No. 91387-1

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 318141

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

BEVERLY VOLK, et al., ***Appellants*****,**

v.

JAMES B. DEMEERLEER, **et al.,** ***Respondents*****.**

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT.....1

A. The scope of Dr. Ashby's duty extends to foreseeable 1
third-parties such as the appellants in this case

B. The Exemptions From Liability Afforded by 7
RCW 71.05.120 are Inapplicable to This Case

C. RCW 70.02.050 Does Not Prohibit Dr. Ashby 12
From Sharing DeMeerleer's Healthcare Information

D. RCW 18.83.110 Does Not Prohibit Dr. Ashby 12
From Disclosing DeMeerleer's Healthcare Information

E. Dr. Knoll's Admissible Declaration Presents 14
Questions of Fact with Respect to Dr. Ashby's Breach
of Duty and Proximate Causation Precluding Summary
Judgment

F. The Loss of Chance Doctrine Applies to this Case, ... 17
it is a Jury Question and it Does Not Require Statistical
Evidence

G. The Court is Requested to Preserve and Promote the 24
Public Policy of Protecting Innocent Third-Parties

III. CONCLUSION.....27

TABLE OF AUTHORITIES

Cases

Berglund v. Spokane County, 4 Wn. 2d 309, 319–320, ...2, 5, 6, 12
103 P.2d 355 (1940)

Doe v. Group Health Cooperative, 85 Wash. App. 213, ...11, 12
220, 932 P.2d 178 (1997), *overruled on other grounds*,
136 Wn.2d 195, 961 P.2d 333 (1998)

Est. of Davis v. Dept. of Corrections, 117 Wn. 4, 8
App. 833, 113 P.3d 487 (2005)

Herskovits v. Group Health Cooperative, , ...17, 18, 19, 20, 21, 22, 23, 24
99 Wn.2d 609, 664 P.2d 474 (1983)

Hertog v. City of Seattle, 138 Wn. 2d 265, ...9
293 n.7, 979 P.2d 400 (1999

James v. United States, 483 F. Supp. 18, 19, 22
581 (N. Dist. Calif. 1980)

Kaiser v. Suburban Transp. Sys., 65 Wn. 2d 461, ...3, 24
398 P.2d 14 (1965)

Mohr v. Grantham, 172 Wn.2d 844, 850, ...18, 19, 20, 21, 22, 23
262 P.3d 490 (2011)

Peterson v. State, 100 Wn.2d 421, ...3, 4, 6, 9, 12, 24
671 P.2d 230 (1983)

Poletti v. Overlake Hospital Medical Ctr., 175 Wn. App. 828, ...7
303 P.3d 1079 (2013)

Rikstad v. Holmberg, 76 Wn.2d 265, 268 – 269, ...2, 5, 6, 12
456 P.2d 355 (1969)

State v. Hansen, 122 Wn.2d 712, 720 – 721, ...12, 13, 14

862 P.2d 117 (1993)

Taggart v. State, 118 Wn.2d 195, 223, 822 P.2d 243 (1992) 4

Tarasoff v. Regents of Univ. of Calif., 17 Cal. 3d 425, ...24, 25, 26
438, 551 P.2d 334 (1976)

Webb v. Neuroeduc., Inc., P.C., 121 Wn. App. 336, ...12, 24, 25
346, 88 P.3d 417 (2004)

Regulations

RPC 1.6.....13, 14

RCW 7.70.040.....20

RCW 18.83.110.....12, 14, 27

RCW 70.02.050.....10, 11, 12, 27

RCW 70.96A.140.....12

RCW 71.05.120.....1, 7, 8, 9, 27

RCW 71.05.330.....7

RCW 71.05.340.....7

RCW 71.05.360.....12

Restatement (Second) of Torts § 315 (1965) 3, 6

Restatement (Second) of Torts § 323 (1965) 17

I. INTRODUCTION AND RELIEF REQUESTED.

This is in reply to the responsive briefs of Respondents Ashby and Spokane Psychiatric Clinic (SPC); and in answer to the brief of Amicus Curiae. The plaintiffs' concede Dr. Knoll's declaration does not raise issues of fact pertaining to plaintiffs' direct action against SPC. Plaintiffs' assert Dr. Ashby is negligent and if that assertion is proven, then SPC is vicariously liable.

The plaintiffs' also concede Amicus' contention that RCW 71.05.120 applies to public and private agencies. Plaintiffs do not; however agree 71.05.120 applies in this case. For the reasons that follow, we ask the court to reverse the Superior Court's entry of summary judgment.

Plaintiff Volk has viable claims against Dr. Ashby and SPC for damages arising from and relating to the murder of Phillip Lee Schiering and Rebecca Leigh Schiering, the attempted murder of Brian P. Winkler, and infliction of emotional distress and other harm to Jack Alan Schiering.

II. ARGUMENT

A. The scope of Dr. Ashby's duty extends to foreseeable third-parties such as the appellants in this case.

> "The better reasoned authorities do not regard forseeability as the handmaiden of proximate cause. To connect them leads to too many false premises and confusing conclusions. Forseeability is, rather, one of the elements of negligence; it is more appropriately attached to the issues whether defendant owed plaintiff a duty, and, if so, whether the duty imposed by the risk embraces that conduct which resulted in

> injury to plaintiff. The hazard that brought about or assisted in bringing about the result must be among the hazards to be perceived reasonably and with respect to which defendants' conduct was negligent. ... **It is not, however, the unusualness of the act which resulted in injury to plaintiff that is the test of forseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant."**

Rikstad v. Holmberg, 76 Wn.2d 265, 268–269, 456 P.2d 355 (1969)(Emphasis added).

> **"The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable, and highly unexpectable, from the point of view of the actor at the time of his conduct.** And yet, if the harm suffered falls within the general danger area, there may be liability provided other requests of legal causation are present."
>
> *Berglund v. Spokane County*, 4 Wn. 2d 309, 319 – 320, 103 P.2d 355 (1940) (Emphasis added).

In the present case, third-party foreseeable risk and resulting damages were foreseeable. It is well settled that, in a claim of negligent treatment, the plaintiff need not be the patient. *Webb v. Neuroeduc. Inc., P.C.*, 121 Wn. App. 336, 346, 88 P.3d 417 (2004). In *Webb*, the plaintiff was the patient's father. He sued the defendant psychologist for negligently implanting and developing false memories of sexual abuse in his son. *Id.* at 339. One of the issues on appeal was whether the defendant owed the non-patient father a duty of care in a medical malpractice case. This court concluded the psychologist did owe a duty and reversed the trial court's summary judgment dismissal. *Id.* at 351.

This duty of care is not limited to psychologists. In *Kaiser v. Suburban Transp. Sys.*, 65 Wn. 2d 461, 398 P.2d 14 (1965), the court held a physicians duty of care extended to a bus passenger who was injured when the bus driver fell asleep as a result of the side effects of a drug prescribed to him by his physician. In *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), the court concluded a psychiatrist has a duty to protect against a third party's injuries caused by a patient. The court held the defendant psychiatrist "incurred a duty to take reasonable precautions to protect **anyone** who might foreseeably be endangered by [his patients] drug related mental problems." *Id.* at 428. (Emphasis added). The court based its decision on Restatement (Second) of Torts § 315 (1965) which provides:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless:
>
> a. A special relation exists between the actor and the third person which imposes a duty upon the actor to control the person's conduct, or
>
> b. A special relation exists between the actor and the other which gives the other a right to protection."

Restatement (Second) of Torts § 315 (1965); *Id.* at 426.

The psychiatrist's duty of care applies to outpatient treatment like DeMeerleer received:

> "The duty we announced in *Peterson* is not limited to taking precautions to protect against mental patients' dangerous propensities only when those patients are being released from the hospital .... The

> duty requires that whenever a psychiatrist determines, or according to the standards of the profession should have determined, that a patient presents foreseeable dangers to others, the **psychiatrist must take reasonable precautions** to protect against harm. **Whether the patient is a hospital patient or an out patient is not important.**"
>
> *Taggart v. State*, 118 Wn.2d 195, 223, 822 P.2d 243 (1992) (Emphasis added).

In *Est. of Davis v. Dept. of Corrections*, 117 Wn. App. 833, 113 P.3d 487 (2005), this court recognized a cause of action pursuant to *Peterson, supra.* In *Davis*, this court wrote:

> "There is no general duty to protect others from the criminal acts of a third party. An exception to this rule exists, however, if there is a **special relationship between the defendant and the victim or the defendant and the criminal**. Such a duty is imposed only if there is a definite, established, and continuing relationship between the defendant and the third-party criminal actor."
>
> *Estate of Davis v. Dept. of Corrections*, 127 Wn. App. 833, 841 – 842, 113 P.3d 487 (2005).

In *Davis*, the court rejected the plaintiffs "special relationship" theory because the defendant saw the counselor only one time. *Id.* at 842. In the present case, DeMeerleer saw Dr. Ashby more than 50 times over a period of nine years. Dr. Ashby had a "special relationship with DeMeerler, upon which plaintiffs have a cause of action.

As demonstrated above, Washington has historically imposed a duty of care on defendant health care providers with respect to foreseeable events. Foreseeability is judged by whether the actual harm falls within the ambit of

the hazards covered by the duty imposed upon the defendant including non-parties where this special relationship exists between the physician and patient.

Dr. Ashby's contention that DeMeerleer's actions were not foreseeable misconstrues the concept of forseeability.

> "It is not the unusualness of the act which resulted in injury to plaintiff that is the test of forseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant."
>
> *Rikstad v. Holmberg,* 76 Wn.2d 265, 268 – 269, 456 P.2d 355 (1969).
>
> "The manner in which the risk culminates in harm may be unusual, improbable, and highly unexpectable from the point of view of the actor at the time of his conduct. And yet if the harm suffered falls within the general danger area, there may be liable ..."
>
> *Berglund v. Spokane County*, 4 Wn. 2d 309, 319 – 320, 103 P.2d 355 (1940).

Dr. Ashby also mistakenly argues harm to the Schiering family were not foreseeable because DeMeerleer's conduct on July 18, 2010, was unusual, improbable, and unexpected. To that end, he relies upon the declarations of DeMeerler's family and prior spouse for the proposition they did not expect or foresee DeMeerleer's homicidal, assaultive, and suicidal actions on July 18, 2010[1]. This concept of foreseeability is erroneous because it views DeMeerleer's acts from the point of view unrelated third parties to the

1 Plaintiffs moved to strike these declarations.

professional relationship between Dr. Ashby and DeMeerler. See *Rikstad; Berglund*, *supra*. Also, factually, the perceptions of the declarations were proven wrong by the admissions of potential harm DeMeerler considered against his prior spouse and her male companion. Dr. Ashby mistakenly argues DeMeerleer's actions were so unusual that they were unforeseeable. This is precisely the error addressed in *Rickstad*, *supra*.

> "It is the misuse of foreseeability – that is, discussion of the improbable nature of the accident in relation to proximate cause – that led the trial judge, in the instant case, to conclude that the challenge should be sustained."
>
> *Rickstad*, 76 Wn.2d at 269.

Again, Dr. Ashby also knew DeMeerler's relationship with Rebecca Schiering dissolved due to the actual harm caused by DeMeerleer by physically assaulting Jack Schiering, yelling and punching him squarely in his 9-year-old mouth. Instead, Dr. Ashby's conduct must be judged by whether his breach of duty encompassed foreseeable victims. In adopting Restatement (Second) of Torts § 315 (1965), the court specifically extended a psychiatrist's duty of care to third parties, not just patients, by virtue of the "special relationship" discussed therein. *Peterson v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983). For these reasons, the court is requested to reverse the superior court's entry of summary judgment.

B. <u>The Exemptions From Liability Afforded by RCW 71.05.120 are Inapplicable to This Case</u>.

> "(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 anti-psychotic 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 any person from giving their 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 or to law enforcement personnel."
>
> RCW 71.05.120

RCW 71.05.120 applies only to situations concerning involuntary mental health treatment and voluntary in-patient mental health treatment. *Poletti v. Overlake Hospital Medical Ctr.*, 175 Wn. App. 828, 832, 303 P.3d 1079 (2013). In *Poletti*, the plaintiff suffered from bi-polar disorder. She stopped taking her medications for approximately four days then sought help at a hospital emergency room. She was referred and transported to the defendants' hospital and voluntarily admitted into the psychiatric unit. After

18 hours she was discharged. She died shortly thereafter in a single vehicle accident. *Id.* at 830-831. Her estate brought a negligence action and the trial court granted her motion for partial summary judgment that the gross negligence standard of RCW 71.05.120 did not apply.

The court of appeals reversed. *Id.* at 832, 839. The court reasoned RCW 71.05.120 was part of the "Involuntary Treatment Act" concerning involuntary mental health treatment and voluntary in-patient mental health treatment. *Id.* at 832. Accordingly, defendant Overlake's actions with respect to the plaintiff's discharge were judged in light of RCW 71.05.120.

In the instant case, Dr. Ashby's treatment of DeMeerleer was not for involuntary mental health treatment nor was DeMeerleer an in-patient voluntarily seeking mental health treatment. Therefore, the "Involuntary Treatment Act" is not applicable and respondents are not entitled to the exemption from liability set forth in RCW 71.05.120.

The exemption applies only to those defendants **"performing duties pursuant to this chapter."** RCW 71.05.120(1)(emphasis added). Dr. Ashby was not performing duties pursuant to this chapter (the "Involuntary Treatment Act"). Therefore, pursuant to the plain language of the statute, the exemption does not apply in this case.

Est. of Davis v. Dept. of Corrections, 117 Wn. App. 833, 113 P.3d 487 (2005), does not compel a different result. In *Davis,* the defendant was

under community supervision for taking a motor vehicle without permission and for a violation of his community service sentence resulting from that offense. His community service mandated that he submit to a psychological anger control evaluation and comply with the resulting treatment requirements. He faced up to 111 days of additional confinement for failure to comply. *Davis*, 127 Wn. App. at 837. This court determined that any of the plaintiffs' allegations with respect to the defendants' failure to detain the plaintiff implicated the "Involuntary Treatment Act" and the immunity set forth in RCW 71.05.120. *Id.* at 840 – 841. Therefore, the trial court's summary judgment was affirmed.

In the present case, Dr. Ashby's treatment of DeMeerleer never encompassed involuntary mental health treatment. DeMeerleer was not an in-patient voluntarily seeking mental health treatment. Therefore, the "Involuntary Treatment Act" is not applicable and respondents are not entitled to the exemptions from liability set forth in RCW 71.05.120.

Dr. Ashby's reliance upon Justice Talmadge's concurring opinion in *Hertog v. City of Seattle*, 138 Wn. 2d 265, 293 n.7, 979 P.2d 400 (1999), is misplaced. As noted by Dr. Ashby, Justice Talmadge wrote in pertinent part:

> "The legislature statutorily abrogated our holding in *Peterson* in Laws of 1987, ch. 212, § 301 (1) (codified at RCW 71.05.120(1)), **with respect to the liability of the state**."

Recall that in *Peterson*, *supra*, Mr. Knox was released from Western

State Hospital five days before he caused the accident injuring the plaintiff. One of the issues was whether he should have been confined for an additional period of time. *Peterson*, 100 Wn.2d at 424-425. Accordingly, *Peterson* implicated the Involuntary Treatment Act as it then existed. *Id.* at 430-432.

Subsequent modifications to the act, such as the addition of RCW 71.05.120 referenced by Justice Talmadge above, do not affect the instant case. DeMeerleer was not receiving involuntary mental health treatment or voluntary in-patient mental health treatment from Dr. Ashby. The Involuntary Treatment Act is not implicated and RCW 71.05.120 does not apply.

C. RCW 70.02.050 Does Not Prohibit Dr. Ashby From Sharing DeMeerleer's Healthcare Information.

RCW 70.02.050 provides in relevant part:

> "(1) A healthcare provide or healthcare facility may disclose healthcare information about a patient without the patient's authorization to the extent a recipient **needs to know** the information, if the disclosure is ...
>
> > (d) to any person if the healthcare provider or healthcare facility **reasonably believes** that disclosure will avoid or minimize an imminent danger to the health or safety of the patient or any other individual, however, there is **no obligation** under this chapter on the part of the provider or facility to so disclose;
> >
> > (e) to immediate family members of the patient, including a patient's state registered domestic partner, **or any other individual with whom the patient is known to have a close personal relationship**, if made in accordance with **good medical or other professional practice,** unless the

> patient has instructed the healthcare provider or healthcare facility in writing not to make the disclosure;
>
> ...
>
> (2) A healthcare provider **shall** disclose healthcare information about a patient without the patient's authorization if the disclosure is: ...
>
> (b) to federal, state or local law enforcement authorities to the extent the healthcare provider **is required by law**;"

RCW 70.02.050(1) and (2) (Emphasis added).

Disclosure of healthcare information based upon the "needs to know" portion of RCW 70.02.050(1) is a jury question. *Doe v. Group Health Cooperative*, 85 Wash. App. 213, 220, 932 P.2d 178 (1997), *overruled on other grounds*, 136 Wn.2d 195, 961 P.2d 333 (1998). In the case at bar, Dr. Ashby contends he was under no obligation to disclose DeMeerleer's healthcare information pursuant to needs to know exception codified at RCW 70.02.050(1)(d). On the other hand, Dr. Knoll raises the issue of whether Dr. Ashby should have warned Ms. Schiering and her family. (CP 55, para. 10).

Pursuant to the statutory language, whether Dr. Ashby **reasonably believed** disclosure would have avoided or minimized imminent danger in light of the facts of this case; whether he was under an **obligation** to disclose under this chapter, *in light of the facts* of this case *and pursuant to the applicable tort law* summarized above; and whether he should have disclosed healthcare information to Ms. Schiering and her family are all jury questions

not appropriately disposed of in summary judgment. *Doe v. Group Health Cooperative*, 85 Wash. App. at 220.

Moreover, RCW 70.02.050(2)(b) mandates disclosure to federal, state, or local law enforcement authorities, to the extent *required by law*. Dr. Ashby owed a duty of care to plaintiffs' under applicable Washington tort law. *Berglund, Kaiser, Peterson, Rikstad and Webb, supra.* Whether this duty required disclosure of DeMeerleer's health care information to law enforcement authorities, based on the facts of this case, is for the jury to decide. The trier of fact should judge Dr. Ashby's conduct in light of this requirement and the facts of the case. Accordingly, we ask the court to reverse the trial court's entry of summary judgment dismissal.

D. <u>RCW 18.83.110 Does Not Prohibit Dr. Ashby From Disclosing DeMeerleer's Healthcare Information</u>.

RCW 18.83.110 provides:

> "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,** but this exception is subject to the limitations under RCW 70.96A.140 and 71.05.360(8) and (9)."

RCW 18.83.110(Emphasis added).

RCW 18.83.110 does not preclude Dr. Ashby's disclosure of DeMeerleer's health care information. *State v. Hansen*, 122 Wn.2d 712, 862 P.2d 117 (1993). In *Hansen*, the defendant (Michael Hansen) was convicted

of a felony and sentenced to prison. After his release, he telephoned attorney Chris Yotz. In that conversation, Yotz declined to represent Hansen. Subsequently, Hansen told Yotz: "I am going to get a gun and blow them all away, the prosecutor, the judge and the public defender." *Id.* at 714 – 715.

Mr. Yotz then warned the judge, prosecutor and public defender of Hansen's threat. *Id.* at 715. Hansen was subsequently convicted of intimidating a judge. One of the issues on appeal was whether Hansen had a reasonable belief that he was engaged in a confidential and privileged conversation with Yotz when he made the threat. *Id.* at 719. The court concluded that no attorney-client relationship existed. *Id.* at 719 – 720. Even so, the court wrote:

> "If an attorney-client relationship could have been found to exist when Hansen made the threat against the judge, the prosecutor, and the public defender, the privilege would still not apply. The attorney-client privilege is not applicable to a client's remarks concerning the furtherance of a crime, fraud, or to conversations regarding the contemplation of a future crime. ... Under the rules of professional conduct, an attorney is permitted to reveal information concerning a client's intent to commit a crime. "A lawyer may reveal ... confidences or secrets to the extent the lawyer reasonably believes necessary ... to prevent the client from committing a crime."
>
> RPC 1.6(b)(1). *State v. Hansen*, 122 Wn.2d 712, 720 – 721, 862 P.2d 117 (1993).

The court also observed the model rules of professional conduct, 1.6(b)(1) provide, "a lawyer may reveal such information to the extent the lawyer reasonably believes necessary: to prevent the client from committing a

criminal act that the lawyer believes is likely to result in eminent death or substantial bodily harm ..." *Id.* at 721 n. 3.

RPC 1.6 provides:

"Rule 1.6. Confidentiality of Information.

...

(b) A lawyer, to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime.

RPC 1.6(b)(1) and (2)

Amicus Curiae's contention that Ashby was prohibited by RCW 18.83.110 from disclosing confidential communications is incorrect. As demonstrated above, he *may* reveal confidential communications to prevent his patient from committing a crime and *shall* reveal information to prevent reasonably certain death or substantial bodily harm. Pursuant to the plain language of RCW 18.83.110, RPC 1.6(b)(1)(2) and *State v. Hansen*, *supra*, the confidential communications privilege was no bar to Ashby's disclosure of confidential communications.

E. Dr. Knoll's Admissible Declaration Presents Questions of Fact with Respect to Dr. Ashby's Breach of Duty and Proximate Causation Precluding Summary Judgment

James L. Knoll, IV, M.D. is a board-certified psychiatrist and

neurologist. He earned a subspecialty certification in forensic psychiatry. (CP 55 at para. 2). The factual basis upon which he formed his opinions in this case is: (1) his review of the clinical records of Jan DeMeerleer from the Spokane Psychiatric Clinic; (2) his review of the Spokane Valley Police/Spokane County Sheriff Department's investigative files pertaining to the July 18, 2010 incident in question; and (3) his review of the Spokane County Medical Examiner's autopsy report and related toxicology report with respect to DeMeerleer. (CP 55 at para. 4). Dr. Knoll is knowledgeable of the applicable standard of care in the State of Washington. (CP 55 at para. 5). His opinions and conclusions are made on a more probable than not basis, and when made with respect to clinical psychiatric practice, made with reasonable medical certainty, on a more probable than not basis. (CP 55 at para. 6). Plaintiffs are not aware of any legal authority requiring Dr. Knoll attach copies of the records he reviewed to his declaration, as suggested by Ashby.

Dr. Knoll's declaration sets forth testimony creating a question of fact with respect to Dr. Ashby's breach of the applicable standard of care. Specifically, at CP 55, para. 11, Dr. Knoll testifies in pertinent part:

> "SPC breached the applicable standard of care by failing to exercise the decree of care, skill and learning expected of a reasonably prudent healthcare provider of psychiatric medical services, in the State of Washington, acting in the same or similar circumstances ... These breaches include, but are not limited to: failing to perform adequate

> assessments of DeMeerleer's risk of harming himself, and others when clinically indicated to do so; and failing to adequately monitor DeMeerleer's psychiatric condition, and provide appropriate treatment."
>
> CP 55, para. 11.

"SPC" refers to Dr. Ashby and his colleagues at the Spokane Psychiatric Clinic. (CP 55, para. 5). Dr. Knoll's testimony, set forth in paragraph 11, creates genuine questions of fact as to whether Dr. Ashby breached the applicable standard of care. Accordingly, the trial court erred in granting the respondent's motion for summary judgment.

Dr. Knoll's declaration properly addresses proximate cause. In paragraph 12, he testifies:

> "But for the referenced Breaches by SPC, it is unlikely the Incident would have occurred."

In paragraph 13, he testifies:

> "The referenced Breaches were, collectively and individually, most likely a causal and substantial factor contributing to and in bringing about the Incident and the resulting harm ..."
>
> CP 55, at para. 12 and 13.

"Unlikely" and "most likely" are simply alternative expressions of "more probably than not." Moreover, any opinions or conclusions made by Dr. Knoll in his declaration are made on a more probable than not basis with reasonable medical certainty. (CP 55, para. 6). As demonstrated above,

Dr. Knoll's declaration addresses Ashby's breach of the standard of care and proximate cause on a more probable than not basis with reasonable medical certainty. Accordingly, the trial court erred in granting the respondent's motions for summary judgment dismissal.

F. <u>The Loss of Chance Doctrine Applies to this Case, it is a Jury Question and it Does Not Require Statistical Evidence</u>.

In loss of chance claims, the standard of proof of negligence is not traditional "but for" proximate causation due to the act or omission is a substantial factor in causing the loss of chance. In *Mohr v. Grantham,* 172 Wn.2d 844, 850, 262 P.34d 490 (2011).

> The lead and plurality opinions split over how, not whether, to recognize a cause of action. Drawing from other jurisdictions, especially the Pennsylvania Supreme Court's holding in Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978), the lead opinion held that **the appropriate framework for considering a lost chance claim was with a "substantial factor" theory of causation.** The court summarized that once a plaintiff has demonstrated that the defendant's acts or omissions have increased the risk of harm to another, such evidence furnishes a basis for the jury to make a determination as to whether such increased risk was in turn a substantial factor in bringing about the resultant harm.
>
> Herskovits, 99 Wn.2d at 616 (additionally noting the Hamil court's reliance on the Restatement (Second) of Torts § 323 (1965), which provides that one who renders services to another, necessary for the protection of that person, is liable if "his failure to exercise [reasonable] care increases the risk of [physical] harm"). **The "substantial factor test" is an exception to the general rule of proving but for causation and requires that a plaintiff prove that the defendant's alleged act or omission was a substantial factor in causing the plaintiffs injury, even if the injury could have occurred anyway.** Fabrique v. Choice Hotels Int'l, Inc., 144

Wn. App. 675, 684, 183 P.3d 1118 (2008).

Mohr , 172 Wn. 2d at 852-53 (emphasis added, citations omitted)

This is further confirmed by Justice Madsen in her dissent in Mohr. Madsen, C.J. (dissenting):

> ...
>
> It is a fundamental principle that in a medical malpractice action the plaintiff must prove causation of the plaintiffs actual physical (or mental) injury before tort liability will be imposed. To avoid the difficulty posed by this requirement, the majority recognizes a cause of action for which the plaintiff does not have to prove that "but for" the physician negligence, the injury would not have occurred. Majority at 850-51 (citing Herskovits v. Grp. Health Coop. of Puget Sound, 99 Wn.2d 609, 619, 664 P.2d474 (1983) (Dore, J., lead opinion); id. at 634-3 5 (Pearson, J., plurality)). That is, because the majority finds the traditional causation-of- injury requirement to be an insurmountable obstacle, it employs a different concept to anchor a lost chance claim. Majority at 850. The majority simply redefines the injury as the lost chance. With this semantic leap--essentially a fiction-- the causation problem is fixed.

Mohr, 172 Wn. 2d at 864 (emphasis added, citations omitted)

A careful reading of the Mohr opinion further reveals that mathematical probability as to loss of chance maybe provided by experts, but is not necessary so long as enough testimony exists that a jury can reasonably assign a value and does not have to resort to mere speculation or conjecture. In Mohr, the court addressed the Probability issue."

The recent case of *James v. United States, 483 F. Supp. 581 (N.D. Cal. 1980)* concerned the failure to diagnose and promptly treat a lung tumor. The court concluded that the plaintiff sustained its burden of proof even without statistical evidence, stating at page 587:

> As a proximate result of defendant's negligence, James was deprived of the opportunity to receive early treatment and the chance of realizing any resulting gain in his life expectancy and physical and mental comfort. ***No matter how small that chance may have been -- and its magnitude cannot be ascertained -- no one can say that the chance of prolonging one's life or decreasing suffering is valueless.***
>
> (Italics ours.)

Where percentage probabilities and decreased probabilities are submitted into evidence, there is simply no danger of speculation on the part of the jury. More speculation is involved in requiring the medical expert to testify as to what would have happened had the defendant not been negligent. McCormick, *supra*.

Herskovits v. Group Health Cooperative, 99 Wn.2d 609, 617-18, 664 P.2d 474 (1983)

A fair reading of the foregoing excerpt from Herskovits is that, although use of statistical probabilities is, perhaps, preferable, it is not an absolute requirement. However, in Herskovits, the court concluded that with testimony of probability of outcome, there could be no argument as to sufficiency of the evidence.

In Mohr, the plaintiff incurred a trauma induced stroke and

subsequently received negligent medical care. As a result, she was permanently brain damaged. *Id.* at 846-849. The trial court dismissed her action because she could not show "but for" (cause-in-fact) causation. *Id.* at 849 – 850. The Washington Supreme Court reversed.

The court analyzed the required elements of a medical malpractice claim. A plaintiff must establish:

> "(1) The healthcare provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent healthcare 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."
>
> *Mohr*, 172 Wn.2d at 856; RCW 7.70.040.

The court observed that nothing in the medical malpractice statute precludes a lost chance cause of action and that Chapter 7.70 does not define "proximate cause" or "injury." *Mohr*, 172 Wn. 2d at 856. The court adopted the reasoning of the Herskovits plurality. *Id.* at 857. The plaintiff must prove duty, breach, and that such breach of duty caused a loss of a chance of a better outcome. *Id.* The specific manner of proving causation in lost chance cases is not prescribed. *Id.* It relies on "established tort theories of causation, without applying a particular causation test to *all* lost chance cases. Instead, the loss of a chance is the compensable injury". *Id.*

In *Herskovits v. Group Health Cooperative*, 99 Wn.2d 609, 664 P.2d

474 (1983), the defendant was negligent in timely diagnosing the plaintiffs' lung cancer. The plaintiff could not offer evidence "more likely than not" that the delay in diagnosis caused his death. He did provide evidence of a decreased chance of survival. *Herskovits,* 99 Wn.2d at 611-612. The trial court granted Group Health's motion for summary judgment. *Id.* at 611. The supreme court reversed.

The court framed the issue as whether the relationship between the increased risk of harm and *Herskovits'* death is sufficient to hold Group Health responsible. The court responded:

> "We answer in the affirmative. To decide otherwise would be a blanket release from liability for doctors and hospitals anytime there was less than a 50 percent chance of survival, regardless of how flagrant the negligence. ..."
>
> 99 Wn.2d at 614.

The court concluded:

> "We reject Group Health's argument that plaintiffs *must show* that *Herskovits* "probably" would have had a 51 percent chance of survival if the hospital had not been negligent. We hold that medical testimony of a reduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow the proximate cause issue to go to the jury."
>
> 99 Wn.2d at 619.

As referenced above, *Mohr* adopted the plurality opinion in *Herskovits*. *Mohr*, 172 Wn. 2d at 857. That opinion, authored by Justice Pearson, recognized the loss of a less than an even chance as an actionable

injury. *Herskovits,* 99 Wn.2d at 634. The plaintiff establishes a prima facie issue of proximate cause by producing testimony that defendant probably caused a substantial reduction in Mr. Herskovits' chance of survival. *Id.*

As previously stated, statistical evidence of loss of a chance is not necessary. In *Herskovits*, the plurality cited with approval the case of *James v. United States*, 483 F. Supp. 581 (N. Dist. Calif. 1980). Similar to *Herskovits*, that case involved the failure to diagnose and properly treat a lung tumor. The district court did not require proof of a statistically measurable chance of survival. *Herskovits*, 99 Wn.2d at 630-631.

In the instant case, Dr. Knoll's declaration addresses loss of a chance in paragraphs 10, 13, and 14. (CP 55). Specifically, Dr. Knoll testified in relevant part:

> "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 or warning by SPC directly, through an appropriate intermediary or an (sic) 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."
>
> CP 55, para. 10

This testimony is admissible. Under the authority of *Herskovits* and *Mohr*, *supra*, it is not necessary that the loss of a chance doctrine be proven to

a statistically measurable degree. Moreover, Dr. Knoll's testimony is not speculative:

> "In the typical tort case, the "but for" test requiring proof that damages or death probably would not have occurred "but for" the negligent conduct of the defendant is appropriate. In *Hamil* and the instant case, however, the defendant's act or omission failed in a duty to protect against harm from another source. Thus, as the *Hamil* court noted, the fact finder is put in the position of having to consider not only what did occur but also what might have occurred."
>
> *Herskovits*, 99 Wn.2d at 616.

In the case at bar, Dr. Knoll's opinions set forth paragraphs 13 and 14 create jury questions as to whether Dr. Ashby's conduct is a cause of the appellants' loss of chance injury. Dr. Knoll testifies Dr. Ashby's breaches were:

> "Collectively and individually, most likely a causal and substantial factor contributing to and in bringing about the incident and the resulting harm ... and in bringing about loss of chance of a better outcome ..."
>
> (CP 55, para. 13 and 14)

Dr. Ashby mistakenly contends "but for" causation of the loss of a chance injury is required. That contention is the antithesis of *Herskovits* and *Mohr*, *supra*. In both cases, the supreme court reversed the trial court's order of summary judgment requiring "but for" causation. If Dr. Ashby's contention was correct, then the trial courts in *Herskovits* and *Mohr* would have been affirmed; not reversed.

"It is not necessary for a plaintiff to introduce evidence to establish

> that the negligence resulted in the injury or death, but simply that the negligence increased the **risk** of injury or death. The step from the increased risk to causation is one for the jury to make."
>
> *Herskovits*, 99 Wn.2d at 617 (citing with approval *Hamil v. Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978) (emphasis added)

SPC's assertion that the *Herskovits* line of cases does not create a duty of care to a third party is misplaced. As shown above, Washington case law established long ago that a healthcare provider owes a duty of care to a third party. *Kaiser v. Suburban Transp. Sys.*, 65 Wn. 2d 461, 398 P.2d 14 (1965); *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983); and *Webb v. Neuroeduc., Inc., P.C.*, 121 Wn. App. 336, 88 P.3d 417 (2004).

Plaintiffs' have provided admissible testimony supporting a loss of a chance claim. This court is requested to reverse the superior court's order of summary judgment dismissal.

G. <u>The Court is Requested to Preserve and Promote the Public Policy of Protecting Innocent Third-Parties</u>

Amicus's contention that violent behavior is not consistently foreseeable is insufficient grounds to abandon Washington's policy of holding health care providers accountable to patients and third parties. The court in *Tarasoff* addressed this argument:

> "The role of the psychiatrist, who is indeed a practitioner of medicine, and that of the psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must often make diagnoses and predictions based upon such evaluations. Thus, the judgment of the therapist in

> diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility. ... We do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances."
>
> *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 438, 551 P.2d 334 (1976).

In Washington, the statutory elements of a medical malpractice claim are particularized expressions of the four common law negligence elements of a duty, breach, injury and proximate cause. *Webb v. Neuroeduc. Inc., P.C.*, 121 Wn. App. 336, 346, 88 P.3d 417 (2004). To establish a breach of the accepted standard of care, the plaintiff must prove that a healthcare provider:

> "(1) Failed to exercise that degree of care, skill, and learning expected of a reasonably prudent healthcare provider at that time in the profession acting in the same or similar circumstances; and
>
> (2) That such failure was a proximate cause of the injury complained of."
>
> *Id.* at 346-347.

As demonstrated above, it is apparent that Washington has adopted a negligence standard similar to that of California as set forth in *Tarasoff*, *supra*. A non-patient can state a cause of action for negligent treatment by showing that his injury resulted from the failure of the healthcare provider to follow the accepted standard of care. *Webb,* 121 Wn. App. at 346.

Accordingly, in Washington, a health care provider must act with reasonable care and that duty extends to third parties.

The argument advanced by Amicus, that violent behavior is not consistently foreseeable, is not new. The allegation that violent behavior is hard to predict does not justify turning established Washington tort law on its head. The court is requested to reject Amicus' argument.

Similarly, the adverse unintended consequences predicted by Amicus are speculative. Plaintiffs' respectfully note there is no legal or empirical research citation to Amicus' claim of unintended consequences. Moreover, plaintiffs' query, why shouldn't mental healthcare practitioners be required to practice within the same negligence standard of care principles applicable to other healthcare practitioners in Washington State.

The public interest in safety from violent assault is paramount to the public interest in protecting confidential communications between a patient and his or her mental healthcare provider. Again, *Tarasoff* phrased it best:

> "If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. ... We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins."
>
> *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 442, 551 P.2d 334 (1976).

As summarized above, Washington has long had a public policy of imposing a duty of reasonable care upon healthcare practitioners. This duty extends to third parties. Washington's public policy can and should continue to promote the protection of innocent third parties.

II. CONCLUSION

A psychiatrist's duty of care extends to all reasonably foreseeable third parties, such as the plaintiffs' in this case. RCW 71.05.120, 70.02.050, and 18.83.110 do not prevent disclosure of healthcare information in the circumstances described above and do not mandate summary judgment in this matter. Finally, Dr. Knoll's testimony is not speculative and provides the jury with an opportunity to determine whether Dr. Ashley's negligence was a significant factor in causing loss of chance of survival in this case. For these reasons, the court is requested to reverse the superior court's order of summary judgment.

RESPECTFULLY SUBMITTED this 17th day of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of March, 2014, I caused a true and correct copy of the Brief of Appellant to be served on the following in the manner indicated below:

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