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No. 91387-1

SUPREME COURT
OF THE STATE OF WASHINGTON

BEVERLY VOLK, et al., *Appellants*,

v.

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

VOLK'S ANSWER AND CONCURRENCE TO
AMICUS CURIAE BRIEF OF
WASHINGTON STATE ASSOCIATION
FOR JUSTICE FOUNDATION

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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 and concur in the brief of Amicus Curiae Association for Justice Foundation (“WSAJ”).

II. ARGUMENT

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

Volk concurs in the WSAJ amicus brief’s argument of applicable (and inapplicable) laws. However, WSAJ does not, in Volk’s considerations, fully delineate the factual reasons in this matter as to which elements of various cited cases and statutes most directly apply or are clearly inapplicable. It is in this regard that Volk’s answer WSAJ’s amicus brief.

The appellate court below began its decision characterizing Ms. Volk’s claims against Dr. Ashby and Spokane Psychiatric Clinic as being based on a psychiatrist’s duty to protect third parties.

“We undertake the humbling and daunting task of demarcating the duty a mental health professional owed to third parties to protect them from the violent behavior of the

professional's outpatient client.”

Volk v. DeMeerleer, 184 Wn. App. 389, 394, 337 P.3d 372, 374, (Wash. Ct. App. 2014)

The appellate court continues by premising the case, primarily on *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983). To the extent that *Petersen* clearly held psychiatrists liable to third parties in a foreseeable zone of risk for professional negligence that is causal in their patient's harm of a third party, this is correct. To the extent the opinion is either meant or interpreted to mean that the *Volk* case is a duty to warn case, it is incorrect. *Petersen* also was not a duty to warn case. It dealt with issues of: (a) a psychiatrist's decision to release an individual from involuntary commitment; (b) resulting harm to a random third party; (c) immunity under RCW 71.05.120; and (d) waiver of that immunity on claimed gross negligence.

This is a medical negligence action based on claims of breach of the psychiatric standard of care by Dr. Ashby and, by agency, Spokane Psychiatric Clinic, in treating Dr. Ashby's patient James B. DeMeerleer. 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 pp.

1-10). **Dr. Knoll is a forensic psychiatrist, and is the only physician to provide testimony in this matter.** (CP 82-83) (Knoll Declaration pp. 1-2).

A careful review of Dr. Knoll's declaration demonstrates competent medical testimony sufficient to maintain a medical negligence action for, alternatively: (1) all resulting ultimate harm to the victims and the victim's estates; and (2) 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. Dr. 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 Rebecca Schiering and her three sons, it was a single family unit with which DeMeerleer had a tempestuous relationship within the months leading up to this tragic occurrence. The victims were foreseeably at risk of harm from DeMeerleer, whose treatment was below the standard of care by Dr. Ashby from which the victim's claims are derived.

Volk's expert, Dr. Knoll, opines that had Dr. Ashby treated DeMeerleer at the standard of care, the incident probably would not have occurred. (CP 090) (Knoll Declaration p.10, LL. 7-15). This substantiates the traditional tort claims for ultimate harm. Further, if treatment within the standard of care proved inadequate, Dr. Ashby may have found it appropriate

to warn the victims and/or civilly commit DeMeerleer. (CP 091) (Knoll Declaration p. 9, LL. 1-5). At a minimum, Dr. Ashby's negligent treatment was causal of loss of chance of a better outcome (and survival) for DeMeerleer to maintain mental stability or normalcy, so that the incident would not have occurred. This resulted in loss of chance for the victims. (CP 091) (Knoll Declaration p. 10, LL. 6-10).

The duty in this matter is liability of mental healthcare professionals to third parties who are reasonably foreseeable to be at risk from and who have been harmed by a patient's acts or omissions which are causally related to the psychiatrist's breach of the standard of care in treatment of the patient. In this regard, it is similar to the standard of liability as set forth in *Kaiser v. Suburban Transp. Sys.*, 65 Wn. 2d 461, 398 P.2d 14 (1965). In *Kaiser*, 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. at464.

Note that in *Kaiser*, failure to properly counsel the patient was a breach in the standard of care. This put random third parties within the reasonably foreseeable zone of risk of the bus driver patient. That is harm to his bus passengers. That the failure to counsel the patient constituted a breach of the standard of care is coincidental as to this matter. It is not the same as "warning" a third party of a psychiatric patient's possible risk to a reasonably identifiable third party at risk, as is contemplated by RCW 71.05.120 under the civil commitment statutes. Again, factually this instant case is most similar to *Kaiser* and not *Petersen*, but for the fact that *Kaiser* did not, and *Petersen* did, address a psychiatrist's liability.

Given the nature of the wording and tenor of the appellate court decision below, and the volume and magnitude of respondents and of various amici, in focusing argument on RCW 71.05.120, and duty to warn, it is understandable that WSAJ has addressed (and refuted) those arguments.

RESPECTFULLY SUBMITTED this 9th day of November, 2015.

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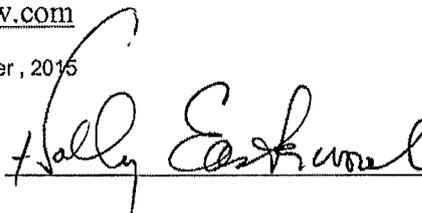
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Please see attached for filing:

1. Volk's Answer to Washington State Psychological Association Amicus Curiae Brief;
2. Volk's Answer and Concurrence to Washington State Association for Justice; and
3. Volk's Answer and Concurrence to Victim Support Services – The National Alliance on Mental Illness (NAMI) Amicus Curiae Brief.

Thank you.

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