ORIGINAL

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 RESPONSE BRIEF

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APPENDIX SEPARATE
POINTS AND AUTHORITIES

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NATURE OF THE CASE

Section 15 of the Mental Health and Developmental Disability Confidentiality Act ("MHDDCA" or "the Act"), 740 ILCS 110/1 *et. seq.* provides that, "Any person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief." This is the basis for Count I of Plaintiff's dismissed complaint. The factual basis for this lawsuit is the many statements made by Plaintiff's attorney "redisclosing" Plaintiff's mental health information she learned from various sources, including sources protected under the MHDDCA. Count I relies only upon disclosures revealed from information

protected by the MHDDCA, not attorney-client privileged communications or trial testimony.

Defendants argue because they do not share a therapeutic relationship with the Plaintiff, they are not capable of violating the Act, but if they could violate the Act, Plaintiff waived any confidentiality that existed when he testified in a public courtroom. This argument was not raised in the Motion to Dismiss. The trial court dismissed Count I of Plaintiff's MHDDCA count of the complaint pursuant to §2-615 of the Code of Civil Procedure. (735 ILCS 5/2-615). The appellate court reversed, finding the Act permitted a claim even though the Defendants were not a provider of mental health services, relying, in part, upon *Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733 (1986) and holding that *Doe* did not waive the Act's protections by testifying at trial.

STATEMENT OF FACTS

Plaintiff's original complaint was dismissed pursuant to §2-615 of the Code of Civil Procedure. Because all pled facts are deemed true, the lengthy recitation of facts regarding the underlying action that Plaintiff brought against medical providers is not relevant, or necessary, to address the issues before the court. Rather, it is the facts alleged in Plaintiff's complaint that are relevant.[1] The appellate court accurately summarizes Count I of the complaint as, "wrongly disclosing confidential information about Doe's mental health and diagnoses." It also accurately found Plaintiff alleged that Defendants did not have his informed consent to disclose the confidential information contained in the Law Bulletin, The Chicago Sun-Times, social media sites, the firm's website, and various other

[1] Plaintiff could go on at length to dispute Defendant's inaccurate accounting of the underlying facts, but procedurally it is not appropriate. Defendant's tactic to make Plaintiff look bad, so she looks good, was inappropriate in the days, weeks and months following trial, and is even more so now.

publications. Plaintiff's original complaint can be found at C27-81.

The Defendants do not deny the disclosed information was confidential information, as defined by the Act. Rather, the lack of a therapeutic relationship and that Plaintiff waived confidentiality by testifying are the twin pillars of the defense. Plaintiff did not allege in his complaint what he said during the trial. Trial transcripts were not mentioned in any publication as the source of the report. The only support for the published information was Elizabeth Kaveny. Plaintiff never gave any interviews. Plaintiff's complaint is the sole source of the facts for any issue to be decided.

STANDARD OF REVIEW

The standard of review for dismissal of a complaint under §2-615 of the Code of Civil Procedure is *de novo. Nyhammer v. Basta,* 2022 IL 128354, ¶ 23.

ARGUMENT

1. Sharing a "Therapeutic Relationship" is not a Required Element of the Act.

Defendants' primary argument is that they, as lawyers, are not subject to liability under the Act because only a therapist can violate the MHDDCA. The starting point for any analysis of this question is the plain language of the Act.

The primary objective in statutory construction is to ascertain and give effect to the intent of the legislature. The most reliable indicator of legislative intent is the language of the statute, which must be given its plain and ordinary meaning. *Haage v. Zavala,* 2021 IL 125918, ¶ 44. When the statutory language is plain and unambiguous, the court may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may it add provisions not found in the law. *McDonald v. Symphony Bronzeville Park LLC,* 2022 IL 126511, ¶ 18. In construing the statute, a court

may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of constructing the statute one way or another. *Id.*

The plain language of the MHDDCA authorizes a cause of action against those who disclose mental health records and communications. Section 15 of the Act provides, "Any person aggrieved by a violation of this Act may sue for damages, an injunction or other appropriate relief. Reasonable attorney's fees and costs may be awarded to the successful Plaintiff in any action under this Act." The Act does not define "aggrieved." *Garton v. Pfeifer*, 2019 Ill. App. (1st) 180872, ¶ 19, used the popularly understood dictionary definition: "suffering from an infringement or denial of legal rights" when it overturned a summary judgment ruling where the trial court, literally, stated "no harm, no foul."

Is Plaintiff an aggrieved person? The MHDDCA prohibits *redisclosure* of personal health information ("PHI"), except as part of the pending litigation.

> "Records or communications may be disclosed when such are relevant to a matter in issue and any action brought under this Act and proceedings preliminary thereto, provided that any information so disclosed shall not be utilized for any other purpose nor be *redisclosed* except in connection with such action or preliminary proceedings." (Emphasis added)
>
> 740 ILCS 110/10(a)(8).

Section 10, "Disclosure in civil, criminal and other proceedings" explains when and how disclosure and redisclosure may take place. The Act frequently cites to regulations defining HIPAA. As defined by 45 CFR 106.103 (incorporated into the MHDDCA by way of Section 2 definitions), "disclosure means the release, transfer, provision or access to, or divulging in any manner of information outside the entity holding the information." Pursuant to the MHDDCA, "confidential communication" or "communication" include all

forms of transmission of an individual's PHI and is not limited to medical records. See 740 ILCS 110/2.

Section 5(d) of the Act prohibits redisclosure without consent stating as follows:

> "(d) 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).

Directly stated, Defendants and all of the lawyers who received information deemed "confidential communication" pursuant to the Act, were permitted to use Plaintiff's mental health records and communications for purposes of the *Advocate* litigation because Plaintiff's mental health was at issue. The MHDDCA prohibited the lawyers from redisclosing what they knew, except in connection with the *Advocate* litigation. Post-verdict boasting to the press and social media is not, in the words of Section 10 (a)(8) of the Act, "In connection with the proceeding."

2. Defendants' Interpretation Of The Act Cannot Be Reconciled With Existing Case Law Finding Lawyers And Others Liable Under The Act.

Defendants' argument that they are excluded from the Act's reach is not supported by existing case law. Mental health care recipients suing attorneys and litigants under the Act is not new or novel. Permissible defendants are not limited to those who provide mental health services and wrongfully disclose a patient's records. In *Doe v. Williams McCarthy, LLP*, 2017 Ill. App. (2nd) 160860, a mental health patient successfully brought suit under the MHDDCA against lawyers and litigants to a prior trust lawsuit for disclosing to the public facts pertinent to plaintiff's mental health status and treatment. *Id.* at ¶ 4. During the trust litigation, an attorney issued subpoenas for records to therapists and mental health

facilities without following the procedures set forth in the Act. After receiving the records, the attorney disclosed them to his client ("redisclosure" under the Act), who was not the patient. During a deposition the client made an outburst and yelled that Plaintiff was mentally ill. *Id.* at ¶ 8. In holding that all defendants, including attorneys and litigants to the trust lawsuit, were subject to the Act, the court stated as follows:

> "The Act itself plainly creates a private right of action. Section 15 of the Act states, "any person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief." 740 ILCS 110/15 (West 2016). Section 3(a) states that "all records and communications shall be confidential and shall not be disclosed except as provided in this Act." 740 ILCS 110/3(a) (West 2016). Furthermore, in accordance with Section 10, the Act applies "in any civil, criminal or administrative, or legislative proceeding." 740 ILCS 110/10 (West 2016). Thus, the plain language of various provisions of the Act indicate that the legislature intended it to control all releases of the material it makes confidential in all types of proceedings and that a safeguard against improper disclosure is a civil action."
> *Id.* at ¶ 25.

The *Doe* court relied upon this court's often quoted pronouncement that, "the Act constitutes a 'strong statement' by the general assembly about the importance of keeping mental health records confidential". *Id.* at ¶ 25. The defendant in *Doe*, an attorney, was not in a therapeutic relationship with the plaintiff.

The appellate court in this case relied upon *Johnson v. Lincoln Christian College,* 150 Ill. App. 3d 733 (4th Dist. 1986), finding liability against a college dean who redisclosed therapeutic discussions to Johnson's mother. The dean never offered any therapy or held a degree that would suggest he could have a therapeutic relationship with Plaintiff. Yet, the court found the dean's actions violated the Act for disclosing information the student provided to the therapist. (The therapist was separately found subject to the Act

for disclosure, not redisclosure.)

The college refused to grant Johnson his diploma based on a charge that he might be homosexual, a charge made by a fellow student. It told Johnson that he would graduate only if he sought counseling. Johnson, fearing that he would not graduate unless he complied with the demand, did as he was instructed, and in the process, revealed many personal facts, some of which he never told anyone else. The counselor reported to the dean that Johnson had not changed and was not progressing. Within a day, the college scheduled a hearing at which Johnson would be required to defend himself against the rumor he was homosexual. The dean told Johnson he would be dismissed because of his alleged homosexuality, and that the reason for his dismissal would be stamped across his transcript. Afraid that the accusation of homosexuality being imprinted on his transcript would destroy his career goal, Johnson withdrew from the college. After the hearing, held in Johnson's absence, the dean called Johnson's mother and told her that the school was dismissing Johnson because he was homosexual. Count III of Johnson's complaint alleged violations of the Act for redisclosing information learned from the therapist to faculty members, students, and members of Johnson's family.

In order to give effect to the intent of the legislature by considering, "the evil to be remedied and the object to be attained", the *Johnson* court found the legislature's general intent is to prevent any unauthorized disclosure of confidential information. *Id.* at 744. Its broad holding is fully applicable to the case at bar.

> "Although the wording in section 5(d) of the Confidentiality Act appears to have been imperfectly drafted, we believe that the legislature intended to proscribe the type of redisclosure which occurred in the instant case, regardless of whether consent to the initial disclosure has been given. Consequently, we conclude that Count III of Johnson's

> complaint adequately alleges a cause of action for violation of the Confidentiality Act by LCC, and the Circuit Court erred by dismissing Count III of Johnson's complaint." *Id.*

If redisclosure is prohibited under Section 5(d) (health information obtained by consent), then redisclosure is also prohibited under Section 10(a)(8) (health information obtained by subpoena). Defendants received protected information from at least those sources. Plaintiff did not allege that his attorney-client privileged communications were the sole source of Defendants' disclosure. The language of the Act and existing case law fully support a cause of action against lawyers who violate this comprehensive statute.

In summary, *Quigg v. Walgreen Co.*, 388 Ill. App. 3d 696 (2nd Dist. 2009), inapplicability is supported by the fact that individuals, lawyers representing individuals, a college dean, hospitals, and many others have been subject to liability for damages under the Act. See *Garton v. Pfeifer*, 2019 Ill. App. (1st) 180872. (Trial court's grant of summary judgment reversed as to ex-spouse and lawyer for failure to comply with MHDDCA.); *Doe v. Williams McCarthy, LLP*, 2017 Ill. App. (2d) 160860 (trust contest litigant yelling Plaintiff is mentally ill during a deposition.); and *Johnson* (college dean liable for redisclosure of information revealed during counseling sessions.). Defendants are within the category of defendants who have been successfully sued for violations of the Act. The appellate court was correct in its holding, regardless of how it arrived at its conclusion.

3. The Amended Version Of The MHDDCA Makes Clear a Therapeutic Relationship Is Not Required To Establish Liability.

The appellate court found it unnecessary to decide whether the amended version of the Act applied to the facts, finding that the prior version was sufficient. Plaintiff agrees; but provides this court with an alternative basis to sustain the appellate court's decision.

The amended version of the Act makes crystal clear that a "therapeutic relationship" is not required for liability. The amended version of the Act directly contemplates liability beyond mental health professionals.

"Redisclosure" occurs when someone other than a therapist has lawfully (or unlawfully) received records and discloses what is contained within those records or wrongfully shares them. If *Quigg* was a correct interpretation of the Act, then the 2015 amendment to section 3(a) expanding the Act explicitly eliminating the need for a therapeutic relationship should control a resolution by this court.

Quigg examines whether a pharmacy can be held liable under the Act for allowing its records to be obtained by a disgruntled ex-husband who tried to use them in an acrimonious post-decree divorce litigation. By the time of the appeal, the ex-husband (and his then wife) were no longer a party to the case. Walgreens defended the matter arguing that it was not a therapist under the Act and thus not subject to liability, directing the court instead to the confidentiality provisions of the Pharmacy Practice Act, 225 ILCS 85/1 *et seq.*, *Id.* at 702. The *Quigg* court agreed with Walgreens' position.

In the case at bar, Kaveny's communications disclosed information she learned from records, depositions and the Plaintiff himself. There is no issue that each medical professional shared a therapeutic relationship with Plaintiff. Thus, the issue in this case is whether the Defendants' disclosure mental health therapeutic information is subject to the Act.

In 2015, the MHDDCA was amended to make unambiguously clear that it applies to everyone. Prior to 2016, Section 3(a) of the Act only stated, "all records and communications shall not be disclosed except as provided by this Act." After *Quigg*, the

following was added:

> "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." (Emphasis added).
>
> 740 ILCS 110/3(a)

Legislative history is nonexistent for this amendment which unanimously passed the legislature. It is difficult to conceive of a reason for this change without connecting it to *Quigg's* holding requiring a therapeutic relationship. *Quigg* cannot be reconciled with the amended statute. Defendants do not even try. Mark Heyrman, a long time professor and scholar of mental health law explains:

> "[S]everal Illinois court opinions have held that the Confidentiality Act does not protect mental health records and communications unless they are made in the course of a 'therapeutic relationship.' *Johnson v. Weil,* 241 Ill. 2d 169, 349 Ill. Dec. 135 (2011); *Quigg v. Walgreen*, 388 Ill. App 3d 696, 328 Ill. Dec. 759 (2009). Unfortunately, these decisions appear to leave unprotected many important communications, including those made in the course of obtaining a preliminary evaluation, a referral for treatment or services provided to persons with serious mental illnesses by ancillary personnel, such as pharmacists. This Act is intended to ensure that these important communications are protected."

Mark J. Heyman, *Review of Illinois mental health legislation* - 2015 (Vol 2. No.2, March 2016), available at

https://www.isba.org/sections/mentalhealth/newsletter/2016/03/reviewillinoismentalhealthlegislati

Thus, *Quigg's* holding (that the appellate court found unsupported by authority) requiring a therapeutic relationship does not apply if Section 3(a) of the Act is applied to the case at bar. In this case there is no question the mental health information improperly disclosed

was generated in a therapeutic relationship.

This language was approved by the legislature in July of 2015 (P.A. 86-1417), and effective January 1, 2016. "Protected from disclosure regardless of whether the communications are made or created in the course of a therapeutic relationship" can only be read to broaden the statute. The phrase "therapeutic relationship" does not otherwise appear within the statute. Yet, it was the central holding of *Quigg*. ("Accordingly, the Act subjects to liability only a therapist or an agency that engages in a therapeutic relationship with a recipient of mental health or developmental disability services. Because Walgreens acted purely as a pharmacist, it was *not* engaged in a therapeutic relationship with the plaintiff.") *Id.* at 299. The expanded and broadened version of Section 3(a), legislatively overturns the holding of *Quigg*. Moreover, *Quigg* only addressed disclosure. As was the issue in this case, it did not address redisclosure of clearly therapeutic mental health information.

Amendments to a statute are an appropriate source for discerning legislative intent. *Markview Motors v. Colonial Ins. Co. of California*, 175 Ill. 2d 460, 469 (1997). Where a statute is ambiguous and the legislature amends it soon after a controversy has arisen as to its meaning, the amendment reads as a legislative interpretation of the original law rather than an attempt to change the law. *Id.* (citing *Church v. State of Illinois,* 164 Ill. 2d 153, 163 (1995)). Conversely, where the legislature chooses not to amend a statute after its judicial construction, it will be presumed that the legislature acquiesced in the court's statement of legislative intent. *Wakulich v. Mraz,* 203 Ill. 2nd 223, 233 (2003). Changes in wording and phrasing will be presumed to have been deliberately made. *In re Marriage of Sutton,* 136 Ill. 2nd 441, 447. If words used in a prior statute to express a certain meaning

are omitted, it will be presumed that a change of meaning was intended. *Id.*

Where the legislature has made a material change in a statute, the presumption is that the amendment was intended to change the law. *Department of Transportation v. Eastside Development, LLC.*, 384 Ill. App. 3d 295 (3rd Dist. 2008). When a statute is amended, it may be presumed that the amendment was made for some purpose and the statute should be construed to give effect to the intended purpose. *Wells Fargo v. Maka,* 2017 Ill. App. (1st) 153010. When the legislature materially changes a statute, that raises the presumption that the change is an alteration and not a clarification of the original statute. *City of Bloomington v. Illinois Labor Relations Board,* 373 Ill. App. 3d 599 (4th Dist. 2007).

Amendments to the MHDDCA are retroactive. See, *Wisinewski v. Kownaki,* 221 Ill. 2d 453 (2006).

Given the risk that *Quigg* would deny a remedy to those aggrieved, the legislature expanded the Act explicitly making clear that a therapeutic relationship is not required under the Act. This Court should look to the plain language of Sections 5(d) and 10(a)(8) of the Act and cases permitting a cause of action to go forward against those who redisclose mental health information who are not therapists.

4. Defendants' Waiver Argument Is Not Supported By The Record Or Litigation Practice.

Defendants' alternative argument is that Plaintiff waived any remedy afforded to him under the Act when he testified in a public courtroom. Yet, Plaintiff has not alleged the sole source of Defendants receiving confidential information was his trial testimony. Moreover, this argument was not raised in his Motion to Dismiss. C.96-240

Any attorney representing Plaintiff in the underlying action would have learned

information from at least three different sources: 1) the Plaintiff himself, 2) medical records, including records that Plaintiff alleged were protected under the MHDDCA, 3) deposition testimony of Plaintiff's treating physicians and health care providers. Plaintiff did not allege in his complaint that the sole source of the wrongfully disclosed information came from his trial testimony. No reasonable reading of the Plaintiff's complaint would suggest otherwise. Accordingly, Defendants' argument that the information that Kaveny disclosed originated in trial testimony is misplaced and unsupported by the allegations of the dismissed complaint. Assuming Defendants' waiver/forfeiture argument had merit, the proper way to have presented it would have been to attach to its 2-619 motion, the entirety of the trial transcript and show that each of Kaveny's statements were statements made by Plaintiff during trial. Defendants never sought to perfect its argument in this way.

Plaintiff specifically alleged that Kaveny did not have informed consent to disclose the confidential information revealed to the *Law Bulletin* (¶44), *The Chicago Sun-Times* (¶51), Patch.com (¶54), and Mysuburbanlife.com (¶57). The complaint alleged that Defendants went well beyond simply confirming the outcome of the underlying litigation, and instead, provided highly personal medical and mental health care information, including Plaintiff's treatment and diagnosis. ¶77. Plaintiff alleged that protected information was obtained through a HIPAA Qualified Protective Order (QPO) requiring anyone who received the information to comply with the Code of Federal Regulations and the QPO entered in the underlying case. Section 5(d) of the Act explicitly prohibits a person from redisclosing information without consent. Defendants do not argue consent because none existed. Waiver, Defendants' argument, is inconsistent with a consent argument.

Defendants' reliance on *Novak v. Rathnam,* 106 Il. 2d 478 (1985) to support its

waiver argument is misplaced for factual and legal reasons. First, as stated above, the Defendants received information from various sources including mental health records that they redisclosed without consent. Second, the entire purpose of the Act is abandoned by such a finding. An aggrieved person would be required to choose between the important purposes this court has explained or being trampled over by another - - here, Plaintiff's own lawyer. *Novak* involved a criminal defendant claiming insanity as a defense. This court looked to sister states that previously confronted the issue. It held that a criminal defendant cannot use his past mental health treatment as a sword to fight allegations of criminal misconduct and then shield that testimony from others seeking civil liability.

Here, the defense turns *Novak's* reasoning on its head. Plaintiff's own lawyer, who received confidential and protected mental health information, used the information for her own gain. (Plaintiff certainly did not plead that the Defendants' disclosure helped him in any way.) The Defendants now seek to shield their wrongful action by aligning themselves with a mentally ill criminal defendant. There is no comparison between the cases.

Novak held a criminal defendant cannot bolster an insanity defense with mental health information and later shield the same information in a civil proceeding. Here, the Defendants argue that Plaintiff's pursuit of a civil remedy that required carefully protected mental health records to be disclosed pursuant to a QPO permitted, literally, worldwide disclosure by an attorney subject to the QPO. There simply is no similarity to the positions, relationship, or protected principals. Defendants stretch *Novak's* language well beyond what was, or could have been, contemplated.

5. The Act Repudiates Defendants' Waiver Argument.

The Act addresses waiver, specifically stating:

"Any agreement purporting to waive any of the provisions of this Act is void."

740 ICLS 110/14

Defendants do not rely upon an "agreement" to support its waiver argument, perhaps knowing that such an agreement under the circumstances would be void *ab initio* or contrary to contract principles of waiver. (Can a patient receiving mental health treatment "knowingly" waive rights protected by that very treatment?) Defendants' argument, though couched as waiver, connotes forfeiture. Defendants argue, "Plaintiff's voluntary public disclosure of his mental health information took away its confidentiality." See Argument II. This argument offends the purpose of the Act. Directly applied, Defendants propose that one whose rights are violated must choose between allowing the public to know about explicitly protected mental health treatment or seeking redress for the wrong. Nothing within the Act, or *Novak*, creates a Hobson's choice that would cause further mental distress. Real word application demonstrates the inadvisability of such a tenet. Applied here, Plaintiff must choose between the community valuing his rights at $4.2 million or allowing his protected mental health to be widely publicized. Every word of the Act, and this court's broad and meaningful enforcement of it, repudiates this result.

This court has already made clear why such a choice as offered by Defendants' argument is unacceptable. As stated in *Norskog:*

> "Moreover, in each instance where disclosure is allowed, the legislature has been careful to restrict disclosure to that which is necessary to accomplish a particular purpose." *Norskog v. Pfiel,* 197 Ill. 2d 60, 70 (2001).
>
> "Exceptions to the Act are narrowly crafted. *Id.,* citing *Pritchard v. Swedish American Hosp.,* 191 Ill. App. 3d 388, 402 (1989). When viewed as a whole, the Act constitutes a "strong statement" by the General Assembly about the importance of keeping mental health records confidential."

Norskog at 72.

6. Abolishing Confidentiality For Those Patients Who Litigate Disputes Limits The Rights Of Mental Health Patients And May Cause Further Injury.

Why Defendants focus on trial testimony is not clear. It would be a very strange rule to declare a Plaintiff waives or forfeits the protections and remedies of the Act at trial, but not before. Accordingly, Plaintiff will further address Defendants' argument as if it were applying to all phases of the litigation. No court has held that disclosing ones name in a complaint eviscerates the MHDDCA. If accepted, Defendants' argument eliminates, or severely limits the rights of patients seeking mental health treatment. Should they choose to redress a wrong, their action opens the doors for the public to know all of their most private information. This directly contradicts what this court and many appellate courts have already decided. The privilege of confidentiality encourages complete candor between patient and therapist and provides motivation for persons who need treatment to seek it. *Novak* at 483. The recent history of this court is to recognize and enforce privacy rights, even when doing so may be costly. See *Cothton v. White Castle Sys.*, 2023 IL 128004.

7. Plaintiff's Very Limited Waiver Is Explicitly Spelled Out in The Qualified Protective Order Entered In the *Advocate* Litigation. It Does Not Protect Defendants' Disclosure.

The QPO in the underlying *Advocate* litigation provides:

> "4. The parties and their attorneys shall be permitted to use the PHI of [JOHN DOE] in any manner that is reasonably connected with the above-captioned litigation. This includes, but is not limited to, disclosure to the parties, their attorneys of record, the attorneys' firms (i.e., attorneys, support staff, disclosure to the parties, their attorneys of record, the attorneys' firms personnel, court reporters, copy

> services, trial consultants, jurors, venire members, and other entities involved in the litigation process."
>
> C420.

Haage holds a non-covered entity acquiring PHI from a covered entity ("redisclosure") is subject to all HIPAA requirements. Thus, one who wrongfully rediscloses PHI is subject to liability under HIPAA. Plaintiff acknowledges HIPAA and the MHDDCA have different enforcement procedures, potential parties, and damages. Yet, interlocking definitions demand a uniform application. The differing enforcement mechanisms (private cause of action versus administrative fines) do not alter the analysis that this action is permissible under the MHDDCA. Defendants' violation of the QPO regarding Plaintiff's mental health information protected by the MHDDCA is an actionable violation. Alternatively stated, a HIPAA violation involving the unauthorized redisclosure of mental health information is a violation of the MHDDCA.

According to *Haage,* the standard QPO allows lawyers to disclose PHI only for the pending litigation. ("Relevant to these appeals, the HIPAA qualified protective orders proposed by the *Surlocks* and *Haage* would (1) ... and (2) prohibit the parties, their attorneys, and their insurers from using or disclosing PHI for any purpose other than the litigation at issue (45 CFR § 164.512(e)(1)(v)(A) (2018).."). Inherent in the term "litigation" is a public trial. Any other interpretation would defeat the privacy protections of HIPAA and the MHDDCA. Kavney's public communication of Plaintiff's mental health information started within days of the verdict. The case was not over. Post-trial motions and briefs where thereafter filed.

The waiver in the QPO was expressly limited to the *Advocate* litigation. Specifically, the order states:

> "2. A party who has disclosed PHI and agreed to the entry of this order explicitly waives the right to privacy over the disclosed materials but only to the extent provided by this court order.
>
> 4. The parties and their attorneys shall be permitted to use the PHI of [JOHN DOE] in any manner that is reasonably connected with the above-captioned litigation."
>
> C420.

Thus, Plaintiff only waived his right of privacy regarding his mental health information for purposes of the underlying *Advocate* litigation. Defendants' argument is that testifying at trial creates a waiver is not supported by the actual order entered in this case or this court's finding that the legislature has narrowly, and carefully, crafted exceptions to the Act.

> "The Confidentiality Act is carefully drawn to maintain confidentiality of mental health records except in the specific circumstances explicitly enumerated." *Sassali, v. Rockford Memorial Hospital,* 396 Ill. App. 3d 80, 84-85 (1998). In each instance where disclosure is allowed under the Act, the legislature has been careful to restrict disclosure to that which is necessary to accomplish a particular purpose. Exceptions to the Act are narrowly crafted. *Pritchard v. Swedish-American Hospital*, 191 Ill. App. 3d 388, 402 (1989)."
>
> *Norskog v. Pfiel,* 197 Ill. 2d 60, 71.

Norskog explained the importance of broad enforcement of the MHDDCA.

> The statutory scheme regulating the disclosure of mental health information is appropriately rigorous. As the United States Supreme Court noted:
>
> "Effective psychotherapy depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."

> *Jaffee v. Redmond,* 518 U.S. 1, 10, 116 S. Ct. 1923, 1928, 135 L. Ed. 2d 337, 345 (1996).
>
> "All 50 states, the District of Columbia and the federal courts recognize a psychiatrist-patient privilege, either by statute or common law. *Jaffee,* 518 U.S. at 12, 116 S. Ct. at 1929, 135 L. Ed. 2d at 346. Clearly, this reflects an understanding that people will increasingly avail themselves of needed treatment if they are confident that their privacy will be protected. It is in the public interest, then, that we zealously guard against erosion of the confidentiality privilege. See *Jaffee,* 518 U.S. at 11, 116 S. Ct. at 1929, 135 L. Ed. 2d at 345–46 ("The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance"); *Doe v. McKay,* 183 Ill. 2d 272, 233 Ill. Dec. 310, 700 N.E.2d 1018 (1998). Consequently, anyone seeking the nonconsensual release of mental health information faces a formidable challenge and must show that disclosure is authorized by the Act."
>
> *Norskog* at 71-72.

Legislating confidentiality without an ability to enforce the mandate is meaningless. Protecting the privacy of citizens availing themselves of mental health services has not lessened in importance since the MHDDCA was enacted. The underlying QPO references the MHDDCA. Defendants' violation of HIPAA and the *Advocate* QPO is a violation of sections 5(d) and 10(a)(8) of the MHDDCA. Absent such finding, the comprehensive and expansive Act fails as little more than a weak aspiration. Yet the Act in its words, and this court's past interpretation, is anything but a toothless suggestion to try and keep sensitive highly personal information contained. Waiver, according to Section 14 of the Act is limited and narrow, if/when it is even available. Plaintiff's complaint does not allege that he was advised by Defendants that he was waiving privacy rights which courts, legislators, regulators, and citizens generally, have long considered sacrosanct. Defendants' argument that he waived his rights by going to trial is far too broad a reading of *Novak* and wholly inconsistent with the body of law established over decades

interpreting the MHDDCA.

8. Defendants Did Not Raise The Issue Of Waiver In Its Motion To Dismiss. Thus, They Have Forfeited That Argument.

The Trial Court raised the issue of waiver during the Motion to Dismiss hearing. See Transcript at RC531-561. However, the Defendants never raised this issue in its §2-619.1 motion. See RC96-240. The only argument raised in Defendants' Motion to Dismiss the MHDDCA count is based on *Quigg*. Thus, Defendants should be limited to arguing that they did not share a therapeutic relationship with Plaintiff. Questions not raised in the Trial Court may not be raised for the first time on appeal. *Dopp v. Village of Northbrook*, 257 Ill. App. 3d 820, 825 (1st Dist. 1993).

9. First Amendment Considerations Do Not Displace the MHDDCA.

The Amicus Brief in support of Defendants' position argues that lawyers such as Kaveny may speak without recourse about a client's protected mental health records. It also, erroneously, focuses upon trial testimony. As pointed out throughout this brief, Plaintiff's complaint was dismissed on a §2-619.1 Motion to Dismiss, with §2-615 being the focus of Count I. Defendants, nor amicus counsel, explain why the waiver should attach to trial testimony, but not the filing of a complaint. If it is true that a Plaintiff testifying about events, emotions, and issues that are also memorialized within mental health records exchanged during a lawsuit, then there does not seem to be any reason why the waiver only attaches to trial testimony and not before. This scheme is unworkable because it all but eviscerates the MHDDCA.

If the waiver/forfeiture at trial rule is accepted, any Defendant being sued under the MHDDCA could, and would, leverage that fact in order to gain a favorable settlement. Few aggrieved persons (as defined by the Act) would proceed to suit if they knew that their

most personal mental health records could be exposed to the world by a defendant that had already shown no respect for privacy. Any lawyer defending such a suit would be bound to advise a client of this strategic defense. It is easy to see how the MHDDCA would be little more than an unenforceable guideline. Of course, the MHDDCA is anything but.

Restrictions on free speech for lawyers are almost too numerous to list. Many rules of professional conduct prohibit lawyers from revealing truthful information about their clients, and for that matter, adversaries of their client. The QPO entered in this litigation, and nearly every personal injury lawsuit in this state certainly restricts lawyers' ability to speak. HIPPA is replete with restrictions. ABA Model Rule 3.6 and its corollary under the Illinois Rules of Professional Conduct prohibit a lawyer involved in a case from making extrajudicial statements that the lawyer knows, or reasonably should know, will be disseminated by means of public communication and would pose a serious and eminent threat to the fairness of adjudicative proceeding. If this court can protect the sanctity of legal proceedings, should not the legislature be able to protect the sanctity of an individual?

Free speech is not unlimited, particularly in a lawsuit. In *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984), a religious organization, its spiritual leader, and members of the church brought a defamation action against various newspapers. The newspapers brought motions to compel discovery, which motions were granted. However, protective orders were issued covering the information relating to donations to the group. The parties appealed. In *Seattle Times*, the United States Supreme Court held that such orders are permissible when a protective order is entered on a showing of good cause, it is limited to the context of pretrial discovery, and does not restrict dissemination of the information if it is gained from other sources in addition to discovery. In other words, protective orders do not offend the First

Amendment. The Court stated that a litigant does not have an unrestrained right to disseminate information that has been obtained through pretrial discovery. The Court observed, "freedom of speech...does not comprehend the right to speak on any subject at any time." *Seattle Times* at 31.

Other rules of professional conduct restricting lawyers' free speech include Rule 1.9 (duties to former clients) that do not allow a lawyer to disadvantage a former client with information that has been revealed. Rule 1.6 (confidentiality) is as sacrosanct a right as any client could ever have and restricts a lawyer's ability to speak. Rule 3.4 (fairness to opposing party and counsel) likewise limits a lawyer's ability to speak.

In summary, lawyers are prohibited from speaking on many subjects, under many circumstances. Here, prohibiting a lawyer, or anyone else, from disclosing confidential mental health information is sound public policy that does not offend the First Amendment.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the 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 under the Mental Health and Developmental Disability Confidentiality 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 certificate of service, and those matters to be appended to the brief under Rule 315(c)(6) is 6,333 words.

Respectfully submitted,

/s/ Thomas M. Paris

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

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PLEASE TAKE NOTICE that on June 15, 2023, I filed APPELLEE'S RESPONSE BRIEF, a copy of which is attached hereto and herewith served upon you via electronic mail.

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