No. 129097

IN THE SUPREME COURT OF ILLINOIS

JOHN DOE, Plaintiff-Appellee v. BURKE WISE MORRISSEY & KAVENY, LLC, AN ILLINOIS PROFESSIONAL LIABILITY COMPANY, AND ELIZABETH A. KAVENY, Defendants-Appellants	Appeal from the Appellate Court First Judicial District No. 1-21-1283 Original appeal from the Circuit Court of Cook County No. 17 L 4610 Honorable Margaret A. Brennon, Presiding Judge

AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE

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INTRODUCTION

A lawyer representing a recipient of mental health services in a tort case gave an interview and issued a press release after winning the case with a sizeable judgment. The resulting article and press release revealed the client's full name and details of his mental health crisis, treatment, and hospitalization. These disclosures were made without the client's consent. Subsequently, additional articles and social media posts about the client and his mental health history were published.

From an advocacy perspective, why is this wrong? On the one hand, it is wonderful that private counsel was willing to pursue and successfully litigate damages for a person with a mental illness, who, in a mental health crisis, was treated improperly. Organizations like the Guardianship and Advocacy Commission's Legal Advocacy Service do not have the funding to staff a civil litigation section, so we are bound to assist clients in seeking private counsel for possible lawsuits[1]. *See* 20 ILCS 3955/11 (Lexis 2023). Finding private counsel for possible mental health lawsuits is not an easy task, as may be understood from the scarcity of case law in Illinois involving mental health torts. For example, cases involving unlawful forced treatment under the Mental Health and Developmental Disabilities Code are rare. *See, generally, e.g.*, *Irvin v. Southern Illinois Healthcare*,

[1] The Legal Advocacy Service currently consists of 15 staff attorneys covering civil mental health proceedings in many parts of the State, 1 staff attorney covering special education matters, 2 paralegals, 1 managing attorney, and a director. The public defenders for various counties cover civil mental health proceedings in areas where the Legal Advocacy Service does not reach. *See* 405 ILCS 5/3-805(2) (Lexis 2023).

2019 IL App (5th) 170466 (finding genuine issues of material fact in false imprisonment case); *Threlkeld v. White Castle Systems, Inc.*, 127 F. Supp. 986 (N.D. Ill. 2001) (finding medical malpractice action exists for administering involuntary psychotropic medication without consent in non-emergency), 201 F.Supp. 834 (N.D. Ill. 2002) (denying summary judgment for same); *Sassali v. DeFauw*, 297 Ill. Ap. 3d 50 (2nd Dist. 1998) (finding an initially authorized detention under the Mental Health Code can become actionable as false imprisonment).[2]

On the other hand, it is devastating that a recipient's own counsel redisclosed their confidential mental health information without seeking and obtaining their informed consent. This case marks the first time we know of in Illinois where a mental health recipient is suing their own counsel for redisclosing their confidential mental health information. As counsel for many recipients of mental health services each year, and as an educator/lawyer who teaches others about mental health confidentiality, we *amici* are crestfallen to learn that John Doe's counsel – who otherwise did so much good for John Doe – was the one to alert the public, through redisclosure, of confidential mental health information entrusted to the lawyer for purposes of the lawsuit only. Ordinarily one's counsel shields their client (sometimes literally) to protect that individual from unwarranted public exposure. Here, instead, John Doe was left exposed and vulnerable by his own lawyer's actions.

[2] There is no indication that the plaintiffs in these cases had concerns about confidentiality.

Other cases citing the Mental Health and Developmental Disabilities Confidentiality Act ("Confidentiality Act") involve someone who is not an advocate for the recipient actually disclosing the information. For example, a hospital that had petitioned for a recipient's involuntary admission pursuant to the Mental Health and Developmental Disabilities Code released the recipient's confidential mental health records to a court-appointed examiner without having followed Confidentiality Act requirements. *Sassali v. Rockford Memorial Hospital*, 296 Ill. App. 3d 80, 82 (2nd Dist. 1998). The appellate court reversed the circuit court's dismissal of the recipient's complaint that her confidentiality had been violated and remanded the matter for further proceedings. *Id.* at 85. In another example, the plaintiff-recipient's college had forced him to see a mental health provider as a condition for graduating although he had met all graduation requirements. *Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733, 736 (4th Dist. 1986). The college's dean of students redisclosed the recipient's confidential mental health information without his consent, which the appellate court found to state a cause of action under the Confidentiality Act. *Id*. at 744.

The converse of these cases finds advocates actively fighting to preserve their client's confidentiality. For example, a decedent's executor successfully fought to keep defendants from obtaining the confidential mental health records of the decedent in a wrongful death case involving misdiagnosed lung cancer, not mental health. *MacKenna v. Pantano*, 2023 IL App (1st) 210486, ¶1-2, 50. The appellate court reversed a contempt finding that the circuit court had entered

against the decedent's executor. *Id*. at 50. Similarly, this Court reversed the trial and appellate courts when plaintiff's counsel in a medical malpractice action was held in contempt for refusing to disclose confidential mental health records where the plaintiff's injury was neurological and did not involve mental health. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 49, 63 (2002).

No case resembles that of John Doe's, where the redisclosure came from his own team.

The appellate court was correct to find here that John Doe stated a cause of action under the Confidentiality Act. We ask this Court to apply the Confidentiality Act and to avoid the "free speech" distraction and recognize that the attorney could have brought the victory of John Doe's case to the public's attention without disclosing his name.

STATEMENTS OF INTEREST

A. Illinois Guardianship and Advocacy Commission's Legal Advocacy Service

The Illinois Guardianship and Advocacy Commission is the state agency charged with safeguarding the rights of persons with disabilities in Illinois. 20 ILCS 3955/1 (et seq.) (Lexis 2023). The Commission's Legal Advocacy Service division, specifically, is charged with "enforc[ing] rights or duties arising out of any mental health or related laws." 20 ILCS 3955/10(2) (Lexis 2023). To this end, the Legal Advocacy Service serves as appointed counsel in civil mental health proceedings in several counties in thousands of cases each year and serves as

appointed counsel in most of the cases when mental health respondents exercise their right to appeal, regardless of the designated trial counsel. 405 ILCS 5/3-805 (Lexis 2023); 405 ILCS 5/3-816(b) (Lexis 2023).

Legal Advocacy Service staff attorneys, to be effective counsel, must review confidential mental health records regularly. Legal Advocacy Service staff attorneys must also adhere to the Confidentiality Act and prevent redisclosure of a client's confidential mental health information. 740 ILCS 110/1 *et seq.* (Lexis 2023); *see In re L.K.*, 2019 IL App (1st) 163156, ¶22-24 (Legal Advocacy Service moved to strike document filed by opposing counsel that disclosed respondent's name; the Court granted this relief and more "to protect respondent's identity").

As protectors of our clients' confidential mental health information, we bring the perspective of attorneys who regularly represent persons with mental illnesses.

B. Professor Sandra Kopels, University of Illinois (Urbana Champaign) School of Social Work and Attorney at Law

Sandra Kopels, is a former staff attorney, Managing Attorney and Director of the Legal Advocacy Service of the Illinois Guardianship and Advocacy Commission. In these roles, she helped advocate for the rights of persons with disabilities, representing them in civil commitments, refusal of certain treatments like psychotropic medication, electroconvulsive therapy and other therapeutic approaches, termination of parental rights cases, and in appellate briefs. She worked to advance the Commission's Legal Advocacy Service role in "enforc[ing]

rights or duties arising out of any mental health or related laws." 20 ILCS 3955/10(2) (Lexis 2023).

For the last 30 years, Sandra Kopels has been a Professor of Social Work at the University of Illinois at Urbana-Champaign. She teaches a survey course on law to social workers every semester, having taught more than 3000 practitioners to date. She also provides many in-services, workshops, and presentations to mental health practitioners. Most of these 100 + presentations center around the confidentiality of mental health records and communications under the Illinois Mental Health and Developmental Disabilities Confidentiality Act and when this information can be disclosed with or without client consent. As part of her responsibilities as a Professor, she publishes scholarly articles in mental health related publications. More than half of her publications focus on issues of maintaining confidentiality in mental health and school settings. She coauthored a book entitled *Social Work Records*, now in its third edition, https://experts.illinois.edu/en/publications/social-work-records.

ARGUMENT

I. The appellate court properly applied the Confidentiality Act to an instance of unauthorized redisclosure.

Applying rules of statutory construction, the appellate court properly found that the Confidentiality Act prohibited redisclosure of John Doe's confidential information without his consent. Like the appellate court, this Court

should find that John Doe stated a cause of action under the Confidentiality Act when his lawyer used his confidential information for a purpose that was never intended to benefit John Doe in his civil court proceeding. Instead, the use of the confidential information was for publicity – not for John Doe who did not want it or ask for it, but for the lawyer and law firm that represented him.

Illinois's Confidentiality Act is recognized as protection for persons who are at their most vulnerable. Legislative history for the Act "recognizes that the mere fact of receiving treatment may itself be stigmatizing to the person involved due to some persisting social attitudes against persons with mental [health] or developmental [disability] problems." *Report*, Governor's Commission for Revision of the Mental Health Code of Illinois, 164 (1976); *see People v. Bledsoe*, 268 Ill. App. 3d 869, 872 (1st Dist. 1994) (noting that courts regularly rely on this Report as a primary source of legislative history of mental health legislation), *citing Estate of Johnson v. Condell Memorial Hospital*, 119 Ill. 2d 496, 505-506 (1988) (additional citation omitted). Nearly half a century later, stigma due to "general public perceptions of behavioral health" remains a concern, as expressed by this Court in its Mental Health Task Force Action Plan issued in 2022. *Mental Health Task Force Action Plan*, Administrative Office of the Illinois Courts, 18 (2022). It makes sense, then, that a purpose of the Confidentiality Act, besides assuring privacy to the recipient of services to allow for "complete candor and revelation" with treatment providers, is to "induce[] persons who need treatment to seek it." *Laurent v. Brelji*, 74 Ill. App. 3d 214, 217 (4th Dist. 1979).

The Confidentiality Act permits disclosure only to specified people, such as the recipient of services, or their guardian, or to others with the recipient's consent. 740 ILCS 110/4 (Lexis 2023); 740 ILCS 110/5 (Lexis 2023). The Act otherwise prohibits disclosure except as specified. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 55 (2002), *citing* 740 ILCS 110/3(a) (West 2000). One exception is that confidential information may be disclosed, without consent, in civil proceedings where a recipient "introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense," but only for that purpose. 740 ILCS 110/10(a)(1) (Lexis 2023). The Confidentiality Act does not permit disclosure of mental health information beyond that purpose, as disclosure is allowed

> if and only if to the extent the court in which the proceedings have been brought… finds, after in camera examination or testimony or other evidence, and that disclosure is more important to the interests of substantial justice than protection from injury to therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm.

Id.

Here, without John Doe's consent to release his confidential mental health records to his lawyer, he could not have filed a medical malpractice cause of action. *Doe v. Burke Wise Morrissey & Kaveny, LLC*, 2022 IL App (1st) 211283, ¶15. Such release does not extinguish or "waive" confidentiality of those records. The Confidentiality Act expressly prohibits redisclosure of mental health information without the consent of the recipient:

> No person or agency to whom any information is disclosed under this Section may redisclose such information unless the person who consented to the disclosure specifically consents to such redisclosure.

740 ILCS 110/5(d) (Lexis 2023). This prohibition against redisclosure under the Confidentiality Act has been important since the Act's origin.

> Paragraph (d) prohibits redisclosure of information disclosed by virtue of an informed consent. This provision is *crucial to prevent disclosed confidential information from being circulated to persons for purposes for which consent was not obtained.*

Report at 167 (italics added). In sum, confidential mental health information that has been released to someone with the recipient's consent cannot be redisclosed for some other purpose without the recipient's consent.

Additionally, the Confidentiality Act specifies that even an unconsented-to disclosure under the "civil proceedings" exception can only be used for that specific purpose. 740 ILCS 110/10(a)(1) (Lexis 2023). This limitation on use of confidential mental health information echoes other prohibitions on redisclosure of unconsented-to information. Section 10(8) of the Confidentiality Act provides the additional language that the unconsented-to released confidential information "shall not be utilized for any other purpose" nor redisclosed except in connection with the action or preliminary proceeding. *Compare* 740 ILCS 110/10(8) (Lexis 2023) *with* 740 ILCS 110/5(d) (Lexis 2023). Using this same language, Section 11(vi) of the Act prohibits the State's attorney, defense counsel, and any other court personnel in civil involuntary mental health proceedings from "utilizing for any

other purpose" or redisclosing confidential information "except in connection with the [Mental Health and Developmental Disabilities Code] proceedings or investigations." 740 ILCS 110/11(vi) (Lexis 2023).

It is a rule of statutory construction that each word or clause in a statute "must be given a reasonable construction, if possible, and should not be rendered superfluous." *In re Goesel*, 2017 IL 122046, ¶13. The Confidentiality Act's language in Sections 10(8) and 11(vi) applying to other matters highlights that a recipient's confidential information is to be used only for the purpose of those proceedings (and matters preliminary thereto) and nothing else, unless there is consent of the recipient. 740 ILCS 110/10(8) (Lexis 2023); 740 ILCS 110/11(vi) (Lexis 2023).

Here, the appellate court considered that John Doe's consent to release information to his lawyer was for the purpose of the medical malpractice litigation, and not for any other purpose. *Doe v. Burke Wise*, 2022 IL App (1st) 211283, ¶16. This Court, too, should find that John Doe's confidential information was used for a purpose for which he did not consent – publicity for his attorneys. The lawyer here made statements to reporters and issued a press release. *Id.* "A press release is a type of communication 'in which writers provide information to journalists in the hope that it will be passed on to the general public.'" Parella, *Public Relations Litigation*, 72 Vand. L. Rev. 1285, 1305-1306 (May 2019). As the appellate court pointed out, the attorney's action in publicizing the John Doe case outcome "appears to be beyond the bounds of that proceeding." *Doe v. Burke Wise*, 2022 IL App (1st) 211283, ¶16. Applying the Confidentiality Act, John Doe did not consent

for his lawyer to use his confidential mental health information for this purpose. This is a straightforward violation of the Confidentiality Act. *Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733, 743 (4th Dist. 1986) (redisclosure of confidential information without consent warranted a cause of action under Section 5 of the Confidentiality Act).

Rules of statutory construction do not allow for exceptions, limitations, or conditions to be read into a statute that would then conflict with the legislative intent. *Goesel*, 2017 IL 122046, ¶13. This Court should not accept the invitation to do so, by reading a "waiver" of confidentiality into the statute. The legislators intended from the beginning of the Confidentiality Act to "narrowly craft" exceptions to the Act, "to restrict disclosure to that which is necessary to accomplish a particular purpose," and to recognize that confidentiality afforded a recipient of services "continues even after the recipient's death." *Norskog v. Pfiel*, 197 Ill. 2d 60, 71-72 (2001).

II. The attorney here had other possible means of publicizing her and her firm's victory without redisclosing confidential information revealing John Doe's identity.

Governmental agencies, Illinois courts, and lawyers have all found ways to provide important information to the public while preserving the confidentiality of a particular individual. Importantly, the person at the heart of proceedings involving confidential mental health information must be a partner in sharing whatever information is released to the public.

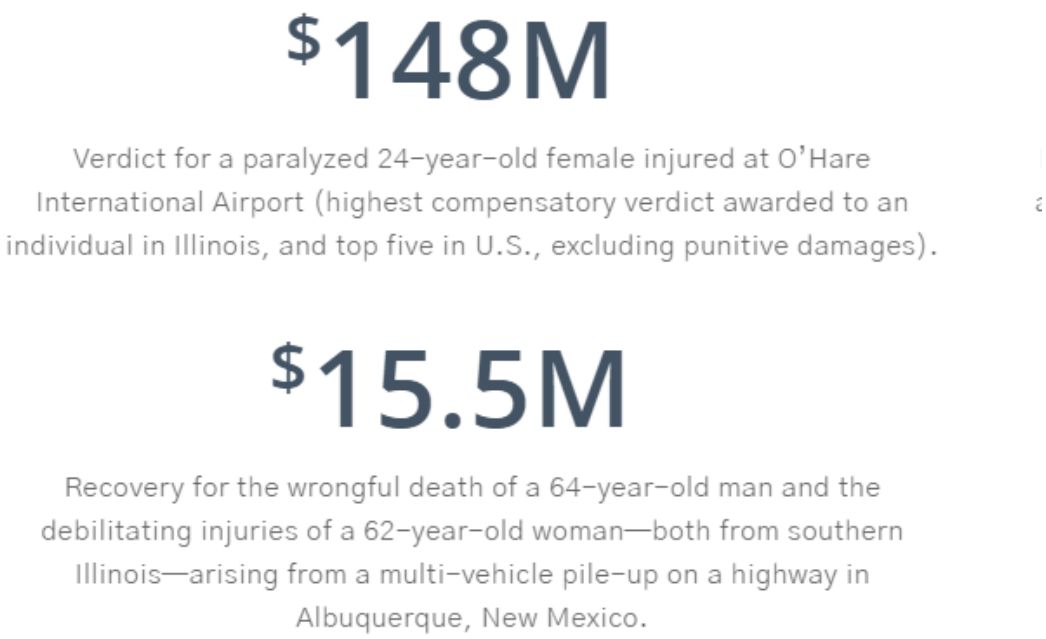
A legal victory in a case involving a mental health recipient could be publicized using "John Doe" and essentially redacted language to preserve confidentiality of mental health information. Even then, before using the generic moniker "John Doe," the lawyer should obtain the client's consent. 740 ILCS 110/5(d) (Lexis 2023); 740 ILCS 110/10(8) (Lexis 2023). This is important even if the client's identity and other identifying details were to be redacted, as "cumulative information" could still "make the possibility of recognition very high." *People ex rel. Dept. of Professional Regulation v. Manos*, 202 Ill. 2d 563, 577-578 (2002) (citation omitted). By offering to publicize the victory in a redacted manner, the attorney could explain the reasons for publicizing what happened (maybe: important for the public to know, opportunity to empower others with similar experiences, publicity for the law firm, etc.). The client could then make an informed decision to consent, to consent with limits on how the information would be presented, or not consent to preserve his confidentiality. Providing information to make an informed consent is a bedrock of the Mental Health and Developmental Disabilities Code. 405 ILCS 5/2-102(a-5) (Lexis 2023).

The Human Rights Authority of the Illinois Guardianship and Advocacy Commission publicizes reports of rights violations under the Mental Health and Developmental Disabilities Code in just this manner. *See* Reports, Human Rights Authority, 2008-present; https://gac.illinois.gov/hra/hra-reports.html. While the complaints resulting in the reports generally come from recipients of services, the reports themselves are respectful of confidentiality, and refer to the "complainant"

and do not provide identifying information. The current first Report on the Human Rights Authority's Reports website is No. 23-030-9007. https://gac.illinois.gov/content/dam/soi/en/web/gac/hra/hrareports/23-9007%20Report%20Final%20(Violation,%20Non-Public%20Response).pdf. Hospital staff administered emergency psychotropic medication on three occasions to the complainant. The Human Rights Authority, upon investigation, found justification in the complainant's records for the first instance of emergency psychotropic medication, but not the latter two. The Human Rights Authority substantiated a rights violation, made recommendations to the hospital, and published its report. *Id*. The many other reports on the website follow this pattern, respecting the complainants' confidentiality.

Similar to the Human Rights Authority's reports, decisions in civil mental health appeals are captioned to preserve recipients' confidentiality. Ill.Sup.Ct.R. 330(b) (as amended October 1, 2001). Cases are published using either the recipient's first name and last initial or initials only. *Id.*

Finally, law firms have found a way to publicize successes while also preserving clients' confidentiality. *See* the Kaveny + Kroll website, "client success," at https://kavenykroll.com/client-success/. This site refers to, for example:



This style of referring to "a 24-year-old woman," "a 64-year-old man," etc., is like the Human Rights Authority's use of "complainant" to preserve client confidentiality while still publicizing important details. The above are not mental health causes of action which actually require confidentiality, but are shown here to indicate understanding of a method of publicizing victories without identifying information.

One mental health cause of action appears on the attorney's website:

https://kavenykroll.com/elizabeth-kaveny/. Again, this illustrates a way to publicize the victory without compromising the client's confidentiality.

There are alternative means of publicizing victories that respect a client's confidentiality. But a client whose confidential mental health information is likely to be disseminated in a press release or part of an interview must give consent and have a say in how and to what extent that information should be presented.

CONCLUSION

It is disheartening at best and chilling at worst that John Doe had his confidentiality violated. The Confidentiality Act protects the mental health information of persons with mental illnesses, providing when that information can be disclosed with consent, and when that information can be disclosed without consent (that is, in narrow circumstances and for specific purposes). John Doe did not consent to release of his confidential mental health information here except for purpose of his medical malpractice action. This Court should affirm the appellate court's decision and uphold what this Court has called a "'strong statement by the General Assembly about the importance of keeping mental health records confidential.'" *Norskog v. Pfiel*, 197 Ill. 2d 60, 71-72 (2001).

This Court should also recognize that lawyers can publicize case victories while preserving client confidentiality.

Finally, reversing the appellate court would strike blows to the Confidentiality Act's protections, specifically, and to persons with mental illnesses generally. This Court has done so much of late to protect the rights of persons with

mental illnesses, from its Mental Health Summit Series (2020) to its Mental Health Task Force (ongoing), to its current "Civil Mental Health Proceedings" series of live educational webcasts (April – Sept. 2023). *Amici* ask that this Court continue in that vein, upholding the protections established by the General Assembly for persons with mental illnesses.

Respectfully submitted,
By: /s/*Laurel Spahn*
Legal Advocacy Service Staff Attorney
For *Amici Curiae*

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 Rule 341(d) cover, the rule 341(h)(1) 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.

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I, Laurel Spahn, an attorney, certify that on June 15, 2023, I caused this brief to be filed (with the motion for leave to file) by electronic means on the Clerk of the Illinois Supreme Court. through Odyssey eFileIL, an approved electronic service provider that then causes service upon the above-named individual through the above-listed email addresses. Out of an abundance of caution, I also served the brief upon the above-listed at their e-mail addresses on this day, June 15, 2023. Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements in this instrument are true and correct.

/s/ *Laurel Spahn*
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