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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.

**DR. ASHBY'S ANSWER TO BRIEF OF *AMICUS CURIAE*
VICTIM SUPPORT SERVICES
THE NATIONAL ALLIANCE ON MENTAL ILLNESS (NAMI)-WA**

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Pursuant to RAP 10.1(e), Dr. Ashby submits the following Answer to the Brief of *Amicus Curiae* Victim Support Services The National Alliance on Mental Illness (NAMI) – WA (hereinafter referred to as “VSS”).

1. Applicability of *Petersen v. State*.

VSS argues *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) controls, and that it “rested squarely and explicitly on the principles set out in Restatement (Second) of Torts §315.” *VSS Brief, Pg. 1*.

Dr. Ashby agrees *Petersen* derived from Restatement (Second) of Torts §315. The existence of a special relationship under §315, however, does not automatically beget an unbounded duty of reasonable care to protect against any potentially foreseeable harm. Rather, a duty may exist under §315 if one of the two specified special relationships exist. *See Nivens v. 7-11 Hoagys Corner*, 133 Wn.2d 192, 200, 943 P.2d 286 (2012) (“As we noted in *Hutchins*, a duty may arise to protect others from third-party criminal conduct if a special relationship exists between the defendant, a third party or the third party’s victim”). Then, if a duty exists, it is incumbent up the courts to define the scope of that duty, based on “mixed considerations of logic, common sense, justice, policy, and precedent” *Christensen v. Royal School District No. 160*, 156 Wn.2d 62, 67,

124 P.3d 283 (2005). *See also Nivens, supra*, (recognizing the existence of a special relationship under §315, and defining the scope of the duty owed).

In an analogous context, this court has rejected the broad duty to warn which VSS attributes to *Petersen*, and instead suggested the case is limited to “take charge” or “custody” situations, and that even then, the duty exists only with respect to specific threats against a specific, identifiable victim or group of victims. In *Osborn v. Mason County*, 157 Wn.2d 18, 124 P.3d 197 (2006) a convicted sex offender, Rosenow, raped and murdered a girl. The girl’s parents sued Mason County, alleging the County was negligent in administering its sex offender registration program by failing to adequately warn of Rosenow’s presence in the community. In holding the County owed no duty to the plaintiff, the court stated:

A public entity has a “take charge” duty to control parolees, *Id.*, mental patients, *Petersen v. State*, 100 Wn.2d 421, 428-29, 671 P.2d 230 (1983), and others it has authority to control, to the extent it has the authority to control them. *See e.g. Couch v. Department of Corrs.*, 113 Wn.App. 556, 571 54 P.3d 197 (2002) (holding authority to control limits duty to control). And a public entity has a duty to protect foreseeable victims of criminals, mental patients, and others leaving its custody. *See Petersen*, 100 Wn.2d at 428-29, 671 P.2d 230. *See also Doyle v. United States*, 530 Fed.Supp. 1278, 1288 (CD Cal. 1982) (holding “a duty to warn arises only when the potential victim is known and foreseeable”); *Hoff v. Backaville Unified School District*, 19 Cal.4th 925, 937, 80 Cal.Rptr.2d 811, 968 P.2d 522 (1998) (holding “public entities have no affirmative duty to warn of the release of an inmate with a violent history unless the inmate makes a specific threat against a specific, identifiable victim

or group of victims”); *Thompson v. County of Alameda*, 27 Cal.3rd 741, 754, 167 Cal.Rptr. 70, 814 P.2d 728 (1980) (finding “no affirmative duty to warn of the release of an inmate with a violent history who has made non-specific threats of harm directed at nonspecific victims” (emphasis omitted)). But Mason County did not “take charge” of Rosenow because it had not authority to control him. And it had no “special relationship” duty to warn the Osborns because Jenny May Osborn was not a foreseeable victim of Rosenow.”

157 Wn.2d at 24-25.

Dr. Ashby’s position is that, with respect to the duty of a mental healthcare provider to protect third persons from patients, *Petersen* was abrogated by RCW 71.05.120. But if this Court declines to construe RCW 71.05.120 that way, the *Petersen* duty should be defined consistent with *Osborn*: a duty to protect or warn exists only with respect to specific threats made against an identified victim or group of victims.

VSS notes that the *Petersen* Court, in adopting the broad duty, relied, in part, on *Semler v. Psychiatric Institute*, 838 F.2d 121, 124 (4th Cir. 1976) and *Lipari v. Sears Roebuck & Co.*, 597 F.Supp. 185 (DC Nebraska 1980) asserting that both “were concerned with outpatient treatment.” *VSS Brief*, Pg. 2.

It is misleading to say that *Semler* and *Lipari* were “concerned with outpatient treatment.” In *Semler*, the patient, Gilreath, was confined to an inpatient psychiatric facility as a condition of his criminal sentence. The

defendants, in spite of the sentencing judge's order, discharged the patient from the facility. While an outpatient, Gilreath committed murder. The plaintiffs claimed the defendants wrongfully released Gilreath from the inpatient facility in violation of the sentencing judge's order. At a bench trial, the trial court issued judgment in favor of the plaintiff. In affirming the trial court's award, the Court of Appeals, applying Virginia law, referenced Restatement (Second) of Torts §319 and remarked, "[a]t the same time, the requirement of confinement until release by the court was to protect the public, particularly young girls, from the foreseeable risk of attack." 538 F.2d at 124. The court went on to state:

We hold, therefore, that the district court correctly concluded that the state court's order imposed a duty on the appellants to protect the public by retaining custody over Gilreath until he was released by court order. (emphasis added).

538 F.2d at 125.

Moreover, since *Semler* was decided, Virginia courts have affirmed that a mental healthcare provider is only liable under the duties created by Restatement (Second) of Torts §315 and §319 for harm caused by a patient to a third person if the provider takes charge of and exercises control over the patient. *See Sage v. U.S.*, 974 F.Supp. 851 (1997) and Virginia cases cited therein. Indeed, in *Sage*, the court refused to impose liability on the defendant military and psychiatric hospitals for allegedly failing to control

a psychiatric outpatient who committed shootings because the shooter was being treated as an outpatient. *See also Gregory v. Kilbride*, 565 S.E.2d 685, 690 (NC App. 2002) (characterizing *Semler* as a case recognizing “a cause of action for wrongful release.”)

As for *Lipari*, the criminal conduct there, a shooting, did occur in the context of outpatient treatment, and the plaintiff claimed the defendant was negligent for failing to detain the shooter or initiate civil commitment proceedings. The federal court, applying Nebraska law, imposed a broad duty on the defendants, similar to the one articulated in *Petersen*. However, in *Munstermann v. Alegent Health-Immanuel Medical Center*, 716 N.W.2d 73 (Nebraska 2006), the Nebraska Supreme Court, after discussing the broad duty of *Tarasoff* and *Lipari*, held that, for licensed or certified mental health practitioners and psychologists, *Lipari* had been abrogated by Nebraska statute¹. The plaintiff, like VSS here, argued statutory strict

¹ Neb.Rev.Stat. §71-1,336 (Reissue 2003) provides, in relevant part:

(1) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is licensed or certified [as a mental health practitioner] for failing to warn of and **82 protect from a patient’s threatened violent behavior or failing to predict and warn of and protect from a patient’s violent behavior except when the patient has communicated to the mental health practitioner a serious threat of physical violence against himself, herself, or a reasonably identifiable victim or victims.

(2) The duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under the limited circumstances specified in subsection (1) of this section. The duty shall be discharged by the mental health practitioner if reasonable efforts are made to communicate the threat to the victim or victims and to law enforcement agency.

construction, specifically that the statutes did not specifically mention psychiatrists and thus the duty limitations set forth in the statutes did not apply. The court rejected that argument, holding the statutes were a reflection of public policy and that, accordingly, the limited duty set forth therein applied to psychiatrists as well:

Given our prior endorsement of Restatement (Second) of Torts §315 (1965), and the clearly articulated public policy expressed in §§71-1,206.30(1) and 71-1,336, we conclude that in some circumstances, a special relation may exist between a psychiatrist and patient which imposes a duty upon the psychiatrist to warn or protect a reasonably identifiable victim when a patient has communicated a serious threat of physical violence against that potential victim. However, given the Legislature's decision to limit *Tarasoff* by enacting §§71-1,206.30(1) and 71-1,336, we find that the limitations set forth in those sections should also be applied to psychiatrist. The Legislature has made a public policy determination with respect to the *Tarasoff* duty that this court is bound to respect. We see no rational basis for distinguishing the *Tarasoff* duty of psychiatrists from that of psychologists or other mental health practitioners. (emphasis added).

§71-1,206.08. Section 71-1,206.30 provides in part:

(1) No monetary liability and no cause of action shall arise against any psychologist for failing to warn of and protect from a client's or patient's threatened violent behavior or failing to predict and warn of and protect from a client's or patient's violent behavior except when the client or patient has communicated to the psychologist a serious threat of physical violence against a reasonably identifiable victim or victims.

(2) The duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under the limited circumstances specified in subsection (1) of this section. The duty shall be discharged by the psychologist if reasonable efforts are made to communicate the threat to the victim or victims and to a law enforcement agency.

716 NW.2d at 84.

In sum, to the extent *Petersen* was based on *Semler* and *Lipari*, subsequent judicial and legislative treatment of those cases supports Dr. Ashby's position: the duty of a mental healthcare professional with respect to persons injured by the criminal acts of a patient should be limited to those situations where the patient has made a direct threat of harm against a reasonably identifiable victim or group of victims.

VSS assigns significance to *Petersen's* reliance on *Kaiser v. Suburban Transportation System*, 65 Wn.2d 461, 398 P.2d 14, 401 P.2d 350 (1965). While the *Petersen* Court did cite *Kaiser*, that case simply stands for the proposition that a physician has a duty to his patient to inform the patient of the possible side effects of a drug, and if a physician fails to do so, the physician can be liable to a third person injured by the patient as a result of the medication side effects. In no way does *Kaiser* support the proposition that a mental healthcare provider should have the broad duty urged by the plaintiff here – to exercise reasonable care to protect reasonably foreseeable victims. The medication side effect in Kaiser was physiologically known and predictable; whereas a patient's future behavior is not, as noted in amici briefs, predictable. The physiological cause and effect of a medication prescribed by a physician is subject to scientific

validation; whereas the whims of a patient's future behavior is not subject to any scientifically validated mechanism for accurate prediction.

A recent example of this Court refusing, for policy reasons, to impose a boundless duty (reasonable care to protect against reasonably foreseeable harm) on a defendant to protect against third party criminal conduct is *McKown v. Simon Property Group*, 182 Wn.2d 752, 344 P.3d 661 (March 2015). There, a random shooter opened fire on employees and shoppers at the Tacoma Mall, injuring seven. One of the victims, McKown, sued the Mall owner alleging it “failed to exercise reasonable care to protect him from reasonably foreseeable criminal harm.” 182 Wn.2d at 758. The trial court granted the Mall owner's motion for summary judgment, rejecting the broad duty urged by *McKown* and limiting the scope of duty by applying a “prior similar acts on the premises” test for determining the foreseeability of criminal acts.

On appeal², the court effectively affirmed summary judgment. After recognizing the relationship between Restatement (Second) of Torts §315 and premises liability law³ the court discussed at length the policy reasons

² Because the case was removed to federal court, the summary judgment was granted by the Federal District Court. The plaintiff appealed, and the Ninth Circuit Court of Appeals certified the duty question to the Washington Supreme Court.

³ This Court has held that a business owner – business invitee is a “special relationship” within the meaning of §315. *Nivens v. 7-11 Hoagys Corner*, 133 Wn.2d 192, 943 P.2d 286 (2012).

for rejecting the broad duty advocated by the plaintiff – reasonable care to protect against reasonably foreseeable harm. First, the court noted that in *Younce v. Ferguson*, 106 Wn.2d 658, 666, 724 P.2d 991 (1986), it had “declined to abandon the traditional premise classifications in favor of a ‘standard with no contours.’” 182 Wn.2d at 765, quoting *Younce*, 106 Wn.2d 658, 666. The McKown Court described the reasons for adhering to the traditional standards as including “stability and predictability of the law, disinclination to delegate complex policy decisions to a jury, and the danger that ‘the land owner could be subjected to unlimited liability.’” *Id.* The McKown Court went on to discuss *Nivens*, *supra*, observing that therein it had cautioned against “treating the business as a ‘guarantor of the invitees safety from all third party conduct on the business premises,’” calling that “too expansive a duty.” 182 Wn.2d at 766, quoting *Nivens*, 133 Wn.2d at 203.

The McKown court explained it was rejecting a “broad notice rule [reasonable care to protect against reasonably foreseeable harm], and in so doing, the court quoted with approval the following from *MacDonald v. PKTN*, 464 Mich.322, 335, 628 N.W. 2d 33 (2001):

Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere. However, even police, who are specially trained and equipped to anticipate and deal

with crime, are unfortunately unable to universally prevent it. This is a testament to the arbitrary nature of crime. Given these realities, it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties.

182 Wn.2d at 777.

The *McKown* Court then stated:

Under a broad notice rule [reasonable care to protect against reasonably foreseeable harm], foreseeability would become an all-expansive standard for imposing a duty on a business to protect invitees from criminal assaults of third parties on the business premises.

182 Wn.2d at 771.

Two points can be drawn from *McKown*: (1) even where a special relationship exists under §315, the court may impose limits on the scope of the duty based on considerations of logic, common sense and policy; (2) just as a property owner is entitled to notice of prior, similar incidents before a duty to protect against criminal conduct arises, a mental healthcare provider should not have a duty to warn or protect with respect to the criminal conduct of a patient unless the patient has made a specific threat about a specific individual or group of individuals. And just as the arbitrary nature of criminal conduct makes it unreasonable to impose an unlimited duty on business owners to protect against it, the unpredictability of violent criminal behavior by those receiving outpatient mental healthcare makes it

unreasonable to impose a boundless duty on outpatient mental healthcare providers.

2. Construction of RCW 71.05.010.

VSS argues that RCW 71.05.010 is irrelevant, asserting that the “actual threat of physical violence against a reasonably identifiable victim” language of RCW 71.05.120(2) applies only in the context of an involuntary commitment. Thus, VSS posits, the statute in no way limits *Petersen*.

As urged by Dr. Ashby in his Petition, as well as by *Amicus* Washington State Psychological Association, when RCW 71.05.120 was amended in 1987, it was the intention and understanding of the mental healthcare community that the amendment would limit the unbounded duty imposed by *Petersen*.

Second, the statute contemplates dual duties. Subsection One addresses involuntary commitments when a patient presents as an imminent (i.e., likelihood of serious harm) threat of harm to self or another. RCW 71.05.020(1). Subsection two then separately notes that section one does not relieve “a person,” not just in the context of commitments, from the duty to warn or take reasonable precautions to protect the non-client when the person becomes aware of an actual threat to a reasonable identifiable victim. This construction mirrors the Nebraska statutory scheme that abrogated

Lipari, and it gives meaning to the two distinct subsections of the 1987 statute.

In addition, as also pointed out by Dr. Ashby in his Petition and by his *Amici*, limiting RCW 71.05.120 to involuntary commitment proceedings would impose a lesser duty on mental healthcare professionals in the context of involuntary commitment when ironically those professionals have custody and control over the patient, compared to a private, outpatient setting, where the mental healthcare professional's contact with the patient is often intermittent and sporadic. The outpatient practitioner has little to no ability to control the patient. This would be an unreasonable construction of the statute, and it is axiomatic that a statute will not be interpreted so as to lead to "absurd or strange consequences." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).

Finally, VSS argues that policies favoring protection and compensation of potential victims of crime support affirming the Court of Appeals. Tort victims and their advocates consistently argue against the imposition of limits on a defendant's duty in negligence. But, as illustrated by *Osborn, supra*, and *McKown, supra*, this Court, when appropriate, has imposed parameters on a defendant's duty when justified by considerations of public policy, and the Court should do so here.

Dr. Ashby's position does not deprive a victim of his or her legal reights to pursue redress. Instead, the more narrow duty will simply prevent random and unpredictable conduct by an outpatient client from making the mental health provider a guarantor for the safety of people the provider does not know.

3. Conclusion.

This Court should decline to construe *Petersen* as imposing the boundless duty on a mental healthcare provider advocated by VSS and instead hold that, in an outpatient setting, a mental healthcare provider has a duty to exercise reasonable care to protect a third person against the criminal conduct of a patient only where the patient has made a specific threat against an identified victim or group of victims.

DATED this 29 day of October, 2015.

EVANS, CRAVEN & LACKIE, P.S.



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on October 29, 2015, I caused to be delivered to the address below a true and correct copy of Dr. Ashby's Answer to Brief of Amicus Curiae Victim Support Services The National Alliance on Mental Illness (NAMI)-WA:

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Attached for filing in .pdf format is:

1. Dr. Ashby's Answer to Brief of Amicus Curiae Victim Support Services The National Alliance on Mental Illness (NAMI) – WA; and
2. Dr. Ashby's Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation

In *Beverly Volk, et al. v. James B. Demeerleer, et al.*, Cause No. 91387-1. The attorney filing these two (2) documents is Christopher J. Kerley, WSBA No. 16489, email address: ckerley@ecl-law.com.

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