[J-76A&B-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SUSAN OCTAVE ON BEHALF OF JAMES OCTAVE, AN INCAPACITATED PERSON, AND SUSAN OCTAVE,	:	No. 38 WAP 2012
Appellants	:	Appeal from the Order of the Commonwealth Court entered December 30, 2011 at No. 532 CD 2011, reversing the Order of the Court of Common Pleas of Westmoreland County entered February 28, 2011 at No. 4128 of 2009 and remanding.
v.	:	
DAVID WADE WALKER, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION,	:	
Appellees	:	ARGUED: October 15, 2013
SUSAN OCTAVE ON BEHALF OF JAMES OCTAVE, AN INCAPACITATED PERSON, AND SUSAN OCTAVE,	:	No. 39 WAP 2012
Appellants	:	Appeal from the Order of the Commonwealth Court entered December 30, 2011 at No. 540 CD 2011, reversing the Order of the Court of Common Pleas of Westmoreland County entered February 28, 2011 at No. 4128 of 2009 and remanding.
v.	:	
DAVID WADE WALKER, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION,	:	
Appellees	:	ARGUED: October 15, 2013

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: OCTOBER 30, 2014**

The Mental Health Procedures Act (MHPA) contains a proviso that "[i]n no event" may privileged communications be disclosed without "written consent." 50 P.S. §7111(a). As Madame Justice Todd observes, this appears to foreclose the possibility that, consistent with legislative intent, a non-written waiver may be implied from the circumstances. See Dissenting Opinion, slip op. at 2. Accordingly, I cannot join the Court's present holding that Appellants "have impliedly waived the MHPA's confidentiality protections by filing the instant negligence suit[.]" Majority Opinion, slip op. at 13 n.9.[1]

With that said, I also think that, where there is an objective basis in the record to believe that the plaintiff's mental-health records are relevant to liability (in this case, for example, records that reflect past suicide attempts), it may be fundamentally unfair to the defendant to deny access to such information – at least subject to the screening process of an in camera inspection so as to prevent unwarranted disclosures. Indeed, as Appellees emphasize, lack of access could allow Appellants to conceal evidence that might absolve them of liability. Hence, it seems that, in such a scenario, the act's confidentiality provision, as applied, can potentially violate due process. See Fox v. Ward, 200 F.3d 1286, 1296 (10th Cir. 2000) (noting that due process is violated where a court's evidentiary rulings are grossly prejudicial and deny fundamental fairness); Mercy Convalescent Home, Inc. v. DPW, 96 Pa. Cmwlth. 217, 221, 506 A.2d 1010, 1013 (1986) ("The essence of due process is fundamental fairness in view of all facts and circumstances of a case."); cf. Brady v. Maryland, 373 U.S. 83, 87-88, 83 S. Ct. 1194,

[1] Some state legislatures have statutorily incorporated the waiver concept in the form of a patient-litigation exception. See, e.g., CAL. EVID. CODE §1016; 740 ILL. COMP. STAT. 110/10(a). Our Legislature has codified a similar exception with regard to physician-patient confidentiality. See 42 Pa.C.S. §5929; Ferrell v. Glen-Gery Brick, 678 F. Supp. 111, 112 (E.D. Pa. 1987). Thus, it may be assumed that the Legislature knew how to include a similar exception in the MHPA, but elected not to do so.

1196-97 (1963) (holding that due process is offended when the prosecution withholds favorable evidence from an accused that would tend to exculpate him or reduce the penalty imposed).[2]

However, the issue raised on appeal to the intermediate court was framed solely in terms of implied waiver, see Octave v. Walker, No. 532 & 540 C.D. 2011, Brief for Appellants, at 4; that tribunal disposed of the appeal on such terms, see Octave v. Walker, 37 A.3d 604, 610 (Pa. Cmwlth. 2011); and the question accepted for review in this Court is similarly limited, see Octave v. Walker, 619 Pa. 176, 176, 58 A.3d 753, 754 (2012) (framing the issue for review as whether Appellants "impliedly waived the protections" of Section 7111(a) by filing the lawsuit). That being the case, it is beyond the scope of the present appeal to consider which records must be provided to Appellees in order to avoid a due process violation.

Accordingly, I would reverse the order of the Commonwealth Court and remand to the common pleas court to determine whether a due process challenge is pending in that court and, if so, which records (if any) must be provided to avoid a constitutional violation.

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[2] Whether a due process challenge was raised before the common pleas court would be a question to be addressed by that court in the first instance. Here, I simply note that Appellees argued that denying them access to evidence of the plaintiff's suicidal tendencies or past instances of self-inflicted harm would violate their right to a fair trial and would be manifestly unfair, grossly prejudicial, and amount to a miscarriage of justice. See Octave. v. Walker, Civil No. 4128 of 2009, Defendants' Brief in Support of Motion for Leave to Access and Copy Sealed Files Pertaining to Plaintiff's Involuntary Psychological Treatments, at 5-7; see also id., Defendants' Brief in Support of Motion to Compel Medical Authorizations Pertaining to Plaintiff's Mental Health Treatment and/or Involuntary Psychiatric Commitments, at 4-5. Thus, on the present state of the record, I cannot foreclose the possibility that Appellees have, in effect, forwarded a due-process challenge to application of Section 7111(a) in the circumstances.