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No. 91387-1

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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*
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION**

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Dr. Ashby, pursuant to RAP 10.1(e), submits the following Answer to the Brief of *Amicus Curiae* submitted by Washington State Association for Justice Foundation (hereinafter referred to as “WSAJF”).

1. Effect of RCW 71.05.120(2) on *Petersen*.

WSAJF argues RCW 71.05.120(2) abrogated *Petersen* only with respect to involuntary commitment. Dr. Ashby’s position is that, for the reasons set forth in his Petition and briefs of his *Amici*, RCW 71.05.120(2) abrogated *Petersen* relative to the scope of duty owed to non-client/third parties. On this issue, Dr. Ashby adopts and incorporates by reference the argument and authorities set forth in his Petition and the briefs of his *Amici*.

2. *Petersen* as *Stare Decisis*.

WSAJF contends the result advocated by Dr. Ashby and his *Amici* would amount to overruling *Petersen*, and that, under the doctrine of *stare decisis*, there is no justification for doing so.

Dr. Ashby has no quibble with WSAJF’s citations on the doctrine of *stare decisis*, particularly the standard for overruling a case. However, *stare decisis* means that a rule laid down in any particular case is applicable to another case involving identical or substantially similar facts. *Greene v. Rothchild*, 68 Wn.1, 414 P.2d 1013 (1966); *Floyd v. Department of Labor & Industries*, 44 Wn.2d 560, 269 P.2d 563 (1954). In addition, this Court can clarify a prior case without overruling it. *See e.g. Eastwood v. Horse*

Harbor Foundation, 170 Wn.2d 380, 241 P.3d 1256 (2001) (holding on “economic loss” rule clarifies *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) without overruling it).

Here, without overruling *Petersen*, the Court could simply clarify that *Petersen*'s holding is limited to custody or wrongful release situations. The Court could also, consistent with *Osborn* and *McKown*, clarify that “foreseeability” within the meaning of *Petersen* requires that the patient make a specific threat against an identified victim or group of victims before a duty arises, a position exactly consistent with the legislature’s enactment of RCW 71.05.020(2).

Even if adopting the duty urged by Dr. Ashby and his *Amici* would mean overruling *Petersen*, there is ample justification for doing so. “Incorrect” for purposes of *stare decisis* can mean that the prior decision is inconsistent with public policy considerations and/or state statutes. *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011). This Court has recognized that, while a decision may be “harmful” for a variety of reasons, the “common thread” in cases where the court found a prior decision “harmful” was the decision’s “detrimental impact on the public interest.” *Barber* at 865.

Here, the broad duty of *Petersen* is “incorrect” and “harmful” because it is inconsistent with the public policy considerations of:

- not placing a boundless and impossible to satisfy duty on mental healthcare professionals who treat patients in an outpatient setting,
- not making mental healthcare professionals guarantors with respect to future violent crimes committed by their patients,
- protecting the confidentiality of the mental healthcare professional-patient relationship,
- not over burdening an already strained mental healthcare system with unnecessary involuntary commitment reviews and proceedings,
- not disincentivising patients from pursuit of mental healthcare
- not creating different standards for providers in the context of involuntary commitment and providers in an outpatient setting,
- not providing more protection to a provider in the context of involuntary commitment than in the context of outpatient treatment.

On the matter of “harmfulness,” WSAJF argues the actual/identifiable victim standard would “appear to allow a practitioner to await the patient making definitive statements, and would disincentivise practitioners from asking “direct questions that might lead to such precise information.” *WSAJK Brief, Pg. 11*. Such a boundless standard, however,

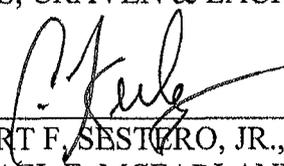
inevitably leads to the fog bank of grossly speculative foreseeability. As with Dr. Ashby in this case, a practitioner who's client much later commits a violent act will be accused of failing to ask the "right" question or administer the "proper" test and a plaintiff's expert will speculate that, if only the proper question, proper interviewing technique, or appropriate test had been utilized or administered, an actual threat to an identifiable victim (the plaintiff or the plaintiff's decedent) would have been made, and the practitioner could have taken the appropriate "reasonable" steps to prevent a tragedy. That a boundless duty invariably leads to speculation about what might have happened is precisely why an actual threat/identifiable victim standard is necessary.

3. Conclusion.

RCW 71.05.020(2) totally abrogated *Petersen*. But even if it did not, ample public policy reasons exist for limiting the duty as urged or for overruling the case outright.

DATED this 29 day of October, 2015.

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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 Washington State Association for Justice Foundation:

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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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