

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

Victor M. Gonzalez, Administrator of the Estate of Roger Gonzalez, deceased,)	
)	No. 15-cv-00776
Plaintiff,)	Judge Philip G. Reinhard
)	Magistrate Judge Iain D. Johnston
vs.)	
)	Jury Demanded
Wexford Health Sources, Inc.,)	
Arthur Davida, M.D., Dr. Stephen Israel, and Dr. Roderick L. Matticks.)	
)	
Defendants.)	

**DEFENDANTS, WEXFORD HEALTH SOURCES, INC. and ARTHUR
DAVIDA M.D.'s, RESPONSE TO PLAINTIFF'S MOTION TO DISMISS
DEFENDANT, DR. STEPHEN ISRAEL, (Dkt. 236) and MOTION FOR
CLARIFICATION OF JUNE 30, 2020 MINUTE ENTRY (Dkt. 238)**

NOW COME Defendants; WEXFORD HEALTH SOURCES, INC. and ARTHUR DAVIDA M.D. (collectively "Defendants"), through their attorneys, CONNOLLY KRAUSE LLC, and for their Response to Plaintiff's Motion to Dismiss Defendant, DR. STEPHEN ISRAEL ("Israel"), (Dkt. 236) pursuant to this Honorable Court's June 30, 2020 Minute Entry (Dkt. 238) and Motion for Clarification of June 30, 2020 Minute Entry (Dkt. 238) state as follows:

I. Response to Plaintiff's Motion to Dismiss Defendant, Israel (Dkt. 236)

1. That Plaintiff's Fifth Amended Complaint (Dkt. 717) was filed on January 29, 2019, asserting, among other claims, a state law claim for medical malpractice against Defendants and Israel.
2. That on April 23, 2020, Plaintiff informed Defendants that he reached a settlement agreement with Israel.

3. That on April 23, 2020, counsel for Defendants, Robert Tengesdal, requested that counsel for Plaintiff disclose the terms of settlement with Israel.

4. That as of the instant filing, the only representation of the terms of settlement has been made orally that a settlement amount of \$75,000 has been reached, with no further terms or settlement documentation provided.

5. That the Illinois Joint Tortfeasor Contribution Act (the “Act”) creates a statutory right of contribution in actions “where 2 or more persons are subject to liability in tort arising out of the same injury to person or property.” 740 ILCS 100/2(a); *see Bulson v. Helmold*, 2018 U.S. Dist. LEXIS 187850 at 5-6 (N.D. Ill. 2018).

6. The good faith nature of a settlement is the only limitation placed on the right to settle. *Cotton v. Privatebank & Trust Co.*, 2003 U.S. Dist LEXIS 16742, at 7 (N.D. Ill. Sep. 23, 2003); *Dubina v. Mesirow Realty Dev., Inc.*, 197 Ill. 2d 185 (Ill 2001).

Good Faith Settlement

7. That parties seeking to overcome challenges to their settlement pursuant to the Act bear the burden of demonstrating a preliminary showing of good faith. *Johnson*, 203 Ill. 2d at 133; *Bulson*, 2018 U.S. Dist. LEXIS 187850 at 6.

8. That should the parties seeking settlement approval meet their burden to show the good faith nature of the settlement, “the party challenging the good faith of the settlement need prove the absence of good faith by a preponderance of the evidence.” *Johnson*, 203 Ill. 2d at 133; *Bulson*, 2018 U.S. Dist. LEXIS 187850 at 7.

9. That the Illinois Supreme Court has held that a settlement is not in good faith if: (1) “the settling parties engaged in wrongful conduct, collusion, or fraud”, or (2) the settlement “conflicts with the terms of the Act or is inconsistent with the policies underlying the Act.” *Johnson v. United Airlines*, 203 Ill. 2d 121, 134 (Ill. 2003); *see Bulson*, 2018 U.S. Dist. LEXIS 187850 at

6. The policies underlying the act include “the equitable apportionment of damages among tortfeasors.” *Johnson*, 203 Ill. 2d at 133; *Bulson*, 2018 U.S. Dist. LEXIS 187850 at 6.

10. In addition to the factors set forth in ¶ 9 above, courts consider the “totality of the circumstances,” including whether a calculated effort was made to conceal information about the circumstances surrounding the settlement agreement. *Bulson*, 2018 U.S. Dist. LEXIS 187850 at 7; *Mercola v. Abdou*, 223 F.Supp.3d 720, 732 (N.D. Ill. 2016) (quoting *Johnson*, 203 Ill. 2d at 135); *LaJeunesse v. Ford Motor Co.*, 642 f. Supp. 2d 835, 838 (N.D. Ill. 2009).

11. That the failure to disclose the terms of settlement suggests the parties are not acting in good faith, as non-settling defendants are not given an adequate opportunity to object to the settlement. *In re Guardianship of Babb*, 162 Ill. 2d at 166 (finding that a failure to notify non-settling defendants suggested settling parties were not acting in good faith).

12. That granting a motion for good faith finding without advising the non-settling defendants of the amounts and terms of the settlement could violate procedural due process. Entry of a good faith finding extinguishes a non-settling defendant’s cause of action for contribution against the settling defendant. *Johnson*, 203 Ill. 2d at 128. A statutory cause of action is considered property under the Fourteenth Amendment; and therefore, due process requirements are implicated. *See Bradford v. Soto*, 159 Ill. App. 3d 668, 672-73 (4th Dist. 1987). “At a minimum, procedural due process requires notice, an opportunity to respond, and a meaningful opportunity to be heard.” *Gold Realty Group Corp. v. Kismet Café, Inc.*, 358 Ill. App. 3d 675, 681 (1st Dist. 2005).

13. That Plaintiff and Israel have not made a full disclosure of the settlement terms reached between the parties, which fails to give Defendants adequate opportunity to object to the settlement and its terms which may include agreements to give cooperative testimony or expert opinions. Plaintiff and Israel’s failure to disclose the full terms of their settlement suggests they

are not acting in good faith. Accordingly, Plaintiff and Israel have not met their burden to show the terms of the settlement are made in good faith.

14. That an in-camera inspection of the settlement terms by this Honorable Court gives this Honorable Court an opportunity to evaluate and rule on the good faith nature or lack thereof of the settlement terms reached between Plaintiff and Israel.

Contribution Setoff

15. That the Illinois Joint Tortfeasor Contribution Act (the “Act”) creates a statutory right of contribution in actions “where 2 or more persons are subject to liability in tort arising out of the same injury to person or property.” 740 ILCS 100/2(a); *see Bulson v. Helmold*, 2018 U.S. Dist. LEXIS 187850 at 5-6 (N.D. Ill. 2018).

16. That pursuant to the Act, “when a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury...it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.” 740 ILCS 100/2(c); *see Bulson*, 2018 U.S. Dist. LEXIS 187850 at 5-6.

17. That a setoff is “a procedural device for adjusting a verdict to avoid windfall to the plaintiff” generally styled as a Rule 59(e) motion to alter or amend the judgment. *See Fox ex rel. Fox v. Barnes*, 2013 WL 2111816 at 2 (N.D. Ill. May 15, 2013) (citing *Zivitz v. Greenberg*, 279 F.3d 536, 539 (7th Cir. 2002); *Smith v. Altman*, No. 12 C 4546 (N.D. Ill. September 21, 2015)).

18. That should this Honorable Court find Plaintiff’s settlement with Israel in the amount of \$75,000 to be in good faith, Defendants respectfully request that this Honorable Court enter an order granting Defendants a verdict setoff in the amount of Plaintiff’s settlement with Israel, presumptively \$75,000.

II. Motion for Clarification of June 30, 2020 Minute Entry (Dkt. 238)

19. That on June 30, 2020, the parties had a status hearing before this Honorable Court regarding Plaintiff's pending Motion for Leave to File Sixth Amended Complaint (Dkt. 23) and Motion to Dismiss Israel (Dkt. 236).

20. That at the status hearing, this Honorable Court instructed Plaintiff to file a revised Sixth Amended Complaint by July 20, 2020, after which, Defendants were given 30-days to amend their FRCP 26(a)(2)(B) and 26(a)(2)(C) disclosures and address the issue of supplemental affirmative defenses to the operative Fifth Amended Complaint or revised Sixth Amended Complaint. Accordingly, this Honorable Court struck the July 17, 2020 dispositive motion deadline.

21. On June 30, 2020, this Honorable Court issued a Minute Entry (Dkt. 238) regarding Plaintiff's Motion to Dismiss Israel and Defendants' response, as well as a July 20, 2020 deadline for Plaintiff to file a revised Sixth Amended Complaint, but did not address the 30-days subsequent to filing the revised Sixth Amended Complaint or the stricken July 17, 2020 dispositive motion deadline as addressed on the record at the status hearing.

WHEREFORE, Defendants, WEXFORD HEALTH SOURCES, INC. and ARTHUR DAVIDA M.D., respectfully request that this Honorable Court enter an order:

- i. for in-camera inspection of all settlement terms and documentation between Plaintiff and Israel to rule on the good faith of the settlement and its terms;
- ii. stating that Defendants are entitled to a verdict setoff in the amount of Plaintiff's settlement with Israel, presumptively \$75,000, if a verdict is entered against Defendants should this Honorable Court determine that any such settlement was made in good faith;
- iii. granting leave for Defendants, WEXFORD HEALTH SOURCES, INC. and ARTHUR DAVIDA, M.D., to amend their FRCP 26(a)(2)(B) and 26(a)(2)(C) disclosures within 30 days of the filing of Plaintiff's revised Sixth Amended Complaint;
- iv. granting leave for Defendants, WEXFORD HEALTH SOURCES, INC. and

ARTHUR DAVIDA, M.D., to amend/supplement their affirmative defenses to Plaintiff's operative Fifth Amended Complaint or Sixth Amended Complaint when filed;

- v. striking the July 17, 2020 dispositive motion deadline; and
- vi. granting such further relief as this Honorable Court deems just and fair.

Respectfully submitted,

By: /s/Anthony M. DeLongis
One of the Attorneys for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2020, I caused the foregoing document to be filed electronically with the Clerk of the Court through ECF. All of the participants in the case are registered CM/EFC users and will be served by the CM/EFC system.

By: /s/Anthony M. DeLongis