In the
Supreme Court of Illinois

John Doe, Plaintiff-Appellee, v. Burke Wise Morrissey & Kaveny, LLC, an Illinois Professional Limited Liability Company, and Elizabeth A. Kaveny, Defendants-Appellants.	) Rule 315 Petition for Leave to Appeal) from the First District Appellate) Court, No. 1-21-1283;)) There Heard on Appeal from the) Circuit Court of Cook County, Illinois,) No.: 17 L 4610)))) The Honorable) Margaret A. Brennan,) Judge Presiding

APPELLANTS' REPLY BRIEF

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POINTS AND AUTHORITIES

RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

Rather than provide a statement identifying the facts he considers relevant to the issues before this Court on appeal, plaintiff instead provides a two-paragraph Statement of Facts asserting the position that his testimony in the underlying medical malpractice trial cannot properly be considered in ruling on a motion to dismiss under § 2-615 of the Code of Civil Procedure. (Pl. Br. at 2–3.) Plaintiff's argument is not properly included in the Statement of Facts. Ill. S. Ct. R. 341(h)(6). It is also wrong.

First, plaintiff's contention that his "complaint is the sole source of the facts for any issue to be decided" (Pl. Br. at 3) is incorrect. This Court has recognized that, in ruling on a § 2-615 motion to dismiss, "those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47. The Kaveny Defendants' attached the transcript of plaintiff's testimony as Exhibit B to their motion to dismiss (C164–217), and requested that the court take judicial notice of this record from the underlying proceeding. (C98, citing *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 20.) Plaintiff raised no objection in either the trial court or the appellate court to consideration of this transcript.

In addition, plaintiff incorrectly states that the Kaveny "Defendants do not deny the disclosed information was confidential information, as

defined by the [Confidentiality] Act" because "the twin pillars of the[ir] defense" are "the lack of a therapeutic relationship[1] and that Plaintiff waived confidentiality by testifying." (Pl. Br. at 3.) These two pillars, however, stand as the foundation for the Kaveny Defendants' position that the information at issue was not, in fact, confidential information protected by the Confidentiality Act.

Finally, in a footnote, plaintiff complains that the Kaveny Defendants' "accounting of the underlying facts" is somehow "inaccurate." (Pl. Br. at 2, n.1.) He does not identify any facts he believes the Kaveny Defendants got wrong.

ARGUMENT

I. Plaintiff's voluntary public disclosure of his mental health information took away its confidentiality.

A. Under *Novak*, plaintiff irrevocably waived his Confidentiality Act privilege.

This Court's holding in *Novak* rests on the premise that public disclosure of matters protected by the Confidentiality Act strips those matters of their confidentiality. *Novak v. Rathnam*, 106 Ill. 2d 478, 485 (1985). Plaintiff's efforts to avoid *Novak* cannot overcome the simple reality that information ceases to be private once it has been publicly disclosed.

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[1] As discussed below, the Kaveny Defendants' position is, more accurately, that plaintiff's trial testimony was a communication made outside the context of mental health and developmental disability services. See Section II below.

1. Waiver of confidentiality does not depend on whether the public disclosure is the "sole source" of information.

Plaintiff argues that he did not waive confidentiality by testifying in he medical malpractice trial because he never alleged in this case that "the sole source of [the Kaveny] Defendants receiving confidential information was his trial testimony." (Pl. Br. at 12.) To be sure, plaintiff's complaint does not identifying *any* source or sources from which the Kaveny Defendants obtained information regarding his mental health. But plaintiff fails to explain why the number of potential sources for the information would make any difference. Regardless of how many additional sources might exist for the information at issue, plaintiff does not deny that his trial testimony and evidence publicly revealed the information in question. *Novak* is clear that the public disclosure of mental health information through trial testimony irrevocably waives the confidentiality of that information. *Novak*, 106 Ill. 2d at 485.

2. Following *Novak* does not undermine the purpose of the Confidentiality Act.

Plaintiff next argues that the consequences identified in *Novak*—that publicly disclosed information is stripped of its confidentiality—should not apply to him because "the entire purpose of the [Confidentiality Act] is abandoned" if *Novak* is followed. (Pl. Br. at 14.)

The purpose of the Confidentiality Act, as this Court recognized in *Novak*, is to "encourage[ ] complete candor between patient and therapist

and provide[ ] motivation for persons who need treatment to seek it" by "preserv[ing] the confidentiality of the records and communications of persons who are receiving or who have received mental-health services." *Novak*, 106 Ill. 2d at 483. Yet the Confidentiality Act also recognizes that individuals receiving mental health treatment may wish to place their mental health at issue in legal proceedings, and that doing so waives the privilege of confidentiality.

Thus, § 10(a)(1) of the Act expressly permits the disclosure mental health information in criminal proceedings when a defendant raises an insanity defense, like Robert Lee Endicott did in *Novak*. *Id*. Once Endicott presented evidence regarding his protected mental health information at the criminal trial, this Court held, he irrevocably waived the confidentiality of that information. *Id*.

This case is no different. Just as § 10(a)(1) permitted disclosure of Endicott's mental health information at his criminal trial, § 10(a)(1) of the Confidentiality Act also expressly permitted the disclosure of plaintiff's mental health information at his medical malpractice trial because plaintiff "introduce[d] his mental condition… [and the] services received for such condition as an element of his claim." 740 ILCS 110/10(a)(1). Once plaintiff presented evidence regarding his mental health history, treatment, and prognosis at that trial—including through his own direct

testimony regarding the subject—he, like Endicott, irrevocably waived the confidentiality of that information.

Plaintiff additionally suggests his trial testimony should not be held to result in a waiver of confidentiality because the Kaveny Defendants, by relying on *Novak*, "seek to shield their wrongful action by aligning themselves with a mentally ill criminal defendant[2]." (Pl. Br. at 14.) But the legal principles announced by this Court are not contingent on the ostensible likability of the parties involved in a particular case.

That Endicott introduced evidence of his mental health as part of his defense in a criminal matter while plaintiff introduced such evidence to establish a medical negligence claim in a civil proceeding does not change the consequence of those disclosures. Both plaintiff and Endicott could have preserved the confidentiality of their mental health information by not placing their mental health at issue in the respective proceedings. Both made rational decisions to waive confidentiality in order to pursue important rights in litigation. Once that choice was made, the "public disclosure… of information protected by the Act… took away its confidentiality." *Novak*, 106 Ill. 2d at 485.

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[2] By the time the privilege was asserted by Endicott's therapists in *Novak*, Endicott had already been acquitted and was no longer a criminal defendant.

While the Confidentiality Act protects recipients of mental health services from "*compulsory* disclosure of confidential communications," the Act does not strip such individuals of their right to *voluntarily* disclose their own confidential information in order to pursue claims and defenses in litigation. *Novak*, 106 Ill. 2d at 484 (emphasis added). The decision to voluntarily disclose such information at a public trial comes at a cost: public disclosure "takes away once and for all the confidentiality sought to be protected." *Id.* Whether the benefit to the individual of pursuing particular claims or defenses is worth that cost is a choice left to that individual to make.

3. Individuals receiving mental health services are presumed to be legally competent.

Notwithstanding the unambiguous finding of waiver in *Novak*, plaintiff questions whether "a patient receiving mental health treatment [can] 'knowingly' waive rights protected by that very treatment." (Pl. Br. at 15.) The question alone is problematic. As the Legal Advocacy Service and Professor Kopels explain in their joint amicus brief, "the mere fact of receiving treatment may… be stigmatizing to the person involved due to some persisting social attitudes." (LAS Amicus Br. at 12, quoting *Report*, Governor's Commission for Revision of the Mental Health Code of Illinois, 164 (1976).) Questioning the capacity of individuals to make decisions about their own lives solely because they have received mental health

services reflects and perpetuates the damaging stigma surrounding mental illness which can deter people from seeking the care that they need.

The question of whether an individual receiving mental health services has the legal capacity to waive their rights is also readily answered by well-established Illinois law. In Illinois, "*all* adults are presumed legally competent to direct their legal affairs." *In re Phyllis P.*, 182 Ill. 2d 400, 401 (1998) (emphasis added). Accord *People ex rel. Drury v. Catholic Home Bureau*, 34 Ill. 2d 84, 95 (1966) ("one is presumed competent until the contrary is shown"). Rooted in the important "distinction between mental illness and the specific decisional capacity to exercise or waive legal rights," this presumption holds even for individuals who have been adjudicated mentally ill under the Mental Health and Developmental Disabilities Code. *Phyllis P.*, 182 Ill. 2d at 402. Accord 405 ILCS 5/2-101 ("No recipient of [mental health] services shall be presumed to be a person under a legal disability…")

The Confidentiality Act provides recipients of mental health services a privilege to prevent compulsory disclosure of their confidential information; the Act does not strip those individuals of their legal capacity to waive that privilege or to make any other decision regarding their own lives. Indeed, if the mere fact of receiving mental health services stripped Doe of his capacity to *waive* legal rights, it would necessarily also strip him of the capacity to *exercise* his rights.

Plaintiff made the decision to pursue a medical malpractice claim that placed his mental health information into the public domain. Once he made that choice, he placed every detail of his own testimony and every bit of evidence presented at that trial into the public domain. To seek to enforce a privilege of confidentiality "thereafter is to seek to preserve a privacy which exists in legal fiction only." *Novak*, 106 Ill. 2d at 484 (quoting 8 Wigmore, Evidence sec. 2389(4), at 860–61 (McNaughton rev. ed 1961)).

B. The existence of a qualified protective order under HIPAA does not restore the confidentiality of publicly disclosed information.

Relying chiefly on *Haage v. Zavala*, 2020 IL App (2d) 190499, plaintiff insists that: (1) the Kaveny Defendants' post-verdict statements regarding the medical malpractice case violated HIPAA; and (2) any "HIPAA violation involving the unauthorized redisclosure of mental health information is a violation of the [Confidentiality Act]." (Pl. Br. at 17.) *Haage* supports neither proposition.

1. The Kaveny Defendants' post-verdict statements did not violate HIPAA.

The primary holding in *Haage* is both simple and inapposite. In *Haage*, the Second District of the Appellate Court held that an entity seeking to access protected health information which has been disclosed pursuant to a qualified protective order must "abide by the terms of the HIPAA qualified protective order[ ]" even if the entity itself not a "covered

entity" under HIPAA. *Haage*, 2020 IL App (2d) 190499 at ¶ 49. In other words an entity cannot accept the benefits of disclosure under a qualified protective order without also accepting the restrictions imposed by that order. *Haage* say nothing about the use or retention of protected health information where the information is obtained through some means other than through a qualified protective order.

Plaintiff never alleged that the Kaveny Defendants learned the information at issue from disclosures made pursuant to the HIPAA qualified protective order. For that matter, plaintiff's complaint includes no allegations identifying *any* source or sources from which the Kaveny Defendants—or their predecessor counsel in the medical malpractice action—learned the information at issue. Plaintiff concedes in his response brief before this Court that "[a]ny attorney representing Plaintiff in the underlying action would have learned information… from plaintiff himself" in addition to various other potential sources. (Pl. Br. at 12–13.)

Haage has no bearing on any information or records plaintiff himself provided to his attorneys. Indeed, the qualified protective order entered in the underlying action itself explicitly confirms that it does "not control or limit the use of protected health information pertaining to [Doe] that comes into the possession of any party or any party's attorney from a source other than a 'covered entity.'" (C1133.) Redisclosure of any records

or communications received directly from plaintiff himself, in other words, would not violate HIPAA.

2. A HIPAA violation, even if one had occurred, would not constitute a per se violation of the Confidentiality Act.

Even if plaintiff had alleged facts demonstrating a HIPAA violation, plaintiff has offered no authority to support his assertion that "a HIPAA violation involving the unauthorized redisclosure of mental health information is a violation of the [Confidentiality Act]." (Pl. Br. at 17.) As the First District recognized in *Haage*, "HIPAA and its regulations establish a 'uniform federal floor of privacy protections for individual medical information." *Haage v. Zavala*, 2020 IL App (2d) 190499, ¶ 10 (quoting Scott D. Stein, *What Litigators Need to Know About HIPAA*, 36 J. Health L. 433, 434 (2003)). While state standards that are more lenient than the HIPAA Privacy Rule are preempted, states are free to impose privacy protections that are "more stringent" than the HIPAA Privacy Rule. Whether a particular disclosure violates HIPAA and whether that disclosure violates a state statute like the Confidentiality Act are thus two separate inquiries.

3. The existence of a qualified protective order does not undo plaintiff's waiver.

Finally, plaintiff's brief, like the appellate court's Opinion, fails to explain how the existence of a qualified protective order overcomes this Court's holding that "[t]he public disclosure… of information protected by

the Act… took away its confidentiality." *Novak*, 106 Ill. 2d at 485. Plaintiff has never argued that *Novak's* holding is somehow contrary to or preempted by HIPAA.

And indeed, like this Court, federal courts have recognized that privacy interests can be waived by public disclosure. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975) ("interests in privacy fade when the information involved already appears on the public record"); *In re Asbestos Products Liability Litigation*, 256 F.R.D. 151, 155 (E.D. Pa. 2009) ("By bringing suit based on diagnoses of asbestosis, Plaintiffs have essentially released to the world their own medical information and waived any privilege to the privacy of that information."); *Collins v. Aranas*, No. 3:17-cv-00417-MMD-WGC, 2019 U.S. Dist. LEXIS 185712, at *1–2 (D. Nev. Oct. 25, 2019) (by putting "his medical records in the public domain," plaintiff "waived any privacy concerns which might otherwise attach to medical records")

The Confidentiality Act protects an individual's right to preserve the confidentiality of protected information, but it does not relieve them of the consequences of choosing to make private information public.

C. Plaintiff's forfeiture argument is forfeited and misguided.

Plaintiff alternatively argues that the Kaveny Defendants forfeited their waiver argument by failing to raise the issue of waiver in their § 2-

619.1 motion to dismiss. (Pl. Br. at 20.) Plaintiff is wrong, both legally and factually.

1. The Kaveny Defendants adequately preserved this issue before the trial court.

While plaintiff is correct that the Kaveny Defendants' initial motion to dismiss did not explicitly invoke "waiver," this is not the end of the story. As this Court has explained, parties are required "to preserve issues or claims for appeal," but they are not required "to limit their arguments here to the same arguments that were made below." *Brunton v. Kruger*, 2015 IL 117663, ¶ 76.

The motion to dismiss invoked the issue of waiver by arguing that plaintiff was seeking to impose liability on them "for disclosing information that [plaintiff] publically [*sic*] testified about at trial." (C97.) In reply to plaintiff's argument that redisclosure of information revealed at trial violated the Confidentiality Act (C270), the Kaveny Defendants emphasized:

> [T]he fundamental flaw in Plaintiff's Complaint… is that the information [the Kaveny Defendants] disclosed in [their] press release was not private confidential information. It was public information… because Plaintiff testified about it at trial.

(C301.) The Kaveny Defendants' surreply reiterated that plaintiff had "waived the confidentiality of his records… because once his medical condition was discussed at trial, the facts became public." (C365.)

Thus, throughout their briefing on the motion to dismiss, the Kaveny Defendants raised the same essential claim that, once publicly disclosed, plaintiff's information was no longer confidential. The issue was not forfeited.

2. Plaintiff forfeited any claim of forfeiture.

In addition, plaintiff's attempt to argue forfeiture now comes too late. It is well established that "issues not raised in the circuit court or appellate court are forfeited" in this Court. *Medponics Illinois, LLC v. Department of Agriculture*, 2021 IL 125443, ¶ 52. This principle applies to forfeiture arguments just as it does to any other argument. See *PML Development LLC v. Village of Hawthorn Woods*, 2023 IL 128770, ¶ 48 n.2 (finding that, by failing to raise forfeiture argument before appellate court, defendant forfeited argument that plaintiff had forfeited issue not raised in the trial court).

a. Plaintiff did not raise his forfeiture argument before the trial court.

At no time did plaintiff ask the trial court to strike the arguments the Kaveny Defendants made on this issue in their motion, reply, or surreply. Instead, plaintiff filed a surresponse to the motion to dismiss that directly addressed the claims that the information at issue became public once introduced into evidence at the medical malpractice trial (C319–24).

Plaintiff's assertion that the issue of waiver was first raised *by the trial court* during the hearing on the motion to dismiss (Pl. Br. at 20) is patently false. At that hearing, the question of waiver was first raised by counsel for the Kaveny Defendants, who argued that "the [Confidentiality Act] doesn't apply to statements made regarding a public trial" and "if a person puts their mental health at issue, they waive the protections and confidentiality of the act." (C533.)

Again, plaintiff's counsel did not object that the Kaveny Defendants had forfeited the waiver argument, instead acknowledging that this issue was "woven through all of the—the motion to dismiss, the response brief, and the surresponse—surreply" (C533) and that "the fundamental argument that we have through all [the Kaveny Defendants'] positions is that if it was testified to at trial, it becomes fair game for them to use in any way" (C534). The trial court did not address the Kaveny Defendants' waiver argument until after the parties had argued as to all six counts of plaintiff's complaint, noting simply: "I think it's also very clear that this was following a public trial and trials are public." (C546.)

As plaintiff briefed and argued the issue of waiver before the trial court without ever arguing that the issue was forfeited, plaintiff has forfeited the claim of forfeiture .

b. Plaintiff did not raise a forfeiture argument in his opening brief before the appellate court.

Plaintiff's forfeiture argument is doubly-forfeited because he also failed to raise it in his opening brief before the appellate court. Points not argued in an appellant's opening brief are forfeited and may not be raised in a reply brief. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23; Ill. S. Ct. R. 341(h)(7).

Indeed, even in his reply brief before the appellate court, plaintiff's forfeiture argument was limited to two short sentences: "Of note, Defendants did not argue in its Motion to Dismiss that Plaintiff's testimony waived confidentiality. Thus, this argument is waived." (Pl. App. Ct. Repl. Br. at 1.) Plaintiff's cursory assertion, unadorned with citation to any legal authority, was insufficient to adequately raise a claim of forfeiture in the appellate court. "Both argument and citation to relevant authority are required." *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36. Having provided neither, plaintiff forfeited his forfeiture argument by failing to adequately raise it on appeal.

D. The holding in *Novak* that public disclosure waives confidentiality is supported by sound public policy.

Plaintiff contends that finding a waiver of confidentiality based on his public disclosures in the course of the underlying medical malpractice litigation "eliminates, or severely limits the rights of patients seeking mental health treatment." (Pl. Br. at 16.) But his concern that a mental

health patient's decision to pursue litigation "opens the doors for the public to know *all* of their most private information" (Pl. Br. at 16) is misplaced. Plaintiff's further suggestion that restricting the disclosure of details regarding a public trial is simply part of the routine regulation of attorney conduct (Pl. Br. at 20–22) is misguided. The waiver of confidentiality that results from public disclosure, as recognized in *Novak*, reflects a sensible balance between individual privacy interests and the public interest in open judicial proceedings and free speech.

1. Finding a waiver of confidentiality under *Novak* does not diminish the rights of those who seek mental health services.

The trade-off between privacy concerns and the assertion of claims or defenses in litigation is by no means unique to recipients of mental health services. All parties who proceed to trial must contend with the public disclosure of facts they might otherwise prefer to keep private.

Nor does any plaintiff open the door to disclosure of "all of their most private information" by pursuing litigation. "Although the scope of permissible discovery can be quite broad, 'parties engaged in litigation do not sacrifice all aspects of privacy or their proprietary information simply because of a lawsuit.'" *Carlson v. Jerousek*, 2016 IL App (2d) 151248, ¶ 31 (quoting *In re Mirapex Products Liability Litigation*, 246 F.R.D. 668, 673 (D. Minn. 2007)). Trial courts have a wide array of tools at their disposal for balancing a litigants' privacy concerns against the public's interest in open judicial proceedings.

For example, under § 2-401 of the Code of Civil Procedure, a trial court is vested with discretion to allow the use of fictitious names "[u]pon application and for good cause shown." 735 ILCS 5/2-401(e). Good cause will be found when "the party seeking to use a pseudonym has shown a privacy interest that outweighs the public's interest in open judicial proceedings." *Doe v. Doe*, 282 Ill. App. 3d 1078, 1088 (1st Dist. 1996). See also, *Santiago v. E.W. Bliss Co.*, 2012 IL 111792, ¶ 60 (citing *Doe v. Doe* with approval).

Illinois Supreme Court Rule 201(c)(1) further empowers the trial court, "at any time on its own initiative, or on motion of any party or witness, [to] make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Ill. S. Ct. R. 201(c)(1).

The Confidentiality Act, moreover, empowers the trial court to "enter such orders as may be necessary in order to protect the confidentiality, privacy, and safety of the recipient" of mental health services. 740 ILCS 110/10(b). The court "may prevent disclosure or limit disclosure to the extent that other admissible evidence is sufficient to establish the facts in issue." *Id*. Indeed, a trial court may bar disclosure of records and communications even when a recipient of mental health services seeks to reveal them if a therapist raises the privilege on behalf

the patient and establishes that disclosure is not in the patient's best interest. *Id*.

The recipient of mental health services remains in control of the decision of whether to place private information into the public domain by testifying and presenting evidence at a public trial, to instead preserve the confidentiality of the information by forgoing suit, or to find a middle-ground by seeking to proceed under a fictitious name or requesting a protective order limiting disclosures. But once a party has placed details regarding his mental health history, treatment, and prognosis into the public record by testifying and presenting evidence at trial, the confidentiality of that information cannot be restored. *Novak*, 106 Ill. 2d at 485. Any "privacy" remaining with respect to such information is "a legal fiction only." *Id*. at 484.

2. Restricting the disclosure of facts revealed at a public trial is far from routine.

Responding to the First Amendment concerns raised by the Illinois Defense Counsel in its amicus brief, plaintiff asserts that "[r]estrictions on free speech for lawyers are almost too numerous to list." (Pl. Br. at 21.) But the present appeal is not about the permissible limits on *attorney* speech. Whether the Kaveny Defendants' post-verdict statements were prohibited based on their role as plaintiff's attorneys is a question raised in plaintiff's claim for breach of fiduciary duty, which he voluntarily dismissed and has since refiled.

The present appeal is limited to plaintiff's claim under the Confidentiality Act and asks whether details regarding plaintiff's mental health, about which he had already testified during a medical malpractice trial, are protected from further disclosure under the Act. The answer to that question cannot vary depending on who seeks to further disclose the information, like a Schrödinger's cat of confidentiality. The information is either protected under the Confidentiality Act or it isn't. If the Confidentiality Act prohibited disclosure by the Kaveny Defendants, then the Act would also prohibit disclosure by anyone else who observed the trial.

Notably, plaintiff has not identified a single case upholding a restriction on speech regarding information already disclosed at a public trial. Instead, he points to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), which upheld a protective order restricting the disclosure prior to trial of information learned through pretrial discovery. Critical to its finding that the protective order did not violate the First Amendment, the United States Supreme Court emphasized that the order: (1) was "entered on a showing of good cause"; (2) was "limited to the context of pretrial civil discovery"; and (3) did "not restrict the dissemination of the information if gained from other sources." *Id.* at 37. The rule advocated by plaintiff—restricting the post-verdict dissemination of information about which an

individual has already testified at a public trial—satisfies none of these three conditions.

Recipients of mental health services are granted a privilege to prevent the disclosure of their confidential records and communications. But they also retain a right of access to the courts and with it the right to place their confidential information into the public record in order to advance their litigation interests. Choosing to place confidential information into the public record comes at a cost: the information ceases to be confidential. As plaintiff does not contend that the Kaveny Defendants disclosed any information that had not already been revealed at trial in the medical malpractice action, this Court should reverse the appellate court and affirm the dismissal of plaintiff's Confidentiality Act claim.

II. The protection afforded by the Confidentiality Act is limited to records kept and communications made in the course of providing mental health and developmental disabilities services.

Alternatively, this Court should affirm because testimony at a public trial is not a "record or communication" protected by the Confidentiality Act.

According to plaintiff, the Kaveny "Defendants' primary argument is that they, as lawyers, are not subject to liability under the Act because only a therapist can violate the [Confidentiality Act]." (Pl. Br. at 3.) Plaintiff misunderstands the Kaveny Defendants' argument. The critical

factor under the Confidentiality Act is not the relationship between the plaintiff and the defendant, but the context in which the records and communications at issue were made or kept.

A. The Confidentiality Act does not apply.

In shielding "records and communications" from disclosure, the Confidentiality Act specifically defines the context in which such records or communications must be made to enjoy the protections of the Act. A "record," to enjoy confidentiality under the Act, must be "kept by a therapist or by an agency *in the course of providing mental health or developmental disabilities services* to a recipient concerning the recipient and the services provided." 740 ILCS 110/2 (emphasis added). A "communication" must be "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." *Id.* (emphasis added).

A connection with the provision of mental health or developmental disabilities services is thus the critical prerequisite to the protections of the Confidentiality Act. In other words, as this Court made clear in *Johnston v. Weil*—a case plaintiff has chosen not to address—"[t]he Act 'only applies to situations in which the patient is seeking treatment for a mental health condition.'" 241 Ill. 2d 169, 183 (2011) (quoting *House v. SwedishAmerican Hospital*, 206 Ill. App. 3d 437, 446 (2nd Dist. 1990)).

Providing for the confidentiality of records or communications made or kept in the context of mental health or developmental disability services furthers the purpose of the Confidentiality Act by "encourag[ing] complete candor between patient and therapist and provid[ing] motivation for persons who need treatment to seek it." *Novak,* 106 Ill. 2d at 483.

Testimony and other evidence presented in open court is a matter of public record made in the course of litigation, not a record or communication made during or in connection with the provision of mental health services. Under *Novak*, that public testimony and evidence is not protected information under the Act but instead resulted in a waiver of confidentiality. In the nearly four decades since *Novak* was decided, the General Assembly has never amended the Confidentiality Act to extend protection to trial testimony and evidence related to a litigant's mental health. "This indicates legislative acquiescence in the construction accorded to the statute" by *Novak*. *People v. Jones*, 223 Ill. 2d 569, 592 (2006).

B. The 2015 Amendment to the Confidentiality Act did not eliminate the required nexus with mental health services.

In May 2015 when the Kaveny Defendants made the challenged statements to the press and on their website, § 3(a) of the Confidentiality Act provided simply:

> All records and communications shall be confidential and shall not be disclosed except as provided in this Act.

740 ILCS 110/3(a) (Lexis 2014). Effective January 1, 2016, the General Assembly amended § 3(a) by adding the following sentence:

> Unless otherwise expressly provided for in this Act, records and communications made or created in the course of providing mental health or developmental disabilities services shall be protected from disclosure regardless of whether the records and communications are made or created in the course of a therapeutic relationship.

Pub. Act 99-28 (eff. January 1, 2016). In addition, a definition of "therapeutic relationship" was added in § 2 of the Confidentiality Act. *Id.*

Plaintiff maintains that, in light of this amendment, the Kaveny Defendants may be held liable under the Confidentiality Act despite the absence of a therapeutic relationship between them and plaintiff.

1. Pub. Act 99-28 does not apply retroactively.

As an initial matter, Pub. Act 99-28 did not take effect until January 1, 2016. The purportedly improper disclosures were made in May 2015. Under § 4 of the Statute on Statutes (5 ILCS 70/4), the amendment to § 3(a) cannot be applied retroactively to these statements. *Doe v. Diocese of Dallas*, 234 Ill. 2d 393, 406 (2009) (substantive amendments may not be applied retroactively absent express legislative declaration of retroactivity).

Plaintiff nevertheless cites *Wisniewski v. Kownacki*, 221 Ill. 2d 453 (2006)—a case decided 10 years before the enactment of Pub. Act 99-28—for the proposition that all "[a]mendments to the [Confidentiality Act] are

retroactive." (Pl. Br. at 12.) Plaintiff profoundly misunderstands *Wisniewski*, which: (1) did not address an amendment to the Confidentiality Act but addressed the adoption of the Act itself; and (2) held that applicability of the Confidentiality Act to pre-enactment treatment records did *not* "hinge upon a retroactivity analysis" because "[d]isclosure, which is the act regulated…, takes place only in the present or the future." *Id.* at 463. In other words, the Confidentiality Act applied only to disclosures occurring after its enactment. The challenged disclosures in this case occurred prior to the 2016 amendment.

Plaintiff alternatively argues that the amended provision should apply based on the principle that "[w]here a statute is ambiguous and the legislature amends it soon after a controversy has arisen as to its meaning, the amendment may be regarded as a legislative interpretation of the original law rather than as an attempt to change the law." *Marketview Motors, Inc. v. Colonial Insurance Co. of CA.*, 175 Ill. 2d 460, 469 (1997) (Harrison, J., dissenting). Plaintiff speculates that Pub. Act 99-28 was adopted in reaction to *Quigg v. Walgreen Co.*, 388 Ill. App. 3d 696 (2nd Dist. 2009) and should be read as simply clarifying the intended meaning of the Confidentiality Act.

But the statutory amendment in that *Marketview Motors, Inc.* occurred within months of the appellate court decision to which it was responding and statements in the legislative history of that amendment

specifically indicated that the legislature was seeking to "restore the law to what we thought it was" prior to the appellate court's interpretation. *Marketview Motors, Inc.* 175 Ill. 2d at 466–67. The amendment in this case, by contrast, was enacted six years after the appellate court decided *Quigg* with no legislative history suggesting it was intended as mere clarification in response to *Quigg*. When a statute is amended, the legislature is presumed to have intended a substantive change in the law absent circumstances which would rebut that presumption. *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 299 (2010).

2. Even if the amendment applied retroactively, it does not change anything here.

Even if it applied retroactively, Pub. Act 99-28 does not change the critical fact that records and communications must be "made or created in the course of providing mental health or developmental disabilities services" to enjoy protection under the Confidentiality Act. Pub. Act 99-28. The records and communications simply no longer need to be made in the course of a "therapeutic relationship." *Id*. In other words, the amendment establishes a distinction between "a therapeutic relationship" specifically and the provision of mental health and developmental disability services more broadly.

The Confidentiality Act, both before and after amendment by Pub. Act 99-28, defines "mental health and developmental disabilities services" as including but not limited to "examination, diagnosis, evaluation,

treatment, training, pharmaceuticals, aftercare, habilitation or rehabilitation." 740 ILCS 110/2. Following the amendment, "therapeutic relationship" is defined as the receipt of such services "from a therapist." Pub. Act 99-28. In other words, while mental health or developmental disabilities services no longer need to be provided by a "therapist" for the associated records and communications to enjoy protection, the records and communications must still be made or kept in the course of such services to be protected.

Plaintiff's testimony during the course of his medical malpractice litigation was not a record or communication made or created in the course of mental health or developmental disabilities services. The details regarding plaintiff's mental health history, treatment, and prognosis disclosed in that testimony are not protected under the Confidentiality Act.

CONCLUSION

WHEREFORE, Defendants-Petitioners, Burke Wise Morrissey & Kaveny, LLC, an Illinois Professional Limited Liability Company, and Elizabeth A. Kaveny, LLC, respectfully request that the judgment of the appellate court be reversed and that this Court affirm the trial court's judgment dismissing the Confidentiality Act claim with prejudice.

Respectfully submitted,

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Dated: July 13, 2023

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 315(c), 315(d) and 341 through 343. The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 315(c)(6), is 5,838 words.

Kimberly A. Jansen

CERTIFICATE OF SERVICE

I, Kimberly A. Jansen one of the attorneys for defendants-appellants, certify that I electronically filed the foregoing **Appellants' Reply Brief** with the Clerk of the Illinois Supreme Court, on July 13, 2023, via Odyssey eFileIL.

I further certify that on July 13, 2023, an electronic copy of the foregoing **Appellants' Reply Brief** is being served on all counsel of record via Odyssey eFileIL:

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Under penalties as provided by law pursuant to §1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), I certify that the statements set forth in this instrument are true and correct.

Kimberly A. Jansen