No. 318141

COURT OF APPEALS,
DIVISION THREE
OF THE STATE OF WASHINGTON

BEVERLY R. VOLK, as Guardian for Jack Alan Schiering, a minor; as Personal Representative for the Estates of Phillip Lee Schiering and Rebecca Leigh Schiering; and on behalf of all statutory beneficiaries of Rebecca Leigh Schiering and Phillip Lee Schiering; and, BRIAN P. WINKLER, individually,

Appellants,

v.

JAMES B. DEMEERLEER, as Personal Representative of the Estate of Jan DeMeerleer; HOWARD ASHBY, M.D., and "JANE DOE" ASHBY, husband and wife, and the marital community composed thereof; SPOKANE PSYCHIATRIC CLINIC, P.S., a Washington business entity and health care provider; and DOES 1 through 5,

Respondents.

RESPONDENT SPOKANE PSYCHIATRIC CLINIC, P.S.'s BRIEF

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I. ASSIGNMENTS OF ERROR

No. 1: Volk and Winkler assert that the trial court erred in entering summary judgment in favor of SPC and Ashby. Volk and Winkler do not suggest any assignments of error that pertain to SPC's dismissal by summary judgment.

II. STATEMENT OF THE CASE

For purposes of this appeal only, Spokane Psychiatric Clinic, P.S. generally accepts Respondent Ashby's "Counter Statement of Facts. SPC is a professional corporation. CP 294-95.

Dr. Ashby began treating Jan DeMeerleer in September 2001. CP 281. Jan DeMeerleer was diagnosed previously with bipolar disorder. CP 84, 153-154. Dr. Ashby treated Jan DeMeerleer for over nine years. CP 281. In the early years of treatment, Dr. Ashby saw Jan DeMeerleer monthly or more often if required. CP154 During those nine years plus, Jan DeMeerleer stated on a few occasions that he had suicidal ideation and he expressed homicidal ideation very rarely and Jan DeMeerleer never acted upon any of these thoughts or ideations. CP 234-241.

Volk and Winkler allege that "[I]n the last clinical visit with Dr. Ashby in April of 2010, [Jan] DeMeerleer appeared to be in obvious distress, and presented with suicidal thoughts. Appellants' Brief, p. 4. However, DeMeerleer was not scheduled by Dr. Ashby for a follow-up

assessment or treatment." Appellants' Brief, p. 4. This allegation is inaccurate and unsupported in the record because Dr. Ashby had been extending the time between visits intentionally because Mr. DeMeerleer's condition and medications were stable. CP 154, CP 234-235.

Contrary to Volk's assertion, Jan DeMeerleer's April 16, 2010, visit did not find Jan DeMeerleer in "obvious distress" and he had not "presented with suicidal thoughts." CP 234. Jan DeMeerleer expressed that when his suicidal ideation happened in the past, this bothered him but he would not and did not act on it. *Id.* The actual treatment note reads:

> April 16, 2010 Dr. Ashby Jan DeMeerleer TT-25
> Jan indicates that his life is stable, he is reconstituting gradually with his fiancé. They are taking marriage classes, he can still cycle many weeks at a time. Right now he is in an expansive, hypomanic mood, but sleep is preserved. He has a bit more energy and on mental status, this shows through as he is a bit loquacious but logical, goal oriented and insight and judgment are intact. He states when depressed he can get intrusive suicidal ideation, not that he would act on it but it bothers him. At this point, it's not a real clinical problem but we will keep an eye on it.
>
> Plan: We will continue Risperdal, Depakote and Bupropion.

CP 234.

Dr. Ashby did not see Jan DeMeerleer after that visit. *Id.* On July 19, 2010, Dr. Ashby learned about Ms. Schiering and her young son's murder, the assault on her teenage son, and Jan DeMeerleer's suicide. *Id.* Dr. Ashby's treatment notes show that over the nine plus years he treated

Jan DeMeerleer, Jan DeMeerleer never threatened to harm Rebecca DeMeerleer or any of her family.[1] CP 234-241. Moreover, in the distant past when Jan DeMeerleer had expressed anger and feelings that he might hurt his ex-wife or her lover, he never acted upon those feelings or he never took any affirmative action that threatened or harmed them. *Id.* Jan DeMeerleer's treatment records confirm these facts. *Id.*

On October 25, 2010, the Appellant, hereinafter ("Volk"), filed an action against the Estate of Jan DeMeerleer, hereinafter ("DeMeerleer"). CP 1-13. On January, 19, 2011, Brian P. Winkler, hereinafter ("Winkler") filed an action against DeMeerleer. CP 14-26. On May 22, 2012, after consolidating the above cases, Volk and Winkler amended the complaint to sue Howard and Jane Doe Ashby, hereinafter ("Ashby") and Spokane Psychiatric Clinic, P.S., hereinafter ("SPC").[2] CP 27-43. This amended complaint states causes of action against Ashby and SPC for medical negligence. *Id.* Volk's allegations against SPC state: "[SPC] did not have in place or did not implement practices, policies, procedures, training, supervision and directives reasonable necessary to provide, appropriate

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[1] SPC acknowledges the incident where Ms. Schiering's surviving son struck Jan DeMeerleer and Jan DeMeerleer retaliated by striking the young son in the face.

[2] SPC concedes that if Dr. Ashby is liable for medical negligence, SPC is vicariously liable for Dr. Ashby's conduct. However, SPC asserts that Dr. Ashby did not violate the standard of care of a reasonably prudent psychiatrist under the facts of this case; and, further, Volk failed to offer expert testimony supporting any violation by Dr. Ashby of the standard of care in Washington.

medical care to patients such as Mr. DeMeerleer when presenting with suicidal and/or homicidal ideation." CP 31. After conducting discovery, Ashby and SPC filed motions for summary judgment. CP 44-69. For purposes of this Respondent's Brief, Volk and Winkler and all other appellants shall be referred to hereinafter as ("Volk").

In response to SPC's motion for summary judgment, Volk offered a single declaration from Dr. Knoll, a psychiatrist. CP 82-92. Dr. Knoll's declaration states that "I am familiar with the standard of care in the State of Washington of a psychiatrist such as Dr. Ashby and his colleagues at Spokane Psychiatric Clinic (collectively referred to as "SPC"), during the years of treatment of DeMeerleer by them." CP 83. Dr. Knoll does not state that he is familiar with nor does he state that he has any expertise regarding the duties and responsibilities of a psychiatric clinic or what standard of care applies to a private psychiatric clinic. CP 82-119. Then, Dr. Knoll fails to distinguish between the applicable duty of care of a treating psychiatrist, such as Dr. Ashby and the other psychiatrists employed by SPC, and the duty of care applicable to a private psychiatric clinic. *Id.* Dr. Knoll did not express any specific opinions regarding SPC's duties, breach thereof, or how SPC's conduct or omissions caused injury or damage to Volk, nor did he address the specific assertions against SPC, alleged in Volk's amended complaint. *Id.* Dr. Knoll's declaration is silent

on Volk and Winkler's independent negligence claim against SPC. *Id.*

III. SUMMARY OF THE ARGUMENT

Volk sued Dr. Ashby for medical negligence as a treating psychiatrist and SPC for independent medical negligence as a private psychiatric clinic. CP 27-43. Volk failed to present admissible expert testimony of the applicable standard of care under these specific facts and failed to offer expert testimony regarding the standard of care of a private psychiatric clinic. Volk failed to present admissible expert testimony showing a breach of the applicable standard of care by Ashby or SPC. Volk failed to present admissible expert testimony of any causal connection between Ashby or SPC's distinct standards of care and any injury or damage to the Appellants.

IV. ARGUMENT

A. The standard of review is de novo for summary judgment.

In *Hanson Indus., Inc. v. Kutschkau,* 158 Wn. App. 278, 239 P.3d 367*; rev. den.* 171 Wn.2d 1011, 249 P.3d 1028 (2011), the Court stated:

> An order of summary judgment is reviewed de novo. This court engages in the same inquiry as the trial court and views the facts in the light most favorable to the nonmoving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780,

789, 108 P.3d 1220 (2005). Questions of law and questions of statutory interpretation are reviewed de novo. *Enter. Leasing, Inc. v. City of Tacoma, Fin. Dep't*, 139 Wn.2d 546, 551-52, 988 P.2d 961 (1999).

B. Standards and Requirements for Summary Judgment.

The purpose of a motion for summary judgment is to examine the sufficiency of the evidence underlying a plaintiff's formal allegations to avoid unnecessary trials when no genuine issue of material fact exists. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Civil Rule 56(c) provides that a judgment "shall be rendered forthwith" if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

It is well settled under Washington law that defendants may test the plaintiff's potential proof by moving for summary judgment "on the ground the plaintiff lacks competent medical evidence to make out a prima facie case of medical malpractice." *Id.* Once a party seeking summary judgment has made an initial showing of the absence of any genuine issues of material facts and the propriety of summary judgment under applicable law applied to those facts, the non-moving party has the burden to demonstrate the existence of unresolved factual issues. *Ruffer v. St. Cabrini Hosp.,* 56 Wn. App. 625, 628, 784 P.2d 1288 (1990), *rev. den.,* 114 Wn.2d 1023 (1990). Established case law clearly places the burden on

the non-moving party to submit affidavits affirmatively presenting the factual evidence relied upon. *Ruffer*, 56 Wn. App. at 634.

C. The Prima Facie Case Against SPC for an Independent Medical Negligence Claim.

An independent professional negligence claim against a psychiatric clinic resulting from health care is controlled by RCW 7.70, *et seq.* and RCW 4.24.290. Specifically, RCW 7.70.030(1) provides that, in a claim of healthcare negligence, a plaintiff must prove, by a preponderance of evidence "[t]hat injury resulted from the failure of a health care provider to follow the accepted standard of care."

RCW 7.70.040 sets forth the necessary elements of proof for such a claim:

> (1) The health care provider failed to exercise that degree of care, skill and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

The appellants were never patients at SPC and SPC did not provide any care or treatment to any of the appellants. CP 278-283. Instead, Volk attempts to argue that SPC's allegedly negligent treatment of its patient, Jan DeMeerleer, can be used as a basis for a medical negligence claim on behalf of the appellants. Such a claim is not supported by the above statute

or Washington case law.

When a hospital, psychiatric clinic or similar entity is involved, a plaintiff must establish the same elements of a professional negligence claim and must present the same expert testimony to establish each element of the plaintiff's claim. *See*: *Pedroza v. Bryant*, 110 Wn.2d 226, 230, 677 P.2d 166 (1984); *Alexander v. Gonser*, 42 Wn. App. 234, 240, 711 P.2d 347 (1985), *rev. den.*, 105 Wn.2d 1017 (1986).

1. Appellants were not patients of SPC.

In order to assert a medical negligence claim against SPC, Volk must have received care or treatment from SPC or SPC must have breached the standard of care in treating the appellants. Here, the appellants concede that SPC did not treat any of them and SPC did not violate any standard of care in treating the appellants.

2. Dr. Knoll's declaration does not establish that he is a qualified expert on the standard of care applicable to a private psychiatric clinic.

Dr. Knoll's declaration fails to meet the minimum requirements of establishing: (1) SPC's duties as a private psychiatric clinic; (2) a breach of the standard of care by a private psychiatric clinic in its treatment of the plaintiffs; or (3) a causal connection between an alleged breach of the standard of care and any plaintiffs' injuries or damages.

Volk is required, under Washington law, to designate an expert that has expertise regarding and is familiar with the duties of care owed by a private psychiatric clinic in order to substantiate allegations of medical negligence against SPC. Volk's expert must first establish specific experience and knowledge of the standard of care in Washington for a private psychiatric clinic. Then, the expert must present evidence of a breach of these standards and the expert's evidence must establish a causal connection between the breach of duty and damage or injury. The failure to establish each of these elements is fatal to Volk's claims against SPC.

The court in *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983), stated the law with regard to this requirement:

> In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a lay person. Medical facts in particular must be proven by expert testimony unless they are 'observable by [a layperson's] senses and describable without medical training'. Thus, expert testimony will generally be necessary to establish the standard of care, and most aspects of causation. (Internal citations omitted).

Furthermore, Volk must not only produce expert testimony, but testimony from an expert in the same profession or class of professionals to which SPC belongs, in order to avoid a summary judgment. As stated by the court in *McKee v. American Home Products*, 113 Wn.2d 701, 706, 707, 782 P.2d 1045 (1989):

> We recently reiterated the rule that to establish the standard of care required of professional practitioners, that standard must be established by the testimony of experts who practice in the same field. The duty of physicians must be set forth by a physician, the duty of structural engineers by a structural engineer and that of any expert must be proven by one practicing in the same field – by one's peer. Id. at 706-07 (internal citations omitted).

Volk presented only Dr. Knoll's declaration. Dr. Knoll's declaration fails to establish that he has specific knowledge or expertise regarding the standard of care owed by a private psychiatric clinic such as SPC, separate and apart from that required of a psychiatrist. Instead, Dr. Knoll attempts to lump the two separate entities and their respective duties together without acknowledging that Dr. Ashby's standard of care is distinct from SPC's standard of care. This collective referral to both defendants as one is inappropriate. Clinics do not practice medicine; physicians practice medicine. It is true that the corporate entity, Spokane Psychiatric Clinic, P.S., cannot act except through its employee agents. However, liability of the clinic for the acts of its employee agents is based upon the theory of vicarious liability and not a theory of independent negligence as claimed by Volk.[3]

Further, Dr. Knoll's declaration is devoid of evidence regarding the standard of care required of a psychiatric clinic and any evidence that the clinic breached this independent standard of care. Dr. Knoll's declaration

[3] SPC concedes that if Dr. Ashby is eventually found to be liable that SPC has vicarious liability for his conduct.

fails even to address the allegations stated in Volk's amended complaint regarding SPC's alleged independent negligence. At best, Dr. Knoll attempts to assert independent negligence against SPC by lumping SPC and Dr. Ashby together and attempting to treat them as a single entity. In so doing, Dr. Knoll fails to state the distinct duties of care and how each duty of care was breached by these separate entities. Volk's failure to present admissible expert testimony is fatal to its claims against SPC.

3. Expert Medical Testimony Regarding Proximate Cause is Necessary to Defeat SPC's Motion for Summary Judgment.

Volk's prima facie case includes not only the requirement that Volk present expert testimony that SPC deviated from the applicable standard of care for a psychiatric clinic but also that this deviation proximately caused injury or damage to the plaintiffs. RCW 7.70.040(2).

The evidence establishing the causation element must be more than speculation, conjecture or mere possibility. *Young v. Group Health*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975). To meet this burden, Volk must present expert medical testimony that appellants' alleged injuries and damages were proximately caused by the violation of the applicable standard of care by SPC. *McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d 1171 (1989); *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113

(1983); *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). For the reasons stated above, Dr. Knoll's declaration fails here also.

In *Hertog v. The City of Seattle*, 138 Wn.2d 265, 283-84, 979 P.2d 400 (1999), the Court analyzed legal causation and stated:

> Legal causation "rests on considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend." *Taggart* [*v. State*], 118 Wn.2d [195, 822 P.2d 243 (1992)] at 226; *Hartley* [*v. State*], 103 Wn.2d [768, 698 P.2d 77 (1985)] at 779. Legal causation is intertwined with the question of duty. *Taggart,* 118 Wn.2d at 226; PROSSER, HANDBOOK OF THE LAW OF TORTS 244-45 (4th ed. 1971)). While the same policy considerations may be relevant to both elements, existence of a duty does not automatically satisfy the requirement of legal causation, however. *Schooley* [*v. Pinch's Deli Market, Inc.*], 134 Wn.2d [468, 951 Wn.2d 749 (1998)] at 479.

Dr. Knoll's declaration fails to address any inappropriate practice, policy, procedure, training, supervision or directive that SPC utilized or failed to utilize and how SPC breached a standard of care by following or failing to follow any such practice, policy, procedure, training, supervision or directive and how any alleged breach caused injury or damage to any appellant. CP 82-92. When Volk failed to produce the required medical expert testimony regarding proximate causation and failed to demonstrate that "but for" an alleged breach of the standard of care by SPC the appellants would not have suffered injury, SPC was entitled to summary judgment dismissal as a matter of law. *See Swanson v. Brigham*, 18 Wn.

App. 647, 571 P.2d 213 (1987); *Stone v. Sisters of Charity of the House of Providence*, 2 Wn. App. 607, 469 P.2d 229 (1970); *Shoberg v. Kelly*, 1 Wn. App. 673, 463 P.2d 280 (1969).

D. Respondent SPC Asserts that *Petersen v.* State is not the applicable standard of care in Washington. Notwithstanding this assertion, Volk's expert testimony fails to satisfy the necessary showing of "foreseeable risk of harm" as defined in *Petersen v. State* and the Restatement 2nd of Torts § 315.

The general rule at common law is that a private person does not have a duty to protect others from the criminal acts of third parties. *Nivens v. 7-11 Hoagy's* Corner, 133 Wn.2d 192, 199, 943 P.2d 286 (1997) (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 236, 802 P.2d 1360 (1991).

After the seminal holding by the California Supreme Court in *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 551 P.2d 334 (1976), Washington courts were faced with determining what standard should apply and what immunities may exist when a psychiatrist, psychologist, psychotherapist or counselor fails to warn a third person about a patient's conduct that could lead to an injury or death.

Finding the *Tarasoff* holding to be unworkable, subsequent California cases limited the psychiatrist's or therapist's duty to a duty to warn only "readily identifiable victims." *Thompson v. County of Alameda*,

27 Cal.3d 741, 752-54, 167 Cal. Rptr. 70 (1980); *Mavroudis v. Superior Court*, 102 Cal.App.3d 594, 600-01, 162 Cal. Rptr. 724 (1980).

Initially, Washington courts analyzed the California cases and cases in other state and selected an approach based upon The Restatement 2nd of Torts § 315 and common law negligent principles. In *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), the Washington Supreme Court was asked to determine whether a state employed psychiatrist and the State were liable for injuries and damages caused to a third person after Dr. Miller discharged an involuntarily confined patient that had a serious, longstanding drug problem. After being discharged by Dr. Miller, the former psychiatric patient drove a vehicle while "intoxicated" and seriously injured the plaintiff. There was evidence that the former patient was "gravely disabled" due to his drug addiction, he was still schizophrenic as a result of continuing drug abuse, and the Court determined that there was a foreseeable risk of harm to the public. These very specific facts and factors led to our State's decision to utilize typical negligence standards in cases where the State has a "special relationship" with the criminal or the victim. Here, there is no State involvement and Dr. Ashby's care doesn't meet the criteria established in *Petersen.*

In Petersen, Dr. Miller was held to be liable for his former patient's conduct when the Washington Supreme Court elected to adopt the

rationale utilized in *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 188 (D. Neb. 1980). The Court found and held:

> Although the *Tarasoff* decision did not emphasize the identifiability of the victim, subsequent California decisions have limited the scope of the therapist's duty to readily identifiable victims. *See Thompson v. County of Alameda, 27 Cal. 3d 741, 752-54, 614 P.2d 728, 167 Cal. Rptr. 70 (1980)*; *Mavroudis v. Superior Court, 102 Cal. App. 3d 594, 600-01, 162 Cal. Rptr. 724 (1980)*. Other courts, however, have required only that the therapist reasonably foresee that the risk engendered by the patient's condition would endanger others. *See, e.g., Semler v. Psychiatric Inst., 538 F.2d 121, 124* (4th Cir.), *cert. denied, 429 U.S. 827 (1976)*; *Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 194 (D. Neb. 1980)*; *Williams v. United States, 450 F. Supp. 1040, 1046 (D.S.D. 1978)*. **In *Lipari*, for example, the court emphasized the importance of foreseeability in defining the scope of a person's duty to exercise due care.** *See Lipari v. Sears, Roebuck & Co., supra.* In *Lipari* a psychiatric patient entered a nightclub and fired a shotgun into a crowded dining room causing injuries to plaintiff and killing her husband. **The *Lipari* court found the defendant therapist had a duty to any person foreseeably endangered by the negligent treatment of the psychiatric patient.** *Lipari v. Sears, Roebuck & Co., supra.*
>
> In the present case [*Petersen, supra*], we follow the approach utilized in *Lipari v. Sears, Roebuck & Co., supra*, and *Kaiser v. Suburban Transp. Sys., supra.* Consequently, we conclude Dr. Miller incurred a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by Larry Knox's drug-related mental problems. (Emphasis added.)

Notwithstanding the Respondent's assertion that *Petersen* is no longer the applicable law in Washington, as more fully addressed in Ashby's Respondent Brief, the trial court here correctly granted summary judgment because it determined that Jan DeMeerleer had no prior history

of assaulting or killing anyone, Jan DeMeerleer's treatment records did not provide Dr. Ashby any basis for reasonably foreseeing DeMeerleer's criminal conduct and Dr. Knoll's declaration did not address the *Petersen* standard nor did Volk submit admissible evidence that Dr. Ashby or SPC could have foreseen what happened. Based upon the lack of any relevant expert testimony, the trial court determined that neither Dr. Ashby nor SPC were liable. *See: Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108 (1992), (Division Two held that a school district was not liable for negligent hiring or negligence retention for a school librarian's inappropriate conduct with a minor student because the school district did not know or in the exercise of reasonable ordinary care could not have known that the librarian was unfit for employment; *Youngblood v. Schireman*, 53 Wn. App. 95, 765 P.2d 1312 (1988), (Division One held that parents were not negligent in preventing son's assault on his girlfriend because the parents has "no reason to know that their son would assault Youngblood in their home so that there was no duty to warn her of any danger.)[4]

Dr. Knoll's declaration fails to establish what evidence, if any, Dr. Ashby or SPC knew, or were made aware of, that Jan DeMeerleer

[4] SPC concedes that the *Youngblood* case did not rely upon *Petersen* or The Restatement 2nd § 315 but it appears that Youngblood elected not to assert the *Petersen* theory because she knew that she could not prove foreseeability, which is exactly the same problem facing Volk here.

represented a foreseeable danger to assault or kill one of the appellants. CP 82-92. Instead, Dr. Knoll's declaration relies upon speculation and conjecture about whether a "suicide risk assessment" would have prevented Jan DeMeerleer's assaults and murders. CP 88-91.

Dr. Knoll's unsupported opinion that a suicide risk assessment "may have substantiated" something does not constitute admissible evidence. ER 702. Dr. Knoll's declaration speculates using 20/20 hindsight as to what a risk assessment may or may not have accomplished and it does not address how Jan DeMeerleer's prior conduct and treatment records informed Dr. Ashby and SPC that Jan DeMeerleer presented a foreseeable risk of harm to third persons. CP 82-92.

Dr. Knoll's declaration states at page 9, paragraph 10, his inadmissible "opinion":

> To the extent that DeMeerleer's potential for harm to self or others could not be reasonably mitigated by psychiatric treatment, including institutional treatment, proper inquiry and assessment **may have substantiated that Ms. Schiering and her children were foreseeably at risk of harm from DeMeerleer**. Had this occurred, given proper caution and warning by SPC directly, through an appropriate intermediary or an subsequent psychiatric services provider to DeMeerleer, Ms. Schiering and her family most likely would have had the opportunity to have: taken reasonable effort to avoid contact with DeMeerleer; seek protection from him; and/or make themselves unavailable to access by DeMeerleer. Failure by SPC to follow-up and treat DeMeerleer appropriately precluded any such opportunity. (Emphasis added.)

CP 90.

In *O'Donoghue v. Riggs*, *supra* at p. 824, the Court held:

> In a case such as this, medical testimony must be relied upon to establish the causal relationship between the liability-producing situation and the claimed physical disability resulting therefrom. The evidence will be deemed insufficient to support the jury's verdict, if it can be said that considering the whole of the medical testimony the jury must resort to speculation or conjecture in determining such causal relationship. **In many recent decisions of this court we have held that such determination is deemed based on speculation and conjecture if the medical testimony does not go beyond the expression of an opinion that the physical disability "might have" or "possibly did" result from the hypothesized cause.** To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of "probably" or "more likely than not" caused the subsequent disability. *Ugolini v. States Marine Lines*, 71 Wn.2d 404, 407, 429 P.2d 213 (1967); *Glazer v. Adams*, 64 Wn.2d 144, 147, 391 P.2d 195 (1964); *Orcutt v. Spokane Cy.*, 58 Wn.2d 846, 853, 364 P.2d 1102 (1961); *Clevenger v. Fonseca*, 55 Wn.2d 25, 32, 345 P.2d 1098 (1959); *Bland v. King Cy.*, 55 Wn.2d 902, 905, 342 P.2d 599 (1959); *Ehman v. Department of Labor & Indus.*, 33 Wn.2d 584, 597, 206 P.2d 787 (1949); *Seattle-Tacoma Shipbuilding Co. v. Department of Labor & Indus.*, 26 Wn.2d 233, 241, 173 P.2d 786 (1946). (Emphasis added.)

Dr. Knoll's "opinion" fails to meet Washington's evidentiary requirement that admissible opinions be expressed "on a more probable than not basis" or "more probably". The burden for presenting expert testimony is not met by responding with conclusory allegations, speculative statements or argumentative assertions. *Ruffer*, *supra; See also, Moore v. Pay-N-Save Corp.*, 20 Wn. App. 482, 484, 581 P.2d 159 (1978).

Moreover, Jan DeMeerleer's expressed suicidal ideation in the distant past, his attempted suicide in college and even his most "recent", alleged homicidal behavior, i.e., waiting with a gun after his truck was vandalized back in the Fall of 2005, almost 5 years before the assault and murders occurred, does not present evidence of recent "homicidal" behavior that would lead a treating psychiatrist to reasonably foresee Jan DeMeerleer's actions towards Ms. Schiering and her sons. Dr. Knoll's declaration fails to provide admissible evidence that explains why Dr. Ashby or SPC "could foreseeably foresee" Jan DeMeerleer's criminal conduct since there is a complete absence of any documented, current homicidal ideation, statements or conduct that would lead to that conclusion. The trial court properly determined neither Dr. Ashby nor SPC had knowledge that Jan DeMeerleer presented a foreseeable risk of harm to Ms. Schiering or her children as required by *Petersen* and The Restatement of Torts 2nd § 315.

E. SPC and Dr. Ashby are Immune from Volk's Theory of Liability based upon Failure to Properly Assess and Commit Jan DeMeerleer.

Dr. Knoll's declaration presents a single allegation about Dr. Ashby's liability and SPC's alleged vicarious liability. Dr. Knoll claims Dr. Ashby should have performed a more detailed "risk assessment" and then he speculates that if Dr. Ashby had done a more detailed risk

assessment, Dr. Ashby may have elected to involuntarily commit Jan DeMeerleer or; in the alternative, Dr. Ashby may elected to treat Jan DeMeerleer with new, different or stronger psychotropic drugs, which Dr. Knoll further speculates may have prevented his suicidal or homicidal ideation. CP 82-92. After all of this conjecture, Dr. Knoll concludes that had Dr. Ashby or SPC committed Jan DeMeerleer or had they provided new, stronger or different psychotropic drugs, then possibly the assault and murders may have been prevented. *Id.* For the reasons set forth above, Dr. Knoll's "opinion" is inadmissible.

1. Immunity is required under RCW 71.05.120.

Dr. Knoll's opinions, if they had been admissible, would have triggered RCW 71.05.120. Pursuant to RCW 71.05.120, Dr. Ashby and SPC are immune from suit if either made a discretionary decision about whether to have Jan DeMeerleer committed or whether to prescribe new, different, additional or stronger psychotropic drugs. RCW 71.05.120 provides:

> **Exemptions from liability.**
>
> (1) No officer of a public or **private agency**, nor the superintendent, **professional person in charge, his or her professional designee**, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, nor any county designated mental health professional, nor the state, a unit of local

> government, or **an evaluation and treatment facility shall be civilly or criminally liable for performing duties pursuant to this chapter 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.**
>
> (2) This section does not relieve a person from giving the required notices under RCW 71.05.330(2) or 71.05.340(1)(b), or the duty to warn or to take reasonable precautions to provide protection from violent behavior where the patient has communicated an actual threat of physical violence against a reasonably identifiable victim or victims. The duty to warn or to take reasonable precautions to provide protection from violent behavior is discharged if reasonable efforts are made to communicate the threat to the victim or victims and to law enforcement personnel. (Emphasis added.)
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> On page 7 of Dr. Knoll's declaration, it states:
>
> Timely, appropriate, and focused psychiatric inquiry of [Jan] DeMeerleer during clinical sessions most likely would have resulted in him having incurred more appropriate and intensive clinical or institutional psychiatric treatment. This until such time as treatment was demonstrably effective and/or risk of harm to himself had been appropriately mitigated.

Dr. Knoll's declaration criticizes Dr. Ashby for not requiring an involuntary or voluntary commitment, institutionalization or treatment with new, different or stronger psychotropic drugs in an attempt to control Jan DeMeerleer's alleged suicidal or homicidal behavior. CP 82-92. Dr. Ashby and SPC's decision making is protected by RCW 71.05.120(1).

Further, to avoid this immunity, RCW 71.05.120(1) requires evidence that the treating psychiatrist or clinic acted in bad faith or was

grossly negligent. Dr. Knoll's declaration does not provide any evidence to suggest that Dr. Ashby or SPC acted in bad faith nor does his declaration explain how Dr. Ashby or SPC were grossly negligent in their respective treatment, diagnosis, failure to commit or prescribe different drugs for Jan DeMeerleer. *See*: *Estate of Davis v. State Dept. of Corrections*, 127 Wn. App. 883, 841, 113 P.2d 487, 491 (2005).

2. Volk did not present any evidence that Jan DeMeerleer communicated an actual threat against Rebecca Schiering or her sons.

Notwithstanding RCW 71.05.120(1), Volk is required to demonstrate that Jan DeMeerleer "communicated an actual threat of physical violence against a reasonably identifiable victim or victims. RCW 71.05.120(2).

Dr. Knoll's declaration does not point to any "actual threat of physical violence" against Rebecca Schiering or her children. CP 82-92. The trial court obtained and reviewed the entirety of Dr. Ashby and SPC's files and determined that there was no direct threat stated in the records. CP 262. Volk did not identify any specific record nor did Dr. Knoll point to a specific record where Jan DeMeerleer communicated to Dr. Ashby or SPC an actual threat against Rebecca Schiering or her sons. Volk failed to present the necessary evidence to reverse the trial court's decision.

F. Volk's Reliance on the Loss of a Chance Doctrine has no Application in a Third Party's Claim for Injury or Damage Caused by a Patient's Criminal Conduct.

Volk's attempt to invoke the "loss of a chance doctrine" is misplaced and completely misconstrues the rational for this doctrine as first set forth by the Washington Supreme Court in *Herkovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983) and its progeny.

In *Herkovits*, the Court held that a patient or plaintiff's estate could establish a claim against a health care provider where the plaintiff presented expert testimony showing that the health care provider's negligent care caused the plaintiff patient a "loss of a chance" for a better outcome.

1. Dr. Ashby and SPC did not treat Ms. Schiering or her children.

Here, Volk asserts that Dr. Ashby's alleged negligence resulted in a "loss of a chance" for a better outcome, either for Ms. Schiering or her sons. Essentially, Volk attempts to extend this doctrine well beyond the policy considerations that the Supreme Court initially considered and adopted. Neither Dr. Ashby nor SPC treated Ms. Schiering or her children. Since the appellants were not patients, the loss of a chance doctrine has no application here. In *Brown v. MacPherson's, Inc.,* 86 Wn.2d 293, 299, 545

P.2d 13 (1975), the court cited *Restatement 2nd of Torts § 323* (1965), which reads:

> **One who undertakes . . . to render services to another** which he should recognize as necessary for the protection of the other's person or things, **is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking,** if
>
> (a) His failure to exercise such care increases the risk of such harm, or
>
> (b) The harm is suffered because of the other's reliance upon the undertaking.
>
> (Emphasis added.)

The *Restatement* section was the foundation for the Court's holding in *Herkovits* and its clear intent is to create a duty of care between the one who renders service (a health care provider) and the person to whom the services are rendered (a patient). Volk's attempt to extend the duty to a third party falls outside of the Restatement and policy reasons relied upon by the Supreme Court in *Herkovits*.

The Supreme Court relied upon and cited a Pennsylvania case, *Hamil v. Bashline,* 481 Pa. 256, 392 A.2d 1280 (1978). The Supreme Court stated at p. 615:

> The [Hamil] court then cited *Restatement 2nd of Torts § 323* (1965) as authority to relax the degree of certitude normally required of plaintiff's evidence in order to make a case for the jury. The court held that once a plaintiff has introduced evidence that a

> defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and that the harm was in fact sustained, "it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm". *Hamil, at 269*. *See also* C. McCormick, *Damages* § 31 (1935); Wolfstone & Wolfstone, *supra* at 744.

The Supreme Court's decision established that a jury could utilize a lesser degree of certainty from expert testimony to find proximate causation as it related to any injury or death of a patient by a health care provider's negligence. However, the Court's holding did not extend to an unrelated third party like the appellants here.[5] *See also*: *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011).

2. Volk is still required to present expert testimony regarding breach of the standard of care and causation.

Notwithstanding the problems addressed in Section 1 above, Volk is required to present admissible expert testimony regarding Dr. Ashby and SPC's breach of the applicable standard of care. *See*: Authorities cited in Section C 2 and C 3 above.

G. Respondent SPC Adopts and Incorporates Section B of Respondent Ashby's Brief as though included herein.

Respondent SPC incorporates and adopts Section B of Respondent Ashby's brief as though set forth herein for any arguments regarding Respondent SPC's vicarious liability for Dr. Ashby's alleged negligence.

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[5] SPC is not suggesting that the estate, a testator, executor or the like cannot bring such a claim on behalf of a plaintiff's estate but that is not the situation presented here.

V. CONCLUSION

Volk has failed to establish a rational basis for overturning the trial court's decision to grant summary judgment in favor of Respondent SPC. Volk failed to submit expert testimony from a qualified expert with knowledge and expertise regarding the standard of care applicable to a private psychiatric clinic. Volk failed to offer admissible expert testimony regarding the applicable standard of care of a private psychiatric clinic.

Volk failed to establish whether and how SPC breached any applicable standard of care or committed medical negligence as to any treatment, care, practices, policies, procedures, training, supervision or directives affecting Ms. Schiering or any of her children. Volk failed to present qualified expert testimony that addressed what practices, policies, procedures, and training or supervision of its employees was negligent and how this may have caused injury or harm to Ms. Schiering or her children.

Volk failed to identify what treatment records, statements, or other information would have allowed Dr. Ashby or SPC to reasonably foresee Jan DeMeerleer's threat of harm to the appellants. Volk did not present any admissible evidence to establish the causative element necessary to substantiate a claim under *Petersen* or applicable Washington law relating to a private psychiatric clinic.

Finally, SPC demonstrated that Volk's attempt to rely upon the "loss of chance" cases, as established in *Herkovits* and *Mohr*, are not supported by Washington case law or the facts presented by appellants' case.

DATED this 26th day of December, 2013.

RANDALL | DANSKIN, P.S.

By: _____
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Spokane Psychiatric Clinic, P.S.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the **RESPONDENT SPOKANE PSYCHIATRIC CLINIC, P.S.'s BRIEF,** on the 26th day of December, 2013, addressed to the following:

Attorneys for Plaintiffs: Michael J. Riccelli, P.S. Attorney at Law 400 S. Jefferson St., Suite 112 Spokane, WA 99204-3144	__X__Hand Delivered _____U.S. Mail _____Overnight Mail _____Fax Transmission
Ian Ledlin Phillabaum, Ledlin, Matthews, Sheldon & Kime 1235 N. Post Street Spokane, WA 99201-0413	__X__Hand Delivered _____U.S. Mail _____Overnight Mail _____Fax Transmission
James McPhee Workland & Witherspoon 601 W. Main Street Suite 714 Spokane, WA 99201	__X__Hand Delivered _____U.S. Mail _____Overnight Mail _____Fax Transmission
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David A. Kulisch

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