ILLINOIS STATE BAR ASSOCIATION

MAY 2021 VOL 67 NO. 9

Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Reminder: Stay Up-to-Date on Illinois Supreme Court Rules

BY HANNAH R. LAMORE

This is your reminder to check the Illinois Supreme Court Rules (the "Rules"). The Rules are a resource – and binding authority – that seem to be forgotten. It can be easy to re-use old forms or follow past practices, but attorneys are expected to proceed in accordance with the Rules, which change regularly. For those who have not recently checked the Rules, below are some of the more recent changes, including newly adopted rules and a reminder from the court about the form of summons.

New Rule 14. *Text Message Notification Programs.*[18] Adopted December 9, 2020, and effective immediately, Rule 14 authorizes any court or clerk of court to implement a text message notification program. The content and scope of the program is within the discretion of the court but information may include reminders about court, notice of new court

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Ethical Practices in the Email Age: Courtesy Copy Emails to Judges

BY DAVID W. INLANDER & RONALD D. MENNA, JR.

As the court system has evolved into the era of permitting emails to transmit courtesy copies of pleadings and motions, a troubling trend has ensued. Recently, in the ISBA's Central discussion, several lawyers noted that their opposing counsel are raising new arguments or making disparaging comments in emails transmitting courtesy copies to the judge.[1] This article will discuss this issue and suggest best practices to use to correct this abusive behavior.

The use of courtesy copy emails to raise new arguments or make disparaging comments is both disturbing and new. As pointed out in the initiating post in the ISBA discussion, this poses several problems: (1) the arguments and comments are outside the record and cannot be effectively reviewed on appeal; (2) it places the Judge "in an ethical trick bag" if the clerk forwards the transmittal to the Judge; and (3) a judge's clerk must assume a discretionary role of deciding what communications should or should not be sent to the judge.[2] Additionally,

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filings or general court announcements. The program is intended to be used not only by parties and counsel of record but also by the media and the public. All mobile telephone numbers collected for this purpose are not part of the court records and kept confidential. Check if your local court offers such a program. If so, consider signing up and encouraging clients to do the same.

Amended Rule 23. *Disposition of Cases in the Appellate Court.*[19] The amendment of Rule 23 is one of the more widely reported – and anticipated – amendments over the last few years, although it is more limited than some had wanted. By order entered November 20, 2020, and effective January 1, 2021, Rule 23(e) was amended to provide that "a nonprecedential order entered under subpart (b) of this rule [Rule 23] on or after January 1, 2021, may be cited for persuasive purposes." Note that this only applies to Rule 23 orders entered after January 1, 2021.

MR 30370.[20] During the last year, the Illinois Supreme Court has issued various orders under *In re: Illinois Courts Response to COVID-19 Emergency/Reduction of Unnecessary In-Person Court Appearances,* MR 30370. These orders have included directions on how to reduce in-person appearances by encouraging remote appearances and reminding litigants of available electronic procedures and resources. By order effective August 27, 2020, and in effect until further order of the court, all summons issued in civil cases in Illinois must contain the following:

> E-filing is now mandatory with limited exemptions. To e-file, you must first create an account with an e-filing service provider. Visit http://efile.illinoiscourts.gov/service-providers.htm to learn more and to select a service provider.
>
> If you need additional help or have trouble e-filing, visit http://www.illinoiscourts.gov/faq/gethelp.asp or talk with your local circuit clerk's office. If you cannot e-file, you may be able to get an exemption that allows you to file in-person or by mail. Ask your circuit clerk for more information or visit www.illinoislegalaid.org.
>
> If you are unable to pay your court fees, you can apply for a fee waiver. for information about defending yourself in a court case (including filing an appearance or fee waiver), or to apply for free legal help, go to www.illinoislegalaid.org. You can also ask your local circuit clerk's office for a fee waiver application.

Rule 101 has similar language related to e-filing. The court must have realized some litigants needed a reminder that notification of e-filing is required on summons. Does your form summons include this language?

Amended Rule 415. *Regulation of Discovery.*[21] Rule 415 requires any material furnished to an attorney pursuant to the Rules to remain in the exclusive custody of the attorney unless dissemination is authorized by the court. By order entered October 23, 2020, and effective immediately, Rule 415 was amended to provide a procedure for such dissemination: "Upon motion of the attorney, the court shall, within 5 days, enter an order allowing the attorney to provide a copy of the discovery to the defendant unless good cause is shown why the discovery should not be furnished to the defendant." This procedure provides an opportunity for the prosecution to show good cause why it should not be furnished to the defendant. If sharing is ordered, certain redactions, such as contact information of witnesses, are to be made unless otherwise ordered. The comments to Rule 415 note that this facilitates "more effective and efficient" representation of a defendant while weighing the potential harm and danger to the prosecution. Article IV of the Rules governs criminal proceedings, but attorneys should consider how this access to discovery can impact a future civil action.

Amended Rule 212. *Use of Depositions.*[22]

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Effective October 1, 2020, Rule 212 was amended with the addition of subsection (e) to allow a deposition taken in any action in another jurisdiction of the United States involving the same subject matter and the same parties to "be used as if taken in the action brought in this State." A party is to give other parties reasonable notice of its intent to use a deposition taken in another jurisdiction by pretrial order.

New Rule 139. *Practice and Procedure in Eviction Cases.*[23] New Rule 139 requires certain supporting documents be attached to eviction complaints. Part (b)(1) requires the eviction notice or demand including proof of service be attached. When the eviction is based on breach of a written lease, Part (b)(2) requires the lease, or the relevant portions, be attached to the complaint. This part formalizes the requirements of section 9-210 of the Code of Civil Procedure (735 ILCS 5/9-210) as it relates to eviction cases. If plaintiff does not have the lease and/or notice, an affidavit, using the standardized form approved for use by the Illinois Supreme Court, stating the same may be attached. Rule 139 notes that it supplements, but does not replace, the requirements of article IX of the Code of Civil Procedure (735 ILCS 5/9-101 *et seq.*) and applies to eviction actions filed on or after the effective date of July 17, 2020.

Using the wrong form of summons may not be jurisdictional, but it is a duty of a competent attorney to apply the Rules and regularly check for updates.■

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1. Ill. Sup. Ct. R. 415 (eff. Dec. 9, 2020).
2. Ill. Sup. Ct. R. 23 (eff. Jan. 1, 2021).
3. Ill. Sup. Ct. MR 30370 (eff. Aug. 27, 2020).
4. Ill. Sup. Ct. R. 415 (eff. Oct. 23, 2020).
5. Ill. Sup. Ct. R. 212 (eff. Oct. 1, 2020).
6. Ill. Sup. Ct. R. 139 (eff. July 17, 2020).

Ethical Practices in the Email Age: Courtesy Copy Emails to Judges

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all counsel are put in the awkward position of not knowing whether the judge actually read the new arguments and/or disparaging comments. Can opposing counsel respond without first seeking leave of court as the record is now blurred?

Within the spirit of the Illinois Rules of Professional Conduct and the court's inherent powers, there are ways to curb this type of behavior. As Justice Cardozo once observed: "Membership in the bar is a privilege burdened with conditions."[3]

There is no statute, Canon of Judicial Conduct, Rule of Professional Conduct, or Supreme Court Rule that covers this exact situation. Since these transmittal emails are not a "pleading, motion and other document of a party,"[4] Supreme Court Rule 137 does not apply.[5] Moreover, a party moving for Rule 137 sanctions must show that the opposing party made untrue and false allegations without reasonable cause for the mere purpose of invoking harassment or undue delay of the proceedings.[6] Finally, our supreme court has recognized that: "Because Rule 137 addresses the pleadings, motions and other papers a litigant files, the rule does not provide a sanction against all asserted instances of bad faith conduct by a litigant or the litigant's attorney during the course of litigation. [Citation omitted.] For example, a party's pleadings may conform to Rule 137, yet the party may be guilty of other rule violations amounting to bad faith."[7] Thus, in this circumstance, a motion seeking Supreme Court Rule 137 sanctions is not likely to succeed. The question is, then, how should this behavior be sanctioned?

To us, the court's inherent powers are best suited to stop this type of behavior. Illinois Code of Judicial Conduct, Canon 3 (Illinois Supreme Court Rule 63), provides, in part, that: "A judge should maintain order and decorum in proceedings before the judge."[8] While not directly addressed by our Rules of Professional Conduct, this behavior implicates Illinois Rules of Professional Conduct 3.5 ("A lawyer shall not: … (d) engage in conduct intended to disrupt a tribunal.")[9], 4.4 ("(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, ….")[10] and 8.4 (It is professional misconduct for a lawyer to: … (d) engage in conduct that is prejudicial to the administration of justice.)[11]. These Rules of Professional Conduct, thus, parallel the judge's duty.

A judge "has the inherent power to punish, as contempt, conduct that is calculated to impede, embarrass, or obstruct the court in its administration of justice or derogate from the court's authority or dignity, or to bring the administration of the law into disrepute."[12] Assuming that a briefing schedule order was entered, or is part of the circuit court's "local" rules, any argument raised in a courtesy copy email violates that order or local rule and is an act of direct criminal contempt.

Criminal contempt sanctions are imposed to punish past willful misconduct, not compel the contemnor to perform a particular act.[13] Direct criminal contempt is conduct that is: (1) "personally observed by the judge," or (2) "committed outside the immediate physical presence of the judge but within an integral part of the court, *i.e.*, the circuit clerk's office."[14] Unlike indirect criminal contempt, where the court does not observe the contemptuous act, "[n] either a formal charge nor an evidentiary hearing must precede a hearing on direct criminal contempt because the misconduct was actually observed by the court and the relevant facts lie within the court's personal knowledge."[15] Importantly, the judge must find that the contemnor's conduct was willful.[16] Thus, for attorneys who repeatedly send courtesy copy correspondence

containing new arguments or disparaging remarks, the judge can find the conduct willful and immediately impose direct criminal contempt sanctions. We expect that this will rarely occur.

Suggested Best Practices: First, attorneys should not include arguments or comments in an email to a judge and/or his/her clerk. If attorneys receive one, print it out and file it with the clerk of the court, thereby placing it in the record. Second, judge's should stop this type of behavior by admonishing any attorney who goes beyond the ministerial contents of a courtesy copy letter or email, and sanction, through direct criminal contempt, attorneys who repeatedly flout the spirit of the rules and the Judge's admonitions. Further, each circuit court could adopt a local rule, pursuant to Illinois Supreme Court Rule 21[17], which specifies the contents of courtesy copy and other communications with Judges to specifically prohibit this type of behavior.

The accepted use of email for filing and transmittal has brought many conveniences and efficiencies to the court system. However, with its advantages, the opportunity for abuse has surfaced, challenging the court rules of professional conduct and civility. Hopefully, our suggestions can be a step in the right direction to curb these inappropriate practices.■

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1. https://central.isba.org/communities/community-home/digestviewer/viewthread?GroupId=133&MessageKey=ef9a4b92-9db8-43a6-b038-b036b236454c&CommunityKey=cf572d57-e4f6-4e6c-9026-78bc31fc8c0c&tab=digestviewer#bmef9a4b92-9db8-43a6-b038-b036b236454c (*last visited May 7, 2021*) (hereinafter "ISBA Discussion").
2. ISBA Discussion, *supra*, at post 2.
3. ***In re Rouss***, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917).
4. Under Illinois Supreme Court Rule 2, a "Document" is "a pleading, motion,photograph, recording, or other record of information or data required or permitted to be filed, either on paper or in an electronic format." http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_I/ArtI.htm#2 (*last visited May 7, 2021*).
5. Illinois Supreme Court Rule 137 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_II/ArtII.htm#137 (*last visited May 7, 2021*).
6. ***Webber v. Wight & Co.***, 368 Ill.App.3d 1007, 1032 (1st Dist. 2006), *appeal denied*, 223 Ill.2d 686 (2007).
7. ***Krautsack v. Anderson***, 223 Ill.2d 541, 562 (2006).
8. Illinois Supreme Court Rule 63 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_I/ArtI.htm#63 (*last visited May 7, 2021*).
9. Illinois Rule of Professional Conduct 3.5 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#3.5 (*last visited May 7, 2021*).
10. Illinois Rule of Professional Conduct 4.4 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#4.4 (*last visited May 7, 2021*).
11. Illinois Rule of Professional Conduct 8.4 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#8.4 (*last visited May 7, 2021*).
12. ***People v. Ernest***, 141 Ill. 2d 412, 421 (1990); *see also,* ***People v. Warren***, 173 Ill.2d 348, 370 (1996) ("The power to punish for contempt does not depend on constitutional or legislative grant.")
13. ***In re Marriage of Betts***, 200 Ill.App.3d 26, 43 (4th Dist. 1990).
14. ***People v. Hixson***, 2012 IL App (4th) 100777, ¶ 12.
15. ***People v. Perez***, 2014 IL App (3d) 120978, ¶ 18.
16. ***People v. Simac***, 161 Ill.2d 297, 307 (1994). The contemptuous state of mind may be inferred from the allegedly contemptuous conduct itself. ***People ex rel. Kunce v. Hogan***, 67 Ill. 2d 55, 60, 61 (1977).
17. Illinois Supreme Court Rule 21 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_I/ArtI.htm#21 (*last visited May 7, 2021*).

The Confidentiality of Mental Health Records: When Are They Secret?

BY PATRICK M. KINNALLY

Any lawyer involved in litigation issues subpoenas for records. It is customary. To do so shows diligence. The discovery device occurs in probate matters (*Doe v. Williams & McCarty*, 2017 IL App. (2nd) 160860), family law (*Garton v. Pfeiffer*, 2019 IL App. (1st) 180872; *Mandziarra v. Canulli*, 299 Ill. App.3d 593), or personal injury disputes (*D.C. v. S.A.,* 178 Ill.2d 551; *Doe v. Great America, LLC*, 2021 IL App. (2nd) 200123. But when the focus of such court mandates are mental health records, the bar for disclosure of such records and communications requires pause, perspicacity and patience. Petulance should not be in that advocacy regardless of the perceived stake in the outcome.

The Mental Health and Developmental Disabilities Confidentiality Act is almost three decades old (740 ILCS 110/1) ("the Act"). It states all records and communications shall be confidential (740 ILCS 110/3) and should not be disclosed except as the Act provides. The types of information made private include, "any record kept by a therapist or by an agency in the course of providing a mental health or developmental disabilities service to a recipient concerning a recipient and the services provided." A recipient is the person who is receiving those type of services. The confidential communications covered by the Act are, "any communication made by a recipient or other person to a therapist or to or in the presence of the other person during or in connection with providing mental health or developmental disability services to a recipient. That includes ESI. And, the privilege is one that applies not only to the recipient, but the provider or in a person in the presence of the therapist provider. (740 ILCS 110/2)

The introduction of mental health records in legal proceedings is based on the following:

* * *

No person shall comply with a subpoena for mental health records

> or communications pursuant to Section 10 of the Mental Health and Developmental Disabilities confidentiality act unless the subpoena is accompanied by a written order that authorizes the issuance of the subpoena and the disclosure of the records or communications or by written consent under section 5 of the Act of the person whose records are being sought. (740 ILCS 110/10)
>
> ***

In other words, before an attorney representing a party can issue a subpoena, he has to obtain an order from the trial court or agency which authorizes the issuance of the subpoena and the disclosure of the records or communications. This will require an *in camera* inspection by the trial court or agency at the request of any party to the proceeding. If the therapist invokes the privilege contrary to the wishes of the recipient, the court can require the therapist to establish that disclosure is not in the best interest of the recipient. And, it is important to note that any final order relating to the disclosure or nondisclosure of records is considered a final order for purposes of interlocutory appeal. See *D.C. v. S.A.* (1997); 178 Ill. 2d 551

In *Garton*, an attorney issued a subpoena to a hospital seeking Ryan Garton's mental health records. Ryan was involved in a dispute with his former spouse, Linda, claiming she had violated certain orders in the divorce court over the parties' minor children. The attorney never sought leave of court to issue such a subpoena, although the hospital delivered the records to the court, not the lawyer. The trial court impounded the records.

Thereafter, the trial court ordered the subpoena to be reissued to the hospital. The attorney then sent the original subpoena and the court's order to the hospital. The hospital then sent the records to the lawyer, even though they should have been sent to the court. The attorney turned the records over to the court, after they had been opened by a partner of the lawyer who issued the subpoena. The trial court entered an order denying the release of the records.

Ryan then filed a lawsuit against the hospital, Linda and Linda's lawyer. He claimed they had violated the Act and he had incurred legal fees and suffered emotional distress due to the Defendants' actions. The trial court granted summary judgment for the Defendants, basically concluding there was "no harm, no foul." The appellate court reversed the trial court, finding the stringent protections of the Act were not followed by the hospital or Linda's attorney. It entered summary judgment for Ryan on liability and remanded the case for a trial on proximate cause and damages.

The issue in *Mandziarra* is similar. In the modification of a custody dispute, the former husband, through his lawyer Canulli, sought the ex-wife's mental health records. The lawyer failed to follow the Act in securing a prior court order before issuing the subpoena. The trial court disclosed the records in open court. The appellate court reversed, finding the Act had been violated. The court observed:

> * * *
>
> Presumably, the patient in psychotherapeutic treatment reveals the most private and secret aspects of his mind and soul. To casually allow public disclosure of such would desecrate any notion of an individual's right to privacy. * * * Finally, confidentiality provides proper assurances and inducement for persons who need treatment to seek it. *Laurent v. Brelji*, 74 Ill.App.3d 214 (1979).

Doe v. Williams McCarthy, LLP, is another example of subpoenas not being issued consistent with the Act. The law firm filed 11 subpoenaes in the Lee County Circuit court that contained mental health records of a party involved in trust litigation. In her lawsuit, Doe claimed the law firm violated the Act in many ways including: obtaining her mental health records when that condition was not an element in the litigation; obtaining such records without prior court approval or an *in camera* inspection; and obtaining such records without her consent or prior approval.

The law firm defendants filed a motion to dismiss which the trial court granted. As to some of the counts the law firm relied on the absolute litigation privilege which states: *** an attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution, during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relationship to the proceeding." Restatement (Second) of Torts, 586 (1977); see also *Johnson v. Johnson & Bell, Ltd*. 2014 IL App (1st) 122677.

Much like the policy considerations attendant to all privileges and judicial adherence to, or rejection of them, the question was whether the Act's constraints were trumped by the absolute litigation privilege. The court held they were not; and again, we see another supposed absolute privilege is not so.

To get there, it turned to *Renzi v. Morrison*, 249 Ill. App. 3rd 5. *Renzi* held the common law witness immunity privilege had to be balanced with the right to privileged communications. *Renzi* concluded the such privilege had to yield to the Act since if it were otherwise the language of the Act would be a nullity. The *McCarthy* court followed *Renzi*, reversed the trial court in part, and remanded the case for further proceedings.

D.C. v. S.A. was a personal injury case. On June 6, 1992, D.C., a pedestrian, was walking across Route 53 in Bolingbrook, Illinois. He was struck by a car operated by S.A. and was injured. D.C. filed a negligence claim against S.A. In his complaint, D.C. made a claim for physical injuries, pain and suffering, medical expenses and lost earnings. No claim was posited for mental health injury. D.C. denied S.A.'s claim and asserted an affirmative defense that D.C. was the cause of his own injuries by entering the busy Route 53 highway.

S.A. issued subpoenas not only to the hospital where D.C. was treated after the accident, but also for his psychiatric records within a physician who treated him. The opinion discusses a letter the physician wrote to D.C.'s attorney where he stated D.C. was referred to him because of an indication D.C. might have been attempting suicide at the time of the accident. After an *in camera*

inspection, the trial court ordered a limited amount of D.C.'s psychiatric records to be turned over to S.A.'s attorney. The trial court then stayed its order and certified the following question to the appellate court:

* * *

> Whether this court correctly held that the plaintiff has introduced his mental health condition in establishing that he was in the exercise of due care for his own safety and that element of his mental health condition has been introduced by the filing of this lawsuit, and therefore, the specified records are discoverable and ordered turned over to defendants?

The appellate court answered the question by holding a plaintiff does not waive the privilege against disclosure of mental health records under the Act unless he specifically or affirmatively raises the condition as an element of his claim. Furthermore, it held that the only basis for injecting the plaintiff's mental health condition became an issue was by defendant's attempt to raise it based on comparative negligence. But, since D.C. was a recipient under the Act, only D.C. could waive the privilege the Act bestowed to him.

The Supreme Court reversed. Basically, it held that D.C.'s privilege was not absolute and had to yield. It found the information was probative and might "provide a possible explanation of how the accident occurred" and was not unduly prejudicial.

In dissent, Justice Harrison concluded the majority opinion was simply rewriting what the statute said, and was merely legislating, not interpreting, the law as written. Personally, I think Justice Harrison was correct. The privilege enacted was clear and unambiguous.

The Illinois Supreme Court has stated unequivocally this law was enacted to maintain and protect the confidentiality of communications, not just records, subject to certain limited disclosures. *Reda v. Advocate Health Care*, 199 Ill. 2d 47(2002) Those limitations include:

1. If the communication or record is introduced as an element of an individual's claim or defense in any civil, administrative, criminal or legislative proceeding.
2. A communication or record of a recipient may be disclosed in a civil proceeding after the recipient's death by any party claiming as beneficiary of the recipient.
3. If an individual who is receiving covered services initiates a civil proceeding regarding an injury which occurs during the court of receiving services.
4. If a court has ordered, for good cause shown, that mental examination be undertaken.
5. Under the Probate Act as it pertains to guardianships to ascertain whether the person is a competent or in need of a guardianship.
6. If the records or communications are being employed to determine a person' ability to stand trial.
7. In a civil or administrative proceeding involving the validity of benefits under a life, accident, health or disability insurance policy records or communications may be disclosed
8. Any records or communications brought pursuant to the Mental Health and Developmental Disabilities Act.
9. Records and communications may be disclosed in any trial for homicide.
10. Under the Counties Code, any records or communications by a coroner undertaking a preliminary investigation to determine the cause of death.
11. In juvenile court proceedings, in a case prosecuted by the state of Illinois, records and communications related to a person's ability to care for a child.
12. Records and communications of a recipient may be disclosed when disclosure is necessary to collect sums or receive third party payment for money owed to those providers by the person who received covered services.

The Act provides for a private right of action for damages. (740 ILCS 110/15) and includes provisions that if the plaintiff is successful, he/she may recover damages, reasonable attorney's fees and costs. *Garton.*

Do the exceptions swallow the rule? Let's see. *Doe v. Great America, LLC*, 2021 IL App(2d) 200123. John Doe, the administrator of Jane Doe's estate filed a lawsuit against Great America, LLC. In November 2017, plaintiff and Jane Doe filed a complaint for damages against GA. It was claimed that some young people had viciously attacked them, causing serious injuries. The gravamen of the complaint was GA was negligent for failing to intervene.

GA, in the course of discovery, filed an interrogatory asking whether Plaintiffs were claiming any psychiatric of psychological injuries, and if so, who treated them. Answering in February 2019, plaintiffs stated they were not claiming any such injury or compensation. On May 5, 2019, Jane Doe committed suicide. In July 2019, John Doe filed an amended complaint on behalf of Jane for wrongful death based on Jane's suicide. The amended complaint stated:

> * * * Jane suffered severe, debilitating and permanent physical injuries that caused conscious pain and suffering, including injuries to her brain that rendered her bereft of reason and suicidal. * * *

Thereafter, GA in discovery requested Doe to identify Jane Doe's mental health providers. Doe refused. GA moved to compel a response, arguing Doe had placed Jane's mental health at issue by pleading GA's acts or omissions caused her to become bereft of reason and kill herself. GA, through third-party discovery of a pharmacy, had learned Jane had been prescribed medication to treat schizophrenia and depression. Doe responded he was not seeking damages for mental or psychological injury.

The trial court granted the motion to compel finding Doe's pleading that Jane was "bereft of reason" made Jane's mental health an issue. Doe refused to comply and was held in friendly contempt. Doe appealed.

The second district affirmed. It acknowledged the evidence of cognitive impairments consistent with traumatic brain injury does not necessarily place a plaintiff's mental health condition at issue. *Sparger*

v. Yamini, 2019 IL App. (1st) 180566. Doe argued that he was only seeking damages relating to a physical brain injury. The appellate court found that Jane's suicide complicated the matter. And correctly, based on precedent.

Justice McClaran concluded, following *Williams v. Manchester*, 228 Ill.2d 404 (2008), that a party's voluntary act of suicide is an independent intervening act which is unforeseeable, which thereby breaks the causal connection from the tortfeasor's alleged negligent conduct.

The appellate court found that it is rare when the decedent's suicide would not break the chain of causation and foreclose a cause of action for wrongful death, which is a statutory claim. The court acknowledged that an exception to that court made rule exists whereas a proximate result of a head injury resulting from the negligence of another person becomes insane or bereft of reason and while in that state of mind, commits suicide. *Crumpton v. Walgreen Co.*, 375 Ill. App.3d 73 (2007). In that instance the act of suicide is not a voluntary undertaking. Hence, it does not eclipse the causal connection between the suicide and the act that caused the injury. See *Little v. Chicago Hoist and Body Co.*, 32 Ill.2d 156 (1965).

The appellate court, quoting Dean Prosser, observed that:

* * *

> If insanity prevents the victim from realizing the nature of his actor controlling his conduct, his suicide is to be regarded either as a direct result and no intervening force at all, or as a normal incident of the risk, for which the defendant will be liable. * * * But if the suicide is during a lucid interval when he is in full command of his faculties, but his life has become unendurable to him, it is agreed that his voluntary choice is an abnormal thing which supercedes the defendant's liability.

Prosser, Handbook of the Law of Torts (2nd Ed. 1955), '49 at 274.

The court concluded that Jane Doe's records should be disclosed since she became insane and bereft of reason and committed suicide. It stated: "that a suicide directly implicates a psychological condition or psychological damage requiring an examination of her mental condition." Thus, her mental condition was introduced as an element of her cause of action and her mental health records were subject to disclosure. One must wonder if Jane Doe every thought her most private thoughts and mental health treatment would ever be disclosed.

The takeaway from Doe and the Act's requirements seem antithetical to the Act's clear requirements as to confidentiality. As advocates we must be circumspect in how we draft pleadings and issue subpoenas where a client's mental history may be an element of a cause of action. As these cases interpreting the Act make manifest, the terrain is a nettled one. Exceptions to the Act's strong command exist. There are many. If we are unfamiliar with them and do not inform our clients that disclosure may result, unfulfilled expectations may result.■

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