because it did not fall within a hearsay exception for a discovery deposition because the physicians were not Advocate's agents at the time of the deposition. *Id*. ¶¶ 52-53. All three justices agreed, finding that summary judgment did not apply to the discovery depositions as the sanctions order was inapplicable, that the depositions did not take place during the agency relationship, Advocate did not give the physicians permission to speak on its behalf and that the Illinois Rules of Evidence would not allow the physicians' testimony to be admitted. *Id*. ¶¶ 55-56, 88. The majority held that because the defendants did not appeal from the sanctions order it was not reviewable because it was "not a step in the procedural progression leading to the judgment against defendants." *Id*. ¶ 57

The majority of the First District affirmed the denial of a new trial because, despite the error in allowing the improper deposition testimony, it did not find prejudicial error in admitting the inadmissible testimony or the error to have affected the outcome. *Id*. ¶ 64. The First District held that since the defendants called the treating physicians as witnesses at trial, the testimony would still have been elicited and the defendants do not identify what testimony would have changed the outcome. *Id*. ¶ 75.

The Dissent

The dissent agreed that the testimony was inadmissible, but stated that the sanctions order was reviewable and that the defendants were prejudiced by the inadmissible testimony. *Id*. ¶ 88. The dissent asserts that the sanctions order was a step in the procedural progression and that the primary issues on appeal stem from that order. *Id*. ¶ 91. The dissent further argues that the inadmissible testimony was prejudicial because many of the depositions occurred without the doctors having counsel present, defendants were unable to call the treating physicians until weeks after the Brownings presented their testimony, and allowing the testimony would blur the line between evidence depositions and discovery depositions. *Id*. ¶¶ 94-96.

Takeaways

Despite the unusual pre-trial procedural history, the lessons from this case are numerous. First, in cases where a possible agent is to be deposed, it is critical for them to have counsel to prepare them for their testimony and review any records with them. Recognizing the complication that *Petrillo* can present, this lesson applies whether the witness is a medical professional or any other witness. This is especially so in light of the decision in *McQueen v. Green*, 2022 IL 126666, in which the Illinois Supreme Court held that a defendant employer could be held liable in negligence for the conduct of an employee, even though the jury found the employee free of negligence.

Second, this case must be kept at the ready by trial counsel where the plaintiff is going to be reading excerpts of testimony from discovery depositions. Clearly delineating which defense witnesses are agents, and which are not, and when the agency relationship existed can be used to prevent this tactic.

Third, if the reading of discovery depositions is allowed, it should be done in a coherent fashion and, if it is not, an objection should be made. As set forth by the dissent, the deposition testimony presented was cobbled together thusly:

> [T]he manner in which Rabinak [the reader] read the discovery depositions to the jury in a cut-and-paste fashion was clearly prejudicial to the defense. For example, when Rabinak read Dr. Stone's discovery deposition to the jury, he began reading from page 5 of the discovery deposition, then jumped to page 17, then back to page 10, before skipping ahead to pages 42-43 of the deposition, and so forth. Rabinak read the other discovery depositions to the jury in the same manner. While Rabinak was only doing his job, the jury was presented with an inaccurate and misleading view of the evidence.

Id. ¶ 98. Though not found to be prejudicial by the majority, this issue should be preserved because, under other circumstances, it could get traction.

Fourth, an argument that does not seem to have been made was that Ill. S. Ct. R. 212(c) provides: "[i]f only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him or her to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used." This brings us back to the first point above: to have testimony from the discovery deposition to be read it is likely necessary to have the witness represented by counsel who can prepare for such rehabilitation questioning. It is unlikely that favorable rehabilitation testimony, pursuant to Rule 212(c), following testimony introduced by the plaintiff will have been elicited at the deposition absent representation of the witness.

Fifth, and though an extension of Ill. S. Ct. R. 212(c), when faced with a plaintiff's lawyer employing this tactic, and where favorable deposition testimony is not available, defense counsel should ask, and be prepared to call, the witness live immediately after the read portions so that the jury can promptly hear the testimony. This request should at least be made to preserve the issue as it comports with the spirit of Rule 212(c), as there is at least one appellate court justice that appreciates the prejudice in having to wait weeks to rehabilitate a witness.

Finally, it is critical that all orders that are potentially appealable be included in the notice of appeal. As the dissent noted, the sanctions order was a step on the way to the erroneous evidentiary decision, but that was rejected by the majority. It is unlikely the outcome would have been different had the sanctions order been appealed, but it would have squarely put the issue before the appellate court.

Epilogue

This is a trial and a ruling that is notable because of the size of the verdict, the manner in which it was tried, and the blistering dissent by Justice Lavin. Not only in his dissent, but at oral argument, he expressed incredulity to plaintiffs' counsel about trying a case using a reader and extensive excerpts of deposition testimony. The distinction between discovery and evidence depositions is fundamental to Illinois civil trial practice and it should be maintained. The unanimous decision of the First District held that it was improper to allow the testimony in this case, but not because rules do not allow it, but because the sanctions order did not permit its use. The defense bar must be vigilant to resist attempts to further erode the distinction between these two kinds of depositions, as justice is best served by the distinction.

This may not be the last of this case. As of this writing, a petition for leave to appeal has been filed and is pending before the Illinois Supreme Court.

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