IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NO. 318141

BEVERLY VOLK, et al.,
Appellants,

v.

JAMES B. DERMEERLEER, et al.,
Respondents

BRIEF OF AMICUS CURIAE WASHINGTON STATE PSYCHOLOGICAL ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

TEXTS, TREATISES, AND OTHER AUTHORITIES

1. Identity And Interest Of Amicus Curiae.

The Washington State Psychological Association (WSPA) is a nonprofit scientific and professional organization founded in 1947. WSPA represents more than 600 members and affiliates, including the majority of psychologists holding doctoral degrees from accredited universities.

RCW 18.83.010(1) defines the "practice of psychology" to mean:

> . . . the observation, evaluation, interpretation, and modification of human behavior by the application of psychological principles, methods, and procedures for the purposes of preventing or eliminating symptomatic or maladaptive behavior and promoting mental and behavioral health. As a result, the mission of WSPA is to support, promote and advance the education, science and practice of psychology in the public interest.

Indeed, WSPA is recognized at the national level of psychology for its dedication to promoting the public interest.

Whenever WSPA attempts to promote the public interest it relies upon the most recent scientific evidence to establish what actions would enhance the mental and behavioral health of Washington citizens. As the leadership of WSPA reviewed the scientific evidence regarding the duty to warn (RCW 71.05.120), it found compelling evidence that demonstrated the current law leads to better outcomes for patients and for the public. As a matter of public interest, WSPA is submitting an amicus brief to support

Washington continuing to hold all mental health professionals – those who work in public or private settings – to the existing standards established by RCW 71.05.120. It is the position of the WSPA that limiting the operation of RCW 71.05.120(1) to only those professionals in "acting on behalf of the State of Washington or a public agency" would defeat the purpose of the legislation.

2. Summary of Argument.

Amicus WSPA, Washington State's leading association of psychology professionals and behavioral scientists, has prepared this brief to provide the Court with a comprehensive and balanced review of the scientific and professional literature pertinent to the issues before the Court in this appeal. In preparing this brief the WSPA has been guided solely by criteria related to scientific rigor and reliability of studies and literature, not by whether a given study supports or undermines a particular conclusion.

Amicus understands that the Appellants contend that the operation of RCW 71.05.120 is limited to only a mental health care professional "acting on behalf of the State of Washington or a public agency as defined in the statute." *Brief of Appellants,* "Issues Pertaining To Assignments Of Error" No. 3 (at p. 2). That is clearly not the intent of the statute in light of the policy reasons behind the legislation, since it applies to both "public"

and "private agencies." Both types of agencies are included in the statutory scheme (see RCW 71.05.020(30) and (35)), and yet the Appellants' argument applies only to "public agencies."

Scientific research has established that the duty to warn is better understood by mental health professionals and is more likely to be applied accurately if the duty is defined clearly. The Washington statute, RCW 71.05.120, imposes a duty to warn upon treating mental health professionals when (1) an actual threat of violence has been made, and (2) the actual threat is made toward a reasonably identifiable victim(s). Both of those criteria led to greater clarity that significantly affected how the duty to warn was implemented by mental health professionals in Washington. Mental health professionals would fail both the efficacious treatment of their patients and the protection of the public if a more vague or ambiguous duty existed.

Washington already has experienced the failure of the common law when a vaguely constructed duty was applied by mental health professionals to their patients who might potentially harm anyone, by any type of violence or in some undefined manner. WSPA urges the Court to uphold the unambiguous standards of RCW 71.05.120 that have been applied to public and private mental health professionals since 1985, in

this case and in all cases involving the confidentiality of treatment, whether in the public or private setting.

3. Argument.

A. The Nature Of Scientific Evidence And Its Presentation In This Brief.

To assist the Court the WSPA will briefly explain the professional standards that we as practicing psychologists and psychiatrists have followed for selecting individual studies and literature for citation and for drawing conclusions from research data and theory.

(1) Practicing psychologists are ethically bound to be accurate and truthful in describing research findings and in characterizing the current state of scientific knowledge.

(2) Practicing psychologists rely on the best empirical research available, focusing on general patterns rather than any single study. Whenever possible, practicing psychologists cite original empirical studies and literature reviews that have been peer reviewed and published in reputable academic journals or books. Not every published paper meets this standard because academic journals differ widely in their publication criteria and the rigor of their peer review. When journal articles report research, they employ rigorous methods, are authored by well established researchers, and accurately reflect professional consensus about the

current state of knowledge. In assessing the scientific literature, WSPA has been guided solely by criteria of scientific validity, and has neither included studies merely because they support, nor excluded credible studies merely because they contradict, particular conclusions.

(3) Before citing any study, WSPA critically evaluated its methodology, including the reliability and validity of the measures and tests it employed, and the quality of its data-collection procedures and statistical analyses. WSPA also evaluated the adequacy of the study's sample, which must always be considered in terms of the specific research question posed by the study. In this brief, WSPA noted when a study's findings should be regarded as tentative because of a particularly small or selective sample, or because of possible limitations to the procedures used for measuring a key variable.

(4) No empirical study is perfect in its design and execution. All scientific studies can be constructively criticized, and scientists continually try to identify ways to improve and refine their own work and that of their colleagues. When a scientist identifies limitations or qualifications to a study's findings (whether the scientist's own research or that of a colleague), or when she or he notes areas in which additional research is needed, this should not necessarily be interpreted as dismissing

or discounting of the research. Rather, critiques are part of the process by which science is advanced.

(5) Scientific research cannot prove that a particular phenomenon never occurs or that two variables are never related to each other. When repeated studies with different samples consistently fail to establish the existence of a phenomenon or a relationship between two variables, researchers become increasingly convinced that, in fact, the phenomenon does not exist or the variables are unrelated. In the absence of supporting data from prior studies, if a researcher wants to argue that two phenomena are correlated, the burden of proof is on that researcher to show that the relationship exists.

B. Washington's Duty To Protect.

Petersen v. State of Washington, 100 Wn.2d 421, 671 P.2d 230 (1983) involved a patient who had been stopped by hospital security for driving recklessly in the hospital's parking lot after returning from a day pass. Knowing this, the treating psychiatrist nonetheless discharged the patient the next morning. The case record showed the psychiatrist also knew the following data about the patient at the time of the discharge: that the patient had an extensive history of drug abuse, the patient had partially castrated himself 16 days earlier while intoxicated on drugs, and the patient had entered the hospital after being adjudged gravely disabled

(unable to take care of his basic life needs) and mentally ill "schizophrenic reaction, paranoid type with depressive features" *Petersen v. State of Washington*, 100 Wn.2d at 423.

At the end of the 14-day involuntary hospitalization and despite his reckless driving of the night before, the patient was assessed on the day of release by the same psychiatrist as having recovered from the drug overdose and having regained "full contact with reality." *Id.* at 427. Five days later, under the influence of drugs, the patient ran a red light in his vehicle and hit Ms. Petersen's vehicle at 50 to 60 miles an hour.

Ms. Petersen was someone unknown to the patient. The Court held that the psychiatrist had "incurred a duty to take reasonable precautions to protect anyone who might be foreseeably endangered by . . . the [patient's] drug-related mental problems." *Petersen v. State of Washington*, 100 Wn.2d at 428. This result caused great concern to members of the mental health care profession since it offered no guidelines and directly involved issues of privilege and confidentiality.

C. Lack Of Clarity Of The Common Law Duty Led To Poor Outcomes.

The *Petersen* decision created great uncertainty within Washington because the court emphasized the foreseeability of the dangerousness, no matter how intangible and overly broad, in defining the mental health

profession's duty to protect the public at large.[1] In addition, *Petersen* left Washington mental health professionals alarmed at their new common-law duty because the case imposed a standard of foreseeability that was unsupported by any scientific basis. *Petersen* not only offered little clarity about how to meet the new duty, but it also forced mental health professionals into making invalid and unreliable clinical judgments in light of the poor research evidence about predicting violent behavior.

D. The Legislature Enacted A Duty To Warn Based Upon The Scientific Literature And Experience Data.

Psychologists[2] turned to the Washington State Legislature to enact a more reasonable duty, and cited the findings in John Monahan, *Predicting Violent Behavior: An Assessment Of Clinical Techniques (SAGE Library of Social Research)* (1981), demonstrating that violent behavior is not consistently foreseeable. This seminal work by Monahan represented the first step in the development of psychological research to develop more accurate methods for predicting dangerousness. More

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[1] In later decisions, the Supreme Court narrowed the reach of *Petersen* by noting that it should only be applied to mental health patients under the institutional care (*Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992); *Couch v. Dep't of Corrs.*, 113 Wn.App. 556, 571, 54 P.3d 197 (2002); *Osborn v. State,* 157 Wn.2d 18, 24, 134 P.3d 197 (2006).

[2] Eric Trupin, PhD and G. Andrew H. Benjamin, JD, PhD worked closely with the staff of Representative Seth Armstrong and Senator Phillip Talmadge to draft and shepherd through the legislation that became Wash. Rev. Code § 71.05.120.

recent psychological research has not led to better outcomes regarding the foreseeability of violence. The literature has suggested that mental health professionals engage in structured risk assessments designed to obtain actuarial and clinical assessments to reduce clinical judgment errors and increase the accuracy of violence assessments,[3] even though recent studies about predictions of violence have shown that such an approach only resulted in marginally lower rates of false-positive and false-negative errors.[4] Because of the variability of each client's disposition, history, contextual situation and clinical issues, "only so much violence can ever be predicted using individually based characteristics, given the highly transactional nature of violence." [5]

One can only imagine the unintended consequences of implementing such an ambiguously defined duty: After the *Petersen* decision, mental health professionals working in both public and private settings, in increasing numbers, would be forced to obtain involuntary

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[3] Monahan, J. (2006). Tarasoff at thirty: How developments in science and policy shape the common law. *University of Cincinnati Law Review, 75,* 497-521.

[4] Harris, G. T., Rice, M. E., & Camilleri, J. A. (2004). Applying a forensic actuarial assessment (the violence risk appraisal guide to nonforensic patients). *Journal of Interpersonal Violence, 19,* 1063-1074; Scott, C. L., & Resnick, P. J. (2006). Violence risk assessment in persons with mental illness. *Aggression and Violent Behavior, 11,* 598-611.

[5] Mulvey, E. P., & Lidz, C. W. (1998). Clinical prediction of violence as a conditional judgment. *Social Psychiatry and Psychiatric Epidemiology, 33,* 107, 107-113.

commitment evaluations from county designated mental health professionals for vague threats of violence uttered by their clients. Mental health professionals would be required to seek evaluations at a significantly greater rate than before the common-law decision. The increase in evaluation requests could overwhelm the involuntary treatment systems of many counties and lead to pervasive disclosures of confidential patient information, significantly greater county expenditures for the involuntary treatment evaluations, and no reductions in violence.

The mobilization of Washington psychologists with other mental health professionals and consumer groups led to the enactment of a statute that defined the duty to warn specifically in order to more reasonably balance the need to maintain confidences of patients and protect the safety of the public. RCW Chapter 71.05 applies to mental health professionals in both public and private settings, and indicates the intent of the legislature in creating the laws of the chapter: [6]

> (1) To prevent inappropriate, indefinite commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment;

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[6] *See*, Wash. Rev. Code § 71.05.010; The Code Reviser recommended to the staffs of Representative Armstrong and Senator Talmadge that the new duty be placed within Chapter 71.05 RCW because, at the time, the laws relating to all mental health professionals existed within just this chapter.

(2) To provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders;

(3) To safeguard individual rights;

. . .

(7) To protect the public safety.

The result is that RCW 71.05.120 has focused Washington's mental health professionals on assessing actual threats of physical violence against reasonably identifiable third parties.

E. Concrete Standards Of Care Lead To Better Outcomes.

The State of Washington has not been alone in enacting duty to warn/protect standards for mental health professionals to meet, although it was among the first States to enact a specific statute. Shortly after the ruling in *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425, 551 P.2d 334 (1976), only three states had implemented such a duty.[7] By the end of the last decade Benjamin, Kent and Sirikantraporn (2009)[8] found that a mandatory duty to warn/protect had been created by statute or rule in 24

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[7] DeKraai, M. B., & Sales, B. D. (1982). Privileged communications of psychologists. *Professional Psychology: Research and Practice, 13,* 372-388.

[8] Benjamin, G. A. H., Kent, L., & Sirikantraporn, S. (2009). A review of the duty to protect statutes, cases, and procedures for positive practice. In J. L. Werth, E. R. Welfel, & G. A. H. Benjamin (Eds.), *The duty to protect: Ethical, legal, and professional responsibilities of mental health professionals* (pp. 9 – 28). Washington, DC: APA Press.

states, and nine states operated under a common-law duty. In addition, 10 other state laws and eight provinces/territories had provided mental health professionals with a permissive duty to warn which means that the law allows, but does not require, a breach to patient confidentiality to protect third parties from a patient's threatened violence. The remaining 30 jurisdictions within North America have not developed law about the duty to warn/protect.

The laws in the jurisdictions differ considerably in clarity about the standards for the assessment of a client's risk of committing violence, the target(s) of the threatened violence, and how to meet the duty to warn/protect. In recent research involving psychologists in four states with varying legal requirements regarding the breach of confidentiality with dangerous clients,[9] the researchers found that most psychologists (76.4%) were misinformed about their state laws. In the two states where no legal duty existed, many mistakenly believed that they were legally mandated to warn. In the two states where there were legal options other than warning the potential victim, most psychologists were confused about how to meet the duty. In other words, if the majority of these

[9] Pabian, Y., & Welfel, E. R., & Beebe, R. S. (2009). Psychologists' knowledge of their state laws pertaining to Tarasoff-type situations. *Professional Psychology: Research and Practice, 40,* 8-14.

psychologists had confronted the circumstances described in the research and breached confidentiality without client permission they would have been at risk for a civil suit from their client for negligence or a disciplinary action by an ethics committee or licensing board for violating the confidentiality standards of their jurisdiction. Such findings are not surprising in light of long known evidence which has shown that concrete legal or ethical standards are better understood and executed more adequately by psychologists.[10] Washington's duty to warn, RCW 71.05.120, provides such precision if it is applied as intended, being to all psychologists/psychiatrists and not just those operating from within the state government or another form of governmental agency.

F. Washington's Duty To Warn Recognizes The Significance Of Protecting Patient Confidences.

Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983) often placed psychologists in an ethical bind: "Confidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client." RCW 18.83.110. During the *Petersen* period many mental health professionals

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[10] Wilkins, M.A., McGuire, J.M., Abbott, D.W. and Blau, B.I. (1990). Willingness to apply understood ethical principles. *Journal of Clinical Psychology,* 46 (4), 539-547.

were insulating themselves from liability by having their patients evaluated for involuntary treatment by the county designated mental health professionals when their patients uttered vague threats. The clarity of RCW 71.05.120 has helped end such confidentiality breaches. Later legislation prohibited all health care providers, including mental health professionals, from disclosing "health care information about a patient to any other person without the patient's written authorization" except when the health care provider reasonably believes that the patient poses an "imminent danger" to the health and safety of an "individual." RCW 70.02.050 (1)(d).

The laws promoting confidentiality have deepened psychotherapeutic evaluation and treatment. The value of full disclosure between mental health professionals and their clients outweighs the potential benefit that might occur if testimony or the release of confidential information is required under most clinical circumstances. Empirical research has demonstrated that if mental health patients were assured of broad confidentiality they were more willing to respond to clinician inquires about personal information, with greater disclosures, and were more honest in their responses.[11] As a society we want our mental

[11] Marsh, J.E. (2003). Empirical support for the United States Supreme Court's protection of the psychotherapist-patient privilege, *Ethics &*

health professionals to protect the confidences of our clients unless a few, very specific types of disclosures would protect the public. Blurring confidentiality communication protections among mental health professionals and patients would prevent effective therapeutic intervention from occurring in many cases.

4. Conclusion.

As the research studies and experience data from Washington have shown, RCW 71.05.120 provides protections to third persons should a patient express an actual threat of harm against a reasonably identifiable victim. RCW 71.05.120 is not limited to only governmental agencies, as proposed by Appellants "Issues Pertaining To Assignments Of Error" No. 3. Clearly, it applies to both "public" and "private agencies", with the latter being defined as:

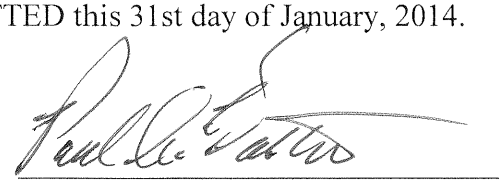
> . . . any person, partnership, corporation, or association *that is not a public agency*, whether or not financed in whole or in part by public funds, which constitutes an evaluation and treatment facility or private institution, or hospital, which is conducted for, or includes a department or ward conducted for, the care and treatment of persons who are mentally ill;

Behavior, 13, 385-397; el O. Taube, D.O. & Elwork, A. (1990). Researching the effects of confidentiality law on patients' self-disclosures, *Professional Psychology: Research and Practice, 21,* 72-75; McGuire, J.M., Toal, P. & Blau, B.I. (1985). The adult client's conception of confidentiality in the therapeutic relationship, *Professional Psychology: Research and Practice, 16*, 375-386.

RCW 71.05.020(30) (emphasis added). Limiting the application of confidentiality and a "duty to warn" to only public agencies, as the Appellants contend, would defeat the purpose of the legislation and leave professionals operating in the private sector in the same quandary as during the *Petersen* era while those in government agencies would be protected. Confidentialities in the private sector would be less likely to be protected as well.

Mental health care professionals have assimilated the standards of RCW 71.05.120 into their practices without needless intrusions on the privacy and the confidences of their patients. WSPA urges that this Court recognize the intent of RCW 71.05.120 and uphold the clarity of the existing law by applying the standards and protections of this law to situations of mental health treatment of patients in either a public or a private setting.

RESPECTFULLY SUBMITTED this 31st day of January, 2014.



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on January 31, 2014, I caused to be delivered to the address below a true and correct copy of Motion To File Amicus Curiae Brief:

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