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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BEVERLY VOLK, et al.,
Plaintiffs/Appellants,

vs.

JAMES B. DEMEERLEER, et al.,
Defendants/Respondents.

Filed
Washington State Supreme Court

OCT 13 2015

Ronald R. Carpenter
Clerk

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
Washington State Association for Justice Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the scope of the duty owed by mental health professionals to protect others from harm by patients under their care.

II. INTRODUCTION AND STATEMENT OF THE CASE

This review provides the Court with the opportunity to clarify the duty of care owed by mental health professionals providing voluntary outpatient services, and the circumstances under which these professionals have a duty to protect others from injury by a patient. The underlying facts are set forth in the Court of Appeals opinion. See Volk v. DeMeerleer, 184 Wn.App. 389, 337 P.3d 372 (2014), *review granted*, 183 Wn.2d 1007 (2015).

For purposes of this brief, the following facts are relevant: Dr. Howard Ashby, M.D. (Ashby) worked at Spokane Psychiatric Clinic, P.S. (Clinic), as a mental health professional, and treated Jan DeMeerleer (DeMeerleer) over an extended period of time. During that time, DeMeerleer voiced to Ashby some suicidal and homicidal ideation, but apparently did not make an actual threat against his former girlfriend, Rebecca Schiering, or her children. In July 2010, DeMeerleer killed Rebecca Schiering and one of her sons, and attempted to kill another son, Brian Winkler. He then committed suicide.

Beverly R. Volk brought this wrongful death and personal injury action as personal representative and guardian on behalf of Rebecca Schiering and her family members, joined by Brian Winkler (collectively Volk), alleging, *inter alia*, negligence claims against Ashby and the Clinic.¹ Ashby and the Clinic moved for summary judgment of dismissal of Volk's claims. The Court of Appeals describes Volk's negligence claims, supported on summary judgment by expert testimony, as follows: that Ashby's assessment of DeMeerleer was negligent and that proper assessment and treatment would have 1) prevented this tragedy by mitigating DeMeerleer's dangerousness, or 2) led to warnings about the

¹ Volk stated claims for standard negligence and for "loss of chance." *Volk*, 184 Wn.App. at 395. This brief only addresses the standard negligence claims, and the claims for loss of chance are not discussed further.

threat he posed to others that would have resulted in the victims protecting themselves. See id. at 409, 412.

The superior court entered summary judgment for Ashby and the Clinic, apparently concluding that neither Ashby nor the Clinic owed a duty to Shiering and her family, in the absence of actual threats of harm against these victims. See id. at 413.

The Court of Appeals reversed, with one judge concurring in part and dissenting in part. See Volk at 413-35; id. at 435-41 (Brown, A.C.J., concurring in part/dissenting in part). The court concluded that Volk presented a genuine issue of material fact regarding whether Ashby was negligent in meeting his duty under Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983), concluding that the provisions of RCW 71.05.120(2) did not apply in this context. See Volk at 413-14, 422-26. Because the Clinic had admitted in its briefing that it would be vicariously liable for any negligence by Ashby, the court reversed summary judgment as to both Ashby and the Clinic. See id. at 434. The concurrence/dissent would have dismissed Volk's claim based on RCW 71.05.120(2) because of the absence of any actual threat of harm to Schiering or her family. See id. at 439-41 (Brown, A.C.J.; concurring in part/dissenting in part).²

² Volk originally sought to impose liability on the Clinic for its independent negligence, but lost this issue on summary judgment and did not challenge this ruling on appeal. See Volk at 413, 434. Also, to the extent that Volk sought liability against Ashby and the

This Court granted Ashby's and the Clinic's petitions for review.

III. ISSUES PRESENTED

Does RCW 71.05.120 abrogate this Court's holding in Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983); and, if not fully abrogated, should Petersen be overruled as "incorrect and harmful" under the doctrine of stare decisis?

IV. SUMMARY OF ARGUMENT

Re: Abrogation of *Petersen*

Ashby and the Clinic's argument that the duty of care established in Petersen v. State, supra, has been completely abrogated should be rejected. Under this Court's 1983 decision in Petersen, a mental health professional has a duty to protect others against injuries caused by a patient when it is reasonably foreseeable that the patient's condition endangers others. In 1987, the Legislature amended RCW 71.05.120, abrogating the Petersen foreseeability standard solely with respect to mental health professionals and others performing "functions necessary to the administration of" or certain "duties pursuant to" Ch. 71.05 RCW. This amendment, codified as RCW 71.05.120(2), limits the duty to warn or take reasonable precautions to protect against a patient's violent behavior "where the patient has communicated an actual threat of physical violence against a reasonably identifiable victim or victims." In all other

Clinic based upon Ashby's failure to seek an involuntary commitment of DeMeerleer under Ch. 71.05 RCW, this theory of recovery was dismissed by the Court of Appeals and is not challenged on review. See id. at 395, 424; Volk Pet. for Rev. at 1.

contexts, the Petersen duty, grounded in reasonable foreseeability, continues to apply.

Re: Overruling *Petersen*

Ashby and the Clinic alternately urge that if the Petersen foreseeability standard remains controlling in this case, then “by analogy” it should be replaced by the active threat/identifiable victim standard of RCW 71.05.120(2). This argument should be rejected and the Petersen duty reaffirmed by the Court in non-Ch. 71.05 RCW contexts under the doctrine of stare decisis, because this holding is neither incorrect nor harmful. Moreover, at the time the Legislature partially abrogated Petersen in 1987 it presumptively was aware of the breadth of this holding, yet chose not to displace it completely. Accordingly, any further modification of the Petersen standard should be left for the Legislature.

V. ARGUMENT

Introduction

On review, Ashby and the Clinic argue that either RCW 71.05.120(2) completely abrogates the foreseeability standard in Petersen—see Ashby Supp. Br. at 13; Clinic Br. at 20-22—or, alternately that, in light of the RCW 71.05.120(2) actual threat/identifiable victim standard, this Court should “by analogy” abandon the Petersen formulation—see Ashby Pet. for Rev. at 19; Clinic Pet. for Rev. at 1. In

conjunction with this latter argument, Ashby and the Clinic urge that Petersen is out of keeping with case law or statutes in other jurisdictions and also should be revisited on this basis. See Ashby Pet. for Rev. at 7-12; Clinic Pet. for Rev. at 12-15. Each of these arguments is addressed separately below.

A. **RCW 71.05.120(2) Only Partially Abrogated The *Petersen* Foreseeability Standard, Which Remains In Effect Except When Persons Or Entities Subject To This Statute Are Performing “Functions Necessary To The Administration Of” Or Certain “Duties Pursuant To” Ch. 71.05 RCW.**

In Petersen v. State, supra, this Court recognized that a mental health professional providing care to a patient has a duty of care to third parties “to take reasonable precautions to protect anyone who might foreseeably be endangered” by the particular patient’s mental problems. 100 Wn.2d at 428. This duty was grounded in the exception set forth in Restatement (Second) of Torts §315 (1965), and in the Court’s decision in Kaiser v. Suburban Transp. Sys., 65 Wn.2d 461, 398 P.2d 14, 401 P.2d 350 (1965), allowing recovery by a third person for a physician’s failure to warn his patient of the side effects resulting from prescribed drug treatment.

In Petersen, the gravamen of the claim was that the mental health professional, a staff member of a state mental health facility, had “failed to petition the court for a 90-day commitment as he could have done under

RCW 71.05.280, or to take other reasonable precautions to protect those who might foreseeably be endangered by [the patient's] drug-related mental problems.” 100 Wn.2d at 428-29; see also id. at 432. Although this Court adopted a *negligence* standard, it reviewed and affirmed a jury verdict for the plaintiff based upon a finding of gross negligence. See id. at 425, 436-38, 441. The reason the case was submitted under a gross negligence theory was because the services involved in-patient treatment at a state facility subject to Ch. 71.05 RCW. The case was apparently tried under a 1974 amendment to RCW 71.05.120 that required proof of gross negligence to hold the state liable under these circumstances. See Laws of 1974 Ch. 145 §7 1st ex. sess. (codified at that time in RCW 71.05.120). This gross negligence standard served to further expand the qualified immunity provided certain persons and institutions performing functions or particular duties under Ch. 71.05 RCW.³

Against this background, Ashby and the Clinic argue that a 1987 amendment to RCW 71.05.120 fully abrogates Petersen, and replaces the reasonable foreseeability formulation with the standard set forth in RCW 71.05.120(2), which provides:

³ This Court upheld a verdict for the Plaintiff Petersen based upon injuries she sustained in a traffic accident in which a former patient of the state was driving at excessive speeds while under the influence of drugs. See 100 Wn.2d at 422-23. However, at trial the jury was allowed to consider other post-accident conduct by the former patient (murder and rape) as relevant in assessing the patient's condition at the time of the accident, which was five days after release from the state facility. See id. at 423-24, 438-41.

(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).

The 1987 revision to RCW 71.05.120, adding subsection (2), does not fully abrogate this Court's opinion in Petersen. See Laws of 1987 Ch. 212 §301. Subsection (2) must be read in conjunction with subsection (1), which limits application of this immunity statute to those persons or entities specified therein "performing functions necessary to the administration of this chapter [Ch. 71.05]" or undertaking certain "duties pursuant to the chapter." This plain language indicates that the Petersen foreseeability standard is only abrogated in these limited circumstances. See Burns v. City of Seattle, 161 Wn. 2d 129, 140, 164 P.3d 475 (2007). Even if the language in subsection (1) is viewed as ambiguous, as an immunity statute, the text must be strictly construed. See Mathews v. Elk Pioneer Days, 64 Wn. App. 433, 439, 824 P.2d 541, *review denied*, 119 Wn. 2d 1011 (1992); Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 600, 257 P.3d 532 (2011).

This interpretation is further supported the by rule of construction that the Legislature is presumed to be familiar with the decisions of this Court. See Harris v. Robert C. Groth, M.D., Inc., 99 Wn. 2d 438, 445, 663 P.2d 113 (1983). Further, the Legislature knows how to supersede decisional law when it intends to do so. See e.g. Hale v. Wellpinit Sch. Dist., 165 Wn. 2d 494, 198 P.3d 1021 (2009).

The actual threat/identifiable victim duty formulation in RCW 71.05.120(2) only applies in the limited circumstances involving Ch. 71.05 RCW, described above. The question remains whether this Court should otherwise overrule Petersen because it is out of keeping with the standard set forth in RCW 71.05.120(2), or for related reasons.⁴

B. Under The Doctrine Of Stare Decisis, The Remaining Application Of The *Petersen* Foreseeability Standard Is Neither Incorrect Nor Harmful, And It Should Not Be Overruled, Especially In Light Of Legislative Acquiescence To The Standard Reflected In The Partial Abrogation Effected By RCW 71.05.120(2).

Ashby and the Clinic urge that, in any event, the Petersen foreseeability standard, “by analogy” to RCW 71.05.120(2), should be replaced with the more exacting actual threat/identifiable victim standard. See Volk, 184 Wn. App. at 414; Ashby Pet. for Rev. at 3, 18-19.

⁴ The Court of Appeals concluded that the services at issue in this case provided by Ashby did not involve Ch. 71.05 RCW, as contemplated by RCW 71.05.120(1). See Volk, 184 Wn. App. at 422-24. This appears correct, as neither of Volk’s theories of negligence described by the court appear to fall within the ambit of RCW 71.05.120(1). See supra at 2-3.

However, in making this argument, it must be determined whether the reasonable foreseeability standard adopted in Petersen is subject to the doctrine of stare decisis. Under this doctrine, if the Court has previously passed on the issue in question then the holding will not be overruled unless it is shown to be both “incorrect and harmful”. See In Re The Waters Of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970); State v. Devin, 158 Wn. 2d 157, 142 P.3d 599 (2006) (undertaking incorrect and harmful analysis). Importantly, at the time this Court decided Petersen, it expressly considered and rejected case law from other jurisdictions limiting the scope of duty to “readily identifiable victims.” 100 Wn.2d at 427-28. Consequently, the doctrine of stare decisis applies here.

Petersen is not incorrect because it is consistent with other cases following the Restatement (Second) of Torts §315. See e.g. Nivens v. 7-11 Hoagy’s Corner, 133 Wn. 2d 192, 200-01, 943 P.2d 286 (1997). Moreover, in determining to impose the reasonable foreseeability standard, the Court carefully weighed the conflicting interests of patient and potential third-party victims as a matter of social policy and fashioned the reasonable foreseeability test with this in mind. See Petersen at 437-38. Essentially the same considerations and risks that Petersen examined exist today, and Ashby and the Clinic provide insufficient justification for now declaring this formulation “incorrect.”

Nor is the Petersen reasonable foreseeability test “harmful.” The test appropriately requires a mental health professional to not lose sight of the need to assess the potential for harm to others. On the other hand, the actual threat/identifiable victim standard would appear to allow a practitioner to await the patient making definitive statements, and even seems to provide a disincentive for practitioners to ask direct questions that might lead to such precise information. Generally, the reasonable foreseeability standard demands more attentiveness, requiring in this context that the mental health professional exercise reasonable care in assessing all patient statements indicating that others may foreseeably be endangered by the patient.⁵

⁵ In arguing that Petersen should be overruled, Ashby and the Clinic argue that any common law warnings under Petersen are foreclosed by one or more privilege statutes. They contend that a provision of the Uniform Health Care Information Act, former RCW 70.02.050(1)(d) (current subsection (1)(c)) is incompatible with Petersen. See Ashby Br. at 18; Ashby Pet. for Rev. at 13-15; Ashby Supp. Br. at 9-11; Clinic Pet. for Rev. at 22. That provision gives health care providers the discretion to “disclose health care information about a patient without the patient’s authorization to the extent a recipient needs to know the information, if the disclosure is ... [t]o any person if the health care provider or health care facility reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the patient or any other individual[.]” (Ellipses & brackets added.) “Health care information” is a specially defined phrase that means “any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and *directly relates to the patient’s health care*[.]” Former RCW 70.02.010(7) (current subsection (16), emphasis & brackets added). Warnings about the danger of a patient should not be construed as directly related to health care. Cf. Beggs v. State Dep’t of Soc. & Health Servs., 171 Wn. 2d 69, 80, 247 P.3d 421 (2011) (holding health care providers’ duty to report suspected child abuse, giving rise to implied cause of action under RCW 26.44.030(1)(a), does not involve “health care” within the meaning of the medical negligence statute, Ch. 7.70 RCW). Petersen otherwise recognizes that the public interest in proper warnings outweighs the benefits of certain claimed privileges. See 100 Wn. 2d at 429.

There is no basis for overruling the Petersen foreseeability standard under the doctrine of stare decisis. In 1987, the Legislature chose to only partially abrogate Petersen, and has not revisited this issue. Any further change in the standard should be made by the Legislature.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief on the issues addressed in resolving the questions on review.

DATED this 30th day of September, 2015.


BRYAN P. HARNETIAUX


GEORGE M. AHREND

On Behalf of WSAJ Foundation

In any event, the issue of privilege does not surface with respect to any negligence claim by Volk based upon the notion that timely assessment and treatment would have avoided the tragedy from happening because DeMeerleer's dangerousness would have been mitigated or eliminated. See Volk, 184 Wn. App. at 412.

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Dear Mr. Carpenter:

On behalf of the WSAJ Foundation, a letter request to file an Amicus Curiae Brief and an accompanying Amicus Curiae Brief are attached to this email for filing with the Court. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

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