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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BEVERLY R. VOLK, et al.,  
Plaintiffs/Appellants

v.

JAMES B. DEMEERLEER, et al.

**BRIEF OF AMICI CURIAE  
VICTIM SUPPORT SERVICES  
THE NATIONAL ALLIANCE ON MENTAL ILLNESS (NAMI) -WA**

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## **I. INTRODUCTION AND SCOPE OF ARGUMENT**

Since this matter is under review from a Court of Appeals opinion reversing an order for summary judgment, there are two distinct aspects to the case at this juncture. The first of course is whether there are genuine issues of material fact requiring consideration by a jury. Addressing this question requires a detailed review of the facts presented to the trial court. Such a review is beyond the scope of this brief. Amici offer no opinion or argument as to whether the evidence presented in opposition to the motion created such issues of fact.

The other aspect to this case is the nature of the duty owed by a psychotherapist to use reasonable care to prevent a dangerous patient from harming a third part party. Amici urge the court that this is well settled law in Washington and that various parties present this as a “new issue for the Court’s determination” only by distorting this court’s previous holdings and by trying to apply wholly inapplicable statutes.

## **II. THIS CASE IS GOVERNED BY PETERSEN v. STATE**

This Court’s opinion in *Petersen v. State*, 100 Wash.2d 421, 671 P.2d 230 (1983) rested squarely and explicitly on the principles set out in Restatement (Second) of Torts §315. This section provided that, although generally there is no duty to control the behavior of another to avoid harm to a third-party, exceptions to this principle arise when,

- a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) a special relation exists between the actor and the other which gives to the other a right to protection.

*Petersen v. State*, 100 Wash. 2d 421, 426, 671 P.2d 230, 236 (1983).

This Court held that the relationship between a psychotherapist and a patient is a type of special relationship that falls within the ambit of subsection a above. That was the question raised there, and it is the same question raised here. The Court presented the question as, “whether a psychiatrist has a duty to protect against injuries caused by a patient”. Id. at 426. The Court answered the question in the affirmative and defined the duty by stating that the psychiatrist had “a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by” the patient. Id. at 428.

Various parties’ attempts to distinguish *Petersen* are unavailing. For example, the fact that the doctor worked in a hospital and that the patient was about to be released from the hospital is not critical. The Court clearly indicated its reliance on *Semler v. Psychiatric Institute*, 538 F.2d 121, 124 (4th Cir.1976) and *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185, 194 (D.Neb.1980), both of which were concerned with outpatient treatment. Perhaps even more significant is this Court’s reliance on *Kaiser v. Suburban Transp. Sys.*, 65 Wash.2d 461, 398 P.2d 14, 401 P.2d

350 (1965). This case did not involve a psychiatrist at all, but rather a medical doctor who prescribed medication to a bus driver without advising him of the potential side effect of drowsiness, resulting in an accident.

This court has never questioned or cut back on its holding in *Petersen*. Indeed, using the same Restatement analysis, this court applied *Petersen* to the situation of parole supervision in *Taggart v. State* 118 Wash.2d 195, 822 P.2d 243 (1992). This Court based its holding in *Taggart* explicitly on *Petersen* and described the *Petersen* holding in language directly relevant herein.

*Petersen* thus stands for the proposition that a “special relation” exists between a state psychiatrist and his or her patients, such that when the psychiatrist determines, or pursuant to professional standards should determine, that a patient presents a reasonably foreseeable risk of serious harm to others, the psychiatrist has “a duty to take reasonable precautions to protect anyone who might foreseeably be endangered”. 100 Wash.2d at 428, 671 P.2d 230. We stated that the scope of this duty is not limited to readily identifiable victims, but includes anyone foreseeably endangered by the patient's condition

*Taggart v. State*, 118 Wash. 2d 195, 218-19, 822 P.2d 243, 254-55 (1992)

Furthermore, the court expressly rejected the notion that the inpatient status of the patient in *Petersen* was a distinguishing factor.

We reject this approach and hold that a parole officer takes charge of the parolees he or she supervises despite the lack of a custodial or continuous relationship. The duty we announced in *Petersen* is not limited to taking precautions to protect against mental patients' dangerous propensities

only when those patients are being released from the hospital, as suggested by the Maryland court in *Lamb*. 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 outpatient is not important.

*Taggart v. State*, 118 Wash. 2d 195, 223, 822 P.2d 243, 257 (1992).

It is likewise untrue, as has been suggested, that the principle underlying this court's holding in *Petersen* only applies under circumstances described by Restatement §319 as "taking charge" of another. As this Court explained in *Taggart*, §315 states the general principle while §§316 – 320 give non-exclusive examples of the kinds of relationships that give rise to the duty to prevent harm described in §315. *Id.* at 195. It is unnecessary to try to pigeonhole the psychiatrist-patient relationship into any one of the specific examples given by the Restatement, as this Court clearly stated in *Petersen*, and equally clearly repeated in *Taggart* that the psychotherapist-patient relationship is the kind of "special relationship" identified in §315 that gives rise to a duty to "take reasonable precautions to protect anyone who might foreseeably be endangered."

### III. RCW 71.05.120 IS IRRELEVANT

An argument has been advanced that somehow RCW 71.05.120 affects or somehow changes the nature of the duty described in *Petersen*. To the degree that statute has any pertinence here, it supports the Plaintiff's position. This statute was first enacted in in the early 1970s with the involuntary commitment act, RCW ch.71.05. In its various forms subsection (1) provides that persons involved in the involuntary commitment process should not be liable criminally or civilly for their actions, provided that these duties were performed in good faith and without gross negligence. *Petersen* itself was tried (perhaps erroneously) under a gross negligence standard.

RCW 71.05.120 (2) states that even in the context of involuntary civil commitment the immunity provided by subsection 1 does not relieve one of the duty to warn or 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. Implicit in subsection 2 is the recognition of the existence of a common law duty to warn or "take reasonable precautions to provide protection". Whereas subsection 1 grants a partial immunity for acts done in the course of involuntary commitment, subsection 2 makes clear that this immunity and its standard of gross negligence do not apply even in the context of involuntary commitment when there is an identifiable victim.

This statute is technically inapplicable outside of the context of involuntary commitment. However, to the degree it explicitly recognizes the existence of a duty to “take reasonable precautions” as the duty was precisely described in *Petersen*, supra, this statute favors the position of the plaintiffs herein.

#### **IV. POLICIES FAVORING PROTECTION AND COMPENSATION OF POTENTIAL VICTIMS OF CRIME FAVOR AFFIRMING THE COURT OF APPEALS**

To decide if the law imposes a duty of care, and to determine the duty's measure and scope, the Court weighs “considerations of ‘logic, common sense, justice, policy, and precedent. “The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a ‘plaintiff's interests are entitled to legal protection against the defendant's conduct.’ ” *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wash. 2d 442, 449-50, 243 P.3d 521, 526 (2010) (Internal citations omitted.) This Court in *Petersen* determined that the interests of potential victims of dangerous psychiatric patients were entitled to legal protection against negligence by their treating healthcare providers. Nothing that has occurred in the more than thirty years since *Petersen* should persuade this Court to re-balance the policy scales in favor of negligent providers and against innocent victims of violence, be they strangers or members of a mentally ill person's family.

It is argued that holding mental health providers to a standard of reasonable care in taking precautions to prevent harm to third parties will harm the physician-patient relationship. *Petersen* was decided over thirty years ago. Nothing but argument has been provided to the court to support this supposed harm. It is argued that outpatient healthcare providers have been unsure as to whether the holding in *Petersen* applies to them. However, it has been over twenty years since the Court's decision in *Taggart* made that absolutely clear, and still no evidence appears of the harm to the physician-patient privilege caused by recognition of this duty.

The court is pointed to statutes in other jurisdictions that limit in one way or another the duties of healthcare providers to take precautions against their patients harming third persons. Indeed, there were states that took other positions when this court decided *Petersen*. But in Washington, at least since the early 1960s when this court decided *Kaiser*, this court recognized that doctors can take actions which might result in harm to third persons at the hands of their patients. Since at least that time the Court decided that it is reasonable to impose a duty on doctors to use reasonable care to avoid that result.

Our legislature is of course presumed to be aware of the rulings of this court. Except in the limited area of involuntary civil commitment, the

legislature has chosen not to impose further limits on the duties recognized by this court in *Petersen*, or for that matter in *Taggart*.

The policies urged on this court against “burdening” the physician-patient privilege are not without cost. To the degree this court eliminates or relaxes the duty of care on those having a “special relationship” with a person likely to cause harm to others, the court increases the likelihood of such harm and reduces the likelihood of compensation for such harm. The balance of interests and policies that this court has drawn is reasonable, is workable, and has served the people of Washington well for over thirty years. No good reason appears at this time to deviate from that balance.

Dated this 2nd day of October, 2015.

Respectfully submitted:  
LEEMON + ROYER, PLLC



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CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury of the laws of the State of Washington, that on this 2nd day of October, 2015, I sent for delivery a true and correct copy of **Brief of Amici Curiae** via electronic mail to:

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Enclosed please find for filing the request to appear amici curiae and Brief of Amici Curiae in the above matter of Victim Support Services and National Association of Mental Health (NAMI)- Washington. By copy of this e-mail the same are being served on all other counsel.

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