No. 130033

IN THE
SUPREME COURT OF ILLINOIS

TERRENCE LAVERY and ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC,	)	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-22-0990
Plaintiffs-Appellees,	)	
and	)	
ANIL RAMACHANDRAN,	)	There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 2020-CH-01202
Plaintiff,	)	
v.	)	
DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION,	)	The Honorable CAROLINE KATE MORELAND, Judge Presiding.
Defendant-Appellant.	)	

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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E-FILED
8/14/2024 1:32 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

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NATURE OF THE ACTION

Plaintiffs-Appellees, Terrence Lavery and Illinois Professionals Health Program, LLC ("IPHP"), filed a complaint in the circuit court seeking a protective order, declaratory relief, and administrative review. Plaintiffs alleged in the complaint that, during the course of his participation as a witness in proceedings for the restoration of the medical license of Anil Ramachandran, Lavery was ordered by an Administrative Law Judge ("ALJ") of Defendant-Appellant Illinois Department of Financial and Professional Regulation ("Department") to produce documents containing his personal notes relative to his therapeutic treatment of Ramachandran. Lavery and IPHP claimed that there was no basis for the production order prior to an *in camera* review of the documents by the circuit court, citing the Mental Health and Developmental Disabilities Confidentiality Act ("Confidentiality Act"), 740 ILCS 110/1 *et seq*. (2022). Following an *in camera* review, the circuit court determined that portions of Lavery's documents contained privileged work product under the Confidentiality Act and warranted a protective order. The claim for administrative review was voluntarily dismissed. The circuit court thereafter granted Lavery and IPHP's amended motion for attorney fees and costs. The Department appealed.

On appeal, the Department argued that, under the doctrine of sovereign immunity, the circuit court lacked subject matter jurisdiction to award attorney fees and costs against the Department. The appellate court affirmed

the circuit court's award, concluding that it was appropriate under the officer suit exception to sovereign immunity because it was "ancillary" to the injunctive relief that was entered and was sought under a statute that generally allowed for an award of fees and costs. This Court granted leave to appeal. The issue of whether sovereign immunity bars the attorney fees and costs award is a question raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether the appellate court's determination that the circuit court had jurisdiction to award attorney fees and costs against an arm of the State under the officer suit exception to sovereign immunity should be reversed where:

A. attorney fees and costs were not expressly permitted against the State under the relevant statute;

B. the complaint failed to allege that an officer had acted outside the scope of the officer's authority or otherwise in violation of law; and

C. to the extent that this Court held in *Leetaru* that an action may proceed under the officer suit exception to sovereign immunity even though only an arm of the State — rather than an officer — is a defendant, *Leetaru* is contrary to the weight of authority and should be overruled.

JURISDICTION

On June 3, 2022, the circuit court issued a final order granting Lavery and IPHP's amended motion for attorney fees and costs. C454.[1] The Department filed a notice of appeal on July 1, 2022, C455-57, within 30 days of the circuit court's final order, *see* Ill. Sup. Ct. R. 303(a)(1). On August 25, 2023, the appellate court issued an opinion affirming the circuit court's judgment. *Lavery v. Dep't of Fin. & Pro. Regul.*, 2023 IL App (1st) 220990. This Court allowed the Department to file a petition for leave to appeal on January 12, 2024, and subsequently allowed the petition on March 27, 2024.

[1] The common law record on review is cited as C__ and the report of proceedings as R__. The Department's opening brief in the appellate court is cited as AT Br. __, plaintiffs' response brief as AE Br. __, and the Department's reply brief as RY Br. __.

STATEMENT OF FACTS

The Parties

The Department is the administrative agency responsible for regulating medical licenses in the State under the Medical Practice Act of 1987, 225 ILCS 60/1 *et seq*. (2022). Ramachandran, a psychiatrist licensed under the Medical Practice Act, sought restoration of his physician and surgeon and controlled substance licenses following a disciplinary suspension. C160.[2] Plaintiffs, Lavery and his employer, brought this action seeking, in part, a declaratory judgment that certain notes Lavery took as Ramachandran's treatment program case manager constituted privileged "personal notes" as defined under the Confidentiality Act, 740 ILCS 110/1 *et seq*. *See* C151-67. In addition to this declaratory relief, plaintiffs sought, and were awarded, attorney fees and costs, which is the sole relief challenged by the Department in this appeal. C454.

The Administrative Proceedings

In 2014, the Department filed an administrative complaint against Ramachandran seeking suspension or revocation of his medical and controlled substance licenses. C187-95. The Department alleged, in part, that Ramachandran had engaged in conduct that was grounds for revocation or suspension of his licenses under section 22(A)(20) of the Medical Practice Act,

[2] Ramachandran was a plaintiff in the circuit court proceeding, but was later dismissed, C279-80, and did not participate in the appellate court proceeding.

which includes "immoral conduct . . . including, but not limited to . . . sexual misconduct related to the licensee's practice" as grounds for revocation or suspension. 225 ILCS 60/22(A)(20) (2022); C193-94. Specifically, the Department alleged that Ramachandran had prescribed opioids to a patient following a sexual encounter with the patient, where the patient had a history of opiate dependence and of being subjected to physical, emotional, and sexual abuse. C190-94. Ramachandran entered into a consent order with the Department, in which he neither admitted nor denied the allegations but agreed to the indefinite suspension of his licenses. C197-200. He later entered into a second consent order following allegations that he had provided a phone consultation to a patient while his licenses were suspended. C201-04.

Ramachandran subsequently sought restoration of his licenses under section 43 of the Medical Practice Act, 225 ILCS 60/43 (2022). *See* C206-08. Under that section, the Department may restore a medical license unless, following an investigation and hearing, its Secretary determines that restoration is not in the public interest. 225 ILCS 60/43 (2022). In the petition, Ramachandran asserted that he had no medical or psychiatric impairments, and that he would provide information about treatment he had received. C208. He also noted that he had been arrested twice for driving offenses since the imposition of the suspension. *Id.*

During the hearing, which was conducted by an ALJ as part of the restoration proceedings, Ramachandran called Lavery as a witness. C160.

Lavery was a licensed clinical professional counselor and served as a case manager for Ramachandran as part of his recovery plan with IPHP. C160-61. The plan included therapy, drug screens, and participation in 12-step or self-help meetings. C161. Lavery testified during the hearing that Ramachandran had complied with the plan's requirements. *Id.*

On cross-examination, Lavery disclosed the existence of documents containing notes of his conversations with Ramachandran's therapist, which Lavery had kept in electronic medical record format and had not disclosed to the Department. *Id.* The ALJ reviewed the Department's discovery requests in the case, halted Lavery's testimony, and ordered the production of the documents within one month, by August 26, 2019. *Id.* The hearing was continued to October 15, 2019. *Id.*

The documents were not produced by the August deadline. *Id.* Instead, nearly seven weeks after the production due date, and five days before the hearing was set to resume, plaintiffs asserted in a memorandum that the documents constituted "personal notes" as defined under the Confidentiality Act, and were thus privileged. *Id.* Under the Confidentiality Act, personal notes are defined as:

> (i) information disclosed to the therapist in confidence by other persons on condition that such information would never be disclosed to the recipient or other persons;
> (ii) information disclosed to the therapist by the recipient which would be injurious to the recipient's relationships to other persons, and
> (iii) the therapist's speculations, impressions, hunches, and reminders.

740 ILCS 110/2 (2022). The Confidentiality Act provides that a therapist's personal notes are work product and not subject to discovery in an administrative proceeding. *Id.* § 3(b).

The ALJ ultimately entered an order again requiring the production of the documents. C160-66. The ALJ noted that the apparent purpose of Lavery's testimony was to show that Ramachandran had complied with the substance abuse program, a "major factor in showing that [Ramachandran] was sufficiently rehabilitated to obtain restoration of his physician's license." C160. The ALJ acknowledged the privilege for personal notes under the Confidentiality Act but ruled that Lavery did not specify how the documents here constituted personal notes under the Confidentiality Act, such as through an affidavit attached to the memorandum. C165. Specifically, the ALJ concluded that Lavery's general characterization of the documents as privileged was insufficient to invoke the privilege. *Id.* The ALJ added that although Lavery testified that Ramachandran had complied with his recovery plan, the Department was prevented from confirming that Ramachandran was rehabilitated because it was not given Lavery's supporting documentation. *Id.*

At a subsequent status hearing, plaintiffs' counsel informed the ALJ that they would be filing an action in the circuit court concerning the documents. C167.

The Circuit Court Proceedings

Plaintiffs brought this action in the circuit court and raised three counts in the operative, amended complaint. C151-67. Ramachandran was also named as a necessary party, though he stated repeatedly that he had no objection to the production of Lavery's notes. C135, 151, 232.

In count one, plaintiffs sought a protective order for the documents, claiming that they constituted privileged work product under the Confidentiality Act. C155-56. In addition to seeking a protective order, plaintiffs asserted that "[t]here was no basis for rejecting Mr. Lavery's assertion of the therapist's work product privilege without the documents being submitted to the Circuit Court for an *in camera* inspection." *Id.* In count two, plaintiffs sought a declaratory judgment that the documents were privileged work product under the Confidentiality Act. C156-57. In count three, they sought administrative review of the ALJ's interlocutory order requiring production of the documents. C157-58. The only defendant named in the complaint was the Department. C151.

Among the requested relief in the first two counts, plaintiffs sought attorney fees and costs pursuant to section 15 of the Confidentiality Act. C156-57 (citing 740 ILCS 110/15 (2022)). That section provides:

> Any person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief. Reasonable attorney's fees and costs may be awarded to the successful plaintiff in any action under this Act.

740 ILCS 110/15 (2022).

The Department moved to dismiss counts one and three arguing, in part, lack of standing as to the first count and lack of a final order for purposes of administrative review as to the third count. C171-230. The Department did not move to dismiss the second count as to plaintiffs, which sought a declaratory judgment that the notes were privileged and requested an *in camera* inspection. *Id.*; C241, n.2. Plaintiffs voluntarily dismissed the third count, C278, and the circuit court denied the Department's motion to dismiss the first count, C277-80.

The circuit court thereafter conducted an *in camera* inspection of the documents. C137-40; C281-82, 292. The court found that some portions of the documents contained Lavery's "personal notes," and thus were not subject to disclosure under the Confidentiality Act, and placed them under a protective order. C292 (citing 740 ILCS 110/2, 3 (2022)); R5-6.

Plaintiffs then filed an amended motion for attorney fees and costs. C368-79. In its briefing on the motion, plaintiffs stated that "the ALJ is not a party to this litigation, nor is Plaintiffs' motion for fees and costs directed at the ALJ." C439. The circuit court granted the motion over the Department's opposition, C381-433, awarding fees and costs against the Department in the amount of $4,079.21 to IPHP and $6,560.00 to its counsel, C454.

The Appellate Court Proceedings

On appeal, the Department challenged the circuit court's award of attorney fees and costs against it based on the doctrine of sovereign immunity.

See Lavery, 2023 IL App (1st) 220990, ¶ 2. Specifically, it argued that, under the State Lawsuit Immunity Act, the circuit court lacked subject matter jurisdiction to enter the monetary award against the Department, an arm of the State. AT Br. 7-14. As the Department noted, when the General Assembly intends to abrogate sovereign immunity and subject the State to attorney fees and costs, it must do so expressly in a statute. *Id.* at 9-14. The Confidentiality Act, the Department observed, did not expressly subject the State to attorney fees and costs, and thus sovereign immunity barred plaintiffs' recovery in circuit court. *Id.*

In response, plaintiffs argued, among other things, that the award of attorney fees and costs was permitted under the officer suit exception to sovereign immunity. AE Br. 10-12. The Department replied that this exception did not apply because the award of attorney fees and costs constituted a money judgment not expressly permitted against the State in the Confidentiality Act and that the complaint contained no allegation of any officer acting unlawfully or outside the scope of their authority. RY Br. 4-10.

The appellate court affirmed the circuit court's award of attorney fees and costs against the Department, concluding that the circuit court had subject matter jurisdiction to enter it pursuant to the officer suit exception to sovereign immunity. *Lavery*, 2023 IL App (1st) 220990, ¶¶ 27-48. The court concluded both that the allegations of the complaint brought it within the

exception and that an award of fees and costs was appropriate as "ancillary" to the injunctive relief sought. *Id.*

To begin, the court held that plaintiffs did not need to name a specific officer as a defendant in the complaint because their action was against the "Department itself," which, in the court's view, had "sought — and persisted in seeking — documents shielded from discovery" under the Confidentiality Act. *Id.* at ¶ 38. The court determined that plaintiffs' position, as "clarified by counsel at [appellate] oral argument," was that the Department should have sought an *in camera* inspection itself or refrained from opposing an *in camera* inspection in the circuit court. *Id.* at ¶ 41. The court stated that this position was evident from the complaint, where plaintiffs asserted that "[t]here was no basis for rejecting Mr. Lavery's assertion of the therapist's work product privilege without documents being submitted to the Circuit Court for an *in camera* inspection." *Id.* It also noted that it saw "nothing in the record indicating the Department sought to disabuse the ALJ of the misunderstanding that [an *in camera*] review had to be done through a separate action in the circuit court," *id.* at ¶ 40, and that the Department had opposed plaintiffs' request for an *in camera* inspection in the circuit court, *id.* at ¶ 42. The court concluded that "the Department knew that the documents might be privileged, resisted plaintiffs' efforts to settle that question, and doggedly persisted in its demand for their production." *Id.*

Acknowledging a split of authority on the issue in the appellate court, the court further held that attorney fees and costs could be awarded under the officer suit exception because they were "ancillary" to the injunctive relief that was awarded under the exception where the Confidentiality Act generally allowed for such fees and costs. *Id.* at ¶¶ 28-35, 45. In support of this decision, the court relied, in part, on federal decisions interpreting the Eleventh Amendment to the United States Constitution. *Id.* at ¶¶ 33-34. The appellate court thus affirmed the circuit court's award and remanded for consideration of plaintiffs' request for attorney fees and costs arising from the appeal. *Id.* at ¶ 47.

ARGUMENT

The appellate court erred in awarding attorney fees and costs under the officer suit exception to sovereign immunity because the Confidentiality Act does not expressly allow for such an award against the State and plaintiffs did not allege that any state officer had acted unlawfully.

The State Lawsuit Immunity Act establishes sovereign immunity for the State and, with limited exceptions, bars suits against it from proceeding in circuit court. 745 ILCS 5/1 (2022). One exception to sovereign immunity is the "officer suit" exception, which allows claims for prospective injunctive relief to proceed in circuit court where a state officer is alleged to have acted unlawfully, such that the officer's conduct is no longer considered to be that of the State. *See Parmar v. Madigan*, 2018 IL 122265, ¶ 22. The appellate court's decision applying the exception here should be reversed for three independent reasons. First, attorney fees and costs should not be awarded in addition to injunctive relief that was entered under the exception where they are not expressly allowed against the State by statute. Second, the operative complaint contained no allegations of unlawful conduct by a state officer. Third, this Court should overturn its decision in *Leetaru v. Bd. of Trs. of the Univ. of Ill.*, 2015 IL 117485, which held that that a suit may proceed under the exception against an arm of the State. Each of those three issues presents a question of law and concerns the circuit court's jurisdiction and thus gives rise to *de novo* review. *See McCormick v. Robertson*, 2015 IL 118230, ¶ 18.

A. The circuit court lacked jurisdiction to award attorney fees and costs because the Confidentiality Act did not expressly allow the award against the State and fees and costs were not necessary to carry out the injunctive relief that was granted.

The appellate court erred by concluding that attorney fees and costs could be awarded against the Department as "ancillary" to the injunctive relief that was afforded under the officer suit exception to sovereign immunity. The court decided that the award was proper because the statute the Department had allegedly violated, the Confidentiality Act, generally allows for fees and costs. *Lavery*, 2023 IL App (1st) 220990, ¶ 32. But this ruling contravenes this Court's precedent requiring an express statutory waiver of sovereign immunity from money judgments, and it should therefore be reversed.

Article XIII, section 4, of the Illinois Constitution provides that "[e]xcept as the General Assembly may provide by law, sovereign immunity in this State is abolished." Ill. Const., art. XIII, § 4. Pursuant to that provision, the General Assembly reinstated sovereign immunity through the State Lawsuit Immunity Act, 745 ILCS 5/1 *et seq.* (2022). *See Nichol v. Stass*, 192 Ill. 2d 233, 237 (2000). The State Lawsuit Immunity Act provides that, except as specified in certain enumerated exceptions not relevant here, "the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (2022). When the State, or an arm of the State, like the Department, is named as a defendant in action brought under Illinois law, the doctrine of sovereign immunity generally applies and deprives the circuit court of subject matter

jurisdiction over the action. *See Brandon v. Bonell*, 368 Ill. App. 3d 492, 510 (2d Dist. 2006) (arms of State are protected by sovereign immunity).

Sovereign immunity "protects the State from interference in its performance of the functions of government and preserves its control over State coffers." *State Bldg. Venture v. O'Donnell*, 239 Ill. 2d 151, 159 (2010). (cleaned up). When a court enters a money judgment against the State, it subjects the State to liability and controls its actions — an outcome that sovereign immunity is intended to avoid. *See James ex rel. Mims v. Mims*, 316 Ill. App. 3d 1179, 1181 (1st Dist. 2000) (a claim is against the State when "a judgment for the plaintiff could subject the State to liability or control the actions of the State").

While the General Assembly possesses the authority to waive sovereign immunity by statute for certain types of claims, this Court has held that the waiver must be "clear and unequivocal." *In re Special Educ. of Walker*, 131 Ill. 2d 300, 303 (1989) (internal quotations omitted). On this basis, this Court has repeatedly denied requests for monetary awards against the State where such relief is not expressly allowed by statute. *See id.* at 304 (costs not permitted where statute "do[es] not in express terms refer to the State"); *accord City of Springfield v. Allphin*, 82 Ill. 2d 571, 578-79 (1980) (legislature must "specifically subject the State to liability" to assess interest against the State); *Dep't of Revenue v. App. Ct.,* 67 Ill. 2d 392, 396 (1977) ("Statutes which in general terms authorize the imposition of costs in various actions or

proceedings, but which do not in express terms refer to the State, are not adequate to authorize the imposition of costs against the State."); *Williams ex rel. Williams v. Davenport*, 306 Ill. App. 3d 465, 470 (1st Dist. 1999) ("language specifically referencing the State is absolutely necessary if the State is to be considered a party consenting to the costs or fees"). These holdings are in accord with a chief goal of sovereign of immunity, which is to "preserve[] . . . control over State coffers." *State Bldg. Venture*, 239 Ill. 2d at 159.

Against this baseline, the officer suit exception to sovereign immunity allows a plaintiff to seek relief in court against a state officer in a limited circumstance: where the plaintiff seeks prospective injunctive relief against that officer to prevent ongoing unlawful conduct or conduct in excess of the officer's authority. *See Parmar*, 2018 IL 122265, ¶ 22. In that scenario, the officer is no longer considered to be acting as the "State," and an action for prospective injunctive relief "may be brought in the circuit court without offending sovereign immunity principles." *Id*.

Here, the appellate court concluded that attorney fees and costs may be awarded, in addition to injunctive relief, under the officer suit exception when the statute at issue allows for fees and costs generally — as opposed to expressly — against the State. *Lavery*, 2023 IL App (1st) 220990, ¶¶ 28-35, 45; *see also* 740 ILCS 110/15 (2022). In fashioning this rule, the court cited no case from this Court that has ever so held. Indeed, as the cases cited above demonstrate, the appellate court's rule contravenes the longstanding

precedent requiring a clear and unequivocal waiver of sovereign immunity to impose a money judgment on the State.

The appellate court's bases for allowing the award — inapposite Illinois case law, federal decisions on the Eleventh Amendment, and the court's own policy judgment — should be rejected by this Court. Instead, the Court should reinforce its long line of precedent holding that a circuit court has jurisdiction to award a monetary judgment against the State only where it is expressly allowed by statute.

1. Illinois case law does not support an award of attorney fees and costs in addition to injunctive relief that was granted under the officer suit exception.

First, the Illinois cases that the appellate court relied on to form its rule — an alternative holding in *Grey*, 2015 IL App (1st) 130267, and this Court's decision in *Ill. Dep't of Fin. & Pro. Regul. v. Rodriquez*, 2012 IL 113706 — are inapposite. *See Lavery*, 2023 IL App (1st) 220990, ¶ 29-32, 35. In *Grey*, the appellate court held that the relevant statute included a waiver of sovereign immunity. 2015 IL App (1st) 130267, ¶ 21. As part of an alternative holding, the court also concluded that statutory attorney fees and costs could be awarded as part of injunctive relief sought under the officer suit exception. *Id.* at ¶¶ 22-28. In support of this holding, the court cited *Wilson v. Quinn*, 2013 IL App (5th) 120337, which stated that "the mere fact that a successful action would cause money to be paid from the state treasury does not mean that the

action is one against the State." *Id*. at ¶ 27 (citing *Wilson*, 2013 IL App (5th) 120337, ¶ 15).

But in *Wilson*, the money the State would be required to pay was necessary to carry out the injunctive relief that was sought and did not form a separate money judgment. *See* 2013 IL App (5th) 120337, ¶¶ 3, 17 (stipend to be paid pursuant to action against Governor seeking declaration that failure to authorize payment of stipend was unlawful). The decisions cited in *Wilson* likewise involved injunctive relief afforded under the officer suit exception that *itself* involved the payment of money from the State treasury. *See Ill. Cnty. Treasurers' Assn' v. Hamer*, 2014 IL App (4th) 130286, ¶ 1 (seeking payment of stipend in action for declaration that failure to pay full amount of mandated annual stipends was unlawful); *Senn Park Nursing Ctr. v. Miller*, 104 Ill. 2d 169, 189 (1984) (seeking Medicaid reimbursement in action for declaration that failure to reimburse for services in accordance with updated procedure was unlawful).

The appellate court here, in fact, recognized that the payment of money in *Wilson* "*was* the injunctive relief sought." *Lavery*, 2023 IL App (1st) 220990, ¶ 32 (emphasis in original). Despite acknowledging this distinction, the court failed to reconcile it with its holding, which allows for the payment of money from the State, in the form of attorney fees and costs, *in addition to* the injunctive relief granted under the officer suit exception.

The court further erred by choosing to rely on *Grey* instead of a more recent decision, *Shempf v. Chaviano*, 2019 IL App (1st) 173146, where the court held the opposite and, despite the presence of a general cost-shifting provision, disallowed an award of costs against the State as part of the injunctive relief awarded there, *id.* at ¶¶ 62-63. In *Shempf*, the court, citing this Court's precedent, noted that "[s]tatutes that generally allow for fees or costs to prevailing parties, but do not expressly refer to the State, do not waive sovereign immunity." *Id.* at ¶ 55 (citing *Walker*, 131 Ill. 2d at 303). The appellate court here did not explain why *Shempf* was wrongly decided, and it erred by following *Grey*, which, as explained, rested its alternative holding on a misapplication of *Wilson*. *Shempf*, in contrast, adhered to this Court's precedent.

The appellate court also cited this Court's decision in *Rodriquez* in support, noting that there, this Court "recognized . . . a statutory fee award 'necessarily arises in' and is a part of the declaratory action itself." *Lavery*, 2023 IL App (1st) 220990, ¶ 35 (citing *Rodriquez*, 2012 IL 113706, ¶ 17). But that case is also inapposite, since it did not involve the officer suit exception. Instead, it addressed a circumstance where sovereign immunity did not apply in the first instance. Specifically, that case involved the fee shifting provision in the Illinois Administrative Procedure Act, *see Rodriquez*, 2012 IL 113706, ¶ 1 (citing 5 ILCS 100/10-55(c) (2022)), which, unlike the Confidentiality Act, applies only to actions against state actors, *see Shempf*, 2019 IL App (1st)

173146, ¶ 67 (provision of Administrative Procedure Act "couldn't apply to anyone *but* a state actor") (emphasis in original). Therefore, neither *Rodriquez*, nor any other decision from this Court, supports the appellate court's expansion of the officer suit exception to include awards of attorney fees and costs that are in addition to injunctive relief.

2. The federal law cases cited by the appellate court do not support an award of attorney fees and costs under state law.

Next, the appellate court determined that fees and costs could be awarded in addition to injunctive relief based on federal law interpreting the Eleventh Amendment to the United States Constitution. *See Lavery*, 2023 IL App (1st) 220990, ¶ 33 (citing *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 278 (1989)). The court noted that in *Jenkins*, the United States Supreme Court stated that "it must be accepted as settled that an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment." *Id.* at ¶ 33 (citing *Jenkins*, 491 U.S. at 279). For several reasons, the court's proposed analogy to *Jenkins* is inapt and should be rejected by this Court.

First, the key case that *Jenkins* relied on, *Hutto v. Finney*, 437 U.S. 678 (1978), involved 42 U.S.C. § 1988, which expressly includes attorney fees as "part of the costs" that may be awarded to a plaintiff. Applying that provision, the Supreme Court in *Hutto* noted that "[c]osts have traditionally been awarded without regard for the States' Eleventh Amendment immunity." 437

U.S. at 695. But here, the appellate court pointed to no similar language in the Confidentiality Act or any Illinois tradition of awarding costs "without regard" to sovereign immunity. Rather, as explained, the tradition in this State is the opposite: express statutory language is necessary to allow for any monetary award in derogation of sovereign immunity. *See Walker*, 131 Ill. 2d at 303-04.

Additionally, when *Jenkins* discussed fees as "ancillary" to prospective relief, it again referenced *Hutto*. *Jenkins*, 491 U.S. at 279 (citing *Hutto*). And when the Court used that term in *Hutto*, it was discussing a fee award that was issued in response to non-compliance with a court order. *See* 437 U.S. at 690-91. Thus, the Court used the word "ancillary" not in the sense of being "additional to" injunctive relief but rather "in aid of" it. *See* Cambridge Online Dictionary, "ancillary," https://dictionary.cambridge.org/us/dictionary/english/ancillary ("additional, *or providing additional support or help*") (emphasis added). Here, the fee award was not issued to ensure compliance with an order granting injunctive relief. It was instead a separate money judgment against the State independent of any injunctive relief sought.

And to the extent the appellate court read *Jenkins* to suggest that fees may be awarded for reasons other than non-compliance with a court order without an express statutory waiver of immunity, that reading does not comport with the Supreme Court's recent decision in *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42 (2024). In *Kirtz*, a unanimous

Court identified *Hutto* as one of the cases that were decided during a "period in the mid-20th century" when the Court's "approach to sovereign immunity looked considerably different than it does today (or did before)." *Id.* at 55. The Court noted that, during that period, "this Court was content to do away with state sovereign immunity without clear authorization from Congress." *Id.* But it later "br[oke] from this approach" and has since "resolved that [its] task is to look for a clear statement in the text of the statute." *Id.* at 56, 58 (internal quotations omitted). *Kirtz* thus comports with this Court's precedent requiring an express waiver of sovereign immunity to allow for a money judgment against the State.

Moreover, the appellate court overlooked *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), which addressed the federal government's immunity from federal claims and, as such, provides a clearer analog to the issue of the State's sovereign immunity from state claims. There, the Court held that "[e]xcept to the extent it has waived its immunity, the Government is immune from claims for attorney's fees." *Id.* at 685. Here, as discussed, the Confidentiality Act contains no such waiver. And at least one federal appellate court has squarely rejected an attempt to extract *Jenkins*'s rationale from the Eleventh Amendment context. In *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994), the court noted that "embracing [the rationale] would entail a leap of faith that we are unwilling to take" because "[f]reely transposing Eleventh Amendment

exceptions to the precincts patrolled by principles of federal sovereign immunity would create a dysfunctional jurisprudential motley." *Id.* at 766.

The appellate court's shoehorning of federal doctrine on the Eleventh Amendment into Illinois's framework for state claims similarly confuses the law in this area. Again, as noted, an award of attorney fees and costs against the State that is in addition to injunctive relief that was granted under the officer suit exception without express statutory language waiving sovereign immunity conflicts with this Court's precedent. Moreover, allowing such an award in the circuit court is incongruent with the Court of Claims Act, which the appellate court has repeatedly interpreted as having jurisdiction over claims against the state for "expenses such as attorney fees." *Williams ex rel. Williams v. Davenport*, 306 Ill. App. 3d 465, 468 (1st Dist. 1999) (citing *Kadlec v. Ill. Dep't of Public Aid*, 155 Ill. App. 3d 384 (1st Dist. 1987), and 705 ILCS 505/8(a) (2022)); *see also Morawicz v. Hynes*, 401 Ill. App. 3d 142, 151 (1st Dist. 2010) (holding appellate court lacked jurisdiction over attorney fee claim against the State). For these reasons, the appellate court's reliance on federal cases applying the Eleventh Amendment should be rejected.

3. An award of attorney fees and costs was not necessary to effectuate any injunctive relief that was sought.

The appellate court also based its rule allowing fees and costs in addition to injunctive relief under the officer suit exception on its belief that the "award of fees is necessary to make it practicable for citizens to assert a

claim to stop a state actor from illegal conduct." *Lavery*, 2023 IL App (1st) 220990, ¶ 31. As an initial matter, the court's conclusion, which is untethered to any statutory language, represents a policy judgment that the General Assembly did not itself see fit to make. *See City of E. St. Louis v. E. St. Louis Fin. Advisory Auth.*, 188 Ill. 2d 474, 486, (1999) (holding Court would not substitute its judgment for that of legislature).

In any event, the appellate court did not explain how an award of fees operates as a necessity for bringing suit, rather than merely providing an incentive to sue. Indeed, viewing fees as necessary to bring suit, as a general matter, is in contravention to this State's adoption of the American rule, under which a party is responsible for its own fees and costs. *See Morris B. Chapman & Assocs., Ltd. v. Kitzman*, 193 Ill. 2d 560, 572 (2000).

Moreover, unlike the cases discussed above, where the payment of money was necessary to effectuate the injunctive relief, *see, e.g., Wilson*, 2013 IL App (5th) 120337, ¶¶ 3, 17, a payment of attorney fees and costs was not necessary to provide the relief plaintiffs sought, namely, protection of Lavery's personal notes. Nor, unlike one of the awards in *Hutto*, was the fee imposed as an enforcement mechanism for non-compliance. *See* 437 U.S. at 690-91. Instead, the fee award is an independent money judgment against the State that is impermissible under this Court's precedent given the absence of any express statutory language waiving sovereign immunity. What is more, nothing about the award of attorney fees and costs is prospective in nature; it

compensates a party retrospectively for fees and costs incurred during the litigation.

In sum, this court should reject the appellate court's expansion of the officer suit exception to include attorney fees and costs that are in addition to the injunctive relief that was granted. The court's holding finds no support in this Court's precedent where the fees and costs award was unnecessary to effectuate the injunctive relief.

B. The officer suit exception does not apply here where the complaint contains no allegations of an officer acting unlawfully or in excess of their authority.

As described above, Illinois law recognizes that the doctrine of sovereign immunity yields where a plaintiff seeks to enjoin an officer acting in violation of statutory or constitutional law. *See Parmar*, 2018 IL 122265, ¶ 22. But here, because the complaint contained no allegations of such unlawful conduct, the officer suit exception does not apply regardless of whether attorney fees and costs were otherwise available.

Whether an action "is brought against the State and thus barred by the doctrine of sovereign immunity" depends on "the issues raised and the relief sought." *Senn Park*, 104 Ill. 2d at 186. An action is in fact against the State and barred by sovereign immunity where it contains "no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts." *Healy v. Vaupel*, 133 Ill. 2d 295, 309 (1990). Stated differently, an action comes within the officer suit exception only where the

plaintiff "alleges that the official is enforcing an unconstitutional law or violating a law of Illinois and thus acting beyond his authority." *Smith v. Jones*, 113 Ill. 2d 126, 131 (1986); *see also Flanigan v. Bd. of Trs. of the Univ. of Ill. at Chi.*, 2018 IL App (1st) 170815, ¶ 31 (dismissing complaint where "review of plaintiff's second amended complaint demonstrate[d] that he failed to allege that defendants were required, and failed," to follow University policies).

Here, sovereign immunity applies because plaintiffs' suit is against an arm of the State, and the Confidentiality Act does not expressly waive sovereign immunity. *See Walker*, 131 Ill. 2d at 303; 740 ILCS 110/15 (2022). The appellate court, as explained, erred by concluding that the officer suit exception permitted an award of fees and costs even though there was no express waiver of sovereign immunity in the Confidentiality Act. And it also erred by applying the exception where plaintiffs failed to identify any state officer who acted unlawfully or beyond the scope of their authority.

As an initial matter, plaintiffs did not identify any officer anywhere in the complaint who may have acted unlawfully. As the appellate court noted, the only individual mentioned in the complaint was the ALJ, whom plaintiffs later conceded was neither a party to this action nor liable for attorney fees and costs. *Lavery*, 2023 IL App (1st) 220990, ¶ 38; C439. Plaintiffs' acknowledgement that they were not bringing an action against any officer should alone be sufficient to defeat the officer suit exception, given that the

exception applies only when an officer takes action that "is not regarded as the conduct of the State." *Parmar*, 2018 IL 122265, ¶ 22.

Beyond that, there was no allegation of unlawful conduct. The sole allegation that the appellate court pointed to as bringing the complaint within the scope of the exception was the allegation that "[t]here was no basis for rejecting Mr. Lavery's assertion of the therapist's work product privilege without the documents being submitted to the Circuit Court for an *in camera* inspection." *Lavery*, 2023 IL App (1st) 220990, ¶ 41. But at most, this allegation asserted a legal error on the part of the ALJ in applying the Confidentiality Act — rather than a violation of any of its provisions. Such errors are not the type of conduct for which the officer suit exception allows redress. *See PHL, Inc., v. Pullman Bank & Tr. Co.*, 216 Ill. 2d 250, 266 (2005) (erroneous legal interpretation not "forbidden" action subject to exception).

And to the extent plaintiffs alleged that it was incumbent upon the ALJ — or the Department — to submit the relevant documents to the circuit court before the ALJ could rule on whether Lavery had sufficiently invoked the privilege, the Confidentiality Act nowhere requires this. While the Confidentiality Act provides that personal notes are privileged, it is silent as to what showing is necessary to sufficiently invoke the privilege or, once the privilege has been invoked, the process for an *in camera* review of documents. 740 ILCS 110/3(b) (2022). And the procedure for an *in camera* review by the circuit court that is set forth in section 10(a)(1) of the Confidentiality Act, 740

ILCS 110/10 (2022), concerns a separate issue: the privilege of a recipient (or a therapist on the recipient's behalf) to refuse the disclosure of a recipient's record or communications. Here, Ramachandran, the recipient, was not asserting a privilege over his record or communications, and Lavery was not asserting this privilege on Ramachandran's behalf. Rather, Lavery was asserting a privilege over his own notes. The ALJ's decision to reject Lavery's blanket assertion of this privilege prior to an *in camera* review by the circuit court therefore could not have constituted a violation of the Confidentiality Act because the procedure in section 10(a)(1) did not apply to this circumstance.

In apparent recognition of the above, the appellate court noted that an *in camera* review was not necessary before the circuit court. *Lavery*, 2023 IL App (1st) 220990, ¶ 40. The court, however, proceeded to rely on various bases for finding a statutory violation that either did not appear in the complaint or did not amount to allegations of a violation of the Confidentiality Act.

First, the court suggested that the Department sought documents that were "shielded from discovery" under the Confidentiality Act. *Id.* at ¶ 38. But this assumes that the ALJ, or the Department, *knew* that the documents over which Lavery asserted the privilege were in fact privileged. To the extent the complaint alleges this (which is not clear from the face of the complaint), the ALJ's order attached to the complaint contradicts any such allegation. *See In re Marriage of Andrew*, 2023 IL App (1st) 221039, ¶ 36 ("factual matters

contained within an exhibit serve to negate inconsistent allegations of fact contained within the body of the complaint"). Per the order, the ALJ did not determine that the documents were privileged and then order their production. C165. Instead, the ALJ merely determined that Lavery's blanket assertion of the privilege was insufficient to invoke it in the first instance. *Id.*

Second, the appellate court also suggested that there was a failure by the Department to "disabuse" the ALJ of the misunderstanding that an *in camera* review by the circuit court was necessary. *Lavery*, 2023 IL App (1st) 220990, ¶ 40. Again, however, this allegation appears nowhere in the complaint. Even assuming it did, this would not constitute a violation of the Confidentiality Act. It is true that as part of his analysis, the ALJ incorrectly cited section 10's procedure for *in camera* review before the circuit court as applying to a therapist's privilege over personal notes. C162. But the appellate court identified no provision in the Confidentiality Act that would require the Department to, *sua sponte,* correct the ALJ.

The appellate court lastly relied on conduct that occurred during the circuit court proceedings to support its finding of a statutory violation by the Department. *Lavery*, 2023 IL App (1st) 220990, ¶ 42. The court, however, failed to explain how such actions could be the subject of the complaint. Regardless, again, there is nothing in the complaint regarding the Department's litigation conduct in the circuit court and such conduct cannot

be construed as unlawful conduct by a state officer when it occurred after the administrative proceeding had ended.

In sum, because the complaint is devoid of any allegation of an officer acting unlawfully, the appellate court erred in determining the officer suit exception applied. Indeed, plaintiffs and the appellate court agreed that the action was against the Department itself, rather than any state officer, thus demonstrating that the officer suit exception does not apply.

C. This Court should overrule its holding in *Leetaru* that allows a suit to proceed against an arm of the State under the officer suit exception because it is inconsistent with Illinois law and unworkable.

Finally, this Court should overrule that portion of its decision in *Leetaru* that, over a vigorous dissent, held that a suit may proceed under the officer suit exception to sovereign immunity even though an arm of the State — rather than an officer — has been made a defendant. *See Leetaru*, 2015 IL 117485, ¶ 44. Although granting this request entails overruling precedent, this Court has held that, consistent with *stare decisis*, a common-law rule it has adopted may be overturned where there exists a "clear showing of good cause." *People ex rel. Dep't of Hum. Rts. v. Oakridge Healthcare Ctr., LLC*, 2020 IL 124753, ¶ 21. Good cause, in turn, exists where a governing decision is unworkable or poorly reasoned. *People v. Sharpe*, 216 Ill. 2d 481, 516 (2005). Here, as both the dissent in *Leetaru* and this case make clear, the majority's analysis in that case is both unworkable and not well-reasoned, and it should therefore be overturned.

In *Leetaru*, a graduate student sought an injunction to halt an investigation of him by the Board of Trustees of the University of Illinois for purported academic misconduct. 2015 IL 117485, ¶ 1. In reversing the dismissal of the action for lack of jurisdiction, this Court held that the officer suit exception to sovereign immunity applied to the case. *Id.* at ¶¶ 2, 49-50. In reaching its holding, the Court determined that the case could proceed against the University as a defendant. *Id.* at ¶ 43. The Court noted the long-standing precedent that suits against officers do not automatically serve to invoke the officer suit exception. *Id.* at ¶ 44. It then reasoned that, "[b]y the same token, the fact that the named defendant is an agency or department of the State does not mean that the bar of sovereign immunity automatically applies." *Id.* "In appropriate circumstances," the court continued, "plaintiffs may obtain relief in circuit court even where the defendant they have identified in their pleadings is a state board, agency or department." *Id.* The Court then concluded that the plaintiff's claim could proceed under the officer suit exception where the plaintiff alleged that "agents of the State [had] acted in violation of statutory or constitutional law or in excess of their authority." *Id.* at ¶ 50.

Three justices of the Court dissented. The dissent explained that, contrary the majority's holding, the "clear weight of authority" in Illinois was that, absent statutory consent, "an arm of the State . . . may not be sued directly in circuit court, regardless of the nature of the relief sought." *Id.* at ¶¶

95, 99 (Burke, J., joined by Freeman and Theis, JJ.) (listing cases). It also pointed out that the cases on which the majority relied in holding that an arm of the State could be the named defendant in a suit brought under the officer suit exception were either premised on questionable reasoning or inapposite.

For example, the majority cited *Landfill v. Poll. Ctrl. Bd.*, 74 Ill. 2d 541 (1978). But the dissent explained that to the extent that decision could be read as holding that an arm of the State may be sued in circuit court, it was "questionable authority." *Leetaru*, 2015 IL 117485, ¶ 91. Specifically, the portion of *Landfill* relied on by the majority "consisted of two sentences on an unbriefed issue," and neither of the two decisions of this Court on which *Landfill* relied had held that an arm of the State could be sued in circuit court. *Id.* (citing *Bio–Medical Lab'ys, Inc. v. Trainor,* 68 Ill. 2d 540 (1977), and *Moline Tool Co. v. Dep't of Revenue,* 410 Ill. 35 (1951)).

Indeed, the dissent noted, eight years after *Landfill* was decided, the Court reached the opposite conclusion in *Smith*, 113 Ill. 2d 126, when, as noted by the dissent, the Court "held that a direct action against an arm of the State is prohibited in circuit court." *Leetaru*, 2015 IL 117485, ¶ 92 (citing *Smith*, 113 Ill. 2d at 132 ("Of course, because of sovereign immunity the State or a department of the State can never be a proper party defendant in an action brought directly in the circuit court.")).

The dissent also explained that the rationale for allowing an action for prospective relief to proceed against an officer is that the officer is "'stripped'

of his official status and 'his conduct is not then regarded as the conduct of the State, nor is the action against him considered an action against the State.'" *Id.* (quoting *PHL, Inc.,* 216 Ill. 2d at 261, and *Moline Tool Co.,* 410 Ill. at 37). The dissent noted that it is the state official who is stripped of official status, and not the arm of the State to which the official belongs, pointing out that this "is precisely how the rule has always been stated." *Id.* Moreover, the entity sued is "not merely academic" because it is this entity that will be held in contempt for non-compliance. *Id*. at ¶ 98 (citing *Alabama v. Pugh*, 438 U.S. 781 (1978)). Thus, an official must be named as a defendant so that, if a violation occurs, it is the "State officer or the head of a department of the State" that may "be restrained by a proper action instituted by a citizen." *Id.* at ¶ 94.

Here, this Court should overcome *stare decisis* concerns and adopt the reasoned and well-supported analysis of the dissent in *Leetaru*. It is consistent with the wealth of authority on this issue, as well as the rationale that, when an officer is stripped of their official status through unlawful conduct, it is the officer that must be sued.

Indeed, requiring that an officer be named as a defendant for the officer suit exception to apply aids both the plaintiff that is bringing the suit and the State. For a plaintiff, the naming of an official identifies the officer whose actions are to be restrained, and thus who may be held in contempt for failure to comply. For the State, the requirement to name an officer as the defendant

allows the State to more effectively dispose of cases that are truly against the State, and therefore barred in circuit court. Additionally, identifying the officer allows the State to fairly defend its officials by clarifying whose actions are allegedly unlawful. Here, for example, while the complaint contained allegations of the ALJ's conduct, C154-55, plaintiffs then later asserted that the ALJ was not a party to the litigation, C439. Plaintiffs' failure to identify an officer as a defendant precluded the State from effectively defending against any purportedly unlawful conduct by that officer.

This case presents an opportunity for the Court to restore its prior, well-established jurisprudence holding that a suit brought against an arm of the State is automatically subject to dismissal in circuit court. Not only is that rule consistent with prior precedent, it provides benefits to both the State, in effectively disposing of cases that do not belong in circuit court, and plaintiffs, by identifying the actor who may be enjoined from engaging in further unlawful conduct. This Court should therefore overrule *Leetaru*'s holding that an action may proceed under the officer suit exception against an arm of the State.

CONCLUSION

For these reasons, Defendant-Appellant Illinois Department of Financial and Professional Regulation requests that this Court reverse the appellate court's judgment.

Respectfully submitted,

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August 14, 2024

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 36 pages.

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APPENDIX

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Illinois Official Reports

Appellate Court

***Lavery v. Department of Financial & Professional Regulation*,**
2023 IL App (1st) 220990

Appellate Court Caption	TERRENCE LAVERY; ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC; and ANIL RAMACHANDRAN, Plaintiffs, v. THE DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, Defendant-Appellant (Terrence Lavery and Illinois Professionals Health Program, LLC, Plaintiffs-Appellees).
District & No.	First District, Sixth Division No. 1-22-0990
Filed	August 25, 2023
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 2020-CH-01202; the Hon. Caroline Kate Moreland, Judge, presiding.
Judgment	Affirmed and remanded.
Counsel on Appeal	Kwame Raoul, Attorney General, of Chicago (Jane Elinor Notz, Solicitor General, and Bridget DiBattista, Assistant Attorney General, of counsel), for appellant. Rick Schoenfield, of DiVincenzo Schoenfield Stein, of Westchester, for appellees.

Panel

PRESIDING JUSTICE MIKVA delivered the judgment of the court, with opinion.
Justices Oden Johnson and Tailor concurred in the judgment and opinion.

OPINION

¶ 1 The circuit court in this case concluded that the Department of Financial and Professional Regulation (Department) wrongfully required Mr. Lavery, a therapist called as a witness in proceedings for the reinstatement of his patient's medical license, to produce personal notes protected as confidential work product under the Mental Health and Developmental Disabilities Confidentiality Act (Confidentiality Act or Act) (740 ILCS 110/1 *et seq.* (West 2020)). The court entered an award of attorney fees and costs, as provided for in the Act, in favor of Mr. Lavery and his employer, Illinois Professionals Health Program, LLC (IPHP) (collectively, plaintiffs), as the prevailing parties in an action to redress a violation of the Act, and against the Department.

¶ 2 The Department does not challenge on appeal the court's findings that Mr. Lavery was a therapist as defined by the Act, that the documents in question were personal notes protected from disclosure, that the Department violated the Act by insisting on the production of those notes, or that the amount of fees and costs claimed was reasonable. Its sole contention, which it did not argue below and is making for the first time as the basis for this appeal, is that the circuit court lacked subject matter jurisdiction to enter an award of fees and costs against the Department because of the protection that sovereign immunity affords the State of Illinois.

¶ 3 Plaintiffs maintain that sovereign immunity does not apply to this fee award because (1) an exception to the doctrine applies where the primary relief sought is to enjoin a state actor from engaging in prohibited conduct and this award is ancillary to such injunctive relief, and (2) sovereign immunity only applies to claims made against the State and this order for fees and costs grew out of an administrative proceeding initiated by the Department itself, not plaintiffs. Plaintiffs' third argument is that, even if sovereign immunity would otherwise apply, there is clear language in the Confidentiality Act waiving sovereign immunity for violations of the Act by the State.

¶ 4 For the following reasons, we agree with plaintiffs that sovereign immunity does not apply here, based on the fact that the fees and costs are ancillary to injunctive relief, and do not reach the two other arguments that plaintiffs make. We affirm the circuit court's award of fees and costs.

¶ 5 I. BACKGROUND

¶ 6 A. The Mental Health and Developmental Disabilities Confidentiality Act

¶ 7 This case grows out of Mr. Lavery's assertion of the therapist's work-product privilege to withhold personal notes he took during his treatment of Dr. Anil Ramachandran in proceedings before the Department in which Dr. Ramachandran sought reinstatement of his medical license. Under the Act, a therapist—defined in part as "a psychiatrist, physician, psychologist, social worker, or nurse providing mental health or developmental disabilities services" (*id.*

§ 2)—is not required to but may keep personal notes regarding the recipient of such services (*id.* § 3(b)). Personal notes include:

> "(i) information disclosed to the therapist in confidence by other persons on condition that such information would never be disclosed to the recipient or other persons;
>
> (ii) information disclosed to the therapist by the recipient which would be injurious to the recipient's relationships to other persons, and
>
> (iii) the therapist's speculations, impressions, hunches, and reminders." *Id.* § 2.

¶ 8 A therapist's personal notes will not be considered "confidential communications" or "records" of mental health or developmental disability services—which are separately defined and for which the *recipient* of such services may waive privilege. *Id.* §§ 2, 4, 5(a). To qualify as therapist's notes, they must be "kept in the therapist's sole possession for his [or her] own personal use" and "not disclosed to any other person, except the therapist's supervisor, consulting therapist or attorney." *Id.* § 2. Section 3(b) of the Act provides that such notes "are the work product and personal property of the therapist" and "shall not be subject to discovery in any judicial, administrative or legislative proceeding." *Id.* § 3(b). Section 15 further provides that "[a]ny person aggrieved by a violation of th[e] Act may sue for damages, an injunction, or other appropriate relief" and that "[r]easonable attorney's fees and costs may be awarded to [a] successful plaintiff in any action under th[e] Act." *Id.* § 15.

¶ 9 B. The Department's Licensing Proceedings

¶ 10 The Department initiated licensing proceedings against Dr. Ramachandran in 2014, and in 2015 it suspended his medical and controlled substances licenses pursuant to a consent order. When Dr. Ramachandran petitioned in 2018 to have his licenses restored, he called as a witness Mr. Lavery, the case manager who, for over four years, had been responsible for monitoring his compliance with a substance and alcohol abuse recovery plan.

¶ 11 This case arose out of that administrative action. Mr. Lavery alleged in his complaint that, during his testimony in the licensing proceedings, he disclosed the existence of personal notes kept by him in connection with his provision of mental health services to Dr. Ramachandran. When the Department asked for a copy of the notes, Mr. Lavery explained that they "were not provided because they were 'work product.' " The administrative law judge (ALJ) presiding over the hearing stated in his order that he then reviewed the relevant discovery requests and responses, halted Mr. Lavery's testimony, and ordered that the notes be produced.

¶ 12 Mr. Lavery moved for a protective order, asserting that the documents at issue were protected from discovery under the Act as the personal notes of a therapist. Following briefing and a hearing, the ALJ entered a written order denying the motion. The ALJ agreed that, as a licensed clinical professional counselor, Mr. Lavery qualified as a therapist under the Act. He concluded, however, that Mr. Lavery had failed to meet his burden of establishing that the withheld documents fell within the statutory privilege. Despite the fact that Mr. Lavery had asserted the privilege while testifying under oath and subject to cross-examination, the ALJ faulted him for not "attach[ing] an affidavit concerning the records in question" to his motion. On December 12, 2019, the ALJ denied Mr. Lavery's motion for a protective order and ordered him to produce the withheld notes.

¶ 13 In response to Dr. Ramachandran's argument that the Department lacked jurisdiction to rule on the applicability of the statutory privilege, the ALJ stated in his order:

> "[A]s a general matter, an Administrative Law Judge determines issues of confidentiality and privilege all the time. To the extent that Petitioner [(referring to Dr. Ramachandan)] argues that, in a specific case implicating the therapist's work product privilege, documents submitted for an *in camera* inspection require review by a judge from a reviewing court, and not an Administrative Law Judge, Petitioner is correct. 740 ILCS 110/10. However, we have not yet reached this stage."

¶ 14 In a handwritten order entered the following month, the matter was continued "[a]waiting [Mr. Lavery's] decision on the production of the documents and/or filing of action in chancery."

¶ 15 C. The Present Action

¶ 16 In response to that order, Mr. Lavery and IPHP initiated this action in the circuit court on January 29, 2020. They sought a declaration that the withheld documents were protected by the therapist's work product privilege codified in section 3(b) of the Act (*id.* § 3(b)), a protective order stating that Mr. Lavery was not required to produce the documents to the Department, attorney fees and costs pursuant to section 15 of the Act (*id.* § 15), and "such other and further relief that the Court deem[ed] just, including but not limited to, an *in camera* inspection." Plaintiffs also asserted, but later withdrew, a claim for administrative review.

¶ 17 According to the parties' filings in the circuit court, the administrative proceeding on Dr. Ramachandran's petition for the reinstatement of his licenses was stayed pending the court's resolution of plaintiffs' complaint.

¶ 18 The circuit court conducted an *in camera* inspection, ruled that the withheld documents were indeed the protected notes of a therapist, and granted Mr. Lavery's request for a protective order.

¶ 19 Plaintiffs then moved for an award of attorney fees and costs under section 15 of the Act (*id.*). They sought $4079.21 payable to IPHP for payments it had already made to plaintiffs' law firm, and $6560 payable directly to the firm for amounts still outstanding. Plaintiffs supported their motion with contemporaneous time records and an affidavit from their counsel. Following a hearing, the circuit court granted plaintiffs' motion. It concluded that plaintiffs were entitled to fees and costs under the Act and agreed that the uncontested amounts sought were reasonable.

¶ 20 This appeal followed.

¶ 21 II. JURISDICTION

¶ 22 The circuit court granted plaintiffs' amended motion for attorney fees and costs on June 3, 2022, and the Department filed a timely notice of appeal from that order on July 1, 2022. We have jurisdiction over this appeal pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) and Rule 303 (eff. July 1, 2017), governing appeals from final judgments in civil cases.

¶ 23 III. ANALYSIS

¶ 24 The Department argues that plaintiffs' request for a statutory award of attorney fees and costs from a state agency is barred by sovereign immunity. Although the Department makes

this argument for the first time on appeal, our supreme court has held that sovereign immunity, which implicates the court's subject matter jurisdiction, may be raised at any time. *Currie v. Lao*, 148 Ill. 2d 151, 157 (1992).

¶ 25 Sovereign immunity is a common law doctrine that protects the government from being sued without its consent. *Jackson v. Alverez*, 358 Ill. App. 3d 555, 559 (2005). Its application in Illinois is governed by the State Lawsuit Immunity Act (Immunity Act) (745 ILCS 5/1 *et seq.* (West 2020)), which revived the doctrine after it was briefly abolished with the adoption of the Illinois Constitution of 1970. See Ill. Const. 1970, art. XIII, § 4; *Parmar v. Madigan*, 2018 IL 122265, ¶ 19. Section 1 of the Immunity Act states that "[e]xcept as provided in *** the Court of Claims Act *** the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (West 2020). Whether the doctrine applies is a question of law we review *de novo*. *Brandon v. Bonell*, 368 Ill. App. 3d 492, 503 (2006).

¶ 26 Plaintiffs argue that sovereign immunity does not apply here because (1) their request for fees and costs was ancillary to injunctive relief intended to prevent the Department from engaging in prohibited conduct and (2) the Department was not "made a defendant" within the meaning of the Immunity Act because this action grew out of administrative proceedings initiated by the Department itself. Plaintiffs argue in the alternative that the only reasonable reading of the statutory text is that the legislature intended to waive sovereign immunity for awards of fees and costs made pursuant to the Confidentiality Act. We agree with the first of these arguments and need not reach the other two.

¶ 27 An exception to the doctrine of sovereign immunity is recognized where a plaintiff alleges that a "[s]tate officer's conduct violates statutory or constitutional law or is in excess of his or her authority." *Parmar*, 2018 IL 122265, ¶ 22. This is often referred to as the "officer suit exception," on the theory that "when the action of a state officer is undertaken without legal authority, such action strips [the] officer of his official status"; his conduct is "not then regarded as the conduct of the State, nor is [an] action against him considered an action against the State." (Internal quotation marks omitted.) *Grey v. Hasbrouck*, 2015 IL App (1st) 130267, ¶ 25. The exception is also referred to as the "prospective injunctive relief exception." *C.J. v. Department of Human Services*, 331 Ill. App. 3d 871, 876 (2002). This is a moniker we prefer because it captures the essential element of the exception: forward-looking relief. See *Green v. State*, 2023 IL App (1st) 220245, ¶ 22 (where we noted that this is "perhaps a more clarifying name"). We have defined the exception as follows: "Where [a] plaintiff is not attempting to enforce a present claim against the State but rather seeks to enjoin the defendant from taking actions in excess of his delegated authority, and in violation of the plaintiff's protectable legal interests, the suit does not contravene the immunity prohibition." *Grey*, 2015 IL App (1st) 130267, ¶ 25.

¶ 28 The Department offers three reasons that this exception is inapplicable here. It first contends that the fees and costs plaintiffs seek are not part and parcel of the injunctive relief driving this action but constitute a separate monetary judgment for which there must be a specific statutory waiver of sovereign immunity by the State. We begin there.

¶ 29 There have been two different approaches to this question in recent decisions of this court. On the one hand is *Grey*, where this court upheld a statutory award of fees and costs on the basis that it did not "transform" what was otherwise a suit to enjoin improper State conduct into one for damages. *Id.* ¶ 27. The plaintiffs in *Grey* sued under the Illinois Civil Rights Act of 2003 (Civil Rights Act) (740 ILCS 23/1 *et seq.* (West 2010)) for injunctive and declaratory

relief aimed at stopping the registrar of vital records from refusing to issue new birth certificates to certain transgender persons. *Grey*, 2015 IL App (1st) 130267, ¶¶ 4, 26. When they had succeeded in enjoining that practice, the plaintiffs then moved, pursuant to the Civil Rights Act's fee-shifting provision, for reimbursement of the fees and costs they had expended to obtain that relief. *Id.* ¶ 4. This court cited *Wilson v. Quinn*, 2013 IL App (5th) 120337, for the proposition that " '[t]he mere fact that a successful action would cause money to be paid from the state treasury does not mean that the action is one against the State.' " *Grey*, 2015 IL App (1st) 130267, ¶ 27 (quoting *Wilson*, 2013 IL App (5th) 120337, ¶ 15). The *Grey* court concluded that the award of fees and costs was ancillary to the injunctive relief the court had granted and thus fell within the prospective injunctive relief exception to sovereign immunity. *Id.* ¶ 28. As the Department points out, that was an alternative basis for the holding in *Grey*, as the court also found that the statute at issue included a waiver of sovereign immunity.

¶ 30 Coming out on the other side of this question is *Shempf v. Chaviano*, 2019 IL App (1st) 173146, ¶¶ 62-63, in which this court determined that a fee- or cost-shifting statute must affirmatively reference the State, even in cases, like that one, where the underlying relief was prospective injunctive relief against the State. The plaintiffs in *Shempf* successfully obtained a writ of mandamus ordering the Department of Labor to post prevailing wage rates on its website and sought an award of damages and fees and costs under the mandamus statute. *Id.* ¶¶ 1-2, 51. The *Shempf* court concluded that the mandamus count itself, "which merely sought to order the Department's director to do something he was required by law to do," fell squarely within the prospective injunctive relief exception to sovereign immunity. *Id.* ¶ 53. But monetary relief against the state agency, whether in the form of damages or a statutory award of costs, was, in the court's view, "a different matter altogether." *Id.* ¶ 54. It recited the general rule, stated by our supreme court in *Department of Revenue v. Appellate Court*, 67 Ill. 2d 392 (1977), that " '[s]tatutes which in general terms authorize imposing costs *** but do not specifically refer to the State are not sufficient authority to hold the State liable for costs' " and concluded that rule applied even though in that case, as here, an exception to sovereign immunity authorized the underlying relief the costs were intended to compensate the successful party for pursuing. *Shempf*, 2019 IL App (1st) 173146, ¶¶ 62-63 (quoting *Department of Revenue*, 67 Ill. 2d at 396).

¶ 31 We agree with the *Grey* court that the fees at issue here, where Mr. Lavery was required to initiate a court action in order to enjoin a state officer from obtaining records that were protected by statute, are part and parcel of the injunctive relief that is not barred by sovereign immunity. The ancillary award of fees is necessary to make it practicable for citizens to assert a claim to stop a state actor from illegal conduct. Here, as in *Wilson*, the "mere fact that a successful action would cause money to be paid from the state treasury" does not mean that sovereign immunity bars the suit. *Wilson*, 2013 Il App (5th) 120337, ¶ 15.

¶ 32 The Department criticizes the *Grey* court's reliance on *Wilson* because it did not involve an award of fees and costs. The plaintiffs in *Wilson* sued to enjoin the nonpayment of a statutorily mandated stipend. *Id.* ¶ 1. The payment of money *was* the injunctive relief sought in that case. We acknowledge this distinction but agree with both of those courts that the "mere fact" that money is being paid out of state funds is not determinative. An award of fees and costs that is ancillary to an action seeking injunctive relief under the prospective injunctive relief exception does not transform the nature of the suit. The underlying relief sought here is plainly injunctive relief under the Confidentiality Act, and the legislature saw fit to make

attorney fees and costs available to parties who succeed in actions brought to protect their rights under the Act. We see no reason why plaintiffs should be denied that relief where what they have sought all along is equitable relief not precluded by the doctrine of sovereign immunity.

¶ 33 We note that this has long been a settled question in federal courts. As the United States Supreme Court explained in *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 278 (1989):

> "In *Hutto v. Finney*, the lower courts had awarded attorney's fees against the State of Arkansas, in part pursuant to § 1988 [the fee-shifting provision of the federal Civil Rights Act], in connection with litigation over the conditions of confinement in that State's prisons. The State contended that any such award was subject to the Eleventh Amendment's constraints on actions for damages payable from a State's treasury. We relied, in rejecting that contention, on the distinction drawn in our earlier cases between 'retroactive monetary relief' and 'prospective injunctive relief.' [Citations.] Attorney's fees, we held, belonged to the latter category, because they constituted reimbursement of 'expenses incurred in litigation seeking only prospective relief,' rather than 'retroactive liability for prelitigation conduct.' [Citations.] We explained: 'Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.' [Citation.]"

"After Hutto," the Court emphasized, "it must be accepted as settled that an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment." *Id.* at 279.

¶ 34 We find this reasoning persuasive. Just as the Immunity Act generally prohibits the State of Illinois from being sued in Illinois courts, the eleventh amendment generally prohibits any state from being sued in federal courts. See *See v. Illinois Gaming Board*, 2020 IL App (1st) 192200, ¶ 4. Like the Immunity Act, the eleventh amendment exempts prospective injunctive relief. *Id.* And as the Supreme Court explained in *Jenkins*, attorney fees expended to obtain injunctive relief are properly characterized as ancillary to that prospective injunctive relief rather than as a separate award of monetary damages. *Jenkins*, 491 U.S. at 278-79.

¶ 35 The Department's argument that an award of litigation expenses should be viewed as an independent form of relief utterly divorced from the injunctive and declaratory relief the fees were expended to obtain is one that our own supreme court has also rejected. In *Illinois Department of Financial & Professional Regulation v. Rodriquez*, 2012 IL 113706, a doctor successfully sued for declaratory relief to have an administrative rule declared invalid. *Id.* ¶¶ 3-4. In a separate action, the doctor petitioned the court for an award of litigation expenses under section 10-55(c) of the Illinois Administrative Procedure Act (5 ILCS 100/10-55(c) (West 2008)), which permits such awards where an administrative rule has been invalidated. *Rodriquez*, 2012 IL 113706, ¶ 6. Our supreme court held that the request was barred because it had to have been brought as a part of the suit in which the rule was invalidated. *Id.* It explained that the fee request needed to be decided "while the court invalidating the rule maintain[ed] jurisdiction." *Id.* ¶ 18. As our supreme court recognized in *Rodriguez*, a statutory fee award "necessarily arises in" and is a part of the declaratory action itself. *Id.* ¶ 17.

¶ 36 The Department's reliance on *Taylor v. State Universities Retirement System*, 203 Ill. App. 3d 513 (1990), for the proposition that sovereign immunity bars any fee award assessed against

a state agency is simply misplaced. The plaintiff in *Taylor* was a lawyer whose efforts on behalf of his client, a recipient of benefits from the State Universities Retirement System (SURS), resulted in compensation for the same disability that SURS had already covered. *Id.* at 516. The lawyer sent SURS a letter informing it of his success and enclosing a check payable to the agency for the amount it was owed, minus his own 20% fee. *Id.* SURS responded that it had a statutory right to reimbursement under the Illinois Pension Code (40 ILCS 5/1-101 *et seq.* (West 2020)), which did not provide for a reduction for attorney fees. *Taylor*, 203 Ill. App. 3d at 516. It argued the doctrine of sovereign immunity barred such an award in the circuit court. *Id.* at 524. The lawyer paid the full amount, under protest, and informed SURS he would " 'pursue litigation against [it]' for his fee." *Id.* at 516. The lawyer then unsuccessfully challenged the agency's denial of his fee in an action for administrative review, and this court affirmed. *Id.* at 518, 525. We concluded that, under the circumstances of that case, the fees sought would constitute a separate money judgment the lawyer could only pursue in the Court of Claims. *Id.* at 524.

¶ 37 The facts of *Taylor* could not be more different than in this case. *Taylor* did not involve injunctive relief or invocation of the prospective injunctive relief exception to sovereign immunity. Nor did it involve a fee-shifting provision in a statute. Rather, the attorney in that case sought payment pursuant to the common-fund doctrine, under which an attorney whose services create a fund is, as a matter of fairness, generally allowed compensation from that same fund. *Id.* at 520. Plaintiffs here, by contrast, sought and obtained injunctive relief under a statute providing for such relief and which also provides for an award of attorney fees to a successful plaintiff. Unlike in *Taylor*, a recognized exception to sovereign immunity—the prospective injunctive relief exception—clearly applies here.

¶ 38 The Department next argues that the exception for prospective injunctive relief does not apply because plaintiffs failed to identify in their complaint any individual state officer who acted outside the bounds of the law. Although the ALJ who presided over the licensing proceedings was named in the complaint, plaintiffs acknowledged in their filings below that the ALJ was not a party to this action and is not being sued for violations of the Confidentiality Act. Rather, plaintiffs' claims are against the Department itself, as the party to those proceedings that sought—and persisted in seeking—documents shielded from discovery under the Confidentiality Act.

¶ 39 We rejected the argument that a plaintiff must identify a specific officer who acted illegally in *C.J.*, 331 Ill. App. 3d at 876-77. The plaintiffs there were criminal defendants who had been found not guilty by reason of insanity and were involuntarily committed to a state mental health facility. *Id.* at 873-74. They succeeded in obtaining an order compelling the Illinois Department of Human Services to make individualized determinations regarding whether they qualified for unsupervised on-grounds passes, rather than denying such passes outright as an across-the-board policy. *Id.* at 874-75. The Department of Human Services insisted on appeal that the prospective injunctive relief exception did not apply where the plaintiffs in that case had not sued a specific state official. *Id.* at 876. We disagreed. *Id.* at 877. Although they had sued "an arm of the State" rather than specific individuals, we reasoned that the action still "sought prospective relief against the illegal actions of state officials" because members of the department's staff would be required to comply with the court's order. *Id.* Here, as in *C.J.*, the relief sought was an order compelling the employees of a state agency to refrain from doing something outside of what the law permits, and the exception applies.

¶ 40 The Department's final argument is that plaintiffs' may not rely on the prospective injunctive relief exception because they have failed to allege that the Department actually violated the Confidentiality Act. At oral argument in this court, counsel for the Department insisted that there could be no violation of the Confidentiality Act where the Department and its staff did not *know* that the withheld documents actually qualified as therapist's notes. Counsel for the Department acknowledged at argument that once the documents were sought and the privilege first raised, the "next procedural step" was an *in camera* inspection to resolve uncertainty regarding whether the statutory privilege applied. In denying Mr. Lavery's protective order, the ALJ had said that an *in camera* inspection required review by a judge from a reviewing court, and "not an Administrative Law Judge." While the Department asserted at oral argument that, of course, the ALJ could have done an *in camera* review, we see nothing in the record indicating the Department sought to disabuse the ALJ of the misunderstanding that such a review had to be done through a separate action in the circuit court.

¶ 41 Plaintiffs' position, also clarified by counsel at oral argument, is that if the Department believed that an *in camera* inspection by the circuit court was necessary, then it should have sought one itself, or at least not opposed plaintiffs' efforts to obtain one from the circuit court. That is precisely what plaintiffs alleged in their complaint, stating in their count for a protective order: "There was no basis for rejecting Mr. Lavery's assertion of the therapist's work product privilege without the documents being submitted to the Circuit Court for an *in camera* inspection." And that is what the circuit court judge found, stating on the record at the hearing on the fee petition that "[p]laintiffs in this case *were aggrieved* when Lavery's notes were sought without an *in camera* inspection." (Emphasis added.) This was conduct by the Department that the circuit court concluded "was in violation of the statutory mandated privilege."

¶ 42 The record reflects that the Department did *not* agree to plaintiffs' request for an *in camera* inspection in the circuit court but instead urged the court to dismiss the case, on the basis that it was an impermissible challenge to an interlocutory discovery order. It criticized plaintiffs in its briefing for seeking relief in the circuit court without first requesting an *in camera* inspection by the Department, even though the ALJ *told plaintiffs in his order* that this was what they were required to do if they wanted to continue to assert the privilege. In sum, the Department knew that the documents might be privileged, resisted plaintiffs' efforts to settle that question, and doggedly persisted in its demand for their production. In our view, this is an arguable basis for a finding that the Department actually violated the Confidentiality Act, which makes quite clear that documents subject to the privilege "*shall not* be subject to discovery." (Emphasis added.) 740 ILCS 110/3(b), 15 (West 2020).

¶ 43 This is not, however, something we need to decide here, because we reject the Department's premise that a past violation of the law must be alleged to invoke the officer suit exception, which we have already noted is more accurately referred to as the prospective injunctive relief exception. By its very definition, the exception contemplates the pursuit of injunctive relief to *prevent* future wrongful conduct from happening. Our supreme court made this clear in *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, ¶ 48, stating "this court and our appellate court have repeatedly reaffirmed the right of plaintiffs to seek injunctive relief in circuit court to *prevent* unauthorized or unconstitutional conduct by the State, its agencies, boards, departments, commissions and agents or to compel their

compliance with legal or constitutional requirements." (Emphasis added.) The plaintiff in *Leetaru* was a graduate student who sued the board of trustees of a state university to enjoin them from proceeding with a disciplinary investigation against him for academic misconduct in a way that did not comply with the university's rules and regulations governing such matters. *Id.* ¶ 1. The court concluded that the student did "not seek redress for some past wrong" but rather "only to prohibit future conduct *** undertaken by agents of the State in violation of statutory or constitutional law or in excess of their authority." *Id.* ¶ 51.

¶ 44 The Department insisted at oral argument that a factually similar case, *Flanigan v. Board of Trustees of the University of Illinois at Chicago*, 2018 IL App (1st) 170815, demonstrates that a past violation must be alleged. That is not what *Flanigan* holds. The plaintiff there was a medical student who was dismissed from a state university. *Id.* ¶ 1. Like the graduate student in *Leetaru*, he alleged that the university's board of trustees had violated his due process rights and exceeded their authority by dismissing him without following the school's student disciplinary policy. *Id.* However, none of the factual allegations in *Flanigan* demonstrated that the disciplinary process the defendants followed violated any applicable rule or was in excess of their statutory authority. *Id.* ¶¶ 30-31. To the contrary, the dismissal motion "established that defendants, as State officials, exercised their authority delegated to them by the State." *Id.* ¶ 31. *Flanigan* stands only for the unremarkable proposition that some improper conduct—either past conduct or contemplated future conduct—must be alleged before relief can be awarded.

¶ 45 In sum, we reject each of the Department's three arguments and agree with plaintiffs that the exception to the sovereign immunity doctrine for suits seeking to enjoin state officers from engaging in conduct exceeding their statutory authority applies here. We concur with the reasoning in *Grey* and the United States Supreme Court's analysis in *Jenkins* that an award of statutory attorney fees and costs is ancillary to that relief and does not constitute a separate monetary judgment against the State. We need not consider plaintiffs' alternative arguments that the doctrine does not apply here because this is an outgrowth of proceedings initiated by the State or that the Act should be read as a waiver of sovereign immunity.

¶ 46 IV. CONCLUSION

¶ 47 For the above reasons, we affirm the circuit court's award of plaintiffs' reasonable attorney fees and costs under the Act. Plaintiffs request that we award them fees and cost arising from this appeal or remand for the circuit court to do so. Because we believe that the circuit court is better equipped to expeditiously review a fee petition and any objections thereto, we remand for this limited purpose.

¶ 48 Affirmed and remanded.

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

18518187

TERRENCE LAVERY, ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC, and ANIL RAMACHANDRAN, M.D.,	)	
Petitioners-Appellees,	)	No. 2020-CH-01202
v.	)	
DEPARTMENT OF PROFESSIONAL REGULATION,	)	The Honorable CAROLINE KATE MORELAND,
Respondent-Appellant.	)	Judge Presiding.

NOTICE OF APPEAL

Respondent-Appellant Illinois Department of Professional Regulation ("Department"), by its attorney, Kwame Raoul, Attorney General of the State of Illinois, hereby appeals to the Appellate Court of Illinois, First Judicial District, from the final order entered by the Honorable Judge Caroline Kate Moreland of the Circuit Court of Cook County, Illinois, on June 3, 2022, in which the circuit court awarded fees and costs against the Department, as well as from all prior adverse interlocutory orders.

By this appeal, Respondent-Appellant Illinois Department of Professional Regulation requests that the appellate court reverse and vacate the circuit court's

judgment and prior adverse orders, and grant any other relief deemed appropriate.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

By: /s/ Bridget DiBattista
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July 1, 2022

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 1, 2022, I electronically filed the foregoing Notice of Appeal with the Clerk of the Circuit Court of Cook County, Illinois, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system. The participants also will be served by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses designated by those participants on July 1, 2022.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

TERRENCE LAVERY, ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC, and ANIL RAMACHANDRAN. M.D. Petitioners	)	
v.	)	NO. 2020-CH-01202
DEPARTMENT OF PROFESSIONAL REGULATION Respondent	)	

FIRST AMENDED COMPLAINT FOR PROTECTIVE ORDER, DECLARATORY JUDGMENT, OTHER RELIEF PURSUANT TO 740 ILCS 110/1 *et seq*., AND FOR ADMINISTRATIVE REVIEW

Now come Terrence Lavery and Illinois Professionals Health Program, LLC (hereinafter "Illinois PHP"), by their attorneys, DiVincenzo Schoenfield Stein, and petition this Court for a Protective Order, for Declaratory Judgment, or other relief pursuant to 740 ILCS 110/1 *et seq*., and/or for Administrative Review. In support thereof, Lavery and Illinois PHP state as follows:

COMMON ALLEGATIONS

1. At all times mentioned herein, there was pending and continues to be pending before the Illinois Department of Professional Regulation, an administrative proceeding filed by Anil K. Ramachandran, M.D. for the reinstatement of his medical license. As a necessary party, Dr. Ramachandran was originally named as a respondent with no relief sought against him. Pursuant to the Court's order to realign Dr. Ramachandran, he is now designated as a petitioner.

2. At all times mentioned herein, Terrence Lavery was an employee of Illinois PHP.

3. At all times mentioned herein, Illinois PHP was contracted, *inter alia*, to help Dr. Ramachandran make contact with clinical services, to assist him in finding a 12-step or other peer support program, to coordinate toxicology testing, and to monitor his rehabilitation program with regard to substance abuse.

4. At all times mentioned herein, Mr. Lavery was Illinois PHP's case manager for Dr. Ramachandran's rehabilitation program with regard to substance abuse.

5. At all times mentioned herein, Mr. Lavery was licensed to provide therapy.

6. Administrative medical licensing proceedings are authorized by the Medical Practice Act, 225 ILCS 60/22. However, it is the "Mental Health and Developmental Disabilities Confidentiality Act", 740 ILCS 110/1 *et seq*. (hereinafter "the Act"), which controls discovery of mental health care in all proceedings, including administrative proceedings. 740 ILCS 110/2 defines terms as used within the Act.

7. 740 ILCS 110/2 defines "Recipient" as follows: "Recipient' means a person who is receiving or has received mental health or developmental disabilities services."

8. At all times mentioned herein, Dr. Ramachandran was a statutory recipient as he received mental health services.

9. 740 ILCS 110/2 defines "Mental health services" as follows: "Mental health or developmental disabilities services' or 'services' includes but is not limited to examination, diagnosis, evaluation, treatment, training, pharmaceuticals, aftercare, habilitation or rehabilitation."

10. 740 ILCS 110/2 defines "Therapist" as follows: "Therapist' means a psychiatrist, physician, psychologist, social worker, or nurse providing mental health or developmental disabilities services or any other person not prohibited by law from providing such services or from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so. Therapist includes any successor of the therapist."

11. At all times mentioned herein, Mr. Lavery was and is a statutory therapist as he is licensed to provide therapy and he provided such services in Dr. Ramachandran's rehabilitation program.

12. 740 ILCS 110/2 defines "Personal Notes" as follows: "Personal notes' means:

(i) information disclosed to the therapist in confidence by other persons on condition that such information would never be disclosed to the recipient or other persons;

(ii) information disclosed to the therapist by the recipient which would be injurious to the recipient's relationships to other persons, and

(iii) the therapist's speculations, impressions, hunches, and reminders."

13. 740 ILCS 110/2 defines "Record", in relevant part, as follows: "'Record' means any record kept by a therapist or by an agency in the course of providing mental health or developmental disabilities service to a recipient concerning the recipient and the services provided….*Record does not include the therapist's personal notes,* if such notes are kept in the therapist's sole possession for his own personal use and are not disclosed to any other person, except the therapist's supervisor, consulting therapist or attorney. If at any time such notes are disclosed, they shall be considered part of the recipient's record for purposes of this Act…. 'Record' does not include a reference to the receipt of mental health or developmental disabilities services noted during a patient history and physical or other summary of care."

14. 740 ILCS 110/2 defines "'Confidential communication' and 'communication', in relevant part, as follows: "Confidential communication" or "communication" means any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability

services to a recipient. Communication includes information which indicates that a person is a recipient..."

15. 740 ILCS 110/2 defines "Therapeutic relationship", in relevant part, as follows: "'Therapeutic relationship' means the receipt by a recipient of mental health or developmental disabilities services from a therapist…."

16. During the course of providing mental health services to Dr. Ramachandran, Mr. Lavery maintained personal notes within the meaning of 740 ILCS 110/2 in that the notes consisted of: (1) information disclosed to him by Dr. Ramachandran which would be injurious to the recipient's relationships to other persons; and (2) of his therapist's speculations, impressions, hunches, or reminders.

17. Mr. Lavery was called as a witness by the Petitioner and testified in a hearing on Dr. Ramachandran's licensing reinstatement petition. During his testimony, Mr. Lavery disclosed the existence of his personal notes. At that time, in response to a request by the Department's counsel for a copy of the notes, Mr. Lavery stated that notes were not provided because they were "work product". The Administrative Law Judge then told Mr. Lavery to return on another date for cross-examination and to turn over his personal notes to the Prosecutor "in good time." The Administrative Law Judge did so without any reference to Mr. Lavery's assertion of a work product privilege and without any reference to the controlling statute. At the hearing, Mr. Lavery and Illinois PHP were without counsel.

18. At all times mentioned herein, 740 ILCS 110/3(b) provided that:

> "A therapist is not required to but may, to the extent he determines it necessary and appropriate, keep personal notes regarding a recipient. *Such personal notes are the work product and personal property of the therapist and shall not be*

subject to discovery in any judicial, administrative or legislative proceeding or any proceeding preliminary thereto." (Emphasis added.)

19. Thereafter, counsel for Mr. Lavery and Illinois PHP filed a memorandum of law advising the Administrative Law Judge and counsel for the Parties that Mr. Lavery was asserting the therapist's work product privilege and would not be producing his personal notes.

20. Thereafter, the Administrative Law Judge ordered that Mr. Lavery produce the documents. In doing so, the Administrative Law Judge treated the documents not as therapist's personal notes, but instead as records or communications. A copy of the Order is attached hereto as Exhibit A.

21. On January 6, 2020, at a status hearing, counsel informed the Administrative Law Judge and counsel for the Parties that Illinois PHP and Mr. Lavery would be filing an action in the Circuit. A copy of the order of January 6, 2020 is attached hereto as Exhibit B.

COUNT I

PROTECTIVE ORDER OR OTHER RELIEF PURSUANT TO 740 ILCS 110/1 *et seq*.

22. Count I is brought for a protective relief to enforce the therapist's work product privilege codified in 740 ILCS 110/3(b).

23. Petitioners restate and re-allege paragraphs 1-21 as paragraph 23 of Count I and make the same as part herein as if fully set forth.

24. There was no basis for rejecting Mr. Lavery's assertion of the therapist's work product privilege without the documents being submitted to the Circuit Court for an *in camera* inspection.

25. Rather than just refusing to turn over the therapist's personal notes, Petitioners' seek a protective order or other relief from the Court to enforce the statutory therapist's work product privilege.

WHEREFORE, the Petitioners, TERRENCE LAVERY and ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC, ask this Honorable Court to issue a protective order which provides that Terrence Lavery is not required to turn over the documents he has asserted are within the therapist's work product privilege, for attorney's fees and costs pursuant to 740 ILCS 110/15, and for such other and further relief that the Court deems just, including but not limited to, an *in camera* inspection.

COUNT II

DECLARATORY JUDGMENT AND OTHER RELIEF

26. Count II is brought for a declaratory judgment and other relief to declare that the withheld documents are within the therapist's work product privilege codified in 740 ILCS 110/3(b).

27. Petitioners restate and re-allege paragraphs 1-21 as paragraph 27 of Count II and make the same as part herein as if fully set forth.

28. There was no basis for rejecting Mr. Lavery's assertion of the therapist's work product privilege without the documents being submitted to the Circuit Court for an *in camera* inspection.

29. A declaratory judgment is needed to adjudicate the rights of the Petitioners to maintain the therapist's work product privilege.

WHEREFORE, the Petitioners, TERRENCE LAVERY and ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC, ask this Honorable Court to issue a declaratory

judgment which provides that Terrence Lavery is not required to turn over the documents he has asserted are within the therapist's work product privilege, for attorney's fees and costs pursuant to 740 ILCS 110/15, and for such other and further relief that the Court deems just, including but not limited to, an *in camera* inspection.

COUNT III

ADMINISTRATIVE REVIEW ACT

30. Count III is brought for administrative review pursuant to the Administrative Review Act.

31. Petitioners restate and re-allege paragraphs 1-21 as paragraph 31 of Count III and make the same as part herein as if fully set forth.

32. 740 ILCS 110/10(a)(1) provides in relevant part as follows:

> "Records and communications may be disclosed in a civil, criminal or administrative proceeding in which the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense, *if and only*…i*n the case of an administrative proceeding, the court to which an appeal or other action for review of an administrative determination may be taken, finds, after in camera examination* of testimony or other evidence…." (Emphasis added.)

33. 740 ILCS 110/10(b) provides in relevant part as follows: "…. Any order to disclose or to not disclose [records or communications] shall be considered a final order for purposes of appeal and shall be subject to interlocutory appeal."

34. There was no basis for rejecting Mr. Lavery's assertion of the therapist's work product privilege without the documents being submitted to the Circuit Court for an *in camera* inspection.

WHEREFORE, the Petitioners, TERRENCE LAVERY and ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC, ask this Honorable Court to reverse the Administrative Law Judge's Order directing Terrence Lavery to turn over documents asserted to be within the therapist's work product privilege, and for such other and further relief that the Court deems just, including but not limited to, an *in camera* inspection.

/s/ Rick Schoenfield

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CERTIFICATE OF SERVICE

Rick Schoenfield, an attorney, certifies that he had the foregoing papers served by e-mailing a copy thereof to Samantha Grund-Wickramasekera at SGrundWickramasekera.atg.state.il.us and to Priyanka U. Desai at pdesai@goldberglawoffice.com on August 27, 2020 before 6:00 p.m.

/s/ Rick Schoenfield

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STATE OF ILLINOIS
DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION
DIVISION OF PROFESSIONAL REGULATION

IN RE: The Petition for Restoration of	)	
	)	No. 2013-10351
ANIL M. RAMACHANDRAN, M.D.	)	
	)	
License Nos. 036-024150, 336.085458, 336.085923,	)	
	)	
Petitioner.	)	

ORDER

This matter coming to be heard on Mr. Terrence Lavery of Illinois Professionals Health Program's Memorandum of Law in Support of Therapist's Work Product Privilege[1] ("Motion for Protective Order") and Petitioner's Motion to Strike Motion to Strike the Memorandum of Law in Support of Therapist's Work Product Privilege and the Court's October 11, 2019 Order; the Department having filed its response to both submissions; Mr. Lavery having filed a reply memorandum; and the Administrative Law Judge being fully advised in the premises:

IT IS HEREBY FOUND THAT:

1. The issues presented have been adequately briefed so that there is no need for oral argument for a clearer understanding of the issues.

2. On July 26, 2019, Mr. Lavery was called by Petitioner to testify in the formal hearing in this case. The apparent purpose of Mr. Lavery's testimony was to show that Petitioner had complied with substance and alcohol abuse monitoring and had attended psychiatric therapy, a major factor in showing that Petitioner was sufficiently rehabilitated to obtain restoration of his physician's license.

3. On direct examination, Mr. Lavery testified that he had been Petitioner's case manager with IPHP since February 2015 and that he was responsible for monitoring Petitioner's compliance with his Recovery Plan Agreement with IPHP. (Exhibit 7). Mr. Lavery described the terms of the agreement as follows:

[1] The Administrative Law Judge treats Mr. Lavery's Memorandum of Law more in terms of a motion for protective order and supporting memorandum.

EXHIBIT
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The terms of the agreement are that he will continue to have provider care in terms of a psychiatrist. At the time that he entered with us it was Dr. Arenas, I know it's been changed but sticking with the agreement, and, also, that his -- he'll maintain a healthcare provider, primary healthcare provider. Any of his old prescriptions that he shouldn't have should be discarded. Shouldn't be treating himself, it should all be done by his primary healthcare provider or his psychiatrist. That he'll participate in the following activities, which include individual therapy, medication management. It mentions workplace restrictions, currently not working. And also outlines the frequency of his drug screens which is 24 to 28 per year and a random hair test. Any fore caused [sic] testing that would be deemed appropriate. Participation in 12-step meetings or self-help meetings, working with a sponsor, phone contact with his case manager from IPHP, which is me, and that is a summary of it.

(Transcript at 27-28).

4. Mr. Lavery further testified that, based upon his monthly telephone contact and monitoring of the results of the drug screen, Petitioner had been in compliance with the agreement " to the best of [his] knowledge." (*Id.* at 28). Mr. Lavery testified that he did not have any concerns whether Petitioner had complied with the Program. (*Id.* at 29).

5. During cross-examination, Mr. Lavery testified that he had seen Petitioner about once a year for the past five years, and that he had never talked to Petitioner's current psychiatrist face-to-face but had spoken with him by telephone. Mr. Lavery conceded that he had kept notes of the conversations in an electronic medical record format and that those records had never been disclosed to the Department. Following review of the relevant discovery requests and responses, the Administrative Law Judge halted the testimony of Mr. Lavery and entered an order requiring production of the requested documents by August 26, 2019, with the case scheduled for continued formal hearing on October 15, 2019.

6. The Department did not receive the requested documents by August 26, 2019.

7. Five days before the formal hearing was due to recommence, on October 10, 2019, Mr. Lavery, through his attorneys, filed a Memorandum of Law in Support of Therapist's Work Product Privilege, wherein he characterized the requested notes as "personal notes," and stated his intention not to turn them over to either the Department or Petitioner due to the therapist's work product privilege contained in the Mental Health and Developmental Disabilities Act (the "Act"), 740 ILCS 110/3(b). Mr. Lavery further advised the Administrative Law Judge that "[i]t would be an abuse of discretion to penalize either party for

Mr. Lavery;s invocation of the privilege, or to negate or discount his testimony because of his invocation of the privilege." (Memorandum at 5).

8. On October 11, 2019, the Administrative Law Judge struck the formal hearing date, entered a briefing schedule on Mr. Lavery's assertion of the therapist's work product privilege, and set the matter for a status hearing on January 6, 2020.

9. On the same day, Petitioner filed a motion to strike Mr. Lavery's "memorandum" on the grounds that (i) he did not have standing to file any pleadings in the case since he was not responding to a subpoena and had not filed an appearance; (ii) Petitioner's counsel did not consider a briefing schedule necessary; and (iii) the Administrative Law Judge did not have jurisdiction to rule on "a privilege/confidentiality issue." Petitioner also argued that setting a briefing a schedule and continuing the case for a later date was "clearly a delay tactic by the Department," and that obtaining the case notes "will not show anything further than his contact with [Petitioner] and various providers, and [Petitioner's] compliance." (Motion to Strike at 4). Petitioner did not challenge the merits of the arguments set forth in Mr. Lavery's motion.

10. The Administrative Law Judge issued a second order which gave parallel dates for a briefing schedule on this motion. The Department timely filed its response to the two motions, and Mr. Lavery timely filed his reply memorandum.

11. Petitioner's Motion to Strike. At formal hearing, the Department had just commenced its cross-examination of Mr. Lavery when it became apparent that the witness had kept notes of his conversations with third-parties concerning Petitioner's compliance with the monitoring plan and that, for the first time the Department learned that all of the requested documentation had not been turned over. Mr. Lavery's memorandum merely supported his claim of therapist work product privilege and did not assert any individual claims or defenses. The Administrative Law Judge finds that, as a witness, he should have the opportunity to attempt to assert a colorable statutory privilege and to file a supporting memorandum to set forth his position.

12. Second, as a general matter, an Administrative Law Judge determines issues of confidentiality and privilege all the time. To the extent that Petitioner argues that, in a specific case implicating the therapist's work product privilege, documents submitted for an *in camera* inspection require review by a judge from a reviewing court, and not an Administrative Law Judge, Petitioner is correct. 740 ILCS 110/10. However, we have not yet reached this stage.

13. Third, the Administrative Law Judge considered briefing to be appropriate and

entered an order to this effect *sua sponte*. It is not the Petitioner's role in this case to determine for the Administrative Law Judge how the case should proceed and whether briefing is necessary. In any case, this issue is now moot.

14. Finally, Petitioner claims that the documents – which are not supposed to have been seen by Petitioner or his counsel – are not crucial to the case. In other words, the Department should accept Mr. Lavery's assertion on direct examination that the withheld documents are "case notes," not subject to production, and should also accept testimony as to Petitioner's compliance with the Plan without being given access to all the relevant information and documentation for the purposes of cross-examination. This appears to run contrary to the basic notion of fairness. Accordingly, Petitioner's Motion to Strike is denied.

15. Mr. Lavery's Assertion of the Therapist's Work Product Privilege (Motion for Protective Order). Mr. Lavery contends that he was acting as a "therapist" during his relationship with Petitioner (the "recipient") and that because of this relationship, any "personal notes" that he kept are protected from discovery pursuant to 740 ILCS 110/10. Such personal notes are not considered to be part of the records arising during the relationship between the therapist and the patient. The significant difference between records and personal notes for the purposes of this case is that records are privileged and belong to the patient, who can waive the privilege, whereas the personal notes, also subject to privilege, belong to the therapist, who can waive the privilege. The privilege protecting the personal notes is not the patient's to waive. This leads to inconsistent and somewhat counter-intuitive results when the patient, as in this case, seeks restoration of his medical license and places his mental health in issue: Petitioner stated in his Petition for Restoration that he has "no medical or psychiatric impairments that would affect his ability to practice at this time. Petioner will provide information about his treatment since April 1, 2014." (Petition to Restore, ¶8).

16. Mr. Lavery has the burden to show that the requested documents fall under the statutory privilege. Section 2 of the Act defines certain terms used throughout the Act:

"Therapist" is "a psychiatrist, physician, psychologist, social worker, or nurse providing mental health or developmental disabilities services or any other person not prohibited by law from providing such services or from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so." 740 ILCS 110/2.

"Mental health or developmental disabilities services" or "services" are defined

to include "examination, diagnosis, evaluation , treatment , training, pharmaceuticals, aftercare, habilitation or rehabilitation." (*Id.*).

"Recipient" is a person receiving or [who] has received mental health or developmental disabilities services." (*Id.*).

17. Mr. Lavery is a llicensed clinical professional counselor who described himself during the formal hearing as a case manager. He falls within the statutory definition of a "therapist." Mr. Lavery also provided monitoring of Petitioner's compliance with the IPHP agreement which could be considered as engaging in the rehabilitation of Petitioner, or "Recipient." His relationship with Petitioner gives rise to a statutory privilege, which can be waived by Petitioner as far as records are concerned, but not in the case of personal notes, assuming a case manager can create "personal notes" as contemplated by the statute.

18. "Record means any record kept by a therapist or by an agency in the course of providing mental health or developmental disabilities services to a recipient concerning the recipient and the services provided." However, "record does not include the therapist's personal notes, if such notes are kept in the therapists' sole possession for his own personal use and are not disclosed to any other person, except the therapist's supervisor, consulting therapist or attorney." Section 2 further provides that "a reference to the receipt of mental health or developmental disabilities services noted during a patient history and physical or other summary of care" does not fall within the Act's definition of "record." (*Id.*).

Finally, "[a] therapist is not required to, but may, to the extent he determines it necessary and appropriate, keep personal notes regarding a recipient. Such personal notes are the work product and personal property of the therapist and shall not be subject to discovery in any judicial, administrative or legislative proceeding or any proceeding preliminary thereto." (*Id.*). "Personal notes" are defined as:

"(i) information disclosed to the therapist in confidence by other persons on condition that such information would never be disclosed to the recipient or other persons;

(ii) information disclosed to the therapist by the recipient which would be injurious to the recipient's relationships to other persons, and

(iii) the therapist's speculations, impressions, hunches, and reminders." (*Id.*).

19. While the Act and the pertinent case law makes clear that a therapist's personal notes are not discoverable in this proceeding, it is incumbent on the party

asserting the work product privilege to show that the documents he seeks to protect fall within the privilege. Mr. Lavery has testified that his notes are contained within his electronic medical records and therefore subject to a blanket therapist's privilege. In his supporting memorandum, he cites "reminders" as an example of how far the privilege reaches but does not provide the Administrative Law Judge with any specifics as to the withheld documents and how such documents satisfy the definition of "personal notes" in the Act. Mr. Lavery does not attach an affidavit concerning the records in question. As the court stated in *In re Estate of Bagus*, 294 Ill. App. 3d 887 (2d Dist. 1998), "allowing a party or potential party to an action to determine unilaterally which documents he will produce for discovery creates an obvious potential for mischief. Such a reading of the Act stands the privilege on its head, creating a psychiatrist's privilege rather than a patient's privilege, and could not have been intended by the legislature." 294 Ill. App. 3d at 889.

20. In the context of this proceeding, where Petitioner must prove by a preponderance of the evidence that he has been rehabilitated (68 Il. Adm. Code 1110.190(b)), it is to Petitioner's benefit to produce all his relevant treatment records. Mr. Lavery has testified that Petitioner has complied with the requirements of the IPHP Recovery Plan; however, the Department has been prevented from testing this conclusion because it has not received Mr. Lavery's supporting documentation. Instead, certain documents have been characterized generally as "personal notes," shielded from production by the therapists' work product privilege. This is not enough to invoke the statutory privilege.

21. Petitioner did not file a response to Mr. Lavery's memorandum or a reply to the Department's response, and there is no evidence in the record or from the benefit of a Petitioner's response or reply that Petitioner specifically requested these notes when the Department requested them in discovery or when the Administrative Law Judge ordered them produced seven weeks prior to the resumption of the formal hearing on October 15, 2019. Instead, the Department and the Administrative Law Judge learned that they would not be produced five days before, on October 10, 2019. Petitioner could have sought an *in camera* review by the Circuit Court, which would have established which, if any, of Mr. Lavery's withheld monitoring records should be produced and which, if any, were shielded by the privilege. Petitioner failed to do so.

22. Because Mr. Lavery has failed to establish that the withheld documents fall within the statutory definition of "personal notes," his assertion of the therapist's work product privilege set forth in his memorandum is inappropriate, and the withheld documents should be produced to the Department.

IT IS HEREBY ORDERED THAT:

1. Petitioner's Motion to Strike the Memorandum of Law in Support of Therapist's Work Product Privilege and the Court's October 11, 2019 Order is DENIED.

2. Mr. Lavery's Motion for a Protective Order (styled "Memorandum of Law in Support of Therapist's Work Product Privilege") is DENIED.

3. Mr. Lavery is to produce the requested withheld documents to the Department on or before January 6, 2019.

4. The case remains set for STATUS HEARING on January 6, 2019 at 9:30 a.m. when a new date for the continuation of the Formal Hearing will be set.

Dated: 12/12/2019

BY: Ian Brenson
Administrative Law Judge

By Email to:

DiVicenzo Schoenfield Stein
Attorneys for Terrence Lavery and Illinois Professional Health Program
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~~Dept. Attorney: Vladimir Lozovskiy~~

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

STATE OF ILLINOIS
DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION
DIVISION OF PROFESSIONAL REGULATION

10256975

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION of the State of Illinois, Complainant,

OR

No. 2013-10351

In Re: Petition for Restoration of

ANIL K. RAMACHANDRAN, M.D.

License No. _____

Petitioner/~~Respondent~~

ORDER FOR CONTINUANCE

This matter coming to be heard for Preliminary, Status, Prehearing, or Formal Hearing, the Department present by Attorney _____, the Respondent and/or his Attorney DE SAS, Y Present _____ Not Present;

IT IS HEREBY ORDERED THAT:

This matter is continued for Status Hearing on March 30, 2020, at 09:30 a.m./p.m. at the Department's offices, located at 100 West Randolph Street, Room 9-172, Chicago Illinois.

IT IS FURTHER ORDERED THAT: Awaiting IPLP decision on the production of the documents and/or filing of action in Chancery

Mail Certified _____ Regular ____

In court Dated: 1/6/2020

J. R.
Administrative Law Judge

Fax to: _____

Dept. Atty: _____

Distribution:
White - File
Yellow - Respondent
Pink - Department Counsel

IL486-1834 06/05 ALJ

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT CHANCERY DIVISION

TERRENCE LAVERY, ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC	)	
v.	)	NO. 2020-CH-01202
DEPARTMENT OF PROFESSIONAL REGULATION and Anil Ramachandran, M.D. Respondents	)	

ORDER

This cause coming on to be heard on Plaintiffs' motion for fees and costs, due notice being given, and the Court being fully advised in the premises, it is hereby ordered that:

For the reasons stated on the record and recorded by a court reporter, the Court grants Plaintiffs' motion and orders the Department of Professional Regulation to pay Four Thousand Seventy-Nine Dollars and Twenty-One Cents ($4,079.21) to Illinois Professionals Health Program, LLC and to pay Six Thousand Five Hundred Sixty Dollars ($6,560.00) to DiVincenzo Schoenfield Stein.

Judge Caroline Kate Moreland

JUN 03 2022

Circuit Court - 2033

ENTERED:

JUDGE

Dated:

Rick Schoenfield
DiVincenzo Schoenfield Stein
11340 W Monticello
Westchester, IL 60154
708-822-1637
rschoenfield@dsschicagolaw.com
39591

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT- CHANCERY DIVISION

TERRENCE LAVERY,	)
	)
Plaintiff,	)
	)
v	)2000 CH 01202
	)
ILLINOIS DEPARTMENT OF	)
PROFESSIONAL AND FINANCIAL,	)
REGULATION, et al.	)
	)
Defendants.	)

REPORT OF PROCEEDINGS taken before the Honorable JUDGE CAROLINE K. MORELAND, Thursday, June 2, 2022, via video conference, Zoom, at 11:00 a.m.

APPEARANCES:

DIVINCENZO, SCHOENFIELD, STEIN,
BY: MR. RICK SCHOENFIELD,
11340 W. Monticello Place
Westchester, Illinois, 60154
Appeared on behalf of the Plaintiff,
ILLINOIS ATTORNEY GENERAL, KWAME RAOUL,
BY: AAG. TAMIYA WRIGHT,
100 W. Randolph - 13th Floor
Chicago, Illinois, 60601
tamiya.wright@ilag.gov
Appeared on behalf of the Defendant,
IDPFR

LEWIS, BRISBOIS, BISGAARD & SMITH, LLP.,
BY: MR. ZACARIAS CHACON,
103 W. Vandalia Street - #300
Edwardsville, Illinois 62025
zacarias.chacon@lewisbrisbois.com
Appeared on behalf of the Defendant,
Ramachandran.

THE CLERK: Lavery versus IDPFR.

MR. SCHOENFIED: Good morning, your Honor, Rick Schoenfield for the plaintiff.

THE COURT: Good morning. There's no defense attorney here?

MR. SCHOENFIED: It is, the AAG is here. I saw her name before, or she was here, I don't know what happened to her.

THE COURT: Maybe she is going to come back.

MR. SCHOENFIED: I'm sorry, what, judge?

THE COURT: I said I was thinking hopefully she will come back, I don't want to issue a ruling without her being here, especially if she was here earlier, but I know you have been waiting.

THE CLERK: Mr. Schoenfield, was it Miss Watkins?

MR. SCHOENFIED: It was Miss Wright.

THE CLERK: I will send the email.

MR. SCHOENFIED: And I do have a court reporter here, pursuant to the Court's direction, your Honor.

THE COURT: Okay. So, hopefully it won't be another ten minutes, I have one other case matter

to handle, so, if she comes back on, I'll stop the other case and come back to yours, okay?

MR. SCHOENFIED: Thank you. Okay.

(Case passed after which the following proceedings were had.)

THE COURT: Lavery versus IDPFR.

MR. SCHOENFIED: Rick Schoenfield for the plaintiff.

MS. WRIGHT: Good morning, your Honor, Assistant Attorney General, Tamiya Wright. My apologies, I was kicked out of zoom earlier.

THE COURT: It's here on plaintiff's petition for attorney's fees and for the court's ruling. I have -- everybody put their name on the record, I think, already did, okay.

So, this case arose out of the administrative proceedings filed by Anil Ramachandran, the doctor, because he filed a request for reinstatement of his medical license, his reinstatement was opposed by the Department of Professional Regulations, and Mr. Lavery was called as a witness in a hearing by the doctor's licensing -- on the doctor's licensing reinstatement position.

During his testimony Mr. Lavery exposed the existence of his personal note. At that time the Department requested a copy of the note and Administrative Law Judge told Mr. Lavery to return on another date for cross examination, and to turn over his personal notes to the prosecutor.

Thereafter, the Administrative Law Judge ordered that Mr. Lavery produce the documents. In doing so, the Administrative Law Judge treated the documents not as a therapist personal notes.

On January 26, 2020, status hearing, plaintiff's counsel informed the Administrative Law Judge and counsel for the parties, that Mr. Lavery would be filing an action in the Circuit Court.

The Statute request -- I am sorry, the statute, 740 ILCS 110/15 states, "Any person aggrieved by a violation of this act may sue for damages and injunction or other appropriate relief."

"Reasonable attorneys fees and costs maybe awarded to the successful plaintiff in any action under this act. The act refers to the Mental Health And Developmental Disability Confidentiality Act,"

"Plaintiffs in this case were aggrieved when Lavery's notes were sought without an in camera

inspection by the Circuit Court, which was in violation of the statutory mandated privilege."

"Plaintiffs were left with the need to obtain an in camera inspection by filing the instant case."

"Where it was the defendant's failure to follow the requirement of the act in demanding the plaintiff produce Lavery's work, product notes without an in camera inspection in Circuit Court, plaintiffs are entitled to attorneys fees and costs."

There's no argument, and thus no dispute as to the amount. The Court has reviewed the plaintiff's affidavit application for attorney's fees.

The Court finds the plaintiff is entitled to the attorney's fees and after review, there, and no argument on the amount, the Court finds that the amount is reasonable and the amount is 4,079, that I believe already have been paid and 6,560, that is still outstanding, so, that total is granted.

MR. SCHOENFIED: Thank you, judge.

THE COURT: That's the order and make sure the order states as stated on the record, court

reported record.

MR. SCHOENFIED: I'm not quite clear on what you meant there judge?

THE COURT: Are you drafting an order?

MR. SCHOENFIED: Yes.

THE COURT: Okay, so in that order make sure you mention that the court stated for the reasons stated on the record, and make sure it says that it was court reported.

MR. SCHOENFIED: Yes.

THE COURT: Okay, great, thank you.

MR. SCHOENFIED: Thank you judge.

(Which were all the proceedings had in the above-entitled cause.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT- CHANCERY DIVISION

TERRENCE LAVERY,)
)
Plaintiff,)
)
v)2000 CH 01202
)
ILLINOIS DEPARTMENT OF)
PROFESSIONAL AND FINANCIAL,)
REGULATION, et al.)
)
Defendants.)

I, Pamela C. Taylor, CSR/RPR of the State of Illinois, do hereby certify that I reported in machine shorthand the proceedings had at the hearing in the above-entitled cause, and that this transcript is a true and accurate transcription of my machine shorthand notes so taken to the best of my ability.

Pamela C. Taylor

CSR #084-001184

Dated this 18th day
of July, 2022

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	Exhibit A – Sept. 3, 2020 Circuit Court Order (1. IDFPR shall file its amended motion to dismiss on or before Sept. 24, 2020, 2. Petitioners have 21 days thereafter, on or before Oct. 15, 2020 to file their response, 3. The Department has 14 days thereafter, on or before Oct. 29, 2020 to file its reply and 4. This matter is set for a Clerks status on Oct. 30, 2020 at 9:30 a.m.)	C256-57
	Exhibit B – e-mail correspondence regarding *Lavery v. IDFPR* between Samantha Grund and Priyanka u. Desai	C258-262
	Exhibit C – e-mail correspondence regarding *Lavery v. IDFPR* from Samantha Grund to Judge Moreland	C263-65
	Exhibit D – Nov. 6, 2020 IDFPR's Notice of Filing its Reply Brief in Support of its Motion to Dismiss Petitioners' Amended Complaint	C266-275
11/20/2020	Circuit Court Order setting this matter for ruling on Feb. 5, 2021 at 10:00 a.m.	C276
06/15/2021	Circuit Court Memorandum Opinion and Order (granting the Departments Motion in part and denying it in part, 2. Dismissing all counts brought by Dr. Ramachandran, 2. Dismissing Count III voluntarily, and 4. Ordering the Department to Answer Count I and II within 28 days)	C277-80
06/16/2021	Circuit Court Memorandum Opinion and Order (granting Lavery's motion for an in camera inspection, 2. Allowing Lavery 35 days to turn over to the Court all documents in its possession responsive to the ALJ's order)	C281-82
07/21/2021	The Illinois Department of Financial and Professional Regulation's Answer to Plaintiff's First Amended Complaint For Protective Order, Declaratory Judgment, Other Relief Pursuant To 740 ILCS 110/1 *Et Seq*., And for Administrative Review	C283-88

	Verification by Mark Thompson Pursuant to 735 ILCS 5/2-610	C289
07/21/2021	IDFPR's Notice of Filing its Answer to Plaintiff's First Amended Complaint	C290-91
11/16/2021	Circuit Court Memorandum Opinion and Order (Finding Lavery entitled to redacted material produced in the underlying administrative proceeding, that after review the notes are properly redacted, and that a Protective Order should be granted for the notes)	C292
12/14/2021	Plaintiffs' Motion for Attorney's Fees and Cost	C293-296
	Exhibit A – DSS Time Records for Illinois PHP, Paid Time	C297-99
	Exhibit B – Affidavit of Rick Schoenfield	C300-01
12/16/2021	Notice of Motion of Rich Schoenfield to appear before Hon. Judge Caroline Kate Moreland via Zoom and present Plaintiff's Motion for Attorney's Fees and Cost	C302
12/16/2021	The Illinois Department of Financial and Professional Regulation's Motion to Clarify, or in The Alternative, Modify The Court's November 16, 2021 Order	C303-06
	Exhibit A – June 15, 2021 (granting the Departments Motion in part and denying it in part, 2. Dismissing all counts brought by Dr. Ramachandran, 2. Dismissing Count III voluntarily, and 4. Ordering the Department to Answer Count I and II within 28 days)	C307-11
	Exhibit B – June 16, 2021 Circuit Court Memorandum Opinion and Order (granting Lavery's motion for an in camera inspection, 2. Allowing Lavery 35 days to turn over to the Court all documents in its possession responsive to the ALJ's order)	C312-14
	Exhibit C – June 16, 2021 Circuit Court Memorandum Opinion and Order (granting Lavery's motion for an in camera inspection, 2. Allowing Lavery 35 days to turn over to the Court all documents in its possession responsive to the ALJ's order)	C315-16
12/16/2021	IDFPR's Notice of Motion to Clarify the Court's Nov. 16, 2021 Order	C317-22
01/07/2022	Circuit Court Order (1. The motion for attorney's fees and costs is entered and continued, 2. Petitioners shall respond to the Department's motion to clarify within 14 days, 3. The Department may reply to Petitioners' response within 7 days)	C323-24
01/19/2022	Plaintiffs' Response to IDFPR's Motion to Clarify, Or Modify the Court's Order Of November 23, 2021	C325-28
	Exhibit 1 – E-mail correspondence between Samantha Grund and Rick Schoenfield	C329

	Exhibit 2 – E-mail correspondence by Rick Schoenfield addressed to Vladimir Lozovskiy and Priyanka Desai	C330
	Exhibit 3 – Phone call and correspondence records	C331-60
01/26/2022	The Illinois Department of Financial and Professional Regulation's Reply in Support of Its Motion to Clarify, Or in The Alternative, Modify the Court's November 16, 2021 Order	C361-63
01/26/2022	Defendant IDFPR's Notice of Filing its Reply in Support of its Motion to Clarify, or in the Alternative, Modify the Court's Nov. 16. 2021 Order	C364-65
02/10/2022	Circuit Court Order (1. Granting the motion in part, orally clarifying parts of the Court's June 15, 2021 and Nov 16, 2021 rulings, 2. Petitioners are granted 14 days to file an amended motion for attorney's fees and cost, 3 the Department is granted 28 days to respond to the amended motion for attorney's fees and cost, 4. Petitioners may reply to the Department's response within 14 days thereafter, and 5. The cause is continued to Apr. 8, 2022 for a Clerk's status and movants' counsel is to electronically submit the motion and briefs to the Calendar's email by 9:30 a.m.)	C366-67
02/15/2022	Plaintiffs' Amended Motion for Attorney's Fees and Costs	C368-71
	Exhibit A – DSS Time Records for Illinois PHP	C372-76
	Exhibit B – Affidavit of Rick Schoenfield	C377-79
03/23/2022	[Proposed] Agreed Amended Briefing Schedule Order (1. Respondent is granted an additional 7 days to file its Response to the Amended Motion for Attorney's Fees and Cost, 2. Petitioners will file their Reply by Apr. 5, 2022 and 3. The Apr. 8, 2022 clerk status date stands)	C380
03/31/2022	Defendant's Opposition to Plaintiffs 'Amended Motion for Attorney's Fees and Costs	C381-88
	Exhibit A – Mar. 31, 2014 IDFPR's Complaint	C389-98
	Exhibit B – May 26, 2015 IDFPR's Consent Order	C399-03
	Exhibit C – Apr. 10, 2017 IDFPR's Consent Order	C404-07
	Exhibit C – Nov. 5, 2018 Anil K. Ramachandran M.D.'s Petition for Restoration	C408-11
	IDFPR Notice of Preliminary Hearing addressed to Goldberg Law Group	C412-13
	Exhibit D – Summons in Administrative Review served upon IDFPR and Anil K. Ramachandran, M.D.	C414-16
	Cook County Circuit Court Chancery Division Civil Cover Sheet in an Administrative Review completed by attorney DiVincenzo Schoenfield Stein	C417
	Complaint for Protective Order, Declaratory Judgment, Other Relief Pursuant to 740 ILCS 110/1 *et seq.* and for Administrative Review	C418-425

CERTIFICATE OF FILING AND SERVICE

I certify that on August 14, 2024, I electronically filed the foregoing Brief and Appendix of Defendant-Appellant with the Clerk of the Court for the Illinois Supreme Court, by using the Odyssey eFileIL system.

I further certify that the other participants in this action, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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