No. 129097

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

JOHN DOE, Plaintiff-Appellee v. BURKE WISE MORRISSEY & KAVENY, LLC, an Illinois Professional Limited Liability Company, DAVID J. RASHID, and ELIZABETH A. KAVENY, individually, and as agents, servants, and employees of BURKE WISE MORRISSEY & KAVENY, LLC, an Illinois Professional Limited Liability Company, jointly and severally, Defendants-Appellants	From the First District Appellate Court, No. 1-21-1283; There heard on Appeal from the Circuit Court of Cook County Trial Court No. 2017 L 004610 The Honorable Margaret A. Brennan, Judge Presiding

APPELLEE'S REPLY BRIEF

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POINTS AND AUTHORITIES

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1. FOR GOOD REASON, THE ILLINOIS CONSTITUTION, THIS COURT, AND PUBLIC HEALTH AUTHORITIES AGREE THAT MENTAL HEALTH INFORMATION IS PROTECTED IN WAYS, AND AT LEVELS BEYOND OTHER INFORMATION.

The primary purpose of the Mental Health and Developmental Confidentiality Act (MHDDCA or Act) is to encourage people to seek mental health treatment. Public knowledge that a person is undergoing mental health treatment will discourage many from seeking help.

According to the Illinois Department of Public Health, suicide is preventable. *Illinois Suicide Prevention Plan*, p.5, available at

https://dph.illinois.gov/content/dam/soi/en/web/idph/files/publications/illinoisstrategicplan2020reduced.pdf. Yet, it is still a leading cause of death and the numbers are increasing. Centers for Disease Control and Prevention (CDC), *Suicide Data and Statistics*, available at https://www.cdc.gov/suicide/suicide-data-statistics.html. Numerous studies have shown reporting on suicides leads to suicide contagion resulting in additional preventable deaths. See, *Reporting on Suicide*, available at https://reportingonsuicide.org/; and *Reporting on Suicide*, available at https://reportingonsuicide.org/about/.Thus, there is strong public interest in keeping a patient's mental health records confidential.

Additionally, confidentiality of mental health records is guaranteed by the Illinois constitution. In *Haage v. Zavala*, 2021 IL 125918 (2020), this court said,

> "'The Illinois Constitution guarantees, in pertinent part, that "[t]he people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable *** invasions of privacy." Ill. Const. 1970, art. 1, § 6. In *Kunkel v. Walton,* 179 Ill. 2d 519 (1997), this court stated as follows:
>
> > "This court has observed that the Illinois constitution goes beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy and that the protection of that privacy is stated broadly and without restrictions. [Citation.] The confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy. Physicians are privy to the most intimate details of their patients' lives, touching on diverse subjects like mental health, sexual health and reproductive choice. Moreover, some medical conditions are poorly understood by the public, and their disclosure may cause those afflicted to be unfairly stigmatized. Respect for privacy of medical information is a central feature of the physician-patient relationship. Under the Hippocratic Oath, and modern principles of medical ethics derived from it, physicians are ethically bound to maintain patient confidences. See *Petrillo v. Syntex*

> *Laboratories, Inc.*, 148 Ill. App. 3d 561, 589 (1986).
>
> In addition, this court has recognized that 'a person has a reasonable expectation that he will not be forced to submit to a close scrutiny of his personal characteristics, unless for a valid reason. *** [T]he individuals' privacy interest in his physical person *** must be protected.' [Citation.] We believe that his privacy interest pertaining to individual physical characteristics necessarily encompasses personal medical information." *Kunkel*, 179 Ill. 2d at 537-538.'"

In *Kunkel*, this court further cautioned:

> "'The text of our constitution does not accord absolute protection against invasion of privacy. Rather, it is *unreasonable* invasions of privacy that are forbidden. In the context of civil discovery, reasonableness is a function of relevance." (Emphasis in original.) *Id.* at 538.'" *Haage* 2021 IL 125918, ¶ 66.

2. PLAINTIFF DID NOT OMIT ESSENTIAL FACTS THAT IMPACT THE "WAIVER" AS A DEFENSE.

Defendants argue that the plaintiff omitted facts relevant to the § 2-615 argument. Instead, it is the defendants that have omitted an essential critical fact. They failed to advise the court that in the underlying Advocate litigation there was a HIPAA Qualified Protective Order (QPO) in effect. The QPO expressly limited the disclosure of plaintiff's mental health information solely for purposes of the litigation. Inherent in the term "litigation" is a public trial. Thus, all facts regarding plaintiff's mental health (*i.e.* records and communications defined in the Mental Health and Developmental Disability Confidentiality Act (MHDDCA or Act) are subject to the QPO in effect. Under the express terms of the QPO, defendants cannot disclose plaintiff's mental health information outside of the litigation. Thus, as a matter of law, as well as the law of the case, the plaintiff did

not waive the confidentiality of his mental health information except for purposes of the underlying Advocate litigation. Plaintiff's complaint alleges conduct outside of the litigation.

Defendants' waiver argument asserts that because the plaintiff went to trial and testified, the QPO had no effect. Yet no court ever vacated the QPO.

3. *NOVAK* DOES NOT SUPPORT DEFENDANTS' CLAIM THAT PLAINTIFF WAIVED THE CONFIDENTIALITY OF HIS MENTAL HEALTH RECORDS.

The defendants rely on *Novak v. Rothnam,* 106 Ill. 2d 478 (1985). *Novak* is clearly inapplicable. The appellate court in this case explains why *Novak* is distinguishable.

> "Defendants try to avoid the Act's sweep by asserting that Doe waived confidentiality by testifying in detail at the medical malpractice trial. In support, defendants rely on *Novak*..., where a psychiatrist's testimony on behalf of a defendant's insanity defense at a criminal trial waived the confidentiality of that information for a subsequent proceeding. In *Novak*, however, there were no limits placed on the psychiatrist's testimony in the underlying criminal trial. Here, Doe's complaint states that the information shared at the medical malpractice trial was subject to a qualified protective order under HIPAA. Generally, such orders restrict how health information is used, prohibiting "'the parties from using or disclosing [the information] for any purpose other than the litigation or proceeding for which such information was requested,'" and requiring" 'the return to the covered entity or destruction of [the information] *** at the end of the litigation or proceeding." *Haage v. Zavala,* 2020 Il. App. (2d) 190499, ¶ 9 (quoting 45 C.F.R. § 164.512(e)(1)(v)(A), (B) (2018)... For the purpose of this appeal, the complaint sufficiently alleged that the information shared at the medical malpractice trial had restrictions on its use, such that Doe did not waive the Act's protections by testifying."
>
> *Doe v. BMW, et al.* 2022 IL App (1st) 211783, ¶17.

4. THERE WAS NO WAIVER OF THE CONFIDENTIALITY OF PLAINTIFF'S MENTAL HEALTH RECORDS.

In *Gallagher v. Lenart*, 226 Ill. 2d 208. 229 (2007), this court defined "waiver" (and distinguished it from "forfeiture") as the intentional relinquishment of a known right (citing *Home v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 326 (2004) ("waiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right.").

Because there was a QPO in effect restricting the disclosure of plaintiff's highly personal mental health information solely for purposes of the litigation (as well as §§ 5(d) and 10(a)(8) of the Act) plaintiff did not have reason to believe he was waiving his right to keep his mental health information private by testifying at trial. Here, defendants who advised plaintiff of his legal rights and obligations, do not assert they provided him with legal advice on waiver. Was he to understand this without legal advice?

Plaintiff's attorney learned of his highly personal mental health information through plaintiff, depositions, and reviewing plaintiff's medical records. Thus, there is no basis to conclude the plaintiff voluntarily (let alone knowingly) waived his right to keep his mental health information private outside of the litigation.

5. THE MHDDCA TREATS THE NOVAK PROCEEDING DIFFERENT FROM THIS CASE.

In *Novak*, there was no need to obtain a QPO. The court in *Novak* specifically noted, "The Act does allow disclosure, however, in criminal proceedings if the patient, when the accused in those proceedings, raises the defense of insanity. (Ill. Rev. Stat. 1981, ch. 91 ½, par. 810(a)(1).)." Thus, in *Novak*, there was no opportunity, need or basis to obtain a QPO.

6. THE DEFENDANTS DID NOT PRESERVE THE ISSUE THAT PLAINTIFF WAIVED CONFIDENTIALITY OF HIS MENTAL HEALTH INFORMATION IN THE TRIAL COURT.

The only issue preserved in the § 2-615 motion to dismiss for Count I (the MHDDCA count) was whether the Act required the plaintiff and defendant to have a therapeutic relationship. C. 96-240. Thus, there was no need for plaintiff to object to any other argument in the trial court, including waiver.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Plaintiff-Appellee prays that this court affirm the First District Appellate Court's holding and find that the complaint has sufficiently alleged a cause of action against the Defendants-Appellants under the Mental Health and Developmental Disability Confidentially Act, 740 ILCS 110/1 et seq. and remand this matter to the trial court for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 315 (c), 315 (d), and 341 through 343. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341 (c) certificate of compliance, the Rule 341(h)(1) table of contents and statement of points and authorities, the certificate of service, and those matters to be appended to the brief under Rule 315(c)(6) is 1,395 words.

Respectfully submitted,
/s/Thomas M. Paris
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