NO. 100892-9

SUPREME COURT
OF THE STATE OF WASHINGTON

SINA GHODSEE,

Appellant,

v.

CITY OF KENT,

Respondent.

AMICUS CURIAE BRIEF OF NAMI-WA.

By: Paulette R. Burgess,
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I. INTRODUCTION

Under Washington State's Involuntary Treatment Act (ITA) an individual may be civilly committed to treatment if he or she is found to be gravely disabled or a danger to self or others as a result of mental illness. RCW 71.05.101. The legal process to determine whether a person should be detained for involuntary treatment involves several steps—from initial investigation to court-ordered treatment and ongoing supervision. [1] From initial investigation by health professionals to ongoing involuntary treatment, if any, the entire

[1] In every case including the Appellant's, the process requires: (1) an investigation conducted by a mental health professional to determine whether the individual meets criteria for involuntary treatment; (2) if applicable, the professional files a non-emergent detention ("NED") petition with a court or emergent detention order. RCW 71.05.150-153; (2) a court hearing shortly after initial detention to decide whether an order for further treatment is necessary, either inpatient or something less restrictive; (4) assessment of patient compliance and progress.

process under the ITA is individualized to meet the medical/mental health needs of the person subject to the ITA.

This issue before the Court is one of law: What duty of care is owed to an individual subject to an NED Order by government actors when enforcing such an order?

Because the very basis of an order issued under the ITA requires a personalized, preliminary finding by trained mental health professionals employed by the government that the named individual is suffering decompensation from mental illness and presents a danger either to him/herself or to the public, and such information is necessarily known to those government actors charged with carrying out the NED Order, the subject of an NED Order, in this case the Appellant, is

owed a personal duty of care by the governmental entity seeking to enforce that order.

Dismissal on summary judgment was improper because there remained a genuine issue of fact whether the Respondents breached their duty of care owing to the Appellant. This Court should grant review and reverse to resolve conflicts in the law and promote the public policy of this state. RAP 13.4(b)(2), (3), (4).

II. IDENTITY AND INTEREST OF AMICI

The identity and interest of NAMI in this action, as required by RAP 10.3(e), are detailed in NAMI's motion for leave to submit this *amicus* brief..

III. STATEMENT OF THE CASE

Amici incorporates Appellant's Statement of the Case.

IV. ARGUMENT

1. The Court should grant review because Division One's opinion conflicts with

recent Division Three precedent

This should be reviewed because the Division One holding conflicts with a Division Three decision. "We recognize when there are conflicts in the Court of Appeals. We resolve them by granting review, not by telling the later panel to adhere to a decision of an earlier panel. RAP 13.4(b)(2); *see also*, e.g., State v. Larson, 184 Wn.2d 843, 847, 365 P.3d 740 (2015) ("We accepted review to resolve this conflict within the Court of Appeals between Division One and Division Two.").

The Court of Appeals, Division One, dismissed the Appellant's case on summary judgment, holding that the ITA essentially provides broad immunity. But the Court of Appeals, Division Three, in a very recent opinion ruled that whether the requirements of the ITA had been disregarded—as alleged by the Appellant here, that the City of Kent Police failed to essentially enforce

an NED Order—was one of fact. The case is In re Det. Of N.G., 20 Wn. App. 2d 819, 503 P.3d 1 (2022), which is actually two cases combined; both N.G. and C.M. were erroneously detained at a state hospital after their 180-day involuntary commitment orders expired.

In C.M., Division Three held that the trial court erred by failing to allow the petitioner an opportunity to present evidence regarding why an improper detention occurred before ruling on a motion to dismiss.

"We hold that in determining whether a petitioner has totally disregarded ITA requirements, a trial court must consider the totality of the circumstances. These circumstances include (1) whether the violation of the statutory requirements occurred knowingly, willfully or through gross negligence[.]" Id. at 837.

Division Three determined that "the trial court erred in CM's case by failing to allow the petitioners the

opportunity to present evidence regarding ***why*** an improper detention occurred before ruling on a motion to dismiss based on a total disregard of the ITA's requirements. . . .the total disregard determination is a ***factual*** one. Before a trial court can make this factual determination, it necessarily must be presented with and consider the specific facts regarding why the petitioner violated ITA requirements." Id. (emphasis added).

Mr. Ghodsee, the Appellant in this case, argues an actionable claim for negligence based on inaction by police, but the trial court and appellate court deny him an opportunity to prove gross negligence—or to even show a special duty was owed. Division Three a discussed that such inaction by state actors could be a basis for gross negligence under the ITA.

"In NG's case, the trial court noted that the doctors and persons working with NG did not engage in any intentional acts. This statement at least suggests that the court did not recognize that gross negligence also could constitute total disregard. And the court did not consider the other factors that we identify above." 20 Wn. App. 2d at 838.

2. The application of the Public Duty Doctrine to the ITA is a case of first impression, which should be clarified by the highest court

These issues, whether the Public Duty Doctrine automatically applies to government actors under the Involuntary Treatment Act, and thus precludes any claim for negligence, is one of first impression. Thus, the parties (and by extension, all Washington residents) are left without clarity on the ultimate question, and instead, are left with uncertainty. Without review by this Court, the significant question of law will remain

unsettled. RAP 13.4(b)(4).

3. The Lower Courts Erred In their Application of the Public Duty Doctrine to the ITA

a. The ITA is designed to address the particular needs of individuals in crisis, not merely to protect the general public

Division One held that to succeed in a claim for negligence against the Kent Police Department, the Appellant must demonstrate the government owed a duty to him, rather than the public at large. This is correct. Indeed, Division One agreed that "the plain language of the court order directing the government to detain [the Appellant] Ghodsee creates a legal duty. However, this duty is one owed to the public at large, not an individual duty owed to Ghodsee." (citing Osborn v. Mason County, 157 Wn.2d 18, 28, 134 P.3d 197 (2006). Wrong.

The preceding statement conflicts with the clear

legislative intent of the ITA. RCW 71.05.010 states unambiguously that its purpose is to protect individual "persons" suffering mental illness as well as the public with whom they may come in contact. The ITA protects individuals through individualized petitions specific to each individual based on his or her unique mental health condition.

To argue otherwise and say that the ITA is designed to protect members of the public from people who are in a mental health crisis would be to interpret the provisions of the ITA as similar to laws that address criminal conduct, making enforcement of an Emergent, Non-Emergent, or LRA Order the equivalency of punitive confinement. But statutes criminalizing conduct such as taking property or services from another without lawful authority (Theft) intentionally causes bodily harm to another (Assault), etc., are

designed to protect "the public at large" from other's conduct; such laws in no way are designed to protect the perpetrators of such conduct from their baser instincts. In sharp contrast, the ITA's plain language makes it clear why it was enacted, "To protect the health and safety of persons suffering from behavioral health disorders," and to do so by "provid[ing] prompt evaluation and timely and appropriate treatment of persons with serious behavioral health disorders." RCW 71.05.010(1)(c).

Because the ITA is designed to protect individuals suffering from a mental health crisis, and because this protection allows for governmental actors to petition courts based on the merits of the individual's circumstances, it is clear a duty of care based on a special relationship attaches to a NED Order or any order put into place under the ITA. As the court noted

in its opinion, 'Under the Restatement (second) of Torts Sec. 315 (Am. Law Inst. 1965), there is generally no duty to prevent a third party from harming another. If, however, 'a special relation exists between the actor and the third person,' there may be a duty to 'control the third person's conduct.' Id." What sort of relationship then, if not a "special relationship" between a mentally ill person, who has been made the subject of a petition and resulting court order for no other reason than his or her known decompensating mental health condition, and the governmental actor charged with enforcing said order could possibly exist?

The duty of officers who are charged with carrying out the NED Order of the issuing court is premised both on the order itself and the underlying *merits of the petition* that prompted that order. RCW 71.05.010(2) Thus, Appellant, and people in Appellant's position, are

necessarily known individually, their frailties or attributes (the mental illness) being the basis for said order. This is the purpose behind the expressed legislative intent that such people be provided "prompt evaluation and timely and appropriate treatment." RCW 71.05.010(1)(c)

If there still should be any doubt as to how an individual is to be known personally to the government actors, RCW 71.05.012, entitled "Legislative intent and finding," states in part, "It is the intent of the legislature to enhance continuity of care for persons with serious behavioral health disorders that can be controlled or stabilized in a less restrictive alternative commitment. Within the guidelines stated in In re LaBelle, 107 Wn. 2d 196 (1986), the legislature intends to encourage appropriate interventions at a point when there is the best opportunity to restore the person to or maintain

satisfactory functioning."

"For persons with a prior history or pattern of repeated hospitalizations or law enforcement interventions due to decompensation, **the consideration of prior history is particularly relevant** in determining whether the person would receive, if released, such care as is essential for his or her health or safety." Id. (emphasis added).

By this plain language the IIA creates a special relationship between the mentally ill individual subject to its provisions and the governmental actors charged with enforcing it.

b. More evidence shows that the ITA is meant to address the needs of particular individuals rather than the general public

In 2015, the Legislature directed the Washington State Institute for Public Policy (WSIPP) to study two aspects of the involuntary commitment process—non-

emergent petitions and less restrictive alternative (LRA) orders to treatment.[2] It found that five different court jurisdictions use non-emergent petitions for civil commitments—King, Pierce, Snohomish, Benton, and Kitsap. However, King County is the only court jurisdiction that routinely collects data on the number of emergent and non-emergent petitions filed.

For King County in particular the researchers noted the number of petitions for initial detention filed in that county had steadily increased from 2,275 in 2008 to 3,593 in 2014. But in the four years preceding the study, the percentage of total petitions in King County that were *non-emergent* decreased from 22% to 10%. The reason for this decrease, according to the study's participants, was an expressed "belief that changes in

[2] Engrossed Second Substitute Senate Bill 5649, Chapter 269, Laws of 2015, ordering report.

the ITA statute that took effect in 2012 provides another reason for the sporadic use of non-emergent petitions. These factors allow a DMHP to more fully consider witness accounts, historical factors, and patterns of behavior when deciding whether the need for treatment is imminent and serious."[3]

Whether it be an emergent or non-emergent order that is sought by the Designated Crisis Responders is based on this particularized evidence. This information is known before any order is ever signed by the issuing court. These are not routine, impersonal bench warrants, as has been argued. The subject of such an

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[3] . The full report is at the Washington State Institute for Public Policy's website (wsipp.wa.gov), at https://www.wsipp.wa.gov/ReportFile/1619/Wsipp_Washingtons-Involuntary-Treatment-Act-Use-of-Non-Emergent-Petitions-and-Less-Restrictive-Alternatives-to-Treatment_Report.pdf.

order is necessarily at risk or placing the public at risk based on individualized facts.

The officers owed a particular, individualized duty of care to someone under these circumstances, Division One was wrong to find otherwise.

4. Using the statutory immunity language of the ITA as a blanket shield against civil suits defeats litigants' right to Due Process and trial by jury, and thus is unconstitutional

Review is also appropriate to ensure the ITA does not act as a broad blanket immunity infringing on a litigant's right to trial and access to justice. RAP 13.4(b)(3).

This Division One holding, by allowing for a Summary Judgment, wrongfully disallows access to the courts when a litigant has been found to fall within the purview of the ITA. Such a potential litigant is necessarily someone affected personally by mental

illness, as was the case here for Mr. Ghodsee. Under Article 1, Section 21 of the Washington State Constitution, all civil litigants have the right to a trial by jury. "The right of trial by jury shall remain inviolate[.]" To enact a statute that curtails liberty interests but then disallows recourse for claims without a trial on the merits that said statute was negligently enforced raises alarm bells. And where Constitutional rights are infringed, a statute must be narrowly tailored to address a compelling governmental interest, and such a law must pass the strictest of scrutiny. Korematsu v. United States, 323 U.S. 214 (1944).

One section of the ITA, RCW 71.05.120, discusses law enforcements exemption from liability. It provides limited civil immunity "**with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a**

person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence." Id. (emphasis added).

The language "with regard to the decision" implies that simple negligence in determining whether someone requires involuntary treatment is not actionable. However, the officers here were not acting in such discretion; they were charged with enforcing a court order, not with deciding whether to seek an order for detention or whether to detain someone for involuntary treatment.

Furthermore, the statute allows civil liability for government actors who display gross negligence, and thus this negates the argument that the statute provides blanket immunity from liability. A summary judgment premised on the Public Duty Doctrine would violate the plain language of this statute in that it would

prevent any potential plaintiff from coming to the courthouse seeking to redress gross negligence.

V. CONCLUSION

This Court should review and reverse to correct conflicts in law and promote the policy of this state that the ITA creates a particularized, not general, duty of care to persons like Mr. Ghodsee.

This document contains 2,499 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 7th Day of July, 2022.

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Filing Petition for Review

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Comments:

This is in response to City's Objection to NAMI WA Motion for Allow File Amicus Curiae Brief

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