2023 IL 129097

IN THE

SUPREME COURT

OF

THE STATE OF ILLINOIS

(Docket No. 129097)

JOHN DOE, Appellee, v. BURKE WISE MORRISSEY & KAVENY, LLC, *et al.*, Appellants.

Opinion filed November 30, 2023.

JUSTICE NEVILLE delivered the judgment of the court, with opinion.

Justices Overstreet, Holder White, Rochford, and O'Brien concurred in the judgment and opinion.

Chief Justice Theis and Justice Cunningham took no part in the decision.

OPINION

¶ 1 The plaintiff, John Doe,[1] filed a multicount complaint against the defendants, Burke Wise Morrissey & Kaveny, LLC, and Elizabeth A. Kaveny, alleging that

[1]The plaintiff was granted leave in the appellate court to proceed with litigation under a fictitious name.

they violated the Mental Health and Developmental Disabilities Confidentiality Act (Act) (740 ILCS 110/1 *et seq.* (West 2014)). The defendants filed a motion to dismiss count I of the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), which the Cook County circuit court granted. The appellate court reversed the decision of the circuit court and remanded the cause to the circuit court for further proceedings. 2022 IL App (1st) 211283, ¶ 22.

¶ 2 We allowed the defendants' petition for leave to appeal pursuant to Illinois Supreme Court Rule 315 (eff. Oct. 1, 2021). We also allowed the Legal Advocacy Service and Professor Sandra Kopels to file an *amicus curiae* brief on behalf of the plaintiff's position, and we allowed the Illinois Defense Counsel to file an *amicus curiae* brief on behalf of the defendants'. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010). For the following reasons, we now reverse the judgment of the appellate court and affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 A. Medical Malpractice Proceedings

¶ 5 The defendants represented Doe in a medical malpractice action against a hospital and other medical staff. During that litigation, the evidence established that, after Doe was admitted to the emergency room of the hospital, he attempted suicide by stabbing himself multiple times. In the medical malpractice litigation, the hospital sought a qualified protective order under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. § 1320d (2012); 45 C.F.R. §§ 160.103, 164.501 (2016)) to gain access to Doe's protected health information. The hospital also requested a subpoena pursuant to HIPAA. During the trial, Doe testified in detail about his suicide attempt, his injuries therefrom, and his diagnosis. At the conclusion of the jury trial in the medical malpractice action, Doe was awarded $4.2 million. Subsequently, in May 2015, the defendants issued a press release related to the medical malpractice trial describing Doe's suicide attempt, the resulting injuries, and his diagnoses. Additionally, Kaveny commented on the medical malpractice case and Doe's history for an article published in the *Chicago Daily Law Bulletin* (*Law Bulletin*).

¶ 6 B. Circuit Court Proceedings Giving Rise to the Issue Before This Court

¶ 7 On May 5, 2017, Doe filed a multicount complaint against the defendants, with count I being the only count at issue in this appeal. In count I, Doe alleged that the defendants violated the Act by wrongfully disclosing confidential information about his diagnoses as well as his mental health. According to the complaint, at the time Kaveny disclosed confidential information about Doe (which was contained in the *Law Bulletin* article and other publications), she did not have his informed consent. Doe alleged that the defendants' wrongful disclosure of his confidential health information proximately caused the damages he sustained and, therefore, the defendants were liable.

¶ 8 The defendants moved to dismiss count I of Doe's complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). The defendants argued, in part, that the Act did not apply to them because there was no therapeutic relationship between them and Doe. They also argued that the information disclosed in the press release was public information because Doe testified to the same information during the medical malpractice trial. Additionally, the defendants asserted that Doe waived any confidentiality in his medical records because he put his medical condition at issue in the medical malpractice litigation.

¶ 9 Doe responded to the motion to dismiss, arguing that the Act prohibited the release of any information identifying a recipient of mental health services and that the information disclosed in the press release did just that. Doe maintained that, because the defendants redisclosed his protected mental health information, they violated the Act (740 ILCS 110/1 *et seq.* (West 2014)).

¶ 10 On April 5, 2018, after a hearing, the circuit court dismissed count I with prejudice. The circuit court reasoned that a therapeutic relationship was required for the Act to apply. The circuit court also reasoned that the disclosure "was following a public trial and trials are public." On May 15, 2018, Doe filed an amended complaint and presented new allegations against the defendants for his same cause of action under the Act. The circuit court struck the claim without leave to replead.

¶ 11 On April 13, 2020, Doe filed a motion to reconsider the orders of the circuit court dismissing count I of his complaint and striking his amended complaint. Doe argued, in part, that the defendants violated the qualified protective order under HIPAA in the medical malpractice case and that violating that qualified protective order also violated the Act. Additionally, Doe indicated that the Act was amended in 2015, making it clearer that a therapeutic relationship is not an element of a cause of action under the Act. On August 13, 2020, after a hearing, the circuit court denied Doe's motion to reconsider, finding that the claim under the Act was dismissed with prejudice.

¶ 12 On August 31, 2021, Doe filed a motion to voluntarily dismiss a remaining count in his complaint, as all of the other counts had been previously dismissed with prejudice. On September 9, 2021, the circuit court dismissed the remaining count without prejudice. Doe subsequently filed an appeal from the circuit court's dismissal of his cause of action.

¶ 13 C. Appellate Court Proceedings

¶ 14 Doe filed a timely appeal challenging the circuit court's dismissal of his cause of action against the defendants for wrongfully disclosing confidential information about his diagnoses as well as his mental health in violation of the Act (740 ILCS 110/1 *et seq.* (West 2014)). The appellate court reversed the decision of the circuit court and remanded the cause for further proceedings. 2022 IL App (1st) 211283, ¶ 22. The appellate court reasoned that "Doe's complaint sufficiently alleged a cause of action under the Act." *Id.* ¶ 15. The appellate court stated that the information the defendants disclosed in the press release and the *Law Bulletin* were records and communications under the Act. *Id.* Further, these communications revealed that Doe received mental health services, and they also revealed his diagnoses. *Id.*

¶ 15 The appellate court also found that the fact that the defendants did not provide Doe with mental health services does not "relieve them of potential liability." *Id.* According to the appellate court, Doe's consent to disclose his mental health information in the medical malpractice litigation did not extend to the alleged redisclosure of his information in the subsequent press release and *Law Bulletin*. *Id.* ¶ 16. Instead, the appellate court found that this redisclosure was subject to

section 5(d) of the Act (740 ILCS 110/5(d) (West 2014)), requiring that Doe "specifically consent[ ] to such redisclosure." 2022 IL App (1st) 211283, ¶ 16. The appellate court declined to follow this court's decision in *Novak v. Rathnam*, 106 Ill. 2d 478, 484 (1985), instead finding that the case on review was distinguishable from *Novak* because Doe's mental health information shared at the medical malpractice trial was "subject to a qualified protective order under HIPAA." 2022 IL App (1st) 211283, ¶ 17. Relying on *Haage v. Zavala*, 2020 IL App (2d) 190499, ¶ 9, the appellate court found that

> "[qualified protective] 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." ' " 2022 IL App (1st) 211283, ¶ 17 (quoting *Haage*, 2020 IL App (2d) 190499, ¶ 9, quoting 45 C.F.R. § 164.512(e)(1)(v)(A), (B) (2018)).

¶ 16 Additionally, the appellate court was unpersuaded by the defendants' reliance on *Quigg v. Walgreen Co.*, 388 Ill. App. 3d 696 (2009), for the proposition that "the Act only included those persons entering into a therapeutic relationship with clients and only those persons could be liable." 2022 IL App (1st) 211283, ¶ 19. Instead, the appellate court found that there was no legal support for the argument that only therapists or agencies engaging in therapeutic relationships can be held liable under the Act. *Id.* Consequently, the appellate court found that "Doe sufficiently alleged a claim against defendants under the Act in count I of his complaint." *Id.* ¶ 22. Accordingly, the appellate court reversed the judgment of the circuit court and remanded the cause for further proceedings. *Id.* The defendants now appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, the defendants maintain that Doe's complaint was properly dismissed under section 2-615 of the Code for failure to state a cause of action upon which relief could be granted because (1) Doe's voluntary public disclosure of his mental health information waived its confidentiality under the Act and (2) the Act's protections are limited to records kept and communications made in the course of providing mental health and developmental disability services. In other words, only

therapists and those engaging in therapeutic relationships with a patient can be liable under the Act.

¶ 19 A. Standard of Review

¶ 20 The circuit court dismissed Doe's complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2014). On appeal from a section 2-615 dismissal, all well-pleaded facts as well as any reasonable inferences arising therefrom must be accepted as true. *In re Application for a Tax Deed*, 2021 IL 126150, ¶ 17. A reviewing court is tasked with determining whether the allegations in the pleadings, when viewed in the light most favorable to the nonmovant, state a cause of action upon which relief may be granted. *Id.* Unless it is clearly apparent that the plaintiff would not be entitled to recovery under any possible set of facts, a cause of action should not be dismissed pursuant to section 2-615 of the Code. *Nyhammer v. Basta*, 2022 IL 128354, ¶ 23. The standard of review on a dismissal of a complaint pursuant to section 2-615 of the Code is *de novo*. *In re Application for a Tax Deed*, 2021 IL 126150, ¶ 17 ("A ruling on a section 2-615 motion to dismiss is reviewed *de novo* because it challenges the legal sufficiency of a pleading."). We will also need to interpret provisions of the Act and HIPAA. The standard of review for statutory interpretation is *de novo*. *Brown v. Illinois State Police*, 2021 IL 126153, ¶ 32 ("Because issues related to the interpretation of statutes present questions of law, our standard of review is *de novo*.").

¶ 21 B. Waiver of Confidentiality

¶ 22 The defendants first maintain that the appellate court erred in reversing the section 2-615 dismissal of Doe's cause of action against them because he waived any confidentiality under the Act by voluntarily disclosing his mental health information in the medical malpractice trial. Doe asserts that any waiver of his confidentiality in his mental health information was only for the purpose of the medical malpractice trial and that the qualified protective order (QPO) prevented the defendants from making a redisclosure of his protected health information outside of the confines of the medical malpractice trial. We agree with the defendants.

¶ 23 The purpose of the Act it to " 'preserve the confidentiality of the records and communications of persons who are receiving or who have received mental-health services.' " *Johnston v. Weil*, 241 Ill. 2d 169, 182 (2011) (quoting *Novak*, 106 Ill. 2d at 483). The parties do not dispute that the mental health information produced during the medical malpractice trial is records or communications under the Act. The question is whether Doe's interest in the confidentiality of those records and communications was waived once they were publicly disclosed in the trial. We find that they were.

¶ 24 Under section 10(a) of the Act, a recipient of mental health treatment is granted a statutory privilege to "refuse to disclose and to prevent the disclosure" of confidential information. 740 ILCS 110/10(a) (West 2014). However, this privilege does not prevent a patient from voluntarily disclosing his own information to others. See *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 35 (noting that a privilege holder may voluntarily testify about otherwise confidential matters).

¶ 25 When the privilege holder chooses to voluntarily divulge confidential information, waiver applies. "[W]aiver is an intentional relinquishment or abandonment of a known right or privilege." *People v. Lesley*, 2018 IL 122100, ¶ 36. This court has long recognized that " 'a voluntary revelation by the holder [of the privilege] of the communication, or of a material part, is a waiver.' " *People v. Simpson*, 68 Ill. 2d 276, 281 (1977) (quoting Edward W. Cleary, McCormick's Handbook of the Law of Evidence § 83, at 170 (2d ed. 1972)); *Turner v. Black*, 19 Ill. 2d 296, 309 (1960) (attorney-client privilege "may be waived by the person whom the privilege is intended to benefit" when a privilege holder voluntarily testifies about privileged matters).

¶ 26 In *Center Partners*, 2012 IL 113107, ¶ 66, we found that "[a] clear example of an express waiver is when a client [or privilege holder] voluntarily testifies about privileged communications." A privilege holder may also relinquish a right through waiver by conduct (*Lesley*, 2018 IL 122100, ¶ 36 ("[A] defendant may relinquish his right to counsel in three ways: waiver, forfeiture, and waiver by conduct.")) or implied consent (*Palm v. Holocker*, 2018 IL 123152, ¶ 33 (waiver by implied consent is a "near-universally recognized principle")). Waiver has routinely been applied when the privilege holder has voluntarily disclosed information in a way inconsistent with the privilege. *People v. Wagener*, 196 Ill. 2d 269, 276-78 (2001);

Simpson, 68 Ill. 2d at 281-82; *Turner*, 19 Ill. 2d at 309. Additionally, the Seventh Circuit has found that the general rule is that "protection from disclosure is available only when the party asserting a privilege has maintained confidentiality," as there is "little interest in the confidentiality of documents which have been publicly discussed by their custodian." *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314 (7th Cir. 1984).

¶ 27 Our decision in *Novak* is consistent with the aforementioned waiver principles and is controlling in this matter. In *Novak*, the defendants, psychiatrist Allen Rathnam and psychologist David Girmscheid, asserted a claim of privilege in the medical treatment of Robert Lee Endicott during his involuntary commitment at Zeller Mental Health Center. *Novak*, 106 Ill. 2d at 480-81. Upon Endicott's release from the mental facility, he shot and killed Beverly Novak, the daughter of the plaintiff David Novak. *Id.* at 480. Endicott asserted an insanity defense and, in support of that defense, he introduced "his Zeller medical records, including a discharge summary and a psychiatric evaluation prepared by Rathnam and Girmscheid, which detailed their diagnosis and treatment of Endicott while a patient at Zeller." *Id.* During the trial, Rathnam was asked about Endicott's medical records and provided detailed testimony regarding the treatment he received at Zeller. *Id.* at 480-81. Endicott succeeded on his insanity defense and was found not guilty. *Id.* at 481.

¶ 28 Subsequently, Novak filed a wrongful death action against Rathnam and Girmscheid, alleging that they were both negligent in approving Endicott's discharge from Zeller. *Id.* at 479-80. Rathnam and Girmscheid refused to be deposed in the wrongful death action, relying on Endicott's privilege under the Act. *Id.* at 480-81.

¶ 29 We affirmed the trial court's order compelling Rathnam and Girmscheid to submit to depositions. First, we observed that Endicott waived the privilege at his murder trial by asserting his insanity defense: "[W]hen a defendant raises an insanity defense and calls his own medical expert as a witness to establish the defense, he cannot thereafter assert the privilege to prevent the State, at the same trial, from calling other medical experts who treated him for the same condition." *Id.* at 483. Second, and relevant here, we found that Endicott's waiver of confidentiality in his medical history during his murder trial was irrevocable: "If

there is a disclosure of confidential information by the individual for whose benefit the privilege exists, or if he permits such a disclosure, *the privilege is waived and cannot be reasserted*." (Emphasis added.) *Id.* at 484. We further emphasized that "a *public disclosure* by Endicott of information protected by the Act *** took away its confidentiality." (Emphasis added.) *Id.* at 485.

¶ 30 In a more recent decision in *Norskog v. Pfiel*, 197 Ill. 2d 60 (2001), we distinguished *Novak*, finding, in part, that there was a lack of public disclosure of mental health information and, therefore, there was no waiver of confidentiality under the Act. In *Norskog*, one of the defendants, Steven Pfiel, gave notice of his intention to assert an insanity defense for committing two murders but instead pled guilty and was sentenced to life imprisonment. *Id.* at 63.

¶ 31 The parents of one of Pfiel's victims initiated a wrongful death action against Pfiel and his parents and sought discovery of Pfiel's mental health records, alleging that Pfiel waived his privilege under the Act because he asserted an insanity defense in his murder proceedings. *Id.* at 73. In other words, the parents of one of the victims argued that, by making his mental health an issue in the previous trial, Pfiel waived any confidentiality in the subsequent proceeding. We disagreed with this reasoning and conclusion.

¶ 32 In *Norskog*, Pfiel pled guilty, and the case never proceeded to trial, unlike in *Novak*, where Endicott had a trial. *Id.* at 75. We found, in *Norskog*, that, once the guilty plea was entered, the anticipated insanity defense was no longer in issue and there was never a public "disclosure of [Pfiel's] mental health records or testi[mony] in open court regarding mental health treatment [Pfiel] had received." *Id.* at 76. Therefore, no waiver under the Act took place.

¶ 33 Our decision in *Norskog*, although reaching the opposite conclusion than that reached in *Novak*, strengthens the result in *Novak*, as it reiterates the need for a public disclosure by the party asserting protection under the Act in order for the confidentiality to be waived.

¶ 34 In the case on review, it is undisputed that Doe voluntarily testified in detail regarding his mental health information during the medical malpractice trial. Specifically, Doe testified about his history of depression and anxiety, his initial suicide attempt that resulted in his hospitalization, the suicide attempt that occurred

during his hospitalization, his continued hospitalization and care at numerous institutions after his suicide attempts, his diagnosis and treatment for a brain injury following his suicide attempts, his ongoing cognitive difficulties that prevented his return to practicing law, and the medications he was taking to treat his mental health conditions. The information was shared during a public proceeding, and there is no indication in the record that an effort was made to seal the record from public view or access. Therefore, Doe's public disclosure of his mental health information "took away its confidentiality," and it cannot regain its confidentiality after disclosure. *Novak*, 106 Ill. 2d at 485.

¶ 35 Doe asserts that the qualified protective order shielded him from redisclosure of his mental health information and that the press release and *Law Bulletin* article were effectively redisclosures of confidential information that was to be used for a limited purpose pursuant to the qualified protective order. Likewise, the appellate court found 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." 2022 IL App (1st) 211283, ¶ 17.

¶ 36 In reaching this conclusion, the appellate court relied on *Haage*, 2020 IL App (2d) 190499, and stated that qualified protective 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." ' " 2022 IL App (1st) 211283, ¶ 17 (quoting *Haage*, 2020 IL App (2d) 190499, ¶ 9, quoting 45 C.F.R. § 164.512(e)(1)(v)(A), (B) (2018)).

¶ 37 Contrary to the reasoning of the appellate court, a qualified protective order under the HIPAA privacy rule regulates the manner in which a covered entity or business associate uses a patient's protected health information. 45 C.F.R. § 164.502(a) (2023); see *Coy v. Washington County Hospital District*, 372 Ill. App. 3d 1077, 1080-81 (2007). The HIPAA privacy rule does not regulate how a person may choose to use his own medical information once it is received from a covered entity.

¶ 38 It is understood that the HIPAA privacy rule "does not create a privilege for patients' medical information; it merely provides the procedures to follow for the

disclosure of that information from a 'covered entity.' " *People v. Bauer*, 402 Ill. App. 3d 1149, 1158 (2010) (quoting *United States v. Bek*, 493 F.3d 790, 802 (7th Cir. 2007)); see also *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923, 925-26 (7th Cir. 2004) ("All that 45 C.F.R. § 164.512(e) should be understood to do *** is to create a procedure for obtaining authority to use medical records in litigation.").

¶ 39 A covered entity is permitted to disclose private health information where a subpoena or discovery requests such information and the patient receives notice of the request—or where the requesting party makes a good-faith attempt to provide notice—and the remaining conditions are met. 45 C.F.R. § 164.512(e)(1)(ii)(A), (iii) (2023). Once notice is provided to the patient, compliance with the HIPAA privacy rule has been achieved. See *id.* § 164.512(e)(1)(ii)(A)-(B).

¶ 40 A qualified protective order may be used to acquire a patient's private health information. *Id.* § 164.512(e)(1)(ii)(B). When a qualified protective order is used, the HIPAA privacy rule provides that private health information (1) must not be used or disclosed for any purpose other than the litigation and (2) must be returned or destroyed once that litigation has concluded. *Id.* § 164.512(e)(1)(v)(A)-(B).

¶ 41 The HIPAA privacy rule governs how a covered entity or business associate may use or disclose private health information once it is in its possession. *Id.* § 164.502(a); see also *id.* § 164.500(a) (unless otherwise provided, "the standards, requirements, and implementation specifications of this subpart apply to covered entities with respect to protected health information"). The HIPAA privacy rule does not govern how a patient may choose to divulge his personal medical information.

¶ 42 Moreover, there is nothing in the HIPAA privacy rule that prevents legal counsel from discussing facts that were voluntarily revealed in a public trial. In fact, the public nature of the proceeding not only removes the confidentiality of the voluntarily disclosed mental health information (*Novak*, 106 Ill. 2d at 485), but it also exempts from punishment anyone who speaks about the publicly released information. See *Craig v. Harney*, 331 U.S. 367, 374 (1947) (Recognizing that a "trial is a public event. What transpires in the court room is public property. *** Those who see and hear what transpired can report it with impunity.").

¶ 43 Additionally, we note that the "common law right of access to court records is essential to the proper functioning of a democracy" (*Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 230 (2000)), and "[j]udicial proceedings in the United States are open to the public—in criminal cases by constitutional command, and in civil cases by force of tradition" (*A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 993 (2004)). Holding legal counsel liable for speaking about voluntarily released information in a public trial would fly in the face of these basic principles, which are at the core of our judicial system and our democracy. Accordingly, we find that Doe waived confidentiality under the Act when he voluntarily and publicly testified to specific details regarding his mental health information, and we find that the qualified protective order did not shield him from waiver of that confidentiality. *Novak*, 106 Ill. 2d at 485.

¶ 44 C. Liability Under the Act

¶ 45 The defendants maintain that the protection under the Act is limited to records kept and communications made in the course of providing mental health and developmental disability services. In other words, the defendants argue that therapists and those engaging in therapeutic relationships can be liable under the Act. Because the defendants are neither therapists nor did they engage in a therapeutic relationship with Doe, they assert that they cannot be liable under the Act. Conversely, Doe maintains that the plain language of the Act does not support the claim that there must be a therapeutic relationship for liability to attach under the Act. Specifically, Doe argues that a cause of action exists under the Act against those who redisclose mental health records and communications regardless of whether the communications were made in the course of a therapeutic relationship. We disagree with Doe.

¶ 46 Adequate review of this issue requires us to analyze the relevant terms in several sections of the Act and employ established principles of statutory construction. The cardinal rule of statutory construction is to ascertain and give effect to the true intent and meaning of the legislature. *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, ¶ 20; *Kunkel v. Walton*, 179 Ill. 2d 519, 533 (1997). The most reliable indicator of legislative intent is found in the statutory

language, given its plain and ordinary meaning. *People v. McChriston*, 2014 IL 115310, ¶ 15.

¶ 47 The Act states that "[a]ll records and communications shall be confidential and shall not be disclosed" (740 ILCS 110/3(a) (West 2014)) and that, in any legal proceeding or preliminary proceeding, "a recipient, and a therapist on behalf and in the interest of a recipient, has the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications" (*id.* § 10(a)). Where a person is injured by a violation of the Act, that person may sue for damages or other appropriate relief and may be awarded costs and attorney fees. *Id.* § 15.

¶ 48 Confidential records under the Act refer to "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.* § 2. Confidential communications under the Act refer to "any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient. Communication includes information that indicates that a person is a recipient." *Id.* A "recipient" under the Act is "a person who is receiving or has received mental health or developmental disabilities services," and a "therapist" under the Act is "a psychiatrist, physician, psychologist, social worker, or nurse providing mental health or developmental disabilities services." *Id.* "Mental health or developmental disabilities services" under the Act "includes but is not limited to examination, diagnosis, evaluation, treatment, training, pharmaceuticals, aftercare, habilitation or rehabilitation." *Id.*

¶ 49 Based on the plain language of the Act, a prerequisite to the protections afforded therein, a connection with providing "mental health or developmental disabilities services," is necessary. In the case on review, Doe's testimony during the public medical malpractice trial, the records and evidence connected to the trial, and Doe's communications with the defendants are confidential communications and records that were made and kept in connection with the medical malpractice litigation, not in connection with *providing* mental health services to Doe.

¶ 50 We find our decision in *Johnston*, 241 Ill. 2d 169, controlling in this matter. In *Johnston*, Dr. Phyllis Amabile, a court-appointed psychiatrist, conducted an independent evaluation of one of the plaintiffs, Heather Johnston, pursuant to

section 604(b) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/604(b) (West 2006)) to assist the court in resolving a postdissolution custody dispute between Johnston and her first husband. *Johnston*, 241 Ill. 2d at 171. When Johnston's second husband sought to subpoena Dr. Amabile in his own custody dispute with Johnston, the circuit court found that Dr. Amabile's report was not discoverable. *Id.* at 172. Thereafter, Johnston filed suits against both of her previous husbands, their attorneys, and the child representatives in each proceeding, alleging that her first husband and his attorneys improperly disclosed confidential information from Dr. Amabile's report to the second husband and his attorneys in violation of the Act. *Id.* We found that the Act did not apply because Dr. Amabile was not retained as a therapist to treat Johnson. *Id.* at 183-84. In other words, Dr. Amabile did not provide mental health services to Johnston. "Rather, she was acting as an independent section 604(b) professional, whose sole function was to make an evaluation for the circuit court to consider. Since Dr. Amabile and plaintiffs were not engaged in a therapeutic relationship, the Confidentiality Act does not apply." *Id.*

¶ 51 In the case on review, the appellate court declined to address our holding in *Johnston*, instead relying on *Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733 (1986), for the proposition that "Illinois has permitted a claim under the Act even where the defendant was not a provider of mental health services." 2022 IL App (1st) 211283, ¶ 15. However, whether the protections under the Act apply is not contingent upon the status of the defendant as a provider of mental health or developmental disability services. Instead, protections under the Act are contingent upon whether the communications or records that were disclosed were made in the course of providing therapy or other mental health or developmental disability services.

¶ 52 In *Johnson*, the plaintiff Gregory Johnson was enrolled in a "program to prepare him for a career teaching sacred music." *Johnson*, 150 Ill. App. 3d at 736. The college consistently refused to grant him his diploma based on another student's allegations that Johnson might be homosexual. *Id.* Johnson began attending private counseling sessions with Kent Paris based on the college's assurances that he would be allowed to graduate if he sought such counseling. *Id.*

¶ 53 Without Johnson's consent to disclosure, Paris reported to the dean of students, Thomas Ewald, that Johnson "had not changed and was not progressing." *Id.* Thereafter, Dean Ewald informed Johnson that the college intended to allow him to defend himself against the rumor that he was homosexual in a hearing in less than 24 hours. *Id.* at 736-37. Instead of attending the hearing, Johnson withdrew from the college based on his understanding that he would be dismissed regardless of the outcome of the hearing. *Id.* at 737. The college held the hearing in Johnson's absence, and Dean Ewald called Johnson's mother afterward to tell her that the college "was dismissing Johnson because he was homosexual." *Id.*

¶ 54 Johnson then filed suit against both Paris and Lincoln Christian College alleging violations under the Act. *Id.* The circuit court dismissed his complaint, and Johnson appealed. On appeal, the appellate court reversed the judgment of the circuit court and found, *inter alia*, that the circuit court erred in dismissing count III of Johnson's complaint for failure to allege a cause of action for violation of the Act where there were sufficient facts that Dean Ewald violated section 5(d) of the Act by redisclosing Johnson's confidential communications without his consent. *Id.* at 744.

¶ 55 The appellate court, in the case on review, reasoned that the defendants' statements posttrial also violated section 5(d) of the Act by redisclosing confidential information. 2022 IL App (1st) 211283, ¶ 16. We disagree.

¶ 56 Section 5(d) applies to "records and communications" as defined in the Act—records and communications made or kept in the course of *providing* mental health services. 740 ILCS 110/2 (West 2014). The defendants in the case on review did not provide mental health services.

¶ 57 Further, in *Johnson*, the communications that Paris disclosed to Dean Ewald and that Dean Ewald later redisclosed to Johnson's mother were communications Johnson made in the course of his therapeutic relationship with Paris. *Johnson*, 150 Ill. App. 3d at 742. Conversely, the evidence and testimony divulged during Doe's medical malpractice trial were not records or communications made in the course of mental health services. Therefore, we find that the Act does not apply to the defendants' posttrial communications of that information.

¶ 58 D. Amendment to the Act

¶ 59 Lastly, Doe argues that the 2015 amendment to the Act (which became effective on January 1, 2016) broadens the scope of the Act such that any disclosure creates liability under the Act—even if that disclosure was not made or created in the course of a therapeutic relationship. See Pub. Act 99-28, § 5 (eff. Jan. 1, 2016) (amending 740 ILCS 110/3(a)).

¶ 60 The General Assembly added the following language to section 3(a) of the Act:

> "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." *Id.* (amending 740 ILCS 110/3(a)).

¶ 61 Relying on this court's decision in *Wisniewski v. Kownacki*, 221 Ill. 2d 453 (2006), Doe argues that the amendment applies retroactively. However, that case is inapposite. First, *Wisniewski* did not address an amendment to the Act but instead addressed adoption of the Act itself; second, we held that the applicability of the Act to preenactment treatment records did not "hinge upon a retroactivity analysis" because "[d]isclosure, which is the act regulated by both statutes, takes place only in the present or the future," "not in the past." *Id.* at 463. Relying on this reasoning, we found that the Act applied to disclosures that occurred after its enactment. In the case on review, the challenged disclosure occurred in May 2015, prior to the enactment of the amendment to section 3(a), which became effective in 2016. Moreover, there is no clear legislative declaration that the amendment is to be retroactively applied. Therefore, the amendment may not be applied retroactively. See *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 406 (2009) (substantive amendments may not be applied retroactively absent express legislative declaration of retroactivity).

¶ 62 III. CONCLUSION

¶ 63 We find that Doe waived his claims of confidentiality under the Act by voluntarily and publicly disclosing his private health information in a public trial,

and the qualified protective order under HIPAA did not preclude such waiver. *Novak*, 106 Ill. 2d at 485. We also find that the defendants are not liable under the Act, as the evidence and testimony divulged during Doe's medical malpractice trial were not records or communications made in the course of mental health services; therefore, the Act does not apply to the defendants' posttrial discussion of said evidence, records, or communications. Next, we find that the amendment to section 3(a) of the Act does not apply retroactively. Lastly, we hold that the appellate court erred when it reversed the circuit court's dismissal of Doe's complaint pursuant to section 2-615 of the Code. Therefore, we reverse the judgment of the appellate court and affirm the judgment of the circuit court.

¶ 64 Appellate court judgment reversed.

¶ 65 Circuit court judgment affirmed.

¶ 66 CHIEF JUSTICE THEIS and JUSTICE CUNNINGHAM took no part in the consideration or decision of this case.