THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

Civil Practice and Procedure

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Recent Decisions Underscore Significant Protections for Mental Health Records

While the acquisition of medical records is governed by federal law under the Health Insurance Portability and Accountability Act, Pub. L. 104-191, 110 Stat 1936 (Aug. 21, 1996) (HIPAA), the production of mental health records is controlled by state law. In Illinois, this is codified as the Mental Health and Development Disabilities Confidentiality Act, 740 ILCS 110/3 *et seq*. (Confidentiality Act). The Confidentiality Act provides significant protection for mental health records and two recent decisions, *Garton v. Pfeifer*, 2019 IL App (1st) 180872, and *Sparger v. Yamini*, 2019 IL App (1st) 180566, highlight the breadth of the protection afforded.

Garton v. Pfeifer

In *Garton*, the Illinois Appellate Court First District partially reversed a summary judgment ruling favoring defendants that had violated the Confidentiality Act when obtaining mental health records in a dissolution of a marriage proceeding involving Ryan Garton (Garton) and Linda Garton (Linda). *Garton*, 2019 IL App (1st) 180872, ¶¶ 2-3. During the proceeding, Linda's attorney, Jeremy Pfeifer, issued subpoenas for Garton's mental health records to NorthShore University HealthSystem (NorthShore), and those subpoenas were complied with. *Id*. ¶ 3. Pfeifer issued the subpoenas without a motion and without a court order permitting their issuance. *Id*. NorthShore responded to the subpoena by delivering the records to the judge presiding over the proceeding. *Id*. Pfeifer then requested that the records be disclosed. *Id*. ¶ 4. An objection was raised based upon Section 10(b) of the Confidentiality Act, and though Pfeifer contended that he had not seen the records, the court ordered: 1) the records sealed, 2) a new subpoena issued, and 3) notice of the new subpoena to be provided to Garton. *Id*.

When the renewed subpoena was issued, NorthShore responded to the records by producing them directly to Pfeifer, despite the subpoena instructing them to be delivered to the court. *Id*. ¶¶ 4-5. Pfeifer produced an opened envelope of the records in court, but claimed that the envelope had been opened by his partner, who had not reviewed them. *Id*. Although Pfeifer told the court he did not review the records, the court again refused to produce the records and ordered them sealed. *Id*.

Garton then filed a separate action asserting three identical counts against Pfeifer, his ex-wife Linda, and NorthShore alleging violation of the Confidentiality Act. *Id*. ¶ 6. Specifically, Garton alleged the defendants "devised a scheme to publicly disclose" Garton's mental health records, that the subpoena was "fraudulently" issued, and that NorthShore wrongfully complied with the subpoena despite its facial insufficiency. *Id*. ¶¶ 6-7.

After answering the complaint and conducting discovery, Pfeifer and NorthShore filed substantially similar motions for summary judgment arguing that Garton could not be "aggrieved" under Section 15 of the Confidentiality Act based on Pfeifer's technical violation because there was no evidence anyone saw the records, the records had no impact on the

contempt proceeding, and there was no evidence Garton suffered any damage. *Id*. Garton filed a cross motion for summary judgment arguing the defendants were liable under the Confidentiality Act. *Id*. ¶ 8. The trial court granted the defendants' motions and denied Garton's motion. *Id*. ¶ 9.

In addressing the parties' arguments, the court noted that the Confidentiality Act "imposes stringent protections on the disclosure of mental health records for litigation purposes" and regulates who may request records and how those records are to be handled. *Id*. ¶ 17. Section 10(a) lists 12 situations in which mental health records may be disclosed and specifies the procedures to be followed. *Id*. The only potentially relevant circumstance, but which the court ultimately rejected, is Section 10(a)(1) which provides that under certain circumstances, "records and communications may be disclosed in a civil, criminal or administrative proceeding in which the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense." *Id*.

Section 10(d) provides that no subpoena for mental health records shall be issued without a written court order or authorization from the person whose records are sought. *Id*. ¶ 18. To obtain such a court order, notice of a motion seeking the order must be provided. *Id*. The Confidentiality Act provides specific language that must be included in the subpoena. *Id*. Failure to comply with these requirements is governed by Section 15 which allows a suit for damages and attorneys' fees and costs for the plaintiff in an action for violation of the Confidentiality Act. *Id*. ¶ 19.

The court found that Pfeifer and NorthShore did not comply with the Confidentiality Act in either requesting the records or in producing them. *Id*. ¶ 21. First, the court found that Garton did not introduce his mental condition as an issue. *Id*. Merely seeking to challenge a witness' credibility based upon information that may be in the mental health records is not sufficient to put one's mental condition at issue. *Id*. Second, the court held that the production of the records by NorthShore was in direct violation of the Confidentiality Act as "every applicable provision of Section 10(d)" was ignored. *Id*. ¶ 22. Third, the very issuance of the subpoena by Pfeifer was a violation of the Confidentiality Act. *Id*. Finally, despite not having been specifically pled, the court found Pfeifer and NorthShore violated the Confidentiality Act with respect to the reissued subpoena because that subpoena did not contain the required language and because NorthShore produced the records to Pfeifer and not the trial court. *Id*. ¶ 23.

Turning to the issue of whether Garton was aggrieved under the Confidentiality Act, the court first rejected the contention that Garton had waived his objection to the production of the records because he did so in a separate proceeding and not in the proceeding in which the records had been produced. *Id*. ¶¶ 26-35. The court also alleged sufficient facts and deposition testimony that he was "aggrieved" and that the improper production of the records caused him injury. *Id*. ¶¶ 36-37. The court rejected Pfeifer and NorthShore's argument that because there is no evidence that anyone saw the records that Garton could not be damaged because the Confidentiality Act does not limit recovery to damages of that kind; mere violation of the Confidentiality Act is sufficient to obtain recovery. *Id*. ¶ 39.

Next, the court found that Garton's claim of emotional distress (that was not treated by a mental health professional) were so self-serving as to be inadmissible. *Id*. ¶¶ 43. Finally, the court held that recovery for emotional distress arising out of the violation of the Confidentiality Act (which Garton claimed did not cause physical injury) was recoverable because it was not a freestanding claim, but merely seeking emotional distress as damages. *Id*. ¶ 43. The court remanded the case for trial, including with respect to damages. *Id*. ¶ 45.

Sparger v. Yamini

The First District also recently held in *Sparger v. Yamini* that where a plaintiff claims a neurological brain injury, rather than a psychological injury, the plaintiff has not put his or her mental health at issue, and accordingly mental health records remain privileged under Illinois law. *Sparger*, 2019 IL App (1st) 180566, ¶¶ 1-2.

In *Sparger*, the minor plaintiff alleged that the defendant physician delayed in repairing a spinal fluid leak which resulted in her developing meningitis. *Id.* Thereafter, the plaintiff was evaluated by a neuropsychologist to determine if meningitis "affected her cognitive, emotional, and behavioral presentation." *Id.* ¶¶ 8-11. The neuropsychologist issued a report stating that plaintiff presented with signs and symptoms consistent with a traumatic brain injury, including cognitive impairments such as decreased attention span, auditory processing delays, impaired memory, impaired mental stamina, and social interaction deficits. *Id.* ¶ 9. The report concluded that "Given her medical history, it is likely that her impaired cognitive presentation is the result of her recent episode of meningitis in May of 2015." *Id.*

The plaintiff produced the report to the defendant. *Id.* ¶ 10. The defendant then subpoenaed the medical records of plaintiff's prior treating physicians, including plaintiff's hospital records for admissions that pre-dated her meningitis. *Id.* The hospital records contained the plaintiff's mental health information, which prompted the plaintiff to obtain the records, redact the records and assert the mental health privilege, and submit the records to the trial court for an *in camera* inspection. *Id.*

In response, defendant filed a motion to compel arguing that the neuropsychologist's report put plaintiff's mental health at issue by concluding her injury affected her cognitive, emotional, and behavioral presentation, so defendant was entitled to determine what plaintiff's cognitive, emotional and behavioral presentation was prior to the occurrence. *Id.* ¶ 11. The court agreed with the defendant finding that plaintiff had put her mental condition at issue. *Id.* ¶ 13. The records showed that plaintiff displayed "emotional symptomatology" prior to developing meningitis, and therefore the exception under Section 10(a) of the Mental Health Act applied. *Id.* The court ordered the records be fully disclosed without redactions, with the situation culminating with the plaintiff taking a friendly contempt to permit the issue to be brought up on appeal. *Id.* ¶¶ 113-14.

The First District held that the trial court erred in ordering plaintiff to produce the records because the records *were* protected mental health information and the plaintiff had not put her mental health at issue. *Id.* ¶ 19. In making its decision, the court held that *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 58-63 (2002), was controlling. *Id.* ¶¶ 16-24. In *Reda*, the plaintiff suffered acute thrombosis following a knee replacement surgery which resulted in his toes being amputated and ultimately a stroke. *Id.* ¶20. During plaintiff's deposition, he testified that he now experienced headaches and his wife testified that he was now very emotional, frustrated, and mean. *Id.* ¶ 21. Based on this testimony, the defendant claimed the plaintiff had put his mental health at issue and they were entitled to his mental health records. *Id.* ¶ 22.

The Illinois Supreme Court disagreed, explaining that "a neurological injury is not synonymous with psychological damage . . . . Nor does neurological injury directly implicate psychological damage." *Id.* (citing *Reda*, 199 Ill. 2d at 58). If that were true, then any injury involving the brain would automatically open the door to the plaintiff's mental health records, and "eviscerate the privilege." *Id.* The court held that the plaintiff's complaints were for neurological injuries, given his stroke, and not psychological injuries. *Id.*

The First District held the distinction made in *Reda*, between a neurological injury and psychological damage, was controlling in *Sparger*. 2019 IL App (1st) 180566, ¶ 24. The First District emphasized that the neuropsychologist report

concluded the plaintiff had a traumatic brain injury, which was a neurological injury and not a psychological injury. *Id*. ¶ 25. Additionally, the plaintiff had stipulated that she was not seeking damages based on psychiatric, psychological, or emotional damages. *Id*. ¶¶ 27-28. Accordingly, plaintiff had not put her mental health at issue and defendant was not entitled to her mental health records. *Id*. ¶ 28. The court reversed the disclosure order and remanded the case for trial. *Id*. ¶ 37.

Unfortunately, the court did not define what constitutes a neurological injury versus a psychological injury and held only that since the neuropsychologist determined plaintiff suffered a traumatic brain injury, the claim clearly fell within the purview of neurological injury. In cases where plaintiff's claim is less clear cut, defendants can expect plaintiffs to argue that they are alleging a neurological injury and not a psychological injury, in an attempt to keep the mental health privilege intact and deny defendants access to plaintiff's mental health records, even where plaintiff is claiming emotional and behavioral injuries as a result of defendant's negligence.

Conclusion

The General Assembly and the courts have shown solicitude for those who have received treatment for mental health issues, and both the Confidentiality Act and the common law have recently developed to reinforce those protections. Mental health records can be obtained, but they must be sought with careful attention to the requirements of the Confidentiality Act.

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