NO. 130033
IN THE SUPREME COURT OF ILLINOIS

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

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APPELLEES' BRIEF AND SUPPLEMENTAL APPENDIX

DiVincenzo Schoenfield Stein
Attorneys for Petitioners-Appellees
11340 W. Monticello Pl.
Westchester IL 60154
708-822-1637
rschoenfield@dsschicagolaw.com

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APPELLEES' BRIEF

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INTRODUCTION

Terrence Lavery is a therapist employed by Illinois Professional Health Program ("IPHP"). Therapists' personal notes are statutorily defined as work product and are protected from "discovery in any judicial, administrative or legislative proceeding or any proceeding preliminary thereto" under 740 ILCS 110/3(b) of the Mental Health and Developmental Disabilities Confidentiality Act ("MHCCDA"). Lavery was called as a witness in an administrative licensing proceeding before the Illinois Department of Financial and Professional Regulation ("IDFPR"). Despite Lavery's assertion of the privilege, IDFPR sought all of his notes. Plaintiffs refused to turn over Lavery's therapist's notes and filed this case, seeking equitable protection and an *in camera* inspection of the notes. The Circuit Court determined that all of the documents claimed to be privileged were privileged. The Circuit Court further determined that Lavery and IPHP were "aggrieved persons" under 740 ILCS 110/15 and ordered IDFPR to pay attorney's fees and costs pursuant to the statute.

In the Appellate Court, for the first time, Defendant raised the issue of sovereign immunity. It did so without addressing the prospective injunctive relief exception to sovereign immunity. Sovereign immunity was the only issue argued in Defendant's appellant's brief. In its reply brief, for the first time, Defendant asserted that Plaintiffs' pleading was deficient.

In affirming the judgment of the Circuit Court, the Appellate Court found that the prospective injunctive relief exception to sovereign immunity applied and that the award of fees and costs was proper ancillary relief.

Defendant filed a petition for leave to appeal which was granted.

STATEMENT OF ISSUES

1. Whether Defendant waived its arguments concerning Plaintiffs' pleading by not raising those issues in the Circuit Court or in its appellant's brief in the Appellate Court?

2. Whether Defendant waived its argument to overturn *Leetaru v. Bd. of Trs. of Univ. of Ill.* by not raising the issue in the Circuit Court or in the Appellate Court?

3. Whether there is sufficient special justification to overturn *Leetaru*, despite its placing substance over form, its consistency with this Court's prior decision in *Landfill, Inc. v. Pollution Control Board* and its citation with approval by this Court in *Parmar v. Madigan*?

4. Assuming *arguendo* that *Leetaru* is overturned, whether this case should be remanded to the Circuit Court to allow Plaintiffs' complaint to be amended?

5. Whether taken in the light most favorable to the Plaintiffs, the amended complaint alleged unlawful conduct by a State agent or employee?

6. Where sovereign immunity is claimed, but a cause of action for prospective injunctive relief establishes subject matter jurisdiction, has the right to statutory ancillary relief in the form of attorney's fees and costs been established?

7. Whether the MHDDCA waives sovereign immunity for statutory attorney's fees and costs?

STATUTES INVOLVED

Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 *et seq*.

740 ILCS 110/2 [Definitions]

****

"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.

****

740 ILCS 110/3(b)

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.

****

740 ILCS 110/15

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.

STATEMENT OF FACTS

The Illinois Department of Financial and Professional Regulation ("IDFPR") began licensing proceedings against Dr. Anil Ramachandran which resulted in the suspension of his license. (A.3) Some years later, Dr. Ramachandran petitioned to have his licenses reinstated. (A.3, 35)

Terrence Lavery was called as a witness in that administrative proceeding. (A.3, 35; C.160–61) Lavery was employed by Illinois Professional Health Program LLC ("IPHP") and was a therapist as defined by the Illinois Mental Health and Developmental Disabilities Confidentiality Act ("MHDDCA"), 740 ILCS 110/2. (A.3, 27) Lavery and IPHP had provided services to Dr. Ramachandran. (A.3, 23–24; C.160–61)

IDFPR sought Lavery's notes, despite his assertion of the therapist's work product privilege. (A.26, 36; C.287) A therapist's personal notes are statutorily defined as the therapist's work product and are protected from "discovery in any judicial, administrative or legislative proceeding or any proceeding preliminary thereto." 740 ILCS 110/3(b). Lavery and IPHP refused to turn over his notes. (C.286) Determining whether the documents were protected therapist's notes required an *in camera* inspection.

However, the administrative law judge ("ALJ") ordered that Lavery's notes be produced without an *in camera* inspection. (A.26) Defendant admitted in its answer to Plaintiffs' complaint that in doing so the ALJ treated the documents not as therapist's personal notes, but as records or communications. (C.386) Plaintiffs informed the ALJ that they would file an action in the Circuit Court. (A.26; C.387). The ALJ then continued the licensing proceeding pending production of the documents and/or filing an action in chancery. (A.30)

IDFPR never informed the ALJ that an *in camera* inspection was needed to determine Plaintiffs' claim that the notes were privileged and never dropped their demand that all of Lavery's notes be produced.

Lavery and IPHP filed in the Circuit Court of Cook County seeking equitable protection and an *in camera* inspection of the notes. (A.14–21) Count I of their amended complaint sought a protective order that Lavery was not required to turn over the documents he had asserted were within the therapist's work product privilege. (A.19) Count II sought a declaratory judgment that Lavery was not required to turn over the documents he had asserted were within the therapist's work product privilege. (A.19). Thus, both counts sought injunctive relief. Counts I and II also sought an *in camera* inspection, statutory attorney's fees and costs. Count III was brought under the Administrative Review Act. Defendant moved to dismiss Count I based on standing and that it impermissibly challenged an interlocutory order. (Def. Br. at 10; A.9) That motion was denied. (Def. Br. at 10.) Count III was voluntarily dismissed. The motion to dismiss did not include Count II. There was no motion to dismiss based on IDFPR being the named defendant, or for not pleading sufficient facts, or claiming sovereign immunity.

As in the administrative proceeding, in the Circuit Court, IDFPR never agreed to an *in camera* inspection. (Lavery, P42, A.9) It was not until oral argument in the Appellate Court that Defendant finally conceded "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." (Lavery, P40, A.9)

The trial court determined that all of the documents which Lavery and IPHP asserted to be privileged, were privileged under the statute and issued a protective order. (C.292)

The chancery judge read her ruling in open court, finding that:

> "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 attorney's fees and costs."

(A.36–37) In the words of the Appellate Court: "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." (Lavery, P42, A.9)

There was no dispute as to the amount of the fees and the requested amount of $10,639 was awarded by the trial court. (A.37)

On appeal, IDFPR did not argue that the Circuit Court erred in determining that the documents at issue were privileged work product, or in determining that Lavery and IPHP were "aggrieved persons" within the meaning of the statute, or in setting the amount of fees and costs. The only issue raised on appeal was whether sovereign immunity nullifies the order for IDFPR to pay fees and costs and that issue was raised for the first time on appeal.

ARGUMENT

I. DEFENDANT WAIVED MOST OF THE ISSUES AND ARGUMENTS IN ITS BRIEF BY FAILING TO RAISE THEM IN THE COURTS BELOW.

IDFPR has filed a thirty-six page brief in which it seeks to raise three issues for review. Those issues are:

> "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."

(Def. Br. at 3.)

Defendant's second and third issues are pleading issues. But neither was raised in the Circuit Court or in the Appellate Court. Both the second and third issues Defendant listed were waived.

As to Defendant's second issue, Defendant's brief now argues not only that Plaintiffs' did not allege unlawful conduct by a State agent or employee, but additionally that Plaintiffs' complaint alleged "at most…a legal error on the part of the ALJ in

applying the Confidentiality Act--- rather than a violation of any of its provisions." (Def. Br. at 28.) Both the second issue stated in Defendant's brief and this additional argument were waived. All three attack Plaintiffs' pleading.

In the Circuit Court, Defendant never asserted that Plaintiffs' complaint should be dismissed for failing to allege that a State officer acted outside the scope of their authority or for failing to allege a violation of the MHDDCA. While that did not waive sovereign immunity, it did waive pleading defects. Not waiving an issue of subject matter jurisdiction is not a free pass to ignore the requirement that pleading defects must be raised by motion or they are waived. 735 ILCS 5/2-612(c). That sub-section specifies that: "All defects in pleadings, either in form or substance, not objected to in the trial court are waived."

Defendant's argument that more had to be alleged as to a State employee acting beyond the scope of their authority or otherwise unlawfully is a normal pleading issue; not a jurisdictional issue. Whether plaintiffs' sufficiently alleged that IDFPR exceeded its lawful authority was a pure pleading issue. The failure to raise that pleading issue before the Circuit Court waived it.

If a motion had been filed, and if the Circuit Court had ruled that more had to be alleged, Plaintiffs could have amended their complaint to conform to such a ruling.

It is significant that Defendant did not appeal the Circuit Court's determination that the documents in question were privileged and that Plaintiffs' were aggrieved by IDFPR'S violation of the MHDDCA. Yet now, Defendant wants to argue that Plaintiffs did not sufficiently plead that Defendant violated the MHDDCA, without appealing the Circuit Court's finding that IDFPR did violate the MHDDCA.

Defendant's second issue was also not raised in the Appellate Court.[1]

In the Appellate Court, IDFPR filed a fourteen page appellant's brief in which it raised one issue for review. That issue was:

> "Whether Lavery and IPHP's request for attorney fees and costs against the State was barred by sovereign immunity because section 15 of the Act does not contain an express waiver of such immunity."

(Def. App. Br. at 2, Supp. A.6.) IDFPR's argument was that:

> "Lavery And IPHP's Request For Attorney Fees And Costs Against The State Was Barred By Sovereign Immunity Because Section 15 Of the Act Does Not Contain An Express Waiver Of Such Immunity."

(Def. App. Br. at 7, Supp. A.11.)

An appellant waives review by this Court for issues it fails to raise in the Appellate Court. *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 73 (2002). That is an additional reason why Defendant's second issue was waived. It should be noted that the sufficiency of the pleading was not responsive to the Plaintiffs' argument in the Appellate Court that the prospective injunctive relief exception to sovereign immunity applied. See *Axion RMS, Ltd. V. Booth*, 2019 Ill App (1st) 180724, P17; *Bowler v. City of Chicago*, 376 Ill. App. 3d 208, 218 (1st Dist. 2007).

As to Defendant's third issue, consistent with the holding in *Leetaru v. Bd. of Trs. of the Univ. of Ill.*, 2015 IL 117485, Plaintiffs named IDFPR as the defendant. IDFPR has never questioned that the trial court had jurisdiction to enter the protective order after its

[1] Pursuant to Supreme Court Rule 342, due to the waiver issues, Plaintiffs have included the Appellate Court briefs in a Supplemental Appendix ("Supp. A.") which is attached hereto.

in camera inspection of Lavery's therapist's notes. IDFPR has not questioned the trial court's jurisdiction to find that IDFPR violated the MHDDCA and thereby aggrieved the plaintiffs within the meaning of the statute.

Defendant's third issue is not limited to overturning *Leetaru*. It is also a pleading issue. Defendant seeks to overturn *Leetaru* to effectuate its argument that Plaintiffs needed to name an individual in IDFPR, rather than the department, to come within the prospective injunctive relief exception to sovereign immunity. But this alleged pleading defect, naming IDFPR as the defendant, rather than naming an IDFPR employee, was not raised in the Circuit Court. Nor was it raised in Defendant's appellant's brief in the Appellate Court. Nor was the concept of overturning *Leetaru* raised in either the Circuit Court or in the Appellate Court. Accordingly, Defendant's third issue was waived.

In the Appellate Court, IDFPR's opening brief asserted sovereign immunity. It did not mention the prospective injunctive relief exception, also known as the officer's exception. Plaintiffs' appellees' brief responded that this exception applied because IDFPR violated the MHDDCA and the relief sought was for prospective relief. Plaintiffs cited *Leetaru*.

IDFPR's reply brief then, for the first time, argued that because Plaintiffs' "complaint failed to identify an officer acting in excess of authority or in violation of law, the officer suit exception does not apply." (Def. Reply Br. at 9, Supp. A.55.) In making that argument, Defendant also asserted "while the Court in *Leetaru* did hold that naming an agency as the defendant will not 'automatically' bar the action from proceeding in circuit

court (a holding which the Department preserves a request for reconsideration of), it did not hold that naming an agency was alone sufficient." (Def. Reply Br. at 8–9, Supp. A.54–55.) It characterized Plaintiffs' interpretation of *Leetaru* as "based on a broad reading." (Def. Reply Br. at 7, Supp. A.53.)

While it was appropriate for Defendant to contest whether the prospective injunctive relief exception to sovereign immunity applied on substantive grounds, issues of pleading were waived when they were not raised in the trial court. The judicial doctrine that sovereign immunity cannot be waived does not invalidate 735 ILCS 5/2-612(c) and its requirement that pleading defects not objected to in the trial court are waived. To hold otherwise would invite defendants not to raise sovereign immunity in the trial court to circumvent the requirements of 5/2-612.

Having raised sovereign immunity for the first time in the Appellate Court, it was incumbent upon the defense to raise any arguments it wished to make in its appellant's brief, other than those already waived. That included why recognized exceptions to sovereign immunity did not apply, as well as why and to what extent *Leetaru* should be overturned, if that was an argument IDFPR wished to preserve for further appeal to this Court.

In contrast to Defendant's reply brief in the Appellate Court, Defendant now dramatically expands the scope of its argument regarding *Leetaru*. Now, for the first time, Defendant asserts that "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." (Def. Br. at 3.) Giving up on its argument in the

Appellate Court that Plaintiffs relied on a broad reading of *Leetaru*, now Defendant claims that "this Court should overturn its decision in *Leetaru*…which held that that a suit may proceed under the exception against an arm of the State." (Def. Br. at 14.)

The issue Defendant now defines and the argument it now makes on *Leetaru* goes beyond the issue it parenthetically sought to preserve in its appellate reply brief. As such it was not properly preserved and has been waived.

Recognizing this Court's authority to decide an issue, despite its having been waived by a party, we have briefed these issues. However, it should be noted that if the pleading issue of naming IDFPR as a defendant was waived, then the issue of overturning *Leetaru* was not only waived, it is also moot.

II. *LEETARU V. BD. OF TRS. OF THE UNIV. OF ILL.* IS GOOD LAW AND SHOULD NOT BE OVERRULED.

The weakness of IDFPR's argument that Plaintiffs' amended complaint did not allege facts which raised the prospective injunctive relief exception to sovereign immunity is evident by its need to argue that this Court should reverse its 2015 decision in *Leetaru*.

As this Court recently reiterated:

> "The doctrine of *stare decisis* is the means by which courts ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Chicago Bar Ass'n v. Illinois State Board of Elections*, 161 Ill. 2d 502, 510, 641 N.E.2d 525, 204 Ill. Dec. 301 (1994). *Stare decisis* is not an "inexorable command," but "'any departure from the doctrine of *stare decisis* demands special justification.'" *Id.* (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984)).

People v. Bush, 2023 IL 128747, P50.

Leetaru holds that "[T]he formal identification of the parties as they appear in the record is not dispositive" as to whether sovereign immunity applies. *Id.*, P44. The court's rationale was both clear and the means by which to achieve justice. "[S]ubstance takes precedence over form." [Citation omitted.] *Id.*, P44. "[T]he 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.*, P44. Depending on the issues raised and the relief being sought, "plaintiffs may obtain relief in circuit court even where the defendant they have identified in their pleadings is a state board, agency or department. See *Landfill, Inc. v. Pollution Control Board*, 74 Ill. 2d 541, 552, 387 N.E.2d 258, 25 Ill. Dec. 602 (1978); *Moline Tool Co. v. Department of Revenue*, 410 Ill. 35, 37, 101 N.E.2d 71 (1951); *Rockford Memorial Hospital v. Department of Human Rights*, 272 Ill. App. 3d 751, 757, 651 N.E.2d 649, 209 Ill. Dec. 471 (1995); *Illinois State Employees Ass'n v. Department of Children & Family Services*, 178 Ill. App. 3d 712, 717, 533 N.E.2d 566, 127 Ill. Dec. 694 (1989)." *Id.*, P44. The same conclusion was reached in *C.J. v. Department of Human Services*, 331 Ill. App. 3d 871, 876-77 (1st Dist. 2002) and *City of Chicago v. Bd. of Trustees of the Univ. of Illinois*, 293 Ill. App. 3d 897, 900 (1st Dist. 1997).

It is evident that *Leetaru* did not break new ground in holding that a State department, agency or board can be a proper defendant in a case for prospective relief. Older cases which suggested otherwise placed form over substance and were no longer good law even before *Leetaru*.

Landfill is of particular significance. In *Landfill*, this Court rejected the argument that "that the action against the Board was barred by sovereign immunity," describing that argument as "without merit." *Id*., 74 Ill. 2d at 552. Sovereign immunity did not apply as Landfill was not making a present claim against the State, but instead sought "a declaration that *the Board* is taking actions in excess of its delegated authority. Such an action does not contravene principles of sovereign immunity." (Emphasis added.) *Id*., 74 Ill.2d at 552.

The holdings in *Leetaru* and in *Landfill* are clear. They can be readily effectuated. IDFPR's assertion that their holdings are unworkable is simply wrong,

Adding further to *Leetaru's* precedential value is its citation with approval in *Parmar v. Madigan*, 2018 IL 122265, P22–24 for the very holding IDFPR now seeks to overrule. While endorsing *Leetaru*, this court then distinguished it because in *Parmar* the defendants were not alleged to be acting in excess of their authority and because the plaintiff was seeking damages. *Id*., P25–26.

Against all of this, IDFPR's claim that "*Leetaru* is contrary to the weight of authority…." is baseless. (See Def. Br. at 3.)

Here, Plaintiffs' pleading followed what has been repeatedly approved in this Court and in the Appellate Courts. Overruling *Leetaru* necessarily means also overruling other cases, including *Landfill*, and rejecting well-established, well-reasoned precedent. The Appellate Court here properly followed *Leetaru*.

IDFPR's argument relies on *Leetaru's* dissent and on a case the dissent relied on, *Smith v. Jones*, 113 Ill.2d 126 (1986). For multiple reasons *Smith* is not a basis for overturning *Leetaru* or *Landfill*.

First, *Smith* did not mention *Landfill*, much less suggest or rule that it had been wrongly decided.

Second, in overly broad dicta, *Smith* stated that "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." *Smith*, 113 Ill. 2d at 132. *Smith* cited *Moline Tool Co. v. Department of Revenue*, 410 Ill. 35, 37 (1951) for that statement. It was overly broad dicta because no unauthorized or illegal conduct was alleged and prospective injunctive relief was not being sought. What was alleged was only breach of contract. *Smith*, 113 Ill. 2d at 132–33.

Furthermore, in making that statement *Smith* miscited *Moline*. The ruling in *Moline* was not based on the Department of Revenue being a named defendant. What *Moline* actually said was quite different.

> "Whether or not a particular action falls within the prohibition of the constitution has not been determined solely by an identification of the formal parties to the record. The determination has rather depended upon the particular issues involved and the relief sought. [Citations omitted.] To determine whether or not the present proceeding falls within the constitutional prohibition it is necessary to look beyond the names of the formal parties to the record and examine the nature of the action."

Id. at 37. That is consistent with *Leetaru*.

Defendant looks to statements in cases which explain that actions by a State officer, taken without legal authority, are not deemed to be the actions of the State. Such statements are correct. Reading into them that actions by State departments, boards and

agencies, taken without legal authority, are the actions of the State, when those cases say nothing about State entities and only involve individual defendants is not correct.

IDFPR can only make decisions through State officers. When that results in the department exceeding its lawful authority, it is no longer acting as the State. Defendant's argument against *Leetaru* and *Landfill* exalts form over substance. This Court should not overrule its holdings in *Leetaru* and *Landfill*.

If *Leetaru* remains the law of Illinois, there is no basis for IDFPR's argument that Plaintiffs were required to name State officers, rather than the department, to assert the prospective injunctive relief exception to sovereign immunity.

III. ASSUMING *IN ARGUENDO* THAT *LEETARU* IS OVERTURNED AND THAT THIS COURT DOES NOT AFFIRM THE LOWER COURTS' JUDGMENTS ON OTHER GROUNDS, THIS CASE SHOULD BE REMANDED TO ALLOW PLAINTIFFS' COMPLAINT TO BE AMENDED.

To avoid unfairness, it is inappropriate to dismiss a complaint with prejudice based on a "correctable pleading defect not raised in the trial court where it was likely that plaintiffs would have been granted leave to amend their complaint if the pleading defect had been found below." *Geaslen v. Berkson, Gorov & Levin*, 155 Ill.2d 223, 230 (1993).

Depending on this Court's rulings on *Leetaru* and on whether the MHDDCA waives sovereign immunity, we will be in an equivalent situation. Paraphrasing *Geaslen*, to avoid unfairness, it would be inappropriate to reverse the Appellate Court's affirming the Circuit Court granting attorney's fees and costs, based on "a correctable pleading defect not raised in the trial court where it was likely that plaintiffs would have been granted leave to amend their complaint if the pleading defect had been found below." Assuming *arguendo* adverse rulings by this Court, the correctable pleading defect would

be to change the form of the complaint to substitute one or more individual IDFPR officers in lieu of the department.

Additionally, if *Leetaru* is overturned, that ruling should only be given prospective effect. That is because overruling clear past precedent which litigants have relied on would create "substantial inequitable results" if applied retroactively." *Aleckson v. Round Lake Park*, 176 Ill.2d 82, 92–93 (1997). See *John Carey Oil Co. v. W.C.P. Investments*, 126 Ill. 2d 139, 149 (1988).

IV. TAKEN IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS, THE COMPLAINT ALLEGES THAT AN AGENT OR EMPLOYEE OF IDFPR, WITHOUT LAWFULL AUTHORITY, SOUGHT AND CONTINUED TO SEEK PRIVILEGED THERAPIST'S NOTES IN VIOLATION OF THE MHDDCA.

Lavery and IPHP sought protection for statutorily privileged therapist's notes that IDFPR demanded be produced without an *in camera inspection*. Sovereign immunity did not apply. For sovereign immunity "affords no protection…when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority, and in those instances an action may be brought in circuit court. [Citations omitted.]" *Leetaru*, P45, quoting *Healy v. Vaupel*, 133 Ill. 2d 295, 308 (1990).

The principle behind this limitation on the application of sovereign immunity is that actions taken without legal authority are not the actions of the State. *Leetaru*, P46; *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250, 261 (2005); *Sass v. Kramer*, 72 Ill. 2d 485, 492 (1978); *Senn Park Nursing Center*, 104 Ill. 2d 169, 188 (1984).

This is the prospective injunctive relief exception, also known as the officer suit exception to sovereign immunity. *Grey v. Hasbrouck*, 2015 IL App (1st) 130267, P22. The two names of the exception are used "interchangeably." *Green v. State*, 2023 IL App (1st) 220245. Where such a violation takes place, the violator is not the State itself, so

sovereign immunity does not apply. *Grey*, P24–25. P22. As the Appellate Court here noted, the more descriptive language is prospective injunctive relief. (*Lavery*, P27, A.5) Arguably, simply prospective relief, would be even more descriptive. See *Landfill*, 74 Ill.2d at 552.

"The exception" is focused on "situations where the official is not doing the business which the sovereign has empowered him or her to do or is doing it in a way which the law forbids." [Citation omitted.] *Leetaru*, P47. This aligns with the purpose of sovereign immunity which is to prevent interference with government functions or with control of the State treasury. *Id.*, P47. For "[t]he State cannot justifiably claim interference with its functions when the act complained of is unauthorized or illegal." [Citation omitted.] *Id.*, P47. In the present case, as in *Grey*, the relief sought was equitable, not money damages, and sovereign immunity does not apply to equitable relief which prevents State officials and entities from exceeding their lawful authority. *Leetaru*, P48. Such relief is not deemed to be an action against the State, even if the State or a State agency is named as a defendant. *Id.*, P48. "[T]his 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." [Citations omitted.] *Id.*, P48.

The issue raised and the relief sought by Plaintiffs in the Circuit Court were outside the limits of sovereign immunity. The issue was whether IDFPR was improperly trying to obtain statutorily privileged therapist's notes and the relief sought was a protective order and declaratory judgment to stop IDFPR. The route to proving that

Plaintiffs were entitled to a protective order and/or declaratory judgment was the *in camera* inspection they requested to establish that the documents withheld were privileged.

Count I sought a protective order that Lavery was not required to turn over the documents he had asserted were within the therapist's work product privilege (A.19) Count II sought a declaratory judgment that Lavery was not required to turn over the documents he had asserted were within the therapist's work product privilege. (A.19) Both counts also sought attorney's fees and costs pursuant to 740 ILCS 110/15 and for such other and further relief that the Court deemed just, including but not limited to, an *in camera* inspection. (A.19)

Counts I and II both alleged that: "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." (A.18–19)

In considering whether an allegation is sufficient, pleadings are interpreted in the light most favorable to the nonmoving party. *Doe v. Chicago Bd. of Ed.*, 213 Ill.2d 19, 23–24 (2004). In doing so, all well-pled facts and all inferences in favor of the plaintiff reasonably drawn from those facts are taken to be true. *Id.* at 28. Pursuant to 735 ILCS 5/2-612(b), "No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet."

There is no question that IDFPR was reasonably informed of the nature of Plaintiffs' claims for a protective order and declaratory judgment. Indeed, there is no question that IDFPR understood the nature of those claims.

After trying to avoid an *in* camera inspection during the administrative proceeding and before the Chancery Court, IDFPR conceded in oral argument before the Appellate Court that an *in camera* inspection was required, whether that was by a chancery judge or the ALJ. (*Lavery*, P40, A.9) But it was Defendant's resistance to the necessity of an *in camera* inspection which caused Plaintiffs to be aggrieved and which caused attorney's fees to be incurred.

The Appellate Court noted Plaintiffs' counsel's statement in oral argument 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…." (*Lavery*, P41, A.9) Relating this to the pleadings, the Appellate Court concluded: "[t]hat is precisely what plaintiffs alleged in their complaint." (*Lavery*, P41, A.9)

Taken in the light most favorable to Plaintiffs, it is reasonable to infer that IDFPR's actions in violation of the MHCCDA were taken at the behest of or with the consent of an IDFPR agent or employee. Indeed, the department could only act through its agents or employees. The pleading was sufficient under 735 ILCS 2-612(b).

No further facts in support of receiving attorney's fees were alleged in the complaint because seeking attorney's fees in the prayer for relief was ancillary to the cause of action being pled and to the equitable relief being sought. Plaintiffs did *not* seek money damages and did *not* plead as if attorney's fees were money damages.

V. ATTORNEY'S FEES ANCILLARY TO A GRANT OF PROSPECTIVE INJUNCTIVE RELIEF ARE OUTSIDE THE SCOPE OF SOVEREIGN IMMUNITY.

Statutory attorney's fees and costs are ancillary relief. *Stein v. Spainhour*, 196 Ill. App. 3d 65, 70 (4th 1990); *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d

778, 782-83 (1st Dist. 1999); *Poilevey v. Spivack,* 368 Ill. App. 3d 412,415 (1st 2006); *Staake v. Department of Corrections,* 2022 IL App (4th) 210071, P32.

Sovereign immunity implicates subject matter jurisdiction. *Currie v. Lao,* 148 Ill. 2d 151, 157 (1992), *Lavery,* P24, A5. If sovereign immunity applies, there is no subject matter jurisdiction.

Ancillary relief is not a cause of action and cannot establish subject matter jurisdiction. *Firebaugh v. McGovern,* 404 Ill. 143, 150 (1949) Thus, ancillary relief is only appropriate when a plaintiff is entitled to other relief based on a cause of action which gives the court subject matter jurisdiction. *Id*.

Comparing *Illinois Dept. of Financial and Professional Regulation v. Rodriquez,* 2012 IL 113796 to the present case is instructive. Rodriquez successfully invalidated an administrative rule of IDFPR. 5 ILCS 100/10-55(c) provided for statutory attorney's fees and costs, stating that "[i]n any case in which a party has any administrative rule invalidated by a court for any reason…the court shall award the party bringing the action the reasonable expenses of bringing the action, including reasonable attorney's fees." But Rodriquez did not petition the Circuit Court for fees until, through the passage of time, the court had lost jurisdiction. When Rodriquez filed a separate case seeking the statutory attorney's fees, this Court held that the fee statute did not create a separate cause of action. *Id.*, P18. In other words, it was ancillary to the proceeding to invalidate the administrative rule. This Court further held that fees could only be awarded by the court which invalidated the administrative rule while that court maintained jurisdiction. Accordingly, Rodriquez's fee claim was untimely.

The statutory fee provision in *Rodriquez* is similar to 740 ILCS 110/15 which states: "[r]easonable attorney's fees and costs may be awarded to the successful plaintiff in any action under this Act." Both here and in *Rodriquez* fees can only be awarded by the court that heard the underlying case. Neither statute creates an independent cause of action. Both provide for ancillary relief. Accordingly, sovereign immunity is not implicated by these statutory fee provisions. Parenthetically, *Rodriquez* also refutes Defendant's casual suggestion, that "allowing such an award in the circuit court is incongruent with the Court of Claims Act…" (Def. Br. at 24.)

It follows that since sovereign immunity defeats subject matter jurisdiction, and since a claim for ancillary relief cannot create subject matter jurisdiction, sovereign immunity has no application to a claim for ancillary relief. Where sovereign immunity does not bar the court's jurisdiction to hear the underlying cause of action, neither can it bar ancillary relief. Sovereign immunity is jurisdictional. Once the court has jurisdiction, not barred by sovereign immunity, the court has jurisdiction to provide authorized ancillary relief.

Here, sovereign immunity did not bar proceeding with Plaintiffs' causes of action because they were within the prospective relief exception.

Indeed, IDFPR has not asserted that the Circuit Court lacked subject matter jurisdiction to conduct an *in camera* inspection to determine that the documents at issue were privileged work product, to issue a protective order that Lavery was not required to turn over the documents he had asserted were within the therapist's work product privilege, or to find that Lavery and IPHP were "aggrieved persons" within the meaning of the statute. At that point, sovereign immunity had no relation to granting statutory

ancillary relief. Statutory ancillary relief was available because the prospective relief exception to sovereign immunity provided subject matter jurisdiction.

Defendant's brief overlooks that fees and costs are ancillary relief under Illinois law, that ancillary claims for fees or costs are not independent causes of action and that ancillary jurisdiction requires that the underlying cause of action provide subject matter jurisdiction.

The primary case relied on by IDFPR is *Shempf v. Chaviano*, 2019 Ill App (1st) 173146. Defendant argues that the Appellate Court should have followed *Shempf*, rather than concluding that *Grey* provided superior analysis in holding that "the fees at issue…are part and parcel of the injunctive relief that is not barred by sovereign immunity." (*Lavery*, P31, A.6) As the Appellate Court accurately summarized:

> "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.

(*Id.*, P32, A.6–7)

In *Shempf*, mandamus was granted and the mandamus statute provided that damages and costs could be recovered. See 735 ILCS 5/14-105. But the mandamus statute is procedural in nature and does not create an independent cause of action for damages. See *Beaver Glass & Mirror Co. v. Bd. of Ed. of Rockford School Dist. No. 205*, 59 Ill. App. 3d 880, 884-85 (2d Dist. 1978). In *Shempf*, fees were not authorized by the

mandamus statute, but costs were. *Shempf's* issuance of a mandamus was outside the scope of sovereign immunity. Nevertheless, *Shempf* denied costs, citing sovereign immunity, and finding that the mandamus statute did not clearly include the State as a party subject to the costs provision

Missing from *Shempf* is any mention of *Grey*. Despite *Grey* also being a First District case decided four years earlier, the *Shempf* court did not consider the reasoning which led *Grey* to conclude that sovereign immunity did not apply for two reasons. First, because fees were part of the injunctive relief. Second, because the fee statute waived sovereign immunity, as the State was expressly included in the overall statutory scheme, though not specifically in the section on fees. Nor did *Shempf* discuss the nature of ancillary relief, the significance of ancillary relief not giving rise to subject matter jurisdiction, or the issue of whether there is any relation between ancillary relief and sovereign immunity. In contrast to *Shempf,* here the Appellate Court considered the reasoning of both *Shempf* and *Grey*, and considered the importance of fees and costs being ancillary relief.

Defendant's reliance on *In Re Special Education Walker*, 131 Ill. 2d 300 (1989) is misplaced. The costs and interest statutes discussed in *Walker* were statutes with general applicability. They were not sections on ancillary relief within a statutory scheme. Costs would have applied even to criminal defendants. Interest was a stand-alone statute setting interest on judgments.

The Appellate Court considered U.S. Supreme Court cases for their persuasive reasoning. Defendant's brief misreads and misinterprets both the line of cases the Appellate Court cited, as well as additional cases Defendant cites.

Here is the relevant point, as stated in *Missouri v. Jenkins*, 491 U.S. 270, 280 (1989).

> "The holding of *Hutto*, therefore, was not just that Congress had spoken sufficiently clearly to overcome Eleventh Amendment immunity in enacting § 1988, but rather that *the Eleventh Amendment did not apply to an award of attorney's fees ancillary to a grant of prospective relief*. See *Maine* v. *Thiboutot*, 448 U.S. 1, 9, n. 7 (1980). That holding is unaffected by our subsequent jurisprudence concerning the degree of clarity with which Congress must speak in order to override Eleventh Amendment immunity, and we reaffirm it today." (Emphasis added.)

This holding continues to be the law now as it has for almost fifty years since *Hutto* was decided. This speaks directly to the issue in the case at bar. Attorney's fees ancillary to a grant of prospective relief do not implicate sovereign immunity.

The Defendant's brief cites dicta from *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 55–56 (2024) concerning the degree of statutory clarity needed to waive sovereign immunity. But that is precisely what the *Jenkins* court explained does not affect the well-established law that sovereign immunity does not bar attorney's fee awards ancillary to prospective relief.

Granting prospective relief, and granting ancillary relief thereto, are outside the scope of sovereign immunity. Thus, in that context, whether statutory language expressly waives sovereign immunity is not relevant. Defendant's brief fails to recognize this despite the clear language of *Jenkins*.

Disregarding *Jenkins'* clear language, Defendant's brief tries to narrow the meaning of *Jenkins* to fee awards "issued in response to non-compliance with a court order." (Def. Br. at 23.) That is not a fair description of the fees awarded or of the principles discussed in *Hutto* and *Jenkins*. They did not limit the meaning of ancillary. Contrary to Defendant's brief, the attorney's fees at issue were described as the "reimbursement of 'expenses incurred in litigation seeking only prospective relief,' rather than 'retroactive liability for prelitigation conduct.'" *Hutto*, 437 U.S., at 695; see also *id*. at 690." *Jenkins*, 491 U.S. at 278.

Defendant's brief wrongly asserts that the Appellate Court "overlooked" *Ruckelhaus v. Sierra Club*, 463 U.S. 680 (1983). (Def. Br. at 23) There is nothing in *Ruckelhaus* to overlook. It is entirely inapposite. It simply held that a fee statute did not authorize fees to a party who did not prevail on any claims. It did not discuss the *Hutto, Jenkins* line of cases.

Another case cited by Defendant, *United States v. Horn*, 29 F.3d 754, 757 (1994), is also inapposite. It held that sovereign immunity bars federal district courts, despite their supervisory powers, from awarding fees and costs against the government in criminal cases. Neither had anything to do with ancillary, statutory fees in a case of prospective relief.

Then Defendant's brief attacks the Appellate Court for explaining that the reason for the legislature authorizing attorney's fees is "to make it practicable for citizens to assert a claim to stop a state actor from illegal conduct." (*Lavery*, P31, A.6) The court's comment is in the same spirit as has often been expressed to explain the importance of statutory attorney's fees. For example, in speaking about the Civil Rights Attorney's Fee

Awards Act, *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) said that: "[t]he purpose of Section 1988 was to make sure that competent counsel was available to civil rights plaintiffs" and applies equally to "Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants."

Defendant's brief even accuses the Appellate Court's explanation of being in "contravention…of the American rule" on fees. (Def. Br. at 25.) Of course, the "American rule" has no application here because the MHDDCA authorizes fees to any party aggrieved by a violation of the statute.

That statutory language itself refutes IDFPR's other arguments that fees should be limited only to fact patterns that would exclude the present case. These arguments disregard the controlling statutory language, the scope of sovereign immunity, and the lessons of *Rodriquez*. When it applies, sovereign immunity bars claims against the State. But sovereign immunity never provides a basis for judicially rewriting a fee-shifting statute passed by the legislature. Neither IDFPR's policy arguments, nor its efforts to distinguish prior fee awards, awards in cases which did not involve the MHDDCA, can alter the broad scope and plain language of Section 110/15 of the MHDDCA.

As Plaintiffs were within the prospective injunctive relief exception to sovereign immunity, the statutory ancillary relief of fees and costs was not barred by sovereign immunity.

VI. THE JUDGMENT OF THE CIRCUIT COURT CAN BE AFFIRMED, ON AN ALTERNATE GROUND NOT REACHED BY THE APPELLATE COURT, THAT THE MHDDCA WAIVES SOVEREIGN IMMUNITY.

"The critical issue is whether the legislature intended to impose liability upon the State -- not how or where the intent is expressed." *Giordano v. Martin*, 115 Ill. App. 3d

367, 370 (4th Dist. 1983). (Holding that sovereign immunity was waived for purposes of paying additional compensation, as required by Section 19 of the Worker's Compensation Act.)

As this Court has consistently explained:

> "The cardinal rule of statutory construction, to which all other canons and rules are subordinate, is to ascertain and give effect to the intent of the legislature. *In re Estate of Dierkes*, 191 Ill. 2d at 331. The best indicator of that intent is the express language of the statute, which should be given its plain and ordinary meaning. *Rogers v. Imeri*, 2013 IL 115860, ¶ 13, 999 N.E.2d 340, 376 Ill. Dec. 457. In interpreting a statute, we must read the statute as a whole, considering the relevant provisions in their context and within the broader framework of the act of which they are a part. *Id.*"

Bayer v. Panduit Corp. Area Erectors, 2016 IL 119553, P18.

Reading the statute as a whole means that in considering whether a statute waives sovereign immunity, waiver does not need to be clearly expressed when the section on fees is read in isolation. Instead, it means that waiver needs to be clearly expressed, reading the statute as a whole, while considering the relevant provisions in context and within the statutory framework.

Here the statutory language shows the legislative intent to waive sovereign immunity. Reading Sections 110/3(b) and 110/15 together, the MHDDCA provides that therapist's notes "shall not be subject to discovery *in any judicial, administrative or legislative proceeding* or any proceeding preliminary thereto*....[a]ny 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." (Emphasis added.)

There is no issue and no doubt that the privilege for therapist's notes applies to protect therapist's notes from discovery by the State. The statutory language, "any judicial, administrative or legislative proceedings," clearly encompasses proceedings where the State is a party or State officials are involved and frequently seek discovery of documents. In plain language, State judicial, legislative and administrative proceedings are included. Moreover, just as the State is bound by the rules of evidence and of civil procedure, so too is it bound by statutory privileges against discovery,

There is a repetitive use of "any" in the relevant statutory sections. The legislature specified that the statute encompasses "*any* judicial, administrative or legislative proceeding," and that *"any person* aggrieved by a violation of this Act may sue," and that fees and costs may be awarded to the successful plaintiff *in any action under this Act.*" (Emphasis added.) This repetitive use of "any" emphasizes the broad inclusion of these provisions and distinguishes the MHDDCA from other statutes where the waiver of sovereign immunity has been considered. The statute could have been written without the use of "any." It could have just read that it applied to "judicial, administrative or legislative proceeding[s]," and that *"*person[s] aggrieved by a violation of this Act may sue," and that fees and costs may be awarded to the successful plaintiff in action[s] under this Act." Instead, "any" was used three times. That emphasizes an intent to be inclusive.

As Section 110/3(b) establishes that the State may not violate the therapist's privilege, Section 110/15's all-inclusive scope of "any person aggrieved may sue" and that fees and costs can be awarded "to the successful plaintiff in in any action under this

Act" allows for no exception for the State. Thus, the fair reading of the statute as a whole is that the legislature intended to waive sovereign immunity.

Grey v. Hasbrouck, supra, applied the same line of analysis to conclude that Section 5 of the Illinois Civil Rights Act, 740 ILCS 23/5 waives sovereign immunity for prevailing plaintiffs. The *Grey* court looked to long established axioms of statutory construction to guide it in determining and effectuating the legislative intent. Axioms such as: reviewing the entire statutory scheme; reading the statute as a whole; considering all of its relevant parts; and not reading non-existent language into the statute. *Id.*, P19.

Grey noted that Section 5(a) specified that the State was an entity which could be sued under Section 5(b). It then observed that Section 5(c) provided that attorney's fees and costs could be awarded to a prevailing party in a Section 5(b) action. Section 5(b) of the Civil Rights Act and Section 110/3(b) of the MHDDCA are quite similar, authorizing legal action by "[a]ny party aggrieved" and by "any person aggrieved."

Grey quoted this Court's decision in *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, P35. "[W]here the legislature wishes to excuse the State or other entities from filing and other fees imposed by the circuit court in connection with litigation, it knows how and has done so expressly." *Id*. at P20. The *Grey* court then correctly concluded:

> "To accept the defendant's argument would require this court to read into the statute an exemption for the State that the legislature could have but did not provide in section 5(c). Construing section 5 of the Civil Rights Act as a whole, the State consented to be sued and, therefore, consented to pay attorney fees and costs to the prevailing party. Sovereign immunity does not bar an award of

> attorney fees and costs pursuant to section 5(c) of the Civil Rights Act against the State."

Id. at P21.

As with the Civil Rights Act, if the legislature had intended to exclude the State from the inclusive language of the MHDDCA, it needed to, and would have, expressly done so. Instead, that inclusive language, the express references to State proceedings, and the State being unquestionably subject to the therapist's privilege, shows clear legislative intent to waive sovereign immunity.

CONCLUSION

Defendant waived pleading issues regarding the sufficiency of the amended complaint's allegations and of naming the IDFPR the defendant. Defendant also waived the issue of whether *Leetaru* should be overturned.

Leetaru has strong precedential support, is good law in placing substance over form, and should not be overturned.

Sovereign immunity does not apply because the claims made and the relief sought were within the prospective injunctive relief exception to sovereign immunity. IDFPR is a proper party defendant. It acted beyond its lawful authority in seeking Lavery's therapist's notes without regard for the statutory privilege that applied. Money damages were not sought. Only prospective injunctive relief was sought.

Sovereign immunity also does not apply to the ancillary relief awarded of fees and costs. Ancillary relief does not give rise to an independent cause of action and therefore does not create subject matter jurisdiction. Sovereign immunity implicates

subject matter jurisdiction. It does not implicate statutory ancillary relief once subject matter jurisdiction is established.

A separate basis for affirming the judgments of the lower courts is that the statutory language of the MHDDCA evinces a clear legislative intent to waive sovereign immunity.

For these reasons, the judgments of the Circuit Court and of the Appellate Court should be affirmed and this cause should be remanded to the Circuit Court for further proceedings to determine attorney's fees and costs arising from Defendant's appeal to the Appellate Court and to this Court.

Assuming *arguendo* that the Court holds that IDFPR was not party which was subject to the prospective injunctive relief exception to sovereign immunity or that the first amended complaint failed to allege sufficient facts to raise the prospective injunctive relief exception, then this case should be remanded to allow Plaintiffs to amend their complaint as none of those matters was raised in the Circuit Court.

Respectfully submitted,

/s/ Rick Schoenfield

DiVincenzo Schoenfield Stein
Attorneys for Plaintiffs-Appellees
11340 W. Monticello Pl.
Westchester IL 60154
708-822-1637
rschoenfield@dsschicagolaw.com

CERTIFICATE OF COMPLIANCE

I, Rick Schoenfield, 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 32 pages.

/s/ Rick Schoenfield

DiVincenzo Schoenfield Stein
Attorneys for Plaintiffs-Appellees
11340 W. Monticello Pl.
Westchester, IL 60154
(708) 822-1637
rschoenfield@dsschicagolaw.com

NO. 130033
IN THE SUPREME COURT OF ILLINOIS

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

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SUPPLEMENTAL APPENDIX

DiVincenzo Schoenfield Stein
Attorneys for Petitioners-Appellees
11340 W. Monticello Pl.
Westchester IL 60154
708-822-1637
rschoenfield@dsschicagolaw.com

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TERRENCE LAVERY and ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC, Plaintiffs-Appellees, and ANIL RAMACHANDRAN, Plaintiff, v. DEPARTMENT OF PROFESSIONAL REGULATION, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 2020-CH-01202 The Honorable CAROLINE KATE MORELAND, Judge Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Defendant-Appellant

BRIDGET DIBATTISTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2130 (office)
(872) 272-0809 (cell)
CivilAppeals@ilag.gov (primary)
Bridget.DiBattista@ilag.gov (secondary)

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 for a protective order, declaratory relief, and administrative review. The complaint alleged that, during the course of his participation as a witness in an administrative proceeding 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")[1] to produce his personal notes relative to his therapeutic treatment of Ramachandran. Lavery and IPHP claimed that the order violated the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 *et seq*. (2020). The circuit court determined that Lavery's notes constituted privileged work product under the Act, and thus placed them under a protective order. The claim for administrative review was voluntarily dismissed. The circuit thereafter granted Lavery and IPHP's amended motion for attorney fees and costs. The Department appealed.

[1] The amended complaint refers to the Department as "The Illinois Department of Professional Regulation." C151-67.

ISSUE PRESENTED FOR REVIEW

Whether Lavery and IPHP's request for attorney fees and costs against the State was barred by sovereign immunity because section 15 of the Act does not contain an express waiver of such immunity.

JURISDICTION

On June 3, 2022, the circuit court issued a final order granting Lavery and IPHP's amended motion for attorney fees and costs. C443-45.[2] The Department filed a notice of appeal on July 1, 2022, C455-57, which was timely based on Illinois Supreme Court Rule 303(a)(1) because it was within 30 days of the circuit court's final order. Thus, this court has jurisdiction over this appeal under Illinois Supreme Court Rule 301.

[2] The record on appeal is cited as "C__," and the report of proceedings as "R__."

STATEMENT OF FACTS

Background

In August 2020, Lavery and IPHP filed an operative first amended complaint, attaching two exhibits, in the circuit court against the Department. C151-67. They alleged in the complaint, and the exhibits showed, the following. Lavery was an employee of IPHP and licensed to provide therapy. C151-52. IPHP had been contracted to, among other responsibilities, monitor a rehabilitation program for Ramachandran for substance abuse. C151. Lavery served as Ramachandran's caseworker. C152.

Ramachandran called Lavery as a witness to testify in an administrative hearing before the Department as part of Ramachandran's petition to restore his medical license. (C154, 160-61). During Lavery's testimony, he disclosed the existence of personal notes that he took during the course of providing mental health services to Ramachandran. *Id.*

The Department ALJ ultimately entered an order requiring the production of withheld documents that Lavery and IPHP claimed contained personal notes. C155; C160-66. In that order, attached as Exbibit A to the complaint, C160-66, the ALJ noted that Lavery had filed a motion for protective order as to the notes. C160. The ALJ acknowledged the privilege for personal notes under the Act, but stated that Lavery had not set forth with any specificity how the withheld documents constituted personal notes, or attached an affidavit regarding the documents. C164-65. At a subsequent

status hearing, counsel for IPHP and Lavery informed the ALJ that they would be filing the present action in the circuit court. C155; C167.

Their complaint raised three counts. C155-58. The first count sought a protective order for the notes, claiming that they constituted privileged work product under the Act. C155-56. As relevant here, the Act provides that a therapist's personal notes are not subject to discovery in an administrative proceeding:

> (b) 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.

740 ILCS 110/3(b) (2020). In addition to seeking a protective order, this count asserted that there was no basis to reject the assertion of privilege without an in camera inspection by the circuit court. C156.

The second count sought a declaratory judgment that the notes were privileged work product under the Act. C156-57. The third count, which was later voluntarily dismissed, C278, sought administrative review of the order requiring production of the notes, C157-58. On the Department's motion, Ramachandran, who also was named as a plaintiff, C151, was dismissed from the action for lack of standing, C279-80.

In response to a motion filed by Lavery and IPHP, the circuit court conducted an in camera inspection of the withheld documents. C137-40 (citing

740 ILCS 110/10(a)(1) (2020)); C281-82; C292. The court determined that the documents contained Lavery's personal notes from the therapy sessions, which were not subject to disclosure under the Act, and thus placed the notes under a protective order. C292 (citing 740 ILCS 110/2, 3 (2020)); R5-6.

Following the circuit court's ruling, Lavery and IPHP filed an amended motion for attorney fees and costs. C368-79. The motion cited the Act's provision affording attorney fees and costs for persons aggrieved by violations of the Act:

> 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.

C370; 740 ILCS 110/15 (2020).

The Department opposed the motion. C381-433. It argued, in part, that Lavery was not an aggrieved person under the Act. *Id.*

The circuit court granted the motion, awarding attorney fees and costs in the amount of $4,079.21 to IPHP, and $6,560.00 to its counsel. C454.

The Department appealed. C455-57.

ARGUMENT

Lavery And IPHP's Request For Attorney Fees And Costs Against The State Was Barred By Sovereign Immunity Because Section 15 Of the Act Does Not Contain An Express Waiver Of Such Immunity.

Lavery and IPHP's request for attorney fees and costs from an agency of the State was barred by sovereign immunity. It was barred because the General Assembly did not include an express waiver of the State's sovereign immunity in section 15 of the Act — the section that generally authorizes awards of attorney fees and costs to persons aggrieved by violations of the Act. *See* 740 ILCS 110/15 (2020).

A. The *De Novo* Standard Of Review Applies To The Issue Presented On Appeal.

When the doctrine of sovereign immunity applies, the circuit court lacks subject matter jurisdiction over the action. *Cortright v. Doyle*, 386 Ill. App. 3d 895, 905-06 (1st Dist. 2008). Whether the circuit court had jurisdiction is a question of law that this court reviews *de novo*. *McCormick v. Robertson*, 2015 IL 118230, ¶ 18. Although not raised in the circuit court in this case, sovereign immunity may be raised at any time during the action, including for the first time on appeal, because it implicates a court's subject matter jurisdiction and thus is not subject to forfeiture. *Currie v. Lao*, 148 Ill. 2d 151, 157 (1992).

B. Sovereign Immunity Bars An Action For Monetary Relief Against A State Agency.

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; *see Sellers v. Rudert*, 395 Ill. App. 3d 1041, 1045-46 (4th Dist. 2009); *People v. Carter*, 392 Ill. App. 3d 520, 524 (2d Dist. 2009). The legislature, however, has reinstated sovereign immunity. *Sellers*, 395 Ill. App. 3d at 1046; *Carter*, 392 Ill. App. 3d at 524. Specifically, the State Lawsuit Immunity Act provides that, except as specified in certain enumerated exceptions, "the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (2020). "Sovereign immunity allows the [S]tate to protect itself from being sued except under terms established by itself." *Sneed v. Howell*, 306 Ill. App. 3d 1149, 1154 (5th Dist. 1999). The purposes of sovereign immunity are to protect the State from interference with the performance of governmental functions and to preserve and protect state funds. *People ex rel. Madigan v. Excavating & Lowboy Servs., Inc.*, 388 Ill. App. 3d 554, 559 (1st Dist. 2009); *Grimes v. Saikley*, 388 Ill. App. 3d 802, 812 (4th Dist. 2009).

Further, when the State, or as relevant here an arm of the State such as the Department, is named as a defendant, sovereign immunity also applies. *See Meyer v. Dep't of Pub. Aid*, 392 Ill. App. 3d 31, 34 (3d Dist. 2009) (sovereign immunity extends to court actions against state agencies and departments); *Brandon v. Bonell*, 368 Ill. App. 3d 492, 510 (2d Dist. 2006) (arms of State protected by sovereign immunity).

C. The General Assembly Has Not Expressly Waived Sovereign Immunity For Awards Of Attorney Fees And Costs Against the State Under the Act.

Although the General Assembly possesses the authority to waive sovereign immunity by statute for certain types of claims, the Illinois Supreme Court has held that the waiver must be clear and unequivocal. *In re Special Educ. of Walker*, 131 Ill. 2d 300, 303 (1989); *see also Shempf v. Chaviano*, 2019 IL App (1st) 173146, ¶ 54 (following *Walker*). Any such waiver must be expressed through specific legislative authorization and must appear in affirmative statutory language. *Walker*, 131 Ill. 2d at 304; *Shempf*, 2019 IL App (1st) 173146, ¶ 54; *In re M.K.*, 284 Ill. App. 3d 449, 454 n.1 (1st Dist. 1996). Furthermore, if there is any ambiguity regarding whether the statute contains an express waiver of sovereign immunity, then the doctrine of sovereign immunity applies. *Lynch v. Dep't of Transp.*, 2012 IL App (4th) 111040, ¶ 30 ("The ambiguity in the statute alone lends sufficient support for finding the legislature did not clearly, unequivocally, or affirmatively waive sovereign immunity.").

Consent to suit by the State may not be inferred or implied, *Martin v. Giordano*, 115 Ill. App. 3d 367, 369 (4th Dist. 1983), and mere nonaction by the State cannot constitute such consent, *Aurora Nat'l Bank v. Simpson*, 118 Ill. App. 3d 392, 400 (2d Dist. 1983). Moreover, because only the General Assembly can waive sovereign immunity via statute, an officer or agency of the State lacks the authority to do so. *Lynch*, 2012 IL App (4th) 111040, ¶ 23;

Brucato v. Edgar, 128 Ill. App. 3d 260, 266-67 (1st Dist. 1984) (Secretary of State could not waive sovereign immunity on behalf of State through his actions).

Accordingly, in *Walker*, the Illinois Supreme Court held that use of the language "any other governmental entity" in a statute generally authorizing awards of post-judgment interest against governmental bodies did not constitute an explicit indication of intent to waive sovereign immunity because the State was not expressly mentioned. 131 Ill. 2d at 307. The Court noted that "[i]t is reasonable to assume that in enacting [the post-judgment interest statute] the legislature acted with knowledge that explicit waiver of sovereign immunity was required to impose liability on the State. Had the legislature intended to impose liability upon the State, it would have followed its pattern of using explicit language of waiver and it would have expressly referred to the State." *Id.*; *see also City of Springfield v. Allphin*, 82 Ill. 2d 571, 576-79 (1980) (no express waiver of sovereign immunity in statute that generally authorized award of interest); *Dep't of Revenue v. App. Ct.*, 67 Ill. 2d 392, 394-98 (1977) (no express waiver of sovereign immunity in statute that generally authorized imposition of costs); *Williams ex rel. Williams v. Davenport*, 306 Ill. App. 3d 465, 468-72 (1st Dist. 1999) (no express waiver of sovereign immunity in statute that generally authorized award of attorney fees and costs to guardian ad litem).

Following *Walker*, this court held that the General Assembly did not waive sovereign immunity for claims under the Illinois Environmental Protection Act because that statute did not contain an express consent for the State to be sued in circuit court and was not listed in the State Lawsuit Immunity Act as one of the exceptions to sovereign immunity. *Lowboy*, 388 Ill. App. 3d at 563. The decision in *Aurora Nat'l Bank* is consistent with this analysis. 118 Ill. App. 3d at 401 (no explicit waiver of sovereign immunity for conditional judgments against state employers in circuit court garnishment actions).

Here, the General Assembly did not expressly waive sovereign immunity for awards of attorney fees and costs under the Act. 740 ILCS 110/15 (2020). Section 15 is merely a general authorization of such awards. *Id.* It does not contain an explicit indication of intent to waive sovereign immunity because the State is not expressly mentioned. *Id.* There is no affirmative statutory language such as is mandatory to establish a waiver of sovereign immunity. *Id.* And reading the Act as not permitting an award of attorney fees and costs against the State and its agencies would honor basic principles of statutory construction, and would not lead to absurd results, because such an award may still be made against any other person to which the statute applies. *Cf. Stephens v. Cozadd*, 159 Ill. App. 3d 452, 456 (3d Dist. 1987) ("[t]his result eliminates the perceived conflict between the [statute] and the principles of sovereign immunity and gives effect to the legislative intent expressed in all of

the relevant statutory provisions" and "is also consistent with fundamental principles of statutory construction").

Finally, another case from this court, *Grey v. Hasbrouck*, 2015 IL App (1st) 130267, which predates this court's decision in *Shempf*, 2019 IL App (1st) 173146, ¶ 54, should not be followed here. *Grey* held that sovereign immunity did not bar an award of fees and costs against the State under the Act. 2015 IL App (1st) 130267, ¶¶ 14-21. Rather than following the controlling test set out by the Illinois Supreme Court in *Walker*, which requires an express waiver of sovereign immunity, *Grey* held that sovereign immunity did not apply because the General Assembly had not specifically invoked sovereign immunity. 2015 IL App (1st) 130267, ¶ 20 ("After allowing the State to be sued under the . . . Act, the legislature, *had it wished to exempt the State* from the obligation of paying attorney fees and costs as provided therein, *could have done so*.") (emphasis added).

But the default position is that sovereign immunity applies, not that it does not apply. *See Aurora Nat'l Bank*, 118 Ill. App. 3d at 400 (mere nonaction by State cannot constitute consent to suit); *Martin*, 115 Ill. App. 3d at 369 (consent to suit by State may not be inferred or implied). Moreover, *Grey* is factually distinguishable, given that, unlike here, the statute at issue "specifically refer[ed] to the 'State'" when describing prohibited conduct. *Grey*, 2015 IL App (1st) 130267, ¶ 20; *Compare* 740 ILCS 23/5(a) (2020) *with* 740 ILCS 110/1 *et seq.* (2020). Because *Grey* was incorrectly

decided or, alternatively, because it is factually inapposite, it should not apply here.

Accordingly, sovereign immunity barred Lavery and IPHP's request for an award of attorney fees and costs against the Department, which is an arm of the State, and the circuit court's award should be vacated because it lacked subject matter jurisdiction to enter it.

CONCLUSION

For these reasons, Defendant-Appellant Illinois Department of Financial and Professional Regulation requests that this court reverse the circuit court's judgment in part, by vacating the award of attorney fee and costs due to lack of subject matter jurisdiction.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorney for Defendant-Appellant

BRIDGET DIBATTISTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2130 (office)
(872) 272-0809 (cell)
CivilAppeals@ilag.gov (primary)
Bridget.DiBattista@ilag.gov (secondary)

February 23, 2023

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) table of contents and statement of points and authorities, the Rule 314(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 14 pages.

/s/ Bridget DiBattista
BRIDGET DIBATTISTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2130 (office)
(872) 272-0809 (cell)
CivilAppeals@ilag.gov (primary)
Bridget.DiBattista@ilag.gov (secondary)

CERTIFICATE OF FILING AND SERVICE

I certify that on February 23, 2023, I electronically filed the foregoing **Brief and Appendix of Defendant-Appellant** with the Clerk of the Court for the Illinois Appellate Court, First Judicial District, 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.

Rick Schoenfield
rschoenfield@dsschicagolaw.com

Michael K. Goldberg
mgoldberg@goldberglawoffice.com

Jenna Milaeger
jmilaeger@goldberglawoffice.com

Priyanka U. Desai
pdesai@goldberglawoffice.com

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.

/s/ Bridget DiBattista
BRIDGET DIBATTISTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2130 (office)
(872) 272-0809 (cell)
CivilAppeals@ilag.gov (primary)
Bridget.DiBattista@ilag.gov (secondary)

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NO. 1-22-0990
IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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v.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division,
ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION Defendant-Appellant	)	No. 2020-CH-01202 The Honorable Caroline Kate Moreland, Judge Presiding
and	)	
ANIL RAMACHANDRAN Defendant	)	

APPELLEES' BRIEF

DiVincenzo Schoenfield Stein
Attorneys for Petitioners-Appellees
11340 W. Monticello Pl.
Westchester IL 60154
708-822-1637
rschoenfield@dsschicagolaw.com

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APPELLEES' BRIEF

POINTS AND AUTHORITIES

INTRODUCTION

Terrence Lavery is a therapist employed by Illinois Professional Health Program ("IPHP"). Therapists' personal notes are statutorily defined as work product and are protected from "discovery in any judicial, administrative or legislative proceeding or any proceeding preliminary thereto." 740 ILCS 110/3(b). Lavery was called as a witness in an administrative licensing proceeding before the Illinois Department of Financial and Professional Regulation ("IDFPR"). Despite Lavery's assertion of the work product privilege, IDFPR sought all of his notes. Lavery and IPHP refused to turn over his notes and filed this case, seeking equitable protection and an *in camera* inspection of the notes. Under the controlling case law, whether a claim that documents are privileged therapist's notes must be decided by a circuit court judge after an *in camera* inspection. *In re Estate of Bagus*, 294 Ill.App.3d 887 (2d Dist. 1998) The Circuit Court determined that all of the documents claimed to be privileged were privileged. The Circuit Court further determined that Lavery and IPHP were "aggrieved persons" under 740 ILCS 110/15 and ordered IDFPR to pay attorney's fees and costs pursuant to that statute. The only issue raised on appeal, which IDFPR raises now for the first time, is whether sovereign immunity nullifies the order for IDFPR to pay fees and costs.

STATEMENT OF ISSUES

1. Whether sovereign immunity applies where the order for fees and costs grew out of an administrative proceeding initiated by IDFPR?

2. Whether sovereign immunity applies where IDFPR acted beyond its authority and in violation of a statutory prohibition?

3. Whether the statute expressly including all "judicial, administrative or legislative proceeding or any proceeding preliminary thereto" evinced, a clear legislative intent to waive sovereign immunity.

STATUTE INVOLVED

Mental Health and Developmental Disabilities Confidentiality Act", 740 ILCS 110/1 *et seq*.

740 ILCS 110/2 [Definitions]

The terms used in this Act, unless the context requires otherwise, have the meanings ascribed to them in this Section.

****

"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..."

****

"Mental health or developmental disabilities services' or 'services' includes but is not limited to examination, diagnosis, evaluation, treatment, training, pharmaceuticals, aftercare, habilitation or rehabilitation."

"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.

****

"Recipient" means a person who is receiving or has received mental health or developmental disabilities services.

"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.

"Records" includes all records maintained by a court that have been created in connection with, in preparation for, or as a result of the filing of any petition or certificate under Chapter II, Chapter III, or Chapter IV of the Mental Health and Developmental Disabilities Code [405 ILCS 5/2-100 et seq., or 405 ILCS 5/3-100 et seq., or 405 ILCS 5/4-100 et seq.] and includes the petitions, certificates, dispositional reports, treatment plans, and reports of diagnostic evaluations and of hearings under Article VIII of Chapter III [405 ILCS 5/3-800 et seq.] or under Article V of Chapter IV of that Code [405 ILCS 5/4-500 et seq.]. *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 information that has been de-identified in accordance with HIPAA, as specified in 45 CFR 164.514. "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. (Emphasis added.)

"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."

****

740 ILCS 110/3(b)

"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."

740 ILCS 110/15

"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."

STATEMENT OF FACTS

IDFPR began licensing proceedings against Dr. Anil Ramachandran in IDFPR Case Number 2013-10351. (A.12) After losing his license, Dr. Ramachandran petitioned to have his licenses reinstated. (A.12) This petition was filed in and was heard as part of continuing proceedings in IDFPR Case Number 2013-10351. (A.12)

Terrence Lavery was called as a witness in that administrative proceeding. (C.286) Lavery was employed by IPHP and was a therapist as defined by the Illinois Mental Health and Developmental Disabilities Confidentiality Act ("MHDDCA"), 740 ILCS 110/2. (C.283-85) Lavery and IPHP had provided services to Dr. Ramachandran. (C.283-85)

IDFPR sought all of Lavery's notes, despite his assertion of the therapist's work product privilege. (C.286-87) A therapist's personal notes are statutorily defined as the therapist's work product and are protected from "discovery in any judicial, administrative or legislative proceeding or any proceeding preliminary thereto." 740 ILCS 110/3(b). Lavery and IPHP refused to turn over his notes. (C.286) Whether documents were protected therapist's notes required an *in camera* inspection by a circuit court judge. *In re Estate of Bagus*, 294 Ill.App.3d 887 (2d Dist. 1998). Lavery and IPHP filed the case now being appealed, seeking equitable protection and an *in camera* inspection of the notes. (C.287-88)

The Circuit Court found that this case "arose" out of the IDFPR administrative licensing proceedings. (A.25) The Circuit Court determined that all of the documents which Lavery and IPHP asserted to be privileged, were privileged under the statute. (C.292) The Circuit Court further determined that Lavery and IPHP were "aggrieved persons" within the meaning of 740 ILCS 110/15 and ordered IDFPR to pay attorney's fees and costs pursuant to Section 110/15. (A.26)

On appeal, IDFPR does not argue that the Circuit Court erred in determining that the documents at issue were privileged work product, or in determining that Lavery and IPHP were "aggrieved persons" within the meaning of the statute, or in setting the

amount of fees and costs. The only issue raised on appeal, which is now raised for the first time, is whether sovereign immunity nullifies the order for IDFPR to pay fees and costs.

ARGUMENT

I. SOVEREIGN IMMUNITY DOES NOT APPLY TO THIS CASE FOR TW0 REASONS.

The Appellant's Brief reads as if sovereign immunity applies to every claim against the State unless it is waived by statute. It does not. For there are threshold questions, before the issue of statutory waiver becomes relevant.

In this case, there are two such issues. First, sovereign immunity does not apply if the claim against the State grew out of a proceeding which the State initiated. Second, sovereign immunity does not apply where the claim against the State arises from a State department or State agent violating a statute or exceeding their lawful authority. In this case, the State cannot meet either of these threshold requirements. Thus, sovereign immunity does not apply.

A. Plaintiffs Did Not Make The State A Party To The Proceedings Because IDFPR's Statutory Violation Of The therapist's Work Product Privilege Arose In A Licensing Proceeding Initiated By IDFPR, And The Dispute Needed To Be Resolved By The Circuit Court.

As set forth in the Illinois Immunity Act, 745 ILCS 5/1, "[e]xcept as provided in the Illinois Public Labor Relations Act, the Court of Claims Act, the State Officials and Employees Ethics Act, and Section 1.5 of this Act [5 ILCS 315/1 et seq.], 705 ILCS 505/1 et seq., 5 ILCS 430/1-1 et seq., and 745 ILCS 5/1.5] the State of Illinois shall not be made a defendant or party in any court. Thus, with exceptions not relevant here, sovereign immunity cannot apply unless the State is made "a defendant or party…." *Id.*

The Appellate Court has consistently applied this requirement to the original proceeding and not to subsequent related litigation which is "a natural outgrowth from the original proceeding." *People v. Ford*, 2019 IL App (1st) 172592-U, P22. *See People v. Carter*, 392 Ill. App. 3d 520, 525 (2d Dist. 2009); *People v. Downs*, 371 Ill. App. 3d 1187, 1190 (5th Dist. 2007); *People v. Wilcoxen*, 358 Ill. App. 3d 1076 (3rd Dist. 2005), *appeal denied*, 217 Ill. 2d 591 (2005). All four cases involved inmates convicted of being sexually dangerous persons. In *Ford*, there was a motion to compel the Illinois Department of Corrections (IDOC) to pay for Ford's housing and reasonable living expenses until he obtained employment. In the other three cases, there were motions for IDOC to pay the defendant's attorney's fees. In each case, IDOC argued that sovereign immunity barred the motions for payments. In each case, the Appellate Court rejected IDOC's argument and held that the motions were part of the proceedings which the State had initiated.

In the present case, the State also initiated the proceedings which resulted in the order to pay attorney's fees. IDFPR Case Number 2013-10351 began when IDFPR suspended Dr. Ramachandran's medical license for alleged misconduct. Some years later, the doctor sought to reinstate his medical license. The reinstatement proceeding was still within Case Number 2013-10351. It was during a hearing on Dr. Ramachandran's petition to reinstate his license in that administrative case when the State demanded all of Lavery's notes. Thus, it was the State which initiated the initial proceeding, out of which the case on appeal naturally grew. Accordingly, the State is not entitled to sovereign immunity.

Under the controlling case law, which IDFPR does not challenge, only a circuit court judge, not the administrative law judge, could conduct an *in camera* inspection to determine whether the claimed privilege applied. *See In re Estate of Bagus*, 294 Ill.App.3d 887 (2d Dist. 1998). Thus, Plaintiffs had to seek equitable relief and an *in camera* inspection in the circuit court.

Prior appellate cases are clear. The ensuing circuit court chancery case was the natural outgrowth of IDFPR's demands on Lavery when he was called as a witness in the licensing case. Therefore, IPHP and Lavery did not make IDFPR a party to this litigation. IDFPR made itself a party by filing its administrative licensing action.

B. IDFPR Acted Without Lawful Authority, In Violation Of The Statutory Therapist's Work Product Privilege, And Plaintiffs Sought Equitable Relief.

"[T]he formal identification of the parties as they appear in the record is not dispositive" as to whether sovereign immunity applies. *Leetaru v. Bd. of Trs. Of the Univ. of Ill.*, 2015 IL 117485, P44. "[S]ubstance takes precedence over form." [Citation omitted.] *Id*., P44. Depending on the issues raised and the relief being sought, "plaintiffs may obtain relief in circuit court even where the defendant they have identified in their pleadings is a state board, agency or department. [Citations omitted.]" *Id*., P44.

Here, Petitioners sought protection from turning over notes they claimed were statutorily privileged therapist's notes, subject to an *in camera* inspection by the Circuit Court judge. In these circumstances sovereign immunity does not apply. For sovereign immunity "affords no protection…when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority, and in those instances an action may be brought in circuit court." [*Healy v. Vaupel*, 133 Ill. 2d 295, 308 (1990)] (and cases cited therein), quoted with approval, *Leetaru*, P45.

The principle behind this limitation on the application of sovereign immunity is that actions taken by State officials, without legal authority, are not the actions of the State. *Id.*, P46; *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250, 261 (2005); *Sass v. Kramer*, 72 Ill. 2d 485, 492 (1978); *Senn Park Nursing Center*, 104 Ill. 2d 169, 188 (1984).

Sovereign immunity does not bar all actions against State officers. To do so would eviscerate many legal guaranties by preventing their judicial enforcement. "To avoid this result a familiar presumption has been adopted which strips a State officer of his official status when he is enforcing an unconstitutional statute *or is proceeding in violation of law*; his conduct is not then regarded as the conduct of the State, nor is the action against him considered an action against the State." [Emphasis added.] *Moline Tool Co.* v. *Department of Revenue*, 410 Ill. 35, 37 (1951); *Herget National Bank of Pekin v. Kenney*, 105 Ill. 2d 405, 411 (1985). ("There is a recognized presumption that the State or a department thereof cannot violate the constitution or the laws of the State."). This is the "officer suit exception" to sovereign immunity. *Grey v. Hasbrouck*, 2015 IL App (1st) 130267, P22. Where such a violation takes place, the violator is not the State itself, so sovereign immunity does not apply. Id., P24–25.

Excluded from this "exception" are "simple breach of contract" cases and where a State official merely errs in exercising his or her delegated authority. *Leetaru*, P47. Instead "[t]he exception" is focused on "situations where the official is not doing the business which the sovereign has empowered him or her to do or is doing it in a way which the law forbids." [Citation omitted.] *Id.*, P47. This aligns with the purpose of sovereign immunity, preventing interference with government functions or with control

of the State treasury. *Id*., P47. For "[t]he State cannot justifiably claim interference with its functions when the act complained of is unauthorized or illegal." [Citation omitted.] *Id*., P47. In the present case, as in *Grey*, the relief sought was equitable, not money damages.

Thus, sovereign immunity does not bar enjoining the State or State officials from exceeding their authority. *Leetaru*, P48. Such an injunction is not deemed to be an action against the State, even if the State or a State agency is named as a defendant. *Id*., P48. "Applying these principles, 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." [Citations omitted.] *Id*., P48.

The issues in the case at bar, and the relief sought by Plaintiffs, each independently brought this case outside the limits of sovereign immunity. First, because IDFPR, as determined by the Circuit Court, and unchallenged in this appeal, violated Plaintiffs' right to protect therapist's notes pursuant to the MHDDCA. Second, because the protective order sought by Plaintiffs, and their request for an *in camera* inspection of the documents they claimed were privileged, were requests for equitable relief which were substantively the same as if they had been labeled requests for injunctive relief.

II. THE STATUTORY FEE SHIFTING PROVISION WAIVES SOVEREIGN IMMUNITY.

The Appellant's Brief argues that there was no statutory waiver of sovereign immunity. But that argument fails to discuss the actual language of the statute. The key language of Sections 110/3(b) and 110/15 is:

> "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."
>
> and
>
> "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."

These words do not appear in the Appellant's Brief. This omission leaves the State's argument fatally incomplete. For it is impossible to argue the meaning of a statute without discussing the relevant statutory language.

Assuming *arguendo* that sovereign immunity might apply to the issues and to the relief sought in this case, it does not bar the right to fees and costs because the statutory language shows the legislative intent to waive sovereign immunity. "The critical issue is whether the legislature intended to impose liability upon the State -- not how or where the intent is expressed." *Giordano v. Martin*, 115 Ill. App. 3d 367, 370 (4th Dist. 1983). (Holding that sovereign immunity was waived for purposes of paying additional compensation, as required by Section 19 of the Worker's Compensation Act.)

In the present case, as in *Grey v. Hasbrouck, supra*, when read as a whole, the statute waives sovereign immunity. In *Grey*, the issue was whether sovereign immunity was waived as to attorney's fees to the prevailing civil rights plaintiff. In its opening brief, the Attorney General attempts to preemptively attack *Grey* for not following *In re Special Education v. Walker*, 131 Ill.2d 300 (1989). The *Grey* court would certainly

disagree. It cited *Walker*, among other cases, for the principles of statutory construction which determine whether sovereign immunity has been waived.

As with the statute at issue in this case, conspicuously absent in the Attorney General's criticism of *Grey*, is any discussion of the statutory language which led to the result in *Grey*. Yet any fair, critical examination of *Grey*, requires exactly such a discussion.

Grey followed the rules of statutory construction in concluding that the statute waived sovereign immunity as to attorney's fees. No further appeal was sought in *Grey* and no subsequent Appellate case has criticized *Grey* as wrongly decided.

Grey examined Section 5 of the Illinois Civil Rights Act provided in relevant part that:

> "(a) No unit of State, county, or local government in Illinois shall:
>
> (1) exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination under any program or activity on the grounds of that person's race, color, national origin, or gender; or
>
> (2) utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, national origin, or gender.
>
> (b) Any party aggrieved by conduct that violates subsection (a) may bring a civil lawsuit, in a federal district court or State circuit court, against the offending unit of government….

> (c) Upon motion, a court shall award reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in any action brought:
>
> (1) pursuant to subsection (b); or
>
> (2) to enforce a right arising under the Illinois Constitution."

740 ILCS 23/5.

The *Grey* court looked to long established axioms of statutory construction to guide it in determining and effectuating the legislative intent. Axioms such as: reviewing the entire statutory scheme; reading the statute as a whole; considering all of its relevant parts; and not reading non-existent language into the statute. *Id*., P19. Doing so, the *Grey* court first noted that Section 5(a) specified that the State was an entity which could be sued under Section 5(b). It then observed that Section 5(c) provided that attorney's fees and costs could be awarded to a prevailing party in a Section 5(b) action. It then quoted *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, P35, which stated "where the legislature wishes to excuse the State or other entities from filing and other fees imposed by the circuit court in connection with litigation, it knows how and has done so expressly." *Id*. at P20. The *Grey* court then correctly concluded:

> "To accept the defendant's argument would require this court to read into the statute an exemption for the State that the legislature could have but did not provide in section 5(c). Construing section 5 of the Civil Rights Act as a whole, the State consented to be sued and, therefore, consented to pay attorney fees and costs to the prevailing party. Sovereign immunity does not bar an award of

> attorney fees and costs pursuant to section 5(c) of the Civil Rights Act against the State."

Id. at P21.

Like Section 5(a) of the Civil Rights Act, Section 110/3(b) of the MHDDCA refers to the State. It does so by specifying that therapists' notes are privileged from discovery "in any judicial, administrative or legislative proceeding or any proceeding preliminary thereto." Administrative and legislative proceedings are proceedings where the State is a party. These are express references to the State. Section 110/15 of the MHDDCA then specifies that "*any person* aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief" and that "[r]easonable attorney's fees and costs may be awarded to the successful plaintiff *in any action* under this Act." [Emphasis added.] Specifying not just judicial proceeding, but also administrative and legislative proceedings, identified the State as being, like everyone else, unauthorized to seek therapists' personal notes. "Any person…in any action" allows no exclusions from the right to fees and costs. Read as a whole, the legislature's intent to waive sovereign immunity is clear. As in *Grey*, with such statutory language, if the legislature intended to exclude the State, it needed to, and would have, expressly excluded the State.

Applegate v. Illinois DOT, 355 Ill. App. 3d 1056, 1060-1061 (3d Dist. 2002); *Ackerman v. Illinois Dept. of Public Aid*, 128 Ill. App. 3d 982, 984 (3d Dist. 1984) are also examples of where references to the State within a statute led courts to conclude that sovereign immunity had been waived. *Applegate* and *Ackerman* held that fees and costs can be awarded against the State, under section 10-55(c) of the Administrative Procedure Act if an administrative rule is invalidated. *See* 5 ILCS 100/10-55(c). That section states:

> "**(c)** In any case in which a party has any administrative rule invalidated by a court for any reason, including but not limited to the agency's exceeding its statutory authority or
>
> the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees."

Although the statute does not expressly state that sovereign immunity is waived, *Applegate* and *Ackerman* concluded that the legislature intended to waive sovereign immunity because Section 100/10-55(c) clearly applies to the State.

Giving plain meaning to the statutory language, and with the State specifically included in the statutory scheme, the legislative intent in the MHDDCA is clear. The State consented to be included in 110/15. There is no ambiguity. Sovereign immunity was waived.

This conclusion is further supported by contrasting Sections 110/3(b) and 110/15 with the statutes at issue in the cases cited by IDFPR as examples of where sovereign immunity was not waived. None of those cases involved statutory language specifying that the scope of the statute included all judicial, administrative, and legislative proceedings. Only one of the cases cited by IDFPR, *Shempf v. Chaviano*, 2019 IL App (1st) 173146, concerned a provision for fees. That statute stated: "If judgment is entered in favor of the plaintiff, the plaintiff shall recover damages and costs. If judgment is entered in favor of the defendant, the defendant shall recover costs." 735 ILCS 5/14-105. Thus, it lacked the inclusive language of "any person aggrieved" in its fees, costs, or interest provisions.

CONCLUSION

Sovereign immunity does not apply to this case for two reasons. First, because the order to pay fees and costs naturally grew out of the administrative proceeding initiated by IDFPR. Therefore, IDFPR made itself a party to the proceedings and sovereign immunity does not apply. Second, because IDFPR acted without lawful authority in violating the statutory prohibition against seeking a therapist's personal notes. Therefore, as a matter of law, IDFPR is deemed to not be acting as the State. Thus, sovereign immunity does not apply.

Assuming *arguendo*, that sovereign immunity could apply, the statutory language shows a clear legislative intent to waive sovereign immunity.

For each of these three reasons, sovereign immunity does not nullify the Circuit Court's order for attorney's fees and costs. Each of these reasons, in and of itself, is sufficient to affirm the Circuit Court's order.

The Circuit Court should be affirmed, and this cause should either be remanded to the Circuit Court for further proceedings to determine attorney's fees and costs arising from this appeal, or this Court should grant leave to file a motion for attorney's fees and costs in the Appellate Court.

Respectfully submitted,

/s/ Rick Schoenfield

DiVincenzo Schoenfield Stein
Attorneys for Plaintiffs-Appellees
11340 W. Monticello Pl.
Westchester IL 60154
708-822-1637
rschoenfield@dsschicagolaw.com

CERTIFICATE OF COMPLIANCE

I, Rick Schoenfield, 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 16 pages.

/s/ Rick Schoenfield

CERTIFICATE OF SERVICE

I, Rick Schoenfield, an attorney, being duly sworn on oath depose and state that I caused a copy of the foregoing APPELLEES' BRIEF to be filed and served via the Odyssey eFileIL system and served on AAG Bridget DiBattista, Bridget.DiBattista@ilag.gov and Michael K. Goldberg, mgoldberg@goldberglawoffice.com by email on or before the hour of 5:00 p.m. on April 26, 2023.

Under Section 1-109 of the Illinois Code of Civil Procedure and the penalties provided by law I, Rick Schoenfield, certify that the statements set forth in this Certificate of Service are true and correct, except as to matters stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

/s/ Rick Schoenfield

DiVincenzo Schoenfield Stein
Attorneys for Plaintiffs-Appellees
11340 W. Monticello Pl.
Westchester, IL 60154
(708) 822-1637
rschoenfield@dsschicagolaw.com

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TERRENCE LAVERY and ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC, Plaintiffs-Appellees, and ANIL RAMACHANDRAN, Plaintiff, v. DEPARTMENT OF PROFESSIONAL REGULATION, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 2020-CH-01202 The Honorable CAROLINE KATE MORELAND, Judge Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Defendant-Appellant

BRIDGET DIBATTISTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2130 (office)
(872) 272-0809 (cell)
CivilAppeals@ilag.gov (primary)
Bridget.DiBattista@ilag.gov (secondary)

ORAL ARGUMENT REQUESTED

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ARGUMENT

I. Lavery And IPHP Sued The Department And So They Cannot Avoid Sovereign Immunity By Claiming That They Did Not Make The Department A Party To This Action.

Terrence Lavery and the Illinois Professionals Health Program, LLC ("IPHP") respond to the position of the Illinois Department of Financial and Professional Regulation ("Department") by arguing that the doctrine of sovereign immunity does not apply here, citing the State Lawsuit Immunity Act language preventing the State of Illinois from being "made a defendant or party in any court." 745 ILCS 5/1 (2020). AE Br. 8. Despite having initiated proceedings in circuit court and suing the Department, Lavery and IPHP claim that they "did not make [the Department] a party to this litigation." *Id*. at 10. They submit that a line of authority supports their position that the State has not been "made a party" to an action if the action is a "natural outgrowth" of an action brought by the State. *Id*. at 9. This erroneous and expansive view of these cases, which would appear to apply whenever the State operates in a prosecutorial capacity, should be rejected by this court.

As an initial matter, the most recent in the line of cases that Lavery and IPHP cite is an unpublished case from this court, *People v. Ford*, 2019 IL App (1st) 172592-U, entered on January 18, 2019. Unpublished cases entered prior to January 1, 2021, however, may not be cited as precedent or as persuasive authority. Ill. Sup. Ct. R. 23(e)(1). As such, this case should not be considered here.

In any event, none of the cases supports their expansive view. In *Ford*, the State charged the defendant with criminal sexual assault in 1978. 2019 IL App (1st) 172592-U, ¶ 4. The following year, the circuit court adjudicated him a sexually dangerous person and appointed the Director of the Illinois Department of Corrections as his legal guardian. *Id.* After defendant's conditional release from custody in 2017, *id.* at ¶ 6, the defendant filed a motion — in the same 1978 criminal case (*see* 2019 IL App (1st) 172592-U (lower court case number "No. 78 CR 94201") — seeking to compel that department to fund his housing outside of its custody, *id.* at ¶ 7.

The appellate court relied on three earlier cases, also cited by Lavery and IPHP here, to find sovereign immunity did not apply. *Id.* at ¶¶ 20-23; *see* AE Br. 9 (citing *People v. Carter*, 392 Ill. App. 3d 520 (2d Dist. 2009); *People v. Downs*, 371 Ill. App. 3d 1187 (5th Dist. 2007); *People v. Wilcoxen*, 358 Ill. App. 3d 1076 (3d Dist. 2005)). Those cases also involved defendants previously adjudicated sexually dangerous persons in proceedings initiated by the State. *Carter*, 392 Ill. App. 3d at 522; *Downs*, 371 Ill. App. at 1188; *Wilcoxen*, 358 Ill. App. 3d at 1078. In those actions, appointed counsel sought attorney fees for their work in later seeking discharge of the defendants. *Id.* The court in *Wilcoxen* held that because the State had not been made a party to the case, and it instead "chose to become a party by initiating proceedings" under the Sexually Dangerous Persons Act, sovereign immunity did not apply. 358 Ill. App. 3d at 1078. Similarly, the court in *Ford* found sovereign immunity

should not bar the defendant's motion seeking housing funds where the motion was a "natural outgrowth from the original proceeding under the [Sexually Dangerous Persons Act] that *the State* initiated as a plaintiff." 2019 IL App (1st) 172592-U, ¶ 22 (emphasis in original).

Thus, in all four cases, the State initiated the proceedings against each of the defendants and, in the same proceedings, the defendant filed a petition or motion seeking money from the State. Factually, then, those cases are not like this one. Here, after Dr. Anil Ramachandran's medical license was suspended following a prosecution by the Department in administrative proceedings, he sought restoration of his license before the Department. *See* C160. After Dr. Ramachandran called Lavery as a witness in the license restoration proceedings, Lavery and his employer initiated a separate action in circuit court seeking a protective order for his personal notes, naming the Department as a defendant. *See* C151-58, C160. Unlike in *Wilcoxen* and its progeny, the Department did not initiate proceedings in court against Lavery and IPHP, with Lavery and IPHP then filing a motion or petition seeking money from the State in the same action against the Department.

And reading the case law in the manner that Lavery and IPHP propose — that an action merely must be a "natural outgrowth" of any proceeding initiated by the State — would carve out an exception to sovereign immunity for any action that bears some causal connection to a State prosecution. Whatever the merits of *Wilcoxen* are on its own — and the state agency

involved challenged that case's soundness in *Ford*, *see* 2019 IL App (1st) 172592-U, ¶ 23 — it certainly does not go this far. This court should decline Lavery and IPHP's invitation to extend this line of cases in this manner.

Moreover, although they allude to the provision of the Mental Health and Developmental Disabilities Confidentiality Act ("Act") that allows for an *in camera* inspection by the circuit court, claiming that they "had to seek equitable relief" in the circuit court, *see* AE Br. 10, Lavery and IPHP ignore that this provision, found at section 10(a)(1) of the Act, 740 ILCS 110/10(a)(1) (2020), is distinct from the private right of action provision of the Act, found at section 15, 740 ILCS 110/15 (2020). Attorney fees are only provided for under the Act if a person brings a separate suit alleging a violation of the Act. *See id.* Because the State was "made a defendant" here in a separate court action brought by Lavery and IPHP, the analysis in *Wilcoxen* does not apply to avoid the bar of sovereign immunity in this case.

II. The Officer Suit Exception To Sovereign Immunity Did Not Apply Here For Several Reasons.

Next, Lavery and IPHP claim that their court action falls within the officer suit exception to sovereign immunity. AE Br. 10-12. That exception applies if a state officer is alleged to have acted illegally or in excess of authority. *See Leetaru v. Bd. of Trs. of Univ. of Ill.*, 2015 IL 117485, ¶ 46. In that scenario, the officer is no longer acting as the "State," and an action seeking injunctive relief "may therefore be maintained against the officer without running afoul of sovereign immunity principles." 2015 IL 117485, ¶¶

46, 56. As detailed below, Lavery and IPHP's request for attorney fees and costs did not fall within the exception for three reasons: (1) attorney fees and costs are not injunctive relief; (2) the complaint did not identify any officer who violated the law or acted in excess of authority; and (3) the complaint identified no violation of the law or action in excess of authority.

A. A Request For Attorney Fees And Costs Seeks A Money Judgment Against The State, Not Prospective Relief.

First, in seeking attorney fees and costs, Lavery did not seek prospective relief but instead a money judgment against the State. *See Taylor v. State Univs. Ret. Sys.*, 203 Ill. App. 3d 513, 524 (4th Dist. 1990) (award of attorney fees constituted "money judgment" that circuit court lacked subject matter jurisdiction to award against state agency). Because any money judgment here would be against the State, given that the Department is an arm of the State, it would subject the State to liability and control its actions. That type of outcome is sought to be avoided by sovereign immunity. *See James ex rel. Mims v. Mims*, 316 Ill. App. 3d 1179, 1181 (1st Dist. 2000) ("A claim will be found to be against the State where a judgment for the plaintiff could subject the State to liability or control the actions of the State.").

Grey v. Hasbrouck, *see* 2015 IL App (1st) 130267, ¶ 27 (from which the state agency director did seek further review, *see* 42 N.E.3d 370 (Ill. 2015), contrary to Lavery and IPHP's assertion, AE Br. 14) is the only case that the Department has identified that has allowed a request of attorney fees to proceed as part of an action under the officer suit exception. But because the

case relied on inapposite case law in reaching that conclusion, it should not be followed by this court. Specifically, *Grey* cited the rationale from an earlier appellate decision 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.* (citing *Wilson v. Quinn,* 2013 IL App (5th) 120337, ¶ 15). But an examination of *Wilson* shows that the money would be paid by the State to carry out the injunctive relief sought, not based on an independent request for a separate money judgment. *See* 2013 IL App (5th) 120337, ¶¶ 3, 17 (stipend to be paid as a result of action against Governor seeking declaration that failure to authorize payment of stipend was unlawful); *see also Ill. Cnty. Treasurers' Assn' v. Hamer*, 2014 IL App (4th) 130286, ¶ 1 (stipend to be paid as result of action against Director of Illinois Department of Revenue for declaration that failure to pay full amount of mandated annual stipends was unlawful).

Conversely, in this case, an award of attorney fees and costs would not be money paid by the State as a consequence of the injunctive relief granted. The declaration sought here — that Lavery's personal notes were privileged — would not result in money being paid from the state treasury, as in *Wilson* and *Ill. Cnty. Treasurers' Assn'*. Instead, the money sought here, attorney fees and costs, would be an independent request for money sought directly from the State. Because *Wilson* is factually inapposite, *Grey* should not have extended

its holding to an award of attorney fees, and that extension of the law should not be followed here.

B. No Officers Acting In Excess Of Authority Or In Violation Of Law Were Identified In The Complaint.

Second, Lavery and IPHP do not claim to have identified any officer in their complaint who may have acted unlawfully. Indeed, the only individual mentioned in the complaint is the administrative law judge ("ALJ") whom Lavery and IPHP conceded in their reply memorandum in support of attorney fees and costs was neither a party to this action nor liable for fees and costs. Indeed, in that filing, they stated: "Obviously, the ALJ is not a party to this litigation, nor is Plaintiffs' motion for fees and costs directed at the ALJ." C439.

Nevertheless, Lavery and IPHP suggest that the identification of an officer anywhere in their complaint was unnecessary based on a broad reading of the Illinois Supreme Court's decision in *Leetaru*. Specifically, Lavery cites a sentence from *Leetaru* that Illinois courts 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, department, commissions and agencies or to compel their compliance with legal or constitutional requirements." AE Br. 12 (citing *Leetaru*, 2015 IL 117485, ¶ 48). Lavery and IPHP suggest that, in this sentence, *Leetaru* holds that an action can proceed in circuit court so long as it makes the State, or an agency of the State (as the Department here), a defendant and seeks

prospective relief. AE Br. 10-12. This is so, they imply, even with no mention in the complaint of an officer violating the law or acting in excess of authority. But a careful reading of *Leetaru* demonstrates that its holding is not so broad.

As Lavery and IPHP themselves note, the Court in *Leetaru* held that the applicability of the officer suit exception rests upon the "issues raised and the relief being sought." AE Br. 10; *see Leetaru*, 2015 IL 117485, ¶ 45 ("Whether an action is in fact one against the State . . . depends on the issues involved and the relief sought."). The Court raised this point in the context of describing prior Illinois cases that have held that it is not enough to merely name a state officer as a defendant to bring an action within the exception. *Id.* (citing *Healy v. Vaupel*, 133 Ill. 2d 295, 308 (1990)). And it held that the converse of this was also true: "By the same token, the fact that that the named defendant is an agency or department of the State does not mean that the bar of sovereign immunity automatically applies." *Leetaru*, 2015 IL 117485, ¶ 44. Instead, the Court instructed that the "issues involved and the relief sought" must be examined. *Id.* at ¶ 45. And, in that case, the Court found that the allegations of the complaint brought the action within the exception because "agents of the State hav[ing] acted in violation of statutory or constitutional law or in excess of their authority" was "precisely what [the plaintiff] had alleged." *Id.* at ¶ 50.

Thus, while the Court in *Leetaru* did hold that naming an agency as the defendant will not "automatically" bar the action from proceeding in circuit

court (a holding which the Department preserves a request for reconsideration of), it did not hold that naming an agency was alone sufficient. *Leetaru* does not clearly hold, as Lavery and IPHP suggest, that no allegations of an officer acting in excess of the law or in violation of it are required at all in the complaint. Indeed, such a ruling would contravene binding precedent holding that an action is in fact against the State if, in addition to other failures, a complaint 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). *Leetaru* not only cites *Healy*, it cites it for the very point that the court must look to the issues raised in the complaint to determine the applicability of the officer suit exception. 2015 IL 117485, ¶ 45. Here, because Lavery and IPHP's complaint failed to identify an officer acting in excess of authority or in violation of law, the officer suit exception does not apply. And because this exception does not apply, this action was barred by sovereign immunity.

C. A Violation Of Law Or Action In Excess Of Authority Was Not Sufficiently Alleged In The Complaint.

Third, even if *Leetaru* stands for the proposition that no officer needs to be identified anywhere in the complaint, and that it is enough to solely allege misconduct by a state agency for the officer suit exception to sovereign immunity to apply, the complaint fails to include such allegations. The first time that Lavery and IPHP described how the Department purportedly violated the law was in their reply memorandum in support of their request for

attorney fees and costs. *See* C439. In that filing, he asserted that the Department "had an obligation to inform the ALJ that the statutory scheme required an *in camera* inspection by the Circuit Court." *Id*. But there were no allegations about this in the complaint.

Instead, Lavery alleged that "[t]here was no basis for rejecting [his] assertion of the therapist's work product privilege without the documents being submitted to the Circuit court for an *in camera* inspection." C155, C156. This did not sufficiently allege facts supporting the application of the officer suit exception. *See Flanigan v. Bd. of Trs. of the Univ. of Ill. at Chi.*, 2018 IL App (1st) 170815, ¶ 31 (action did not fall within exception where plaintiff "failed to allege sufficient facts demonstrating that the exception . . . applied").

Indeed, in *Flanigan*, the appellate court explained that "review of plaintiff's second amended complaint demonstrate[d] that he failed to allege that defendants were required, and failed" to follow University policies. *Id.* Similarly here, the complaint contained no allegations of what was purportedly required of the Department and what it failed to do. For this additional reason, then, the officer suit exception did not apply in this case.

Lastly, although Lavery and IPHP assert that whether a violation occurred has gone "unchallenged" by the Department, AE Br. 12, that is because that issue goes to the merits of their entitlement to attorney fees and costs. *See* 740 ILCS 110/15 (2020). Because this question was not properly before the circuit court due to lack of subject matter jurisdiction, it is also not

a question reached by the Department on appeal. The Department has not thereby conceded that it violated the Act, and to the extent Lavery and IPHP so suggest, that is incorrect.

III. The Act Does Not Unambiguously Waive Sovereign Immunity.

Finally, Lavery and IPHP argue that the "legislature's intent to waive sovereign immunity is clear." AE Br. 16. But they point to nothing in the Act that clearly waived sovereign immunity in this situation. At most, they identify inferences or ambiguities in the statute, which do not amount to the "clear and unequivocal" language by the General Assembly required to waive immunity. *See In re Walker*, 131 Ill. 2d 300, 303 (1989) ("The State's consent [to liability] must . . . be clear and unequivocal.") (cleaned up); *Martin v. Giordano*, 115 Ill. App. 3d 367, 369 (4th Dist. 1983) ("[C]onsent must be clear and unequivocal; it cannot be inferred or implied."); *Lynch v. Dep't of Transp.*, 2012 IL App (4th) 111040, ¶ 30 ("The ambiguity in the statute alone lends sufficient support for finding the legislature did not clearly, unequivocally, or affirmatively waive sovereign immunity.").

Specifically, Lavery and IPHP identify two provisions of the Act that they claim waive sovereign immunity: (1) a provision providing that personal notes shall not be subject to discovery "in any judicial, administrative or legislative proceeding," 740 ILCS 110/3(b) (2020); and (2) a provision stating that "any person aggrieved by a violation of [the] Act" may sue for relief and be awarded fees and costs "in any action under this Act," 740 ILCS 110/15

(2020). AE Br. 13. As an initial matter, although Lavery and IPHP assert that the Department's opening brief is "fatally incomplete" because the provisions purportedly "do not appear" there, *id.*, both provisions were in fact quoted in full in that brief, *see* AT Br. 5, 6.

Regardless, by their plain terms, neither provision involves the Illinois General Assembly expressly consenting to be sued in circuit court. Although Lavery and IPHP claim that the Act's reference to "any . . . administrative or legislative proceeding," 740 ILCS 110/3(b) (2020), "identified the State," AE Br. 16, it clearly does not. And to the extent that they are asserting that the provision can only have meaning if it applies to restrict the State, that ignores the fact that an action can be filed in court against other purported violators, such as opposing parties or municipalities. And this is what distinguishes *Ackerman v. Ill. Dep't of Pub. Aid*, 128 Ill. App. 3d 982, 984 (3d Dist. 1984), and *Applegate v. Ill. Dep't of Transp.*, 355 Ill. App. 3d 1056, 1060-61 (3d Dist. 2002), cited by Lavery and IPHP as examples of where the statute need "not expressly state that sovereign immunity is waived." AE Br. 17. Those cases involved the Illinois Administrative Procedure Act, which, when identifying agency conduct, obviously could only apply to administrative agencies of the State. *See Shempf v. Chaviano*, 2019 IL App (1st) 173146, ¶ 67 (provision of Administrative Procedure Act "couldn't apply to anyone *but* a state actor") (emphasis in original). Lavery and IPHP have not claimed that the Act can only apply to State actors.

Additionally, regarding the provision allowing attorney fees and costs in "any action" by "[a]ny person aggrieved," Lavery and IPHP cite no authority supporting their position that this language amounts to an express waiver of sovereign immunity. As noted by this court *Shempf*, statutes which, as here, "generally allow for fees or costs to prevailing parties, but do not expressly refer to the State, do not waive sovereign immunity." 2019 IL App (1st) 173146, ¶ 55.

Rather than acknowledge the extensive case law in this area that requires a clear and unequivocal waiver of sovereign immunity, Lavery and IPHP champion the *Grey* decision. As noted in the Department's opening brief, however, *Grey* improperly makes the default position that sovereign immunity does not apply, but for an express statement to the contrary. *See* 2015 IL App (1st) 130267, ¶ 20 ("[a]fter allowing the State to be sued under the . . . Act, the legislature, *had it wished to exempt the State* from the obligation of paying attorney fees and costs as provided therein, *could have done so*") (emphasis added). In fact, the default position under well-settled Illinois law is the opposite: that sovereign immunity applies, absent an express waiver to the contrary.

But in any event, Lavery and IPHP point to no similar explicit reference to the "State" in describing prohibited conduct as there was in *Grey*. 2015 IL App (1st) 130267, ¶ 20. As such, it has failed to counter the Department's

point that *Grey*, even if correctly decided, is factually distinguishable. *See* AT Br. 12-13.

* * * *

In sum, the Department was made a party to this litigation, the officer suit exception does not apply, and the Act contains no express waiver of sovereign immunity. Because Lavery and IPHP's request for attorney fees and costs seeks a money judgment against an arm of the State, it is barred by sovereign immunity.

CONCLUSION

For these reasons, Defendant-Appellant Illinois Department of Financial and Professional Regulation requests that this court reverse the circuit court's judgment in part, by vacating the award of attorney fees and costs due to lack of subject matter jurisdiction.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorney for Defendant-Appellant

BRIDGET DIBATTISTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2130 (office)
(872) 272-0809 (cell)
CivilAppeals@ilag.gov (primary)
Bridget.DiBattista@ilag.gov (secondary)

May 11, 2023

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) table of contents and statement of points and authorities, the Rule 314(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 15 pages.

/s/ Bridget DiBattista
BRIDGET DIBATTISTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2130 (office)
(872) 272-0809 (cell)
CivilAppeals@ilag.gov (primary)
Bridget.DiBattista@ilag.gov (secondary)

CERTIFICATE OF FILING AND SERVICE

I certify that on May 11, 2023, I electronically filed the foregoing **Reply Brief of Defendant-Appellant** with the Clerk of the Court for the Illinois Appellate Court, First Judicial District, 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.

Rick Schoenfield
rschoenfield@dsschicagolaw.com

Michael K. Goldberg
mgoldberg@goldberglawoffice.com

Jenna Milaeger
jmilaeger@goldberglawoffice.com

Priyanka U. Desai
pdesai@goldberglawoffice.com

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.

/s/ Bridget DiBattista
BRIDGET DIBATTISTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2130 (office)
(872) 272-0809 (cell)
CivilAppeals@ilag.gov (primary)
Bridget.DiBattista@ilag.gov (secondary)

CERTIFICATE OF SERVICE

I, Rick Schoenfield, an attorney, being duly sworn on oath depose and state that I caused a copy of the foregoing APPELLEES' BRIEF AND SUPPLEMENTAL APPENDIX to be filed and served via the Odyssey eFileIL system and served on AAG Bridget DiBattista, Bridget.DiBattista@ilag.gov, Michael K. Goldberg, mgoldberg@goldberglawoffice.com, Jenna Milaeger jmilaeger@goldberglawoffice.com, and Priyanka Desai pdesai@goldberglawoffice.com by email on or before the hour of 5:00 p.m. on November 27, 2024.

Under Section 1-109 of the Illinois Code of Civil Procedure and the penalties provided by law I, Rick Schoenfield, certify that the statements set forth in this Certificate of Service are true and correct, except as to matters stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

/s/ Rick Schoenfield

DiVincenzo Schoenfield Stein
Attorneys for Plaintiffs-Appellees
11340 W Monticello Pl
Westchester, IL 60154
708-822-1637
rschoenfield@dsschicagolaw.com