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SUPREME COURT  
OF THE STATE OF WASHINGTON

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BEVERLY VOLK, et al., *Appellants*,

v.

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

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**VOLK'S AMENDED ANSWER  
TO AMICUS CURIAE BRIEF OF  
WASHINGTON STATE MEDICAL ASSO., ET. AL.**

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## I. IDENTITY OF PETITIONER/RESPONDENT

Petitioners/Respondents Brian P. Winkler and Beverly R. Volk (“Ms. Volk”), as Guardian for Jack Alan Schiering, a minor, and as Personal Representative of the Estates of Phillip and Rebecca Schiering, deceased, and on behalf of all statutory claimants and beneficiaries (hereinafter “Volk” or “plaintiffs”), respectfully answer the brief of Amicus Curiae Washington State Medical Association, et. al. (hereinafter “WSMA”).

## II. ARGUMENT

### A. The Claims Of Ms. Volk Rest On Failure To Assess And Treat Mr. DeMeerleer, Not The Duty To Warn Those Harmed by Him, Nor RCW 71.05.120

This is a medical negligence action based on Dr. Ashby and, by agency, Spokane Psychiatric Clinic’s breach in the standard of care in treating Dr. Ashby’s patient James B. DeMeerleer. As such, only competent medical testimony can frame issues of liability. Volk’s claims are on behalf of Rebecca Leigh Schiering, Phillip Lee Schiering and their estates; and survivors Jack Alan Schiering and Brian P. Winkler (hereinafter referred to as “victim” or “victims”). Volk’s medical expert, Dr. Knoll, testifies by way of Declaration. (CP 82-91) (Knoll Declaration). Dr. Knoll is the only physician to provide testimony in this matter.

A careful review of Dr. Knoll's declaration demonstrates competent medical testimony sufficient to maintain a medical negligence action for, alternatively: all resulting ultimate harm to the victims and the victim's estates; loss of chance of survival regarding the two victims who suffered demise; and loss of chance of a better outcome for the two victims who survived. Ashby's breach of the standard of care by failure to appropriately assess and treat DeMeerleer rendered DeMeerleer unable to achieve and maintain mental stability and normalcy, to the extent which would put violent behavior in check. The victims were foreseeably at risk of harm from DeMeerleer. Their claims derive from Dr. Ashby's negligence in treatment of DeMeerler.

Volk's expert Dr. Knoll opines that had Dr. Ashby treated DeMeerleer at the standard of care, the incident probably would not have occurred. This substantiates the traditional tort claims. (CP 090) (Knoll Declaration p.10, LL. 7-15). Had Dr. Ashby maintained treatment within the standard of care, he may have found it appropriate to warn the victims and/or civilly commit DeMeerleer. (CP 091) (Knoll Declaration p. 9, LL. 1-5). At minimum, Dr. Ashby's negligent treatment was causal of loss of chance of a better outcome (and survival) for DeMeerler psychologically, so that the incident would not have occurred, resulting in loss of chance for the victims. (CP 091) (Knoll Declaration p. 10, LL. 6-10).

**B. Peterson is Stare Decisis, and Should Remain So**

This court's decision in *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), was made over 30 years ago. The law as stated in *Peterson* is well known and understood by the bench and bar. It should be well known and understood by this state's physicians. The *Peterson* decision is *Stare Decisis*. In that regard, this court has held:

“But as properly viewed, the doctrine retains vital importance. A basic function of any legal system is to provide rules by which people may guide their conduct in society. To fulfill this purpose, it is essential that the law be reasonably certain, consistent and predictable. In this respect, stare decisis serves an important and valid function. As we observed in *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970):

Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office. But we also recognize that stability should not be confused with perpetuity. If the law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. The true doctrine of stare decisis is compatible with this function of the courts. The doctrine requires a clear showing that an established rule is incorrect and harmful before it is abandoned.”

*House v. Erwin*, 81 Wn.2d 345, 501 P.2d 1221 (1972).

The parties and amici requesting demise of the *Peterson* decision argue and fret over what might occur in the future if the appellate court's decision in this matter is not reversed and *Peterson* overturned. However,

since the 1983 *Peterson* decision, up to and through all briefing of the instant matter before this court, there has been no evidence submitted by any party or amici that demonstrates: (1) *Peterson's* application to matters such as this is incorrect; and (2) *Peterson* is responsible for any undue harm to the residents and physicians of the State of Washington. *Peterson* should remain as *Stare Decisis* and the Court should reject WSMA's argument.

**C. The Underlying Court Of Appeals Opinion Correctly Interpreted Long-Standing Washington Case Law Which Holds That A Healthcare Provider Owes A Duty Of Care To Third Persons Foreseeably At Risk.**

The concern of amicus curiae that the lower court "expanded" an outpatient clinical psychiatrist's duty to warn (WSMA's brief p. 2) ignores applicable case law in existence for half a century.

In *Kaiser v. Suburban Transp. Sys.*, 65 Wn. 2d 461, 398 P.2d 14 (1965), a bus driver lost consciousness due to the side effects of a drug which had been prescribed by his physician and the bus struck a telephone pole. One of the passengers on the bus was injured and commenced an action against the bus driver's physician, among others. 65 Wn. 2d 461, 462-463. Without citation to the Restatement of Torts, the court concluded there was sufficient evidence to submit the issue of the doctor's negligence to the jury.

"A physician is responsible in damages when he fails to possess such skill and learning as is usually possessed by the average member of the profession in the locality where he practices and to apply that learning with reasonable care. ... Doctors Smith, Van Arsdel and Faghin all testified that a

warning should have been given when the drug is *prescribed* because of its potential known dangers. About 20 percent of the people who take the drug experience unwanted side effects ... there is evidence in the record that the doctor failed to warn his patient, who he knew to be a bus driver, of the dangerous side effects of drowsiness ... that may be caused by the taking of this drug. This evidence was sufficient to submit the issue of the doctor's negligence to the jury."

*Id.* at 464.

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). (Citing *Kaiser v. Suburban Transp. Sys., supra*). A non-patient can state a cause of action for negligent treatment by showing the injury resulted from the failure of a healthcare provider to follow the accepted standard of care. *Webb*, 121 Wn. App. at 346. 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. The court concluded the psychologist did owe a duty and reversed the trial court's summary judgment dismissal. *Id.* at 351.

In *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), this Court determined 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 explained: “In the present case, we follow the approach utilized in *Lipari v. Sears Roebuck & Co.*, 497 Fed. Supp. 185, 193 (D. Neb. 1980) and *Kaiser v. Suburban Transp. Sys., supra.*” *Peterson*, 100 Wn. 2d. at 428. Ms. Peterson was injured by the patient when a motor vehicle she was operating was struck by one operated by the patient. Surely, if a bus rider in *Kaiser* and a random driver in *Peterson* are foreseeable, DeMeerleer’s victims in this matter should be, as well.

The issue presented in *Lipari* was the same as presented in *Peterson* and exists in the case at bar. Specifically, whether a psychotherapist owes a duty of care to third persons injured by a patient. The court wrote:

“... the relationship between a psychotherapist and his patient gives rise to an affirmative duty for the benefit of third persons. This duty requires that the therapist initiate whatever precautions are reasonably necessary to protect potential victims of his patient. This duty arises only when, in accordance with the standards of his profession, the therapist knows or should know that his patient’s dangerous propensities present an unreasonable risk of harm to others.”

*Lipari*, 497 Fed. Supp. 185, 193 (D. Neb. 1980).

*Lipari*’s holding was based primarily on Restatement (Second) of Torts § 315 (1965).

“Under the common law, a person had no duty to prevent a third party from causing physical injury to another. A number

of courts, however, have recognized an exception to this general rule. Under this exception, a person has a duty to control the conduct of a third person and thereby to prevent physical harm to another if:

- (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 rise to the other a right to protection."

*Lipari*, 497 Fed. Supp. at 188. See also, *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334 (1976) (applying section 315).

In *Est. of Davis v. Dept. of Corrections*, 127 Wn. App. 833, 113 P.3d 487 (2005), the court recognized a cause of action pursuant to *Peterson, supra*. The 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). (Emphasis added).

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 DeMeerleer, upon

which plaintiffs have a cause of action.

As demonstrated above, as far back as 1965, Washington State case law has held a healthcare professional's duty of care extends to third parties. This duty is based upon the Restatement (Second) of Torts § 315 (*Peterson, Lipari, and Davis*) and/or where the provider breaches the standard of care (*Kaiser and Webb*). The present case is no different. The court of appeals correctly held Dr. Ashby owed the plaintiffs a duty of care and this Court is requested to reject WSMA's contention to the contrary.

**D. The Legislature Narrowed The Scope Of Duty Set Forth In Peterson But Chose Not To Include Voluntary Outpatient Treatment Such As That Obtained By DeMeerleer In The Instant Case.**

“(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 (Emphasis added).

In 1987, the legislature narrowed the duty created by *Peterson* by enacting the Involuntary Treatment Act, RCW 71.05.120. *Volk v. DeMeerleer*, 184 Wn. App. at 422. The act applies to *involuntary* mental healthcare and *voluntary in-patient* mental health treatment. *Poletti v. Overlake Hospital Medical Ctr.*, 175 Wn. App. 828, 832, 303 P.3d 1079 (2013).

The Involuntary Treatment Act is not applicable to this case. The plain language of the statute supports this reasoning. The immunity applies only to those defendants “*performing duties pursuant to this chapter.*” RCW 71.05.120(1)(emphasis added). Here, Dr. Ashby was not performing duties pursuant to the Involuntary Treatment Act and the immunity does not apply.

As demonstrated above, a healthcare provider’s duty to non-patients is well established in Washington. This duty has existed for half a century. WSMA’s argument on pages 13 - 15 of its brief is simply not supportable. There is no evidence that mental health professionals are unduly or impossibly burdened by current law. WSMA’s argument to the contrary is

unsupported and spurious.

E. RCW 70.02.050 Does Not Prohibit Sharing DeMeerleer's Healthcare Information.

Volk's claims are based on Ashby's failure to assess and treat. Disclosure of DeMeerleer's healthcare information, according to Dr. Knoll, is not an element of liability in this matter. It is only a hypothetical, tangential consideration. Dr. Knoll states that had Dr. Ashby treated DeMeerleer within the standard of care, more probably than not, no dangerous, exigent behavior of DeMeerleer would have occurred. However, if it did, Dr. Ashby would have had the ability to warn those at risk, and civilly commit DeMeerleer. (CP 090-Knoll Dec. p. 9, LL. 7-15) 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, amicus curiae contends a psychologist or psychiatrist is under no obligation to disclose healthcare information of a patient to a third party. On the other hand, plaintiff's expert, Dr. Knoll offers the only opinion evidence in this matter regarding standard of care, of which may have included a potential future and permissible need for disclosure had Dr. Ashby continued treatment of DeMeerleer within the standard of care.

Accordingly, whether a psychologist or psychiatrist **reasonably believes** disclosure would have avoided or minimized imminent danger in light of the facts of this case; whether he or she was under an **obligation** to

disclose under this chapter, in light of the facts of this case; and whether he should have disclosed healthcare information to Ms. Schiering and her family, are all jury questions not appropriately disposed of by 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*. As demonstrated above, Washington has long held a healthcare professional's duty of care extends to third parties. This duty is based upon the Restatement (Second) of Torts § 315 (*Peterson, Lipari, and Davis*) or when the provider breaches the standard of care (*Kaiser and Webb*). Whether this duty required disclosure of DeMeerleer's healthcare information to law enforcement authorities, based on the facts of this case, is for the jury to decide.

By statute, various professionals, clergy, therapists, counselors, and the like, have a limited confidentiality privilege with clients and penitents which shield them from being compelled to testify. *See* RCW 5.60.060. Conversely, by common law, attorneys and doctors have duty to disclose what might be otherwise protected information, or warn third parties and entities in certain exigent circumstances. As to attorneys:

Turning then to the Hawkinses' theory of a common-law duty to warn or disclose, we note common-law support for the precept that **attorneys must, upon learning that a client plans an assault or other violent crime, warn foreseeable victims**. *See Tarasoff v. Regents of Univ. of Cal.*, *supra*; *State*

*ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 394 P.2d 681, 16 A.L.R.3d 1021 (1964); *Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968).

*Hawkins v. King County*, 24 Wn. App. 338, 343, 602 P.2d 361 (1979).

The U.S. Department of Health and Human Services (“HHS”), Office of the Secretary, through the Director of Civil Rights, enforces the Privacy and Security Rules of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). The Privacy Rule standards address the use and disclosure of individuals’ health information (called “protected health information”) by organizations subject to the Privacy Rule called “covered entities.” Covered entities are, generally: Doctors, Clinics, Psychologists; Dentists; Chiropractors; Nursing Homes; Pharmacies; Company Sponsored and Self Insured Health Plans; Health Insurance Companies; HMOs; and Government Agencies, Plans, and Healthcare Entities ( Medicare; Medicaid; Tricare; Veterans Administration; etc.).

Due to the unfortunate multiple occurrences of mass murders in which persons purportedly under the care and treatment of the healthcare professionals by way of counseling, therapy, and/or treatment with psychotropic drugs, the Director of Civil Rights issued an open letter to our nation’s healthcare providers (covered entities). On January 15, 2013 this letter addressed the HIPPA privacy and security mandates versus disclosure

of protected information in exigent circumstances. This letter stated in part:

“When a healthcare provider believes in good faith that such a warning is necessary to prevent or lessen a serious and imminent threat to the health or safety of the patient or others, the Privacy Rule allows the provider, consistent with applicable law and standards of ethical conduct, to alert those persons whom the provider believes are reasonably able to prevent or lessen the threat. Further, the provider is presumed to have had a good faith belief when his or her belief is based upon the provider’s actual knowledge (i.e., based on the provider’s own interaction with the patient) or in reliance on a credible representation by a person with apparent knowledge or authority (i.e., based on a credible report from a family member of the patient or other person). These provisions may be found in the Privacy Rule at 45 CFR § 164.512(j).”

A copy of this letter and of 45 CFR § 164.512(j) is attached as Appendix A-1.

Similar information has been provided educational institutions.

F. **RCW 18.83 Does Not Prohibit Disclosure Of Healthcare Information.**

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 fully preclude Dr. Ashby’s disclosure of DeMeerleer’s healthcare information. See *Hawkins v. King County, supra*, at

343. See also, *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) (emphasis added)

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 a psychologist or psychiatrist is prohibited by RCW 18.83.110 from disclosing confidential communications is incorrect. As demonstrated above, he or she *may* reveal confidential communications to prevent a 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), *Hawkins v. King County, supra*, and *State v. Hansen, supra*, the confidential

communications privilege is not an impediment to disclosure of confidential communications.

**G. The Court Is Requested To Preserve And Promote The Public Policy Of Protecting Innocent Third-Parties.**

This court, in *Peterson*, relied heavily on *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 438, 551 P.2d 334 (1976). The *Tarasoff* court clearly address public policy issues when considering privacy rights:

“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.”

Washington has long held a healthcare professional’s duty of care extends to third parties. This duty is based upon the Restatement (Second) of Torts § 315 (*Peterson, Lipari, and Davis*) or when the provider breaches the standard of care (*Kaiser and Webb*).

The arguments advanced by the amicus curiae are not new. Indeed, its concerns and concerted action are chronicled throughout its brief. These

arguments do not justify turning established Washington tort law on its head.

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).

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. Moreover, there is no compelling argument or reason to exclude mental healthcare practitioners from the same negligence standard of care principles applicable to other healthcare practitioners in Washington.

### III. CONCLUSION

Volk’s primary claims on behalf of the victims and their estates rest on existing Washington tort law. This includes claims of Dr. Ashby’s

liability for DeMeerleer's injury or harm to the victims as they were within the ambit of foreseeable risk of such harm, and where there is competent evidence that Dr. Ashby's breach of the applicable standard of care was causal. Further, Volk claims that had Dr. Asbury treated DeMeerleer within the standard of care, and had such treatment been unsuccessful to the extent DeMeerleer might harm the victims, Dr. Ashby could have, within the law and standard of care, warned the victims and/or civilly committed DeMeerleer. Further, public policy supports (if not requires) this type of protection of innocent third parties. For these reasons, the court is requested to reject all arguments put forth and actions requested by Washington State Medical Association.

RESPECTFULLY SUBMITTED this 6th day of November, 2015.

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APPENDIX

A-1 January 15, 2013 Department of Health & Human Services letter to Nation's Healthcare Providers regarding Privacy Rule and 45 CFR § 164.512(j)

DECLARATION OF SERVICE

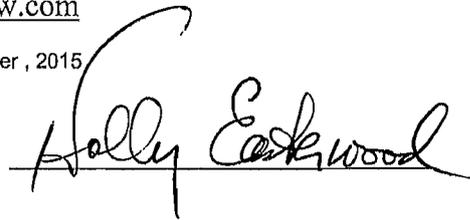
I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James McPhee	_____	Overnight Mail
Workland-Witherspoon	_____	U.S. Mail
601 W. Main Ave., Suite 714	_____	Hand-Delivered
Spokane, WA 99201	_____ x	E-Mail
David Kulisch	_____	Overnight Mail
Randall-Danskin	_____	U.S. Mail
601 W. Riverside Ave., Suite 1500	_____	Hand-Delivered
Spokane, WA 99201	_____ x	E-Mail
Christopher Kerley, Robert Sestero and Michael McFarland	_____	Overnight Mail
Evans, Craven & Lackie	_____	U.S. Mail
818 W. Riverside Ave., Suite 250	_____	Hand-Delivered
Spokane, WA 99201	_____ x	E-Mail
	_____	Facsimile
Paul A. Bastine	_____	Overnight Mail
Attorney at Law	_____	U.S. Mail
806 South Raymond Road	_____	Hand-Delivered
Spokane Valley, WA 99206	_____ x	E-Mail

And the following by e-mail:

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Dated this 6th day of November, 2015

  
Holly Eastwood



Director  
Office for Civil Rights  
Washington, D.C. 20201

January 15, 2013

Message to Our Nation's Health Care Providers:

In light of recent tragic and horrific events in our nation, including the mass shootings in Newtown, CT, and Aurora, CO, I wanted to take this opportunity to ensure that you are aware that the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule does not prevent your ability to disclose necessary information about a patient to law enforcement, family members of the patient, or other persons, when you believe the patient presents a serious danger to himself or other people.

The HIPAA Privacy Rule protects the privacy of patients' health information but is balanced to ensure that appropriate uses and disclosures of the information still may be made when necessary to treat a patient, to protect the nation's public health, and for other critical purposes, such as when a provider seeks to warn or report that persons may be at risk of harm because of a patient. When a health care provider believes in good faith that such a warning is necessary to prevent or lessen a serious and imminent threat to the health or safety of the patient or others, the Privacy Rule allows the provider, consistent with applicable law and standards of ethical conduct, to alert those persons whom the provider believes are reasonably able to prevent or lessen the threat. Further, the provider is presumed to have had a good faith belief when his or her belief is based upon the provider's actual knowledge (i.e., based on the provider's own interaction with the patient) or in reliance on a credible representation by a person with apparent knowledge or authority (i.e., based on a credible report from a family member of the patient or other person). These provisions may be found in the Privacy Rule at 45 CFR § 164.512(j).

Under these provisions, a health care provider may disclose patient information, including information from mental health records, if necessary, to law enforcement, family members of the patient, or any other persons who may reasonably be able to prevent or lessen the risk of harm. For example, if a mental health professional has a patient who has made a credible threat to inflict serious and imminent bodily harm on one or more persons, HIPAA permits the mental health professional to alert the police, a parent or other family member, school administrators or campus police, and others who may be able to intervene to avert harm from the threat.

In addition to professional ethical standards, most states have laws and/or court decisions which address, and in many instances require, disclosure of patient information to prevent or lessen the risk of harm. Providers should consult the laws applicable to their profession in the states where they practice, as well as 42 CFR Part 2 under federal law (governing the disclosure of substance abuse treatment records) to understand their duties and authority in situations where they have information indicating a threat to public safety.

We at the Office for Civil Rights understand that health care providers may at times have information about a patient that indicates a serious and imminent threat to health or safety. At those times, providers play an important role in protecting the safety of their patients and the broader community. I hope this letter is helpful in making clear that the HIPAA Privacy Rule does not prevent providers from sharing this information to fulfill their legal and ethical duties to warn or as otherwise necessary to prevent or lessen the risk of harm, consistent with applicable law and ethical standards.

A handwritten signature in black ink, appearing to read "Leon Rodriguez". The signature is written in a cursive style with a large initial "L" and a long, sweeping underline.

Leon Rodriguez

>>>>

**(j) Standard: Uses and disclosures to avert a serious threat to health or safety. (1) Permitted disclosures. A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:**

**(i)**

**(A)** Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and

**(B)** Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat; or

**(ii)** Is necessary for law enforcement authorities to identify or apprehend an individual:

**(A)** Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim; or

**(B)** Where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody, as those terms are defined in § 164.501.

**(2)** Use or disclosure not permitted. A use or disclosure pursuant to paragraph (j)(1)(ii)(A) of this section may not be made if the information described in paragraph (j)(1)(ii)(A) of this section is learned by the covered entity:

**(i)** In the course of treatment to affect the propensity to commit the criminal conduct that is the basis for the disclosure under paragraph (j)(1)(ii)(A) of this section, or counseling or therapy; or

**(ii)** Through a request by the individual to initiate or to be referred for the treatment, counseling, or therapy described in paragraph (j)(2)(i) of this section.

**(3)** Limit on information that may be disclosed. A disclosure made pursuant to paragraph (j)(1)(ii)(A) of this section shall contain only the statement described in paragraph (j)(1)(ii)(A) of this section and the protected health information described in paragraph (f)(2)(i) of this section.

**(4)** Presumption of good faith belief. A covered entity that uses or discloses protected health information pursuant to paragraph (j)(1) of this section is presumed to have acted in good faith with regard to a belief described in paragraph (j)(1)(i) or (ii) of this section, if the belief is based upon the covered entity's actual knowledge

## OFFICE RECEPTIONIST, CLERK

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**To:** Olive Easterwood  
**Subject:** RE: Volk v. Ashby - Case No. 913871

Received on 11-09-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Olive Easterwood [mailto:Holly@mjrps.net]  
**Sent:** Friday, November 06, 2015 5:23 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Volk v. Ashby - Case No. 913871

Please see attached Volk's Amended Answer to Washington State Medical Association.

Thank you.

Holly Easterwood  
Legal Assistant  
Michael J Riccelli PS  
400 S. Jefferson St., Suite 112  
Spokane, WA 99204  
509-323-1120  
FAX 509-323-1122