a criminal act and bar the application of an intentional-act exclusion clause. Under the law, the terms of an insurance policy are construed according to the general rules of contract construction. The determinative question is the intent of the parties, that is, what coverage the insured expected to receive and what the insurer was to provide, as disclosed by the provisions of the policy. If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. However, when the words of an insurance contract are susceptible to two equally reasonable interpretations, the one that will sustain the claim and cover the loss must, in preference, be adopted. This rule of construction favorable to the insured extends to exclusion causes.

Intentional-act exclusion clauses were adopted primarily to prevent individuals from benefiting financially when they deliberately injure others. An individual who lacks the capacity to conform his or her behavior to acceptable standards of society will not, however, be deterred by the existence of insurance coverage for injuries caused by his or her actions. Therefore, the consideration of mental capacity when interpreting an exclusionary clause is not inconsistent with the purposes of such an exclusion. Furthermore, both principles meet the public interest in compensating victims for their injuries. Under a rule whereby damages caused by an insured's conduct are not denied coverage where the insured lacks a certain capacity, the injured person will have redress for his or her damages, even if the insured is judgment proof. However, some insurance companies have excluded coverage for:

> . . .an act or omission which is criminal in nature and committed by an insured person who lacked the mental capacity to appreciate the criminal nature or wrongfulness of the act or omission or to conform his or her conduct to the requirements of the law or to form the necessary intent under the law. . . such provisions have received unfriendly treatment from certain courts.

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Privacy Violation in Fitness-for-Duty Evaluation

Police Officer's Statements in a Department-Ordered Fitness-for-Duty Evaluation Are Protected Under Illinois Mental Health and Developmental Disabilities Confidentiality Act From Further Disclosure Without the Officer's Consent

Facts of the Case

In *McGreal v. Ostrov*, 368 F.3d 657 (7th Cir. 2004) James T. McGreal was a police officer for the Village of Alsip, Illinois. His superior officers, Chief of Police Kenneth Wood and Field Operations Commander Lt. David Snooks, were appointees of the longstanding mayor, Arnold Andrews. Mr. McGreal, following a series of incidents in which he felt that the mayor and other village officials had acted improperly, challenged Mayor Andrews in the 1997 election. After his failed attempt to unseat the mayor, Mr. McGreal found himself under "unprecedented scrutiny" from his departmental superiors. He filed reports detailing the alleged infractions, which in one case initiated an investigation into the conduct of the mayor.

In November 1997, Mr. McGreal was ordered to appear for an administrative interview to address the matter. Despite his undergoing many hours of interrogation over four months, no charges or disciplinary actions were brought against him. Instead, he was ordered to undergo a psychological evaluation to assess his fitness for duty.

Mr. McGreal was forced to sign a waiver with respect to the confidentiality and privacy of the information given to the psychologist and the dissemination of his report. He signed the waiver and noted it was "under duress." The psychologist's lengthy and detailed report concluded that to remain on the force, Mr. McGreal must "undertake a course of psychotherapy directed toward helping him gain insight into the vagaries of his reasoning processes, their potential for disruption in the police department and the community, and the relationship to his own psychological needs and functioning." Mr. McGreal agreed to the therapy, but Chief Wood chose to place him on paid sick leave until further notice. Mr. McGreal sued, and two weeks later he was terminated on the basis of "various acts of misconduct." Subsequent to the receipt of the report, Chief Wood forwarded the report to Mr. McGreal's colleagues in

the Fraternal Order of Police (FOP), supposedly in response to a grievance filed by Mr. McGreal, who objected to the disclosure of the report and questioned the validity of his consent and also the scope of the information disclosed in the report.

Mr. McGreal's suit claimed deprivation of First Amendment rights, deprivation of speech rights, and violation of the Illinois Mental Health and Developmental Disabilities Confidentiality Act arising from the disclosure of the psychological report. The defendants moved for a dismissal of the final count, noting that there was no therapeutic relationship between the psychologist and Mr. McGreal and that further, Mr. McGreal had signed a waiver of confidentiality. The defendants moved for summary judgment on the remaining counts. The court granted judgment in favor of all the defendants, and Mr. McGreal appealed.

The lower court, in granting the defendants' motion for summary judgment, found that the Illinois statute (the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 *et seq*.) did not apply in this situation, because Mr. McGreal was not a "recipient" of the psychologist's report pursuant to the waiver he signed.

The questions of law presented to the appellate court included whether Mr. McGreal's First Amendment right outweighed the "government's interest as an employer in efficiently providing government services," and if not, would Mr. McGreal have been disciplined "even in the absence of his speech?" The final question, most pertinent to psychiatry, was whether the psychologist's fitness-for-duty report was covered by the Illinois Mental Health and Developmental Disabilities Confidentiality Act.

Ruling and Reasoning

The standard for granting a motion for summary judgment, as set forth in this case, is that Mr. McGreal need only demonstrate a genuine issue of material fact as to each element. All facts are construed in a light most favorable to Mr. McGreal, the party opposing summary judgment, and the court draws all reasonable inferences in his favor.

The appeals court found that Mr. McGreal's statements were worthy of First Amendment protection and that they played a substantial role in the department's decision to terminate him. However, they felt that there were "too many open questions" for a court to decide whether Mr. McGreal's First Amendment protection of speech was outweighed by the need for an employer to restrict such speech in the interest of "effective and efficient public service." With regard to The Village of Alsip's contention that it could not be held liable for the independent acts of the elected and appointed officials, the appeals court found instead that the Mayor and Chief Wood were acting as "final policymaking authorit[ies]" in initiating the termination process and mandating psychotherapy. This brings us to the final question of whether Mr. McGreal's communication with the appointed psychologist was protected by the Illinois Mental Health and Developmental Disabilities Confidentiality Act.

The appeals court found that Mr. McGreal was entitled to have a jury hear his claim regarding the necessity of the ordered psychological evaluation and whether the extent of the report's dissemination went beyond the circumscribed departmental interest to establish his fitness for duty. The court of appeals held that the psychological fitness-for-duty evaluation was protected under the Confidentiality Act. The appeals court reasoned that the evaluator was a psychologist, thereby qualifying as "therapist" under the Act, and that his examination and diagnosis qualified as mental health services, for which Mr. McGreal was recipient. Therefore, the final document constituted a protected mental health record.

The Illinois Supreme Court had held, in *Sangirardi v. Village of Stickney* 342 Ill. App.3d 1 (2003), that a police chief maintained authority to order fitness-for-duty evaluations of his officers in the interest of public safety and that logically the police chief was entitled to the results of the examinations. The appeals court pointed out that the Illinois Confidentiality Act contained a detailed consent form, as well as a defined exception to the strict confidentiality, that is, the consent to disclose. Therefore, there was no necessary conflict between the need for disclosure and the right to privacy. Any such disclosure, however, was restricted to "that which is necessary to accomplish a particular purpose." While Mr. McGreal had reluctantly agreed to sign a Consent for Evaluation form, under orders from Lt. Snooks, this consent was inconsistent with what was provided by the statute. Furthermore, Mr. McGreal's psychological evaluation, which included sensitive personal information not relevant to his fitness for duty, had been disseminated far beyond the superiors responsible for the determination of his fitness.

The appeals court noted that:

> The Confidentiality Act contains no disclosure exception for police departments performing mental health examinations to determine fitness for duty. It does allow for disclosure on consent, but the consent form used here does not meet the standards set forth by Illinois law. *See 740 ILCS 110/5*(*b*) (listing what is required for valid consent).

Further the appeals court noted:

> . . .that a recipient may consent to disclosure of information for a limited purpose and that any agency or person who obtains confidential and privileged information may not redisclose the information without the recipient's specific consent.

Discussion

With every forensic psychiatric evaluation, we begin with a statement documenting our disclosure to the evaluee that the information will be used in a report to the referring party and is, therefore, not confidential. We also explain that although we are psychiatrists, we have no patient-doctor relationship with those whom we evaluate in a forensic context. Yet, the Seventh Circuit Court of Appeals interpreted the application of the Illinois statute such that by virtue of the fact that the evaluator was a psychologist and in this role assessed Mr. McGreal, the forensic evaluation was construed as a mental health service. The report produced was therefore protected. The appellate court recognized that the statute does provide for a waiver in limited circumstances, but those exceptions must be narrowly read. The key facts on which this case turned are: (1) the waiver used did not meet the statutory exception to nondisclosure; (2) the Alsip Police Department redisclosed the report to another party, not required within the purpose of evaluating Mr. McGreal for his fitness for duty; and (3) the standard for review was that of a summary judgment motion interpreting an Illinois state statute. Thus, the *McGreal* decision instructs that forensic psychiatrists must follow the confidentiality statute(s) applicable in their jurisdiction. This means obtaining the legal consent specified by any relevant mental health confidentiality statute and limiting the dissemination to those permitted under the statute.

McGreal also raises questions about the "no doctor-patient" relationship that we define at the outset of our evaluations. This self-serving descriptor allows us to negate assumptions presumed in our medical role that cannot be reconciled with our forensic role. As forensic evaluators, we cannot promise to "first, do no harm" and that everything disclosed will remain strictly confidential. Yet, it is not only our psychiatric skill that allows us to elicit information from those we evaluate, but also the benevolent authority that is subsumed in the role of psychiatrist. It is precisely because of this combination of skill and authority that we are capable of eliciting information that an evaluee might not otherwise disclose. *McGreal* serves to remind us that with privilege comes responsibility. Under the wording of the Illinois Confidentiality Statue, by virtue of our identity as psychiatrists, we are providing mental health services to those we evaluate. Redefining ourselves at the start of the interview does not dismiss the evaluees' perceptions of us or reduce their vulnerability to our authority.

In sum, *McGreal* cautions that confidentiality remains paramount in all psychiatric services, and proper consent to disclosure should be obtained. Sensitive personal data that are irrelevant to the purpose of an evaluation should be withheld in the interest of privacy. And finally, we are reminded that disclosure is limited in scope and is permitted only for the purpose for which consent was provided.

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Psychiatric Treatment in Prison

The Guilty Defendant Does Not Have the Right to Sentence Departure for Treatment by a Private Psychiatrist Unless Extraordinary Circumstances Exist Under the Federal Sentencing Guidelines

In *United States v. Derbes*, 369 F.3d 579 (1st Cir. 2004), the First Circuit Court of Appeals considered whether a defendant who had pled guilty to tax evasion should have a downward sentence departure based on his alleged need for continued treatment by his private psychiatrist. In this case, there were no