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Medical Malpractice

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Redisclosure of Mental Health Records Can Create Liability Under the Illinois Mental Health Act

The Illinois Mental Health and Developmental Disabilities Confidentiality Act (the "Act") limits the disclosure of protected health information relating to mental health services. 740 ILCS 110/1, *et seq.* ("the Act"). While attorneys are accustomed to exercising caution when managing a plaintiff's medical records pursuant to the federal HIPAA statute, it is important to also be mindful of the additional requirements protecting mental health records under the Act. The purpose of the Act is to protect the confidentiality of mental health records. *In Re Marriage of Peters-Farrell*, 345 Ill.App.3d 603, 608. (1st Dist. 2003). The Act also provides certain exceptions to the prohibition on disclosure of information. 740 ILCS 110/10. Unauthorized persons who disclose mental health records may be held liable for such communications under the Act. 740 ILCS 110/15. The holding in *Doe v. Burke Wise Morrissey & Kaveny, LLC* provides some guidance on the Act's application, as well as potential exceptions to its requirements. *Doe v. Burke Wise Morrissey & Kaveny, LLC*, 2022 IL App (1st) 211283. The *Doe* court found that a party who discloses information about mental health services does not need to be in a therapeutic relationship with the patient in order to violate the Act, and a general waiver authorizing the disclosure of medical records does not necessarily include mental health records.

In *Doe*, the plaintiff asserted negligence against a hospital and various individual healthcare providers after a suicide attempt while a patient in the emergency room. *Doe*, 2022 IL App (1st) at ¶ 3. During the underlying litigation, the hospital sought a HIPAA qualified protective order to gain access to the plaintiff's protected health information. *Id*. The jury found in favor of the plaintiff and awarded over $4 million in damages. *Id.* After trial, the law firm that represented the plaintiff in the underlying suit issued a press release regarding the verdict, and one of plaintiff's lawyers provided statements for an article to be published in the Chicago Daily Law Bulletin ("Law Bulletin") about the outcome. *Id*. Both the press release and the article used the plaintiff's name, included information about his diagnosis and about the incident. *Id.* The plaintiff then filed a lawsuit against the law firm and two of its attorneys asserting that the disclosure of this information was a violation of the Act. *Id.* ¶ 4.

At trial, the defendants filed a motion to dismiss Count 1 of the complaint, pursuant to 735 ILCS 5/2-615, arguing that the plaintiff failed to state a cause of action because a therapeutic relationship must exist between the parties for the Act to apply. *Id*. ¶ 5. The defendants also argued that the plaintiff waived any claim to confidentiality of his records by putting his medical condition at issue in the underlying case, and, therefore, the information within the press release was public. *Id*. The trial court granted the motion to dismiss, stating that a therapeutic relationship was required for the Act to apply, and none existed between the parties. *Id.* ¶ 7. The trial court also commented that "this was following a public trial and trials are public". *Id*. The plaintiff filed an amended complaint that included new allegations, but the court did not allow the amendment because the plaintiff did not obtain leave to replead. *Id.* ¶ 8. Two years later, the plaintiff filed a motion to reconsider the orders that dismissed Count 1, arguing that the defendants violated the HIPAA qualified protective order that was in place in the underlying case, which in turn violated the Act. *Id.* ¶ 9. The plaintiff also noted that the Act was amended in 2015 to clarify that a therapeutic relationship is not an element of a cause of action. *Id*. The

trial court denied the motion to reconsider and dismissed the claim brought under the Act, with prejudice. *Id*. The plaintiff then moved to voluntarily dismiss the remaining count of his complaint, which was granted, and then appealed the trial court's order granting dismissal of the claims brought under the Act. *Id.* ¶ 10.

On appeal, the plaintiff argued that he established a cause of action because the Act prohibits the release of any information identifying someone as the recipient of mental health services. *Id.* ¶ 12. The plaintiff further asserted that the redisclosure of this information violated sections 5(d) and 10(a)(8) of the Act. *Id.* ¶ 16; 740 ILCS 110/5(d) and 110/10(a)(8). Specifically, the plaintiff argued that the information disclosed by the defendants after trial was protected by the Act because it was not only received from Doe himself, but was also obtained from his medical records and the depositions of his treating physicians. *Id.* ¶ 15. He also argued that while the defendants were allowed to use his records in the litigation because his mental health was at issue, the Act prohibited the defendants from disclosing the information for purposes other than the litigation. *Id*. Doe further argued that defendants violated the Act by disclosing information protected by HIPAA, and, finally, Doe argued that the Act does not require a therapeutic relationship to establish liability. *Id*. The appellate court found that a therapeutic relationship is not required for a party to violate the Act, that the litigation waiver did not apply, and, therefore, the plaintiff established a cause of action under § 615. The trial court's ruling was reversed, and the case was remanded. *Id.* ¶ 22.

In its ruling, the court confirmed that a primary purpose of the Act is to protect the confidentiality of records and communications of those who receive mental health services and that the Act generally prohibits the disclosure of such information, stating "all records and communications shall be confidential and shall not be disclosed except as provided in this Act". *Doe*, 2022 IL App (1st) 211283 at ¶ 14. The Act defines a "record" as "any record kept by a therapist or by an agency in the course of providing mental health or developmental disabilities service to a recipient concerning the recipient and the services provided". *Id.* ¶ 14, *citing* 740 ILCS 110/2 (West 2014). The Act defines a confidential communication as "any communication made by a recipient or other person to a therapist or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient". *Id*. The Act provides a remedy for violations, stating "(a)ny person aggrieved by a violation of the Act may sue for damages, an injunction, or other appropriate relief." *Id. citing* 740 ILCS 110/15.

In finding that the plaintiff sufficiently alleged a cause of action against defendants under the Act, the appellate court found that the information disclosed by the defendants in the press release and the Law Bulletin qualified as records and communications under the Act, and that in their role as Doe's attorneys in the underlying suit, they would have received information about his condition and mental health history. *Id.* ¶ 15. The court stated that the defendants are not relieved of liability under the Act merely because they did not provide any mental health services to the plaintiff. *Id*. The court pointed to *Johnson v. Lincoln Christian College* (1986) to support the contention that claims are allowed under the Act even when the defendant was not a provider of mental health services. *Id., citing Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733, 743-44. In *Johnson*, it was determined that a cause of action under the Act was established by a student against a college when the school allegedly redisclosed the student's mental health information to various individuals. *Id.* ¶ 15. The defendants supported their argument that a therapeutic relationship is required to establish liability under the Act with *Novak v. Rathnam*, 106 Ill. 2d 478 (1985). In *Novak*, a psychiatrist provided opinions on a criminal defendant's mental health in support of the insanity defense at trial. The court found that because of the testimony in support of his defense, the criminal defendant waived the confidentiality of that information, and it could be introduced at a subsequent proceeding. *Id.* ¶ 17. The *Doe* appellate court distinguished *Novak* because in that case, there were no limits placed on the psychiatrist's testimony at trial. In the instant case, there was a qualified HIPAA protective order in place. The court stated that these orders typically prohibit parties from disclosing the protected information outside of the litigation. The court did not comment on whether the *Doe* defendants violated HIPAA, or whether a HIPAA violation

would violate the Act. Of interest, the court did not cite any language from the specific protective order that was in place in the underlying case and it is unclear whether the plaintiff relied on the order in its arguments.

In addition to *Novak*, the defendants relied on *Quigg v. Walgreen*, 388 Ill. App. 3d 696 (2nd Dist. 2009). There, the plaintiff sued a pharmacy for disclosing her prescription profile to her ex-husband. *Id.* ¶ 18. The court there found that the pharmacy could not be liable under the Act because it was not in a therapeutic relationship with the woman, and that only a therapist or agency in a therapeutic relationship with the recipient of the mental health services could be held liable under the Act. *Id*. The *Doe* court distinguished *Quigg*, finding that the records and communications at issue in the instant case were "created in the course of addressing Doe's mental health in the presence of physicians and nurses, who were 'therapists' under the Act". *Id*. Of note, one could certainly argue that a patient's prescription orders were "created in the course of addressing" mental health issues in the presence of physicians, who are therapists under the Act. The *Doe* court also said that *Quigg's* finding that only therapists or agencies engaging in therapeutic relationships can be liable under the Act is unsupported by authority. *Id*. In making that finding, the *Quigg* court had relied on one line from the opinion in *Martino v. Family Service Agency of Adams County*, which stated that according to a 1976 report, the Act was "intended to include all those persons entering into a therapeutic relationship with clients". *Id*., *citing Martino v. Family Service Agency of Adams County*, 112 Ill. App. 3d 593, 599-600 (4th Dist.1982). The *Quigg* court interpreted this to mean that only parties who are in a therapeutic relationship can be found liable under the Act, but the *Doe* court said that this was not the holding in *Martino*. *Id.* ¶ 19. The *Doe* court, therefore, found neither *Novak* nor *Quigg* to be persuasive or applicable.

The defendants further argued that the plaintiff waived confidentiality by raising the issue of his mental health in litigation, and that such a waiver is specifically provided in the Act. *Id.* ¶ 16. Section 10(a)(1) of the Act provides an exception to non-disclosure requirement for information disclosed during litigation. *Id*., citing 740 ILCS 110/10. That section states that records and communications may be disclosed "in a civil, criminal or administrative proceeding" where the recipient introduces his mental condition or any aspect of the services he received for that condition as an element of his claim or defense. *Id*. While the court agreed that section 10(a) allowed for the disclosure of Doe's confidential information for the purposes of the medical malpractice litigation, the subsequent broadcast of Doe's mental health history "appears to be beyond the bounds of that proceeding". *Id.* In addition, the court found that the press release and statements to the Law Bulletin amounted to "redisclosure" of the information, and is barred under § 5(d) of the Act, which states that "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". *Id., citing* 740 ILCS 110/5.

Finally, the court discussed the 2015 amendment to the Act which added the provision "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". *Id.* ¶ 20, *citing* 740 ILCS 110/3. However, the amendment went into effect on January 1, 2016, and the statements at issue were made in May of 2015, and the court determined that the amendment did not apply to the instant case.

The *Doe* court summarized its holding by saying that the plain language of the Act provides the plaintiff with a cause of action against the defendants because the defendants disclosed the plaintiff's records and communications and no exception to such disclosure has been shown to apply. *Id.* ¶ 19.

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Conclusion

The Appellate Court's holding in *Doe* appears to conflict with the litigation waiver that is an express exception to the prohibition of the disclosure of mental health information under the Act. The case has been appealed to the Illinois Supreme Court and at the time of this article's publication, the court has not yet ruled. The appellate court holding in *Doe* reminds us to ensure that we have proper authorization and consent for the disclosure of mental health records. It is also a cautionary tale for any communications that may occur regarding a plaintiff's health information once the litigation has concluded. Best practices to avoid a violation of the Act is to address confidentiality of health information in settlement releases and also make sure that case resolution is communicated to experts with instructions to shred all medical records and cease communications regarding the plaintiff's medical records and information.

About the Author

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