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35 WAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Docket No. 35 WAP 2019

KATHRYN F. LEIGHT AND JOHN L. LEIGHT, HER HUSBAND,

Appellants/Plaintiff,

v.

UNIVERSITY OF PITTSBURGH PHYSICIANS, UPMC, UNIVERSITY OF PITTSBURGH OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, SUSAN SHICK and PHILLIP L. CLARK, Administrator of the Estate of JOHN F. SHICK, Deceased,

Appellees/Defendants.

BRIEF OF *AMICI CURIAE* AMERICAN MEDICAL ASSOCIATION, PENNSYLVANIA MEDICAL SOCIETY, PENNSYLVANIA PSYCHIATRIC SOCIETY AND PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM IN SUPPORT OF APPELLEES

Appeal from the Order of the Superior Court entered December 31, 2018, at No. 1912 WDA 2017, affirming an Order of Court dated April 2, 2015, reinstating and amending an Order of Court dated May 27, 2014, sustaining Preliminary Objections, as made final by an Order of Court dated December 15, 2017, before the Honorable R. Stanton Wettick, Jr., in the Court of Common Pleas of Allegheny County at No. G.D. 12-009942.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are the American Medical Association ("AMA"), Pennsylvania Medical Society ("PAMED"), Pennsylvania Psychiatric Society ("PaPS"), and Pennsylvania Coalition for Civil Justice Reform ("PCCJR"). The AMA is the largest professional association of physicians, residents and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policymaking process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including Pennsylvania, and in every medical specialty.

PAMED is a Pennsylvania non-profit corporation that likewise represents physicians of all specialties and is the largest physician organization in the Commonwealth. PAMED regularly participates as *amicus curiae* in Pennsylvania appellate courts in cases raising important health care issues. The AMA and PAMED also represent the AMA Litigation Center, a coalition of the AMA and state medical societies to advance the views of organized medicine in the courts.

PaPS, a district branch of the American Psychiatric Association, is comprised of more than 1,500 physicians practicing the specialty of psychiatry in the Commonwealth. PaPS's mission is to fully represent Pennsylvania psychiatrists in

advocating for their profession and their patients, and to assure access to psychiatric services of high quality, through activities in education, shaping of legislation and upholding ethical standards. The doctor-patient relationship and the privileged communication shared within treatment is paramount to effective evidenced-based treatment.

PCCJR is a statewide, nonpartisan alliance of organizations and individuals representing businesses, professional, and trade associations, health care providers, nonprofit entities, taxpayers, and other perspectives. The coalition is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues in the courts and General Assembly.

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), *amici* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution to fund the preparation or submission of this brief.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Amici adopt and incorporate Appellees'/Defendants' Statement of the Case and Procedural History to the extent needed for the arguments stated herein. This case involves a mass shooting on March 8, 2012. Mr. John Shick arrived at the outpatient lobby of the Western Psychiatric Institute and Clinic ("WPIC") and shot several people, including Ms. Kathryn Leight, who was the receptionist there.

Mr. Shick had a history of mental health struggles, including involuntary commitment, in New York, where he was living years earlier, and in Portland, where he attended a graduate program at Portland State University. He moved to Pittsburgh in 2011 because he had been accepted to Duquesne University's doctoral program in the Department of Biological Sciences.

In the months before the March 2012 incident, Mr. Shick sought and received outpatient medical care for various asserted physical ailments from physicians with the University of Pittsburgh Physicians ("UPP") and University of Pittsburgh of the Commonwealth System of Higher Education ("Pitt"). He sometimes sought and was often denied painkillers. The physicians observed over time that the physical ailments may be due to mental illness and, at several points, encouraged Mr. Shick to seek voluntary psychiatric treatment. Mr. Shick neither exhibited nor expressed suicidal or homicidal ideations, and denied having them during examinations.

At several points, physicians at UPP and Pitt considered whether Mr. Shick was a candidate for involuntary commitment; at times they inquired as to the criteria for involuntary commitment, wanted to see paperwork, and recommended voluntary examinations. However, at no time did any physician find, after a clinical examination, that he met the criteria for involuntarily commitment or initiated the process to have him involuntarily examined or admitted. On the day of the incident, he went to WPIC with loaded firearms and shot Ms. Leight and several other people,

killing one. The Leights brought this action against UPP, Pitt, and their physicians seeking damages for their collective decision not to involuntarily commit Mr. Shick.

ARGUMENT

This case grew out of the tragic shooting by Mr. Shick, an outpatient who sought voluntary care for his physical and mental ailments while seeking to attend graduate school and be integrated into his community. It is clear under traditional liability law, including for the treatment of mentally ill patients, that Defendants are not liable to Mr. Shick's victims, including Ms. Leight. *See Emerich v. Philadelphia Ctr. for Human Dev., Inc.*, 554 Pa. 209, 231-32, 720 A.2d 1032, 1042-43 (1998). There was no indication, as required under *Emerich*, that Mr. Shick presented an immediate threat or that Ms. Leight was identified or readily identifiable as a target of Mr. Shick before the shooting occurred. *See id.* In trying to circumvent this law and subject Mr. Shick's health care providers to liability for her injuries, the Leights present this Court with a legally incongruous proposition: they are attempting to trigger a statute that provides Defendants with *immunity* in order to sue them.

This statute, the Mental Health Procedures Act (MHPA), provides limited liability protections to physicians who treat mentally ill patients in an effort to "assure the availability of adequate treatment to persons who are mentally ill." 50 P.S. § 7102. The General Assembly, though, did not provide these additional protections to physicians who act with "willful misconduct or gross negligence" and

expressly excluded such conduct from the immunity provision. 50 P.S. § 7114(a). In those situations, the added protections are not afforded and traditional liability law applies. As indicated, the Court in *Emerich* held that there is no liability to third parties unless specific extenuating circumstances existed, which they did not here.

What Plaintiffs are arguing, however, is that if they can trigger the MHPA and show Defendants acted with gross negligence, they could subject the physicians to liability notwithstanding *Emerich*. They base this argument on *Goryeb v. Com., Dept. of Public Welfare*, where the Court allowed a claim that health care providers "through gross negligence or willful misconduct, ha[d] unleashed into the community a person *non compos mentis*, who ha[d] been diagnosed to be a clear and present danger to himself or others." 525 Pa. 70, 79, 575 A.2d 545, 549 (1990). *Goryeb* has no application to the case at bar. Here, Defendants never found Mr. Shick to be "a clear and present danger," never involuntarily committed him, and never released him to an unsuspecting public. Also, *Goryeb* dealt with issues of sovereign immunity and causation, not whether the claims fell under MHPA or whether the immunity exception circumvents traditional common law.

If the Court allows this case to proceed it would turn the MHPA on its head. Triggering an immunity provision to create liability is the exact type of "absurd" legal outcome this Court has long cautioned against. *See Farago v. Sacred Heart Gen. Hosp.*, 522 Pa. 410, 415, 562 A.2d 300, 303 (1989). Further, as the Superior

Court properly found, the MHPA was not triggered here. The MHPA applies only to the "*involuntary treatment* of mentally ill persons, whether inpatient or outpatient, and [to] all *voluntary inpatient* treatment of mentally ill persons." 50 P.S. §7103 (emphasis added). Defendants, though, only provided Mr. Shick with *voluntary outpatient* care—none of the indicia of involuntary or inpatient care exist here. As a result, the MHPA does not apply; Defendants cannot invoke its limited immunity, and Plaintiffs cannot seek to trigger it to somehow create liability.

In making these arguments, *amici* do not, in any way, discount the impact of Mr. Shick's horrendous act. Ms. Leight does not deserve her fate; her shooting was a tragedy. But, the questions before this Court are of liability, and the laws of the Commonwealth do not create the liability they seek. For these reasons, as further discussed below, *amici* respectfully urge the Court to uphold the ruling below.

I. THE LEGAL FRAMEWORK FOR TREATING PATIENTS WITH MENTAL ILLNESSES HAS BEEN DEVELOPED OVER DECADES TO CAREFULLY BALANCE THE RIGHTS OF THE MENTALLY ILL WITH THE NEED TO PROTECT THE PUBLIC

Mr. Shick, like many people with mental ailments, was trying to live a productive life integrated into society while regularly seeking outpatient care for his physical and mental ailments. He completed college and had been admitted into a prestigious doctoral program at Duquesne University. In the Commonwealth, as in other states, health care providers are to treat such patients with the fewest restrictions possible on their liberty. *See* 50 P.S. § 7107. The Commonwealth, like

most states, prioritizes giving people like Mr. Shick the greatest opportunity to successfully manage his or her mental ailments—not removing them from society.

This approach represents a sharp divergence from the past. For much of American history, people with mental ailments were put in prisons, shelters for the poor, or asylums. Society's view "was that persons with mental illness lacked the capacity to make decisions." Megan Testa, M.D. & Sarah West, M.D., *Civil Commitment in the United States*, Psychiatry Vol. 7 No. 10, 32 (2010). They were denied the basic right to liberty, as judges would lock them up and families could purchase the confinement of unwanted relatives. *See id*. By the 1950s, the rolls at state asylums swelled to more than 500,000 people. *See id.*

Around this time, the outlook toward mental health started to change, leading to fundamental shifts in the public policies toward patients. In 1951, the National Institute of Mental Health published the "Draft Act Governing Hospitalization for the Mentally Ill" to facilitate procedures, like those currently used in Pennsylvania, to protect the due process rights of mental health patients. Congress enacted the Mental Health Study Act in 1955 to establish the Joint Commission on Mental Illness and Health. *See* E. Fuller Torrey, M.D., *Out of the Shadows, Confronting America's Mental Illness Crisis*, appendix (1997). In 1963, President Kennedy signed the Community Mental Health Centers Act to facilitate treating individuals in their communities, not through forced commitment. *See* Bernard E. Harcourt,

Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960's, 9 Ohio. St. J. Crim. L. 53, 53 (2011).

The United States Supreme Court, in a series of rulings in the 1970s, supported this effort, finding that mental health patients did not lose their constitutional rights. The Court recognized that being involuntarily committed to a mental institution was a "massive curtailment of liberty," *Humphrey v. Cady*, 405 U.S. 504, 509 (1972), and that people with mental illnesses retain their due process rights to control their own destiny, *see O'Connor v. Donaldson*, 422 U.S. 563 (1975). Consequently, the state bears the burden of proving by clear and convincing evidence that a person is a present danger to him or herself, or others, and therefore must be involuntarily committed. *See Addington v. Texas*, 441 U.S. 418 (1979). Otherwise, mental health care providers must use the "least restrictive treatment" in caring for their patients. *See Lake v. Cameron*, 267 F. Supp. 155 (D.C. Cir. 1967).

Courts and legislatures around the country, including here in Pennsylvania, followed these developments by establishing legal regimes to focus mental health treatment on community-based outpatient programs. Patient advocacy groups and the medical community welcomed this sea change in legal and social attitudes because they believed that out-patient treatment plans were generally better for the mentally ill than involuntary commitment. *See* Mental Health America, *Position Statement 22: Involuntary Mental Health Treatment* (2013) ("Persons with mental

health conditions can and should be treated in the least restrictive environment and in a manner designed to preserve their dignity and autonomy and to maximize the opportunities for recovery."); *see also* Justin M. Johnson & Theodore A. Stern, *Involuntary Hospitalization of Primary Care Patients*, Prim. Care Companion CNS Disord. 16.3 (2014) (Involuntary admissions should be "considered carefully and coercion used only in acute crises."). "[M]ental health treatment and services can only be effective when the consumer embraces it, not when it is coercive." *Id.* [1]

Pennsylvania law now squarely emphasizes the due process rights of patients, including Mr. Shick, and the need to find the least restrictive path for treating them. *See* 55 Pa. Code § 5100.3(b) ("It is the policy of the Commonwealth to seek to assure that adequate treatment is available with the least restrictions necessary to meet each client's needs."). The Court and General Assembly have appreciated that integrating such individuals into society is not without risk. In *Emerich*, the Court acknowledged that when outpatients even have homicidal and suicidal ideations—which Mr. Shick never expressed to Defendants—they are not to be automatically involuntary committed. Without these rules, individuals such as Mr. Shick would never be able to function in society, leading to a return to mass involuntary confinement.

[1] This effort to reduce involuntarily committing mental health patients worked. By the 1990s, involuntary commitments were reduced to only 30,000 people. *See* Testa & West, *supra* at 33.

II. MANY PEOPLE WITH MENTAL ILLNESSES REMAIN IN SOCIETY, WITH TREATMENT UNDER THE MHPA RESERVED FOR ONLY THOSE MEETING SPECIFIC CRITERIA

Consistent with this history, Pennsylvania law specifies the processes and standards that physicians must apply to provide someone with voluntary inpatient treatment and to order that a person be involuntarily committed. As the Superior Court found, these were the situations for which the General Assembly enacted the MHPA—the "involuntary treatment of mentally ill persons, whether inpatient or outpatient, and [to] all voluntary inpatient treatment of mentally ill persons." 50 P.S. § 7103. Otherwise, a patient would be treated through voluntary outpatient care in an effort to facilitate his or her ability to function in society, and traditional liability law would be applied.

For a person to seek voluntary inpatient care, he or she would have to file an application seeking an examination. *See* 50 P.S. § 7202. "Before a person is accepted for voluntary inpatient treatment, an explanation shall be made to him of each treatment, including the types of treatment in which he may be involved, and any restraints or restrictions to which he may be subject together with a statement of his rights." 50 P.S. § 7203. He or she must then provide written consent to be admitted. None of this occurred here. To the contrary, Mr. Shick did not fully cooperate with the voluntary examination Defendants recommended in the weeks before the shooting. This recommendation was consistent with Pennsylvania law that

"[t]reatment on a voluntary basis shall be preferred to involuntary treatment." *Allen v. Montgomery Hosp.*, 548 Pa. 229, 696 A.2d 1175, 1178 (1997).

At the same time, Defendants also considered whether Mr. Shick's condition had worsened such that he required an involuntary examination and treatment. Involuntary treatment is appropriate only when a person "is severely mentally disabled when, as a result of mental illness, his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a clear and present danger of harm to others or to himself." 50 P.S. § 7301(a). Clear and present danger must be shown by establishing that the person "has inflicted or attempted to inflict serious bodily harm on another and that there is a reasonable probability that such conduct will be repeated." *Id.* at (b)(1). The Mental Health Manual lists specific factors physicians must consider for whether this standard is met, including whether "[t]he clear and present danger is so imminent that mental health intervention without delay is required to prevent injury or harm from occurring." 55 Pa. Code § 5100.85.

No decision was ever made that Mr. Shick presented such a clear and present danger, and the process for involuntarily committing him to inpatient treatment was never started. Even when required, though, involuntary treatment must be as short-term as possible, namely until the threat passes or medication can facilitate a return to society. *See* 50 P.S. 7302(b) ("if at any time it appears there is no longer a need

for immediate treatment, the person shall be released"). This Court, as have those in other states, has appreciated that deciding whether and when to involuntarily admit someone is an "unscientific and inexact field" and certainly not free from risks, particularly given the requirement to choose the least restrictive treatment options for a patient. *Farago*, 522 Pa. at 417, 562 A.2d at 304. Accordingly, when a patient such as Mr. Shick is living in society and seeks outpatient care, the Court does not require health care providers "to be liable for a patient's violent behavior because he fails to predict such behavior accurately." *Emerich*, 554 Pa. at 225, 720 A.2d at 1040.

The truth is that this mass shooting could have been predicted only through the lens of hindsight, and this Court must guard against any tendency to judge involuntary treatment decisions through hindsight bias. *See Kortus v. Jensen*, 237 N.W.2d 845, 851 (Neb. 1976) (discussing hindsight biases in medical malpractices cases); *cf.* Michael A. Haskel, *A Proposal for Addressing the Effects of Hindsight and Positive Outcome Biases in Medical Malpractice Cases*, 42 Tort & Ins. L. J. 895, 905 (2007) ("In the context of medical litigation, the existence of these biases suggest that it may be difficult for finders of fact to evaluate fairly (e.g., without reference to whether the decision, in retrospect, turned out to be the right choice)."); Hal R. Arkes, *The Consequences of Hindsight Bias in Medical Decision Making*, 22(5) Curr. Directions in Psych. Sci. 356, 359 (2013) ("The hindsight bias has particularly detrimental effects" in "important, highly consequential situations.").

If Defendants were concerned about any such hindsight liability, the safest choice for themselves would have been to forcibly commit Mr. Shick into a mental health facility and not allow him an opportunity to integrate into society. Doing so would have triggered the MHPA and provided them with limited immunity. *See* Winsor C. Schmidt, *Critique of the American Psychiatric Association's Guidelines for State Legislation on Civil Commitment of the Mentally Ill*, 11 New. Eng. J. Crim. & Civ. Confinement 11, 24 (1985) (observing immunity "militat[es] against the otherwise inherent tendency to limit patient freedom"). Plaintiffs, as well as many other people in society, may prefer this better safe than sorry approach, but that is not the law in Pennsylvania or other states.

Here, there is no evidence that the providers made their decisions for any reason other than their sincere assessment of their obligations under the law and what they thought best for Mr. Shick. Outside influencers, including liability, must not invade this decision. *See* James R. Roberts, M.D., *The Risks of Discharging Psych Patients Against Medical Advice*, Emergency Medicine News, Vol. 38 Iss. 7 (July 2016) ("Many practical and logistical pressures are placed on psychiatric patients from family, police, lack of shelter or personal resources."). Otherwise, health care providers would be incentivized to curtail patients' personal liberties or may choose not to work with patients who demonstrate mental ailments out of fear of lawsuits.

III. INCENTIVIZING HEALTH CARE PROVIDERS TO INVOLUNTARILY COMMIT PATIENTS TO GUARD AGAINST LIABILITY WILL REDUCE OVERALL SAFETY

It also is in the best health care interest of patients, and ultimately the public, that individuals with mental ailments have access to outpatient care, which can give them a sense of self-determination. Studies have shown that forcing treatment plans on patients could have long-term negative effects, as patients in Mr. Shick's situation will refuse help out of fear of losing their civil rights. *See, e.g.*, Dinah Miller, M.D. & Annette Hanson, M.D., *Committed: The Battle over Involuntary Psychiatric Care* xviii (1st ed. 2016). His previous involuntarily commitments in New York and Portland may very well have been a reason he was not receptive to the voluntary examination Defendants recommended. Overall, studies have shown that 77 percent of previously admitted patients will not risk being institutionalized again, even if they know they pose a danger to themselves or others. *See id.*

Creating a liability system that would incentivize involuntary commitment, which a liability ruling here would do, would have larger repercussions. Currently, one in five adults experiences a mental illness, and one in twenty-five adults live with a serious mental illness. *See* Nat'l Alliance on Mental Illness, *Mental Health by the Numbers*.[2] In Pennsylvania, more than 4.6 percent of the population, or nearly 590,000 people, have a serious mental illness. *See* State Estimates of Adult Mental

[2]https://www.nami.org/NAMI/media/NAMI-Media/Infographics/GeneralMHFacts.pdf.

Illness from the 2011 and 2012 National Surveys on Drug Use and Health, The NSHUH Report, Substance Abuse and Mental Health Services Admin., Feb. 28, 2014.[3] Expanding the scope of liability of health care professionals would strain the mental health care system by increasing the costs of patient care. Here, creating liability may result in compensation to Ms. Leight and her family, but it will not lead to a safer community or better mental health care. It could very easily have the opposite effect, putting more patients and others at greater risk.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Honorable Court affirm the Order of the Superior Court entered December 31, 2018.

Sincerely,

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December 13, 2019

[3]https://www.samhsa.gov/data/sites/default/files/sr170-mental-illness-state-estimates-2014/sr170-mental-illness-state-estimates-2014/sr170-mental-illness-state-estimates-2014.htm

CERTIFICATION OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(d), I hereby certify that this Brief of *Amici Curiae* complies with the word count limits of Pennsylvania Rule of Appellate Procedure 531(b)(3).

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Pursuant to Pennsylvania Rule of Appellate Procedure 121(d), I hereby certify that two (2) copies of this Brief of *Amici Curiae* were served upon the following counsel of record via both electronic mail and U.S. Mail, first class, postage pre-paid, on this 13th day of December 2019.

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University of Pittsburgh Physicians, UPMC, University of Pittsburgh of the Commonwealth System of Higher Education, Susan Shick, and Phillip L. Clark, Administrator of the Estate of John F. Shick, Deceased, Appellees	:	

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