

MEDICAL DEFENSE AND HEALTH LAW

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This article discusses an Illinois Appellate Court decision that addressed whether the Illinois Mental Health and Developmental Disabilities Confidentiality Act prevented disclosure of mental health records in a medical negligence case involving an alleged neurological brain injury.

Illinois Appellate Court Deems Mental Health Record Privileged in Neurological Brain Injury Case

ABOUT THE AUTHORS



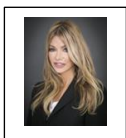
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The Illinois First District Appellate Court (First District) recently reversed the trial court's order on defendants' motion to compel mental health records, concluding that the plaintiff failed to place his minor daughter's mental condition at issue in a medical negligence case involving a neurological brain injury. *Sparger v. Yamini*, 2019 IL App (1st) 180566. As a result of the ruling, the minor's mental health records remained privileged under the Illinois Mental Health and Development Disabilities Confidentiality Act, 740 ILCS 110/3.

Factual Background

Jeff Sparger, on behalf of his daughter Kiersten, filed a complaint against the University of Chicago Medical Center and Dr. Bakhtiar Yamini, Kiersten's neurosurgeon, alleging that Dr. Yamini's delay in repairing a spinal fluid leak caused Kiersten to develop meningitis. *Sparger*, 2019 IL App (1st) 180566, 5. Dr. Yamini performed a lumbar laminoplasty to untether Kiersten's spinal cord. Dr. Yamini advised the Spargers at the follow-up appointment that the wound was leaking, but Kiersten could not be admitted to the hospital due to a nursing strike. For the next several days, a pouch developed at the wound site, and Kiersten developed a fever and significant neck pain. Fourteen days after the follow-up appointment, Dr. Yamini surgically repaired the leak. *Id.* She was later diagnosed with meningitis. *Id.*

Discovery Dispute

During discovery, defendants issued an interrogatory to plaintiff seeking the names and addresses of all medical personnel who examined or treated Kiersten for her injuries. *Sparger*, 2019 IL App (1st) 180566, 7. Plaintiff identified Dr. Kathy Borchardt, a neuropsychologist. Dr. Borchardt was asked to author a report after evaluating Kiersten's neuropsychological condition to determine whether Kiersten's meningitis affected her cognitive, emotional, and behavioral development. *Id.* 9.

After conducting an interview of Kiersten and her parents, along with several tests, Dr. Borchardt opined that Kiersten had become more frustrated and angry since her infection. Dr. Borchardt also determined that Kiersten's friendships have suffered as a result of her moods and outbursts. *Id.* In her report, Dr. Borchardt concluded that "[g]iven 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.* 8

The plaintiff produced Dr. Borchardt's report to the defendants, who then subpoenaed the medical records of Kiersten's prior treating physicians, including plaintiff's hospital records for admissions that predated her meningitis and contained mental health information. *Id.* 10. Plaintiff submitted the records to the trial court for an *in camera* inspection, redacted the mental health information, and asserted the mental health privilege. *Id.* Defendants filed

a motion to compel disclosure of the records, arguing that Dr. Borchardt's report put Kiersten's mental health at issue by concluding her injury had affected her cognitive, emotional, and behavioral condition. Therefore, defendants argued that they were entitled to determine what plaintiff's cognitive, emotional, and behavioral presentation was prior to the occurrence. *Id.* 11. Plaintiff filed a motion to bar discovery of the records because they did not place her mental condition at issue by merely claiming a neurological injury.

The trial court agreed with the defendants and compelled the disclosure of the records. *Id.* 13. The court further agreed the records showed that Kiersten displayed "emotional symptomatology" prior to developing meningitis, and therefore the exception under Section 10(a) of the Mental Health Act applied. The court ordered the records be fully disclosed without redactions. *Id.* 14. Plaintiff's counsel, however, declined to produce the records, was held in friendly contempt, and filed a timely appeal. *Id.*

First District's Analysis

The First District held that the trial court erred in ordering plaintiff to produce the records because the records were protected under the Mental Health Act and the plaintiff had not put her mental health at issue. In so concluding, the First District relied on the Illinois Supreme Court decision in *Reda v. Advocate Health Care*, 199 Ill. 2d 47 (2002). *Sparger*, 2019 IL App (1st) 180566, 16.

In *Reda*, the plaintiff filed a medical negligence claim following a knee replacement surgery that resulted in the amputation of his toes and his eventual stroke. *Reda*, 199 Ill. 2d at 50. The plaintiff testified that, after the incident, he experienced headaches that he did not experience prior to the surgery. His wife further testified that he became emotional, frustrated, and mean. *Id.* at 52-53. After an *in camera* inspection of the mental health records, the trial court ordered disclosure, agreeing with the defendants' argument that the plaintiff put his mental health at issue. *Id.* at 53. The Illinois Supreme Court, however, reversed the decision. The Court noted in its ruling that "[a] neurological injury is not synonymous with psychological damage. Nor does neurological injury directly implicate psychological damage." *Id.* at 58. The court in *Reda* further noted that if it were true that a neurological injury were the same as psychological damage, then any injury involving the brain would automatically open the door to the plaintiff's mental health records and "eviscerate the privilege." *Id.* The Illinois Supreme Court concluded that the plaintiff's complaints were for neurological, not psychological, injuries, given his stroke, which prevented the disclosure of his mental health records. *Id.*

The First District found the facts in *Reda* similar, noting that the Illinois Supreme Court had already made an important distinction between a neurological injury and psychological damage. Thus, in *Sparger*, the First District emphasized that the

neuropsychologist report concluded that Kiersten presented with signs and symptoms consistent with a traumatic brain injury; a neurological injury and not psychological damage. *Sparger*, 2019 IL App (1st) 180566, 24-25. Therefore, like *Reda*, which held that a patient does not place his or her mental condition at issue merely by claiming brain damage, the court similarly held in *Sparger* that that plaintiff did not place Kiersten's mental condition at issue. *Id.* 24. The court further reasoned that the plaintiff stipulated when asserting the privilege that she was not seeking damages based on psychiatric, psychological, or emotional damages. *Id.* 28.

Based on the analysis above, the First District held that the plaintiff properly asserted the privilege by redacting information pertaining to Kiersten's mental health records and submitting the records for an *in camera* inspection. *Sparger*, 2019 IL App (1st)

180566, 34. The court concluded that the defendants therefore did not sufficiently show that such records fell into the narrow exception in section 10(a) (1) of the Mental Health Act. *Id.* 35.

Conclusion

Using the analysis applied in *Sparger*, it will be important for defense counsel to analyze whether plaintiff has asserted neurological injuries or psychological damage. Plaintiffs' counsel will almost certainly contend that a plaintiff suffers from a neurological injury rather than psychological one, in an attempt to limit the disclosure of mental health records, even where plaintiff has claimed cognitive, emotional, and behavioral injuries as a result of a defendant's alleged negligence.

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