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State of Minnesota
In Court of Appeals

Regina C. Losen, Trustee for the Heirs and Next of Kin of Deborah Miller, Deceased, Randolph C. Miller and Laurie A. Miller,

Appellants,

vs.

Allina Health System, d/b/a United Hospital, Minnesota Epilepsy Group, P.A., a Minnesota Corporation, Paul Goering, M.D., Deanna L. Dickens, M.D. and Patricia E. Penovich, M.D.,

Respondents.

BRIEF AND APPENDIX OF AMICI CURIAE MINNESOTA MEDICAL ASSOCIATION AND FAIRVIEW HEALTH SERVICES

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Statement of Legal Issue[1]

I. Whether the immunity granted in Minn. Stat. § 253B.23 applies to a licensed psychiatrist's considered decision not to place an individual on a 72-hour emergency hold when the psychiatrist acts pursuant to the authority the Legislature gave to medical professionals in the Civil Commitment Act to evaluate whether an individual presents a risk of harm to himself or others.

The district court granted summary judgment to Respondents Dr. Goering and Allina Health Systems.

Apposite authority:

Minn. Stat. § 253B.05(c)

Minn. Stat. § 253B.23

Mjolsness v. Riley, 524 N.W.2d 528 (Minn. Ct. App. 1994)

Statement of the Case and Statement of Facts

Because the facts are undisputed and the procedural posture of the case is well-summarized, the Minnesota Medical Association (MMA) and Fairview Health Services (Fairview) adopt the Statement of the Case and the Facts of the Respondents. MMA and Fairview submit this brief in support of the reasoning of the district court that granted immunity to the decision not to place an individual on a 72-hour emergency hold.

The MMA is a non-profit Minnesota corporation whose members are primarily physicians licensed to practice in the state of Minnesota. For more than 150 years, the MMA and its members have worked together to safeguard the quality of medical care in Minnesota as well as the future of medical professionalism. The MMA is a professional

[1] Pursuant to Minn. R. Civ. App. P. 129.03, the undersigned certify that they authored this brief in its entirety. No person or entity, other than the Minnesota Medical Association and Fairview Health Services, made any monetary contribution to the preparation or submission of this brief.

association comprised of over 11,000 members, including physicians, medical residents, and medical students. The MMA regularly partners with national and state organizations to address issues of health care administration, health policy, medical ethics and professionalism, and quality control. The MMA's goals are to promote excellence in health care, present a united voice for physicians, and uphold the ethics of the medical profession. The care that its members provide often includes treating patients with mental health issues and making sound civil commitment determinations.

Fairview is a non-profit Minnesota corporation founded in 1906. It is currently one of the largest non-profit health care systems in Minnesota. Fairview's mission is to improve the health of communities served through safe, effective, patient-centered, timely, and efficient care. Fairview employs more than 19,000 employees in seven hospitals, fifty primary care clinics, thirty-seven specialty care clinics, and five urgent care clinics throughout the state. Fairview also provides home health services, hospice care, rehabilitative care, pharmacies, and multiple community-based healthcare initiatives. Fairview provides a comprehensive program of mental health services and treatment programs for many patients at its various hospitals and clinics. Fairview's University of Minnesota Medical Center has the largest behavioral program in the upper mid-west. The care Fairview and its employees provide also often includes treating patients with mental health issues and making sound civil commitment determinations.

Argument and Authorities

I. The standard of review on appeal is *de novo*.

This appeal from the summary judgment granted to Dr. Goering and Allina Hospital is subject to *de novo* review. Because the facts are undisputed, the sole question on appeal concerns whether the district court erred in its application of the law. *Mjolsness v. Riley*, 524 N.W.2d 528, 530 (Minn. Ct. App. 1994). Because this case concerns the interpretation of a statute, which presents a question of law, this Court's review is *de novo*. *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985).

II. The district court did not err in granting immunity to a psychiatrist's good faith decision not to place a patient on a 72-hour emergency hold.

Plaintiffs do not dispute that Dr. Goering and Allina acted in good faith. They do not suggest that Dr. Goering and Allina lacked "either actual knowledge or information thought by them to be reliable," as the immunity statute provides. Instead, Plaintiffs' sole argument challenging the district court's decision is their contention that, while immunity applies to a decision to place someone on an emergency 72-hour hold under the Act, no immunity whatsoever applies to a decision *not* to place someone on an emergency hold. Appellants' Brief at 13 (immunity under the Act "does not apply when the patient was never committed"). Neither the language of the Act nor Minnesota public policy is served by such a result.

Civil commitment, and the shorter holds that can be part of the commitment process, is one of the most intrusive actions the state can take in a person's life. "Civil

Commitment Court Related Issues and Discussion of a Consolidated Metro Area Mental Health Hospital," Ombudsman Discussion Paper Fall/Winter 2002 at 1, Office of the Ombudsman for Mental Health and Mental Retardation ("Ombudsman Report") (available at http://www.ombudmhdd.state.mn.us/cctrc/cctrcdiscussion.pdf). Civil commitment is one of the few ways an individual citizen can lose his or her liberty without having committed a crime. *Id.*; *see County of Hennepin v. Levine*, 345 N.W.2d 217, 219 (Minn. 1984) ("[i]nvoluntary civil commitment is one of the most extreme forms of intervention existing in our legal system"). Indeed, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Enberg v. Bonde*, 331 N.W.2d 731, 736 (Minn. 1983) (quotation omitted). Accordingly, in order to commit someone civilly, the state must meet a heightened burden of proof and establish the criteria for a civil commitment by a showing of clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2006). The requirements for commitment are interpreted strictly and the Act is construed in favor of those whose liberty interests are being deprived. *In re Civil Commitment of Raboin*, 704 N.W.2d 767, 769 (Minn. Ct. App. 2005).

Because civil commitment curtails individual liberty, the Legislature created a scheme that for decades has endeavored to provide for the treatment of mentally ill persons in the least restrictive manner. *In re Brown*, 640 N.W.2d 919, 924 (Minn. 2002); *In re Moll*, 347 N.W.2d 67, 70 (Minn. Ct. App. 1984) (commitment cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more

narrowly achieved). That well-established public policy will not be served by narrowly construing the immunity the Legislature granted.

A. History and workings of Minnesota's Civil Commitment Act

In 1982, the Legislature repealed the Minnesota Hospital and Commitment Act, Minn. Stat. §§ 253A.01-.23 in its entirety, and replaced it with the Minnesota Commitment Act of 1982, Minn. Stat. §§ 253B.01-.23. *See Enberg*, 331 N.W.2d at 732 n.1 (reviewing and rejecting arguments that pre-1982 statute was unconstitutional).[2] Other than renumbering, the language in the prior statute regarding immunity is identical to the current language. *Compare* Minn. Stat. § 253A.21, subd. 2 (1980) with Minn. Stat. § 253B.23, subd. 4 (2008). The grant of immunity is broad. *Mjolsness v. Riley*, 524 N.W.2d 528, 531 (Minn. Ct. App. 1994).

An emergency admission or emergency hold is a means of temporarily confining an individual in a secure facility. Minn. Stat. § 253B.05, subd. 1. A hold last 72 hours, not including weekends and holidays. *Id.*, subd. 3. An emergency hold is not a required step in the civil commitment process in Minnesota. Understanding the Minnesota Civil Commitment Process," National Alliance on Mental Illness Minnesota, at 7 (available at http://nami.beardog.net/AdvHTML_Upload/CivilCommitment.pdf). It is but one potential part of the civil commitment process. "An emergency hold does not necessarily result in starting the commitment process. It only serves as a way to assess the individual to determine if commitment is necessary." *Id.*

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[2] Since 1997, the chapter is now referred to as the Minnesota Commitment and Treatment Act. Minn. Stat. § 253B.01; Laws 1997, c. 217, art. 1, § 5.

Three different individuals or groups can initiate an emergency hold: (1) an examiner (*i.e.* a licensed physician, or doctoral level psychologist); (2) a peace or health officer; or, (3) a court. *Id.* at 7-8; Minn. Stat. § 253B.02, subds. 7-9, 11-12, and 16; § 253B.05, subds. 1-2; § 253B.045; §253B.07, subd. 2b. Health officers are defined to include various medical professionals, including licensed physicians, licensed psychologists, licensed social workers, registered nurses working in a hospital emergency room, psychiatric or public health nurses, and others. Peace officers are defined as sheriffs, state patrol officers, or local police officers. These individuals have contact with persons that may pose a danger to themselves or others because of mental health issues. The State of Minnesota has authorized peace and health officers, among others, to evaluate and assess individuals and, if appropriate, to admit or hold them temporarily on an emergency basis if they pose a danger to themselves or others.

B. The language of the Act supports the grant of immunity.

Although Plaintiffs contend that immunity applies only if civil commitment proceedings have been initiated, there is nothing in the language of the Act that requires this. Instead, the Act in plain language provides immunity to those who in good faith act pursuant to any provision of Chapter 253B. Plaintiffs fail to explain why immunity under the Act cannot apply. The grant of immunity under Minn. Stat. § 253B.23 is broad. *Mjolsness*, 524 N.W.2d at 531.

The Legislature extended immunity in at least two instances in Section 253B.23. Immunity is provided from liability, whether civil or criminal, for acting pursuant to the statute. Immunity is also provided for assisting, whether procedurally or physically, in

committing someone. A plain reading of the statute makes clear that acting pursuant to any provision in Chapter 253B is different from and broader than assisting, procedurally or physically, in the commitment of an individual. The latter phrase applies to extend immunity to those assisting in the actual commitment of someone. The former phrase, however, contains no limiting language that requires the actual commitment of someone – either attempted or successful. Instead, it applies to all parts of Chapter 253B, which encompasses more than just commitments. For example, Chapter 253B authorizes emergency holds by a variety of individuals (e.g. peace officers and medical professionals). It also authorizes judicial holds. Thus, the immunity under the chapter extends to all persons who act in good faith as to any part of the statute. It is not limited to just commitments. The statute simply does not say that immunity only applies if a patient is committed. The statute also does not read, as Plaintiffs would read it, that only those who take steps pursuant to the chapter to actually commit someone civilly are entitled to protection from civil or criminal liability.

Just as the statute's immunity applies regardless of whether a patient is actually committed, immunity also applies to good faith actions taken pursuant to Chapter 253B, regardless of whether a decision to place a patient on an emergency hold occurs. While Plaintiffs contend that no act took place under the statute, they ignore what Dr. Goering did. A health officer's assessment and evaluation as to whether a patient should be held is acting pursuant to a provision in the chapter, the provision that authorizes emergency holds. The task of considering whether an emergency hold is warranted is an act or

acting under the statute. Just because someone is not placed on an emergency hold does not mean that no acts under the chapter were taken.

C. Minnesota's public policy does not support a narrow application of the immunity the Legislature enacted.

Minnesota does not and should not have a policy of "if in doubt, order a hold." But Plaintiffs argue essentially for just such an outcome. Significantly, this case addresses a complex area of the law. It concerns the competing fundamental interests of individual liberty and the state's parens patriae power. *See Levine*, 345 N.W.2d at 219. Assessing someone for a possible 72-hour emergency hold is like the issue of a prisoner's supervised release, "a complex policy [choice] that is sometimes fraught with danger for innocent citizens, [but one that] remains a policy choice of the legislature that is protected from judicial second-guessing." *See Johnson v. State*, 553 N.W.2d 40, 48 (Minn. 1996) (government not liable to pay damages for the murder that a parolee committed while on supervised release). The state's compelling interest in a temporary *ex parte* detention of someone dangerous to themselves or others is justified only for the amount of time necessary to prepare for a hearing before a neutral judge. *State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 365 (Minn. 1980).

As noted, the Act emphasizes treatment of mentally ill individuals in the least restrictive manner. *Levine*, 345 N.W.2d at 219. Minnesota's public policy favors "open door treatment rather than custodial detention of the state's mentally ill." *Cairl v. State*, 323 N.W.2d 20, 23 n.3 (Minn. 1982) (statutory immunity applied to protect hospital from wrongful death action for releasing for a Christmas home visit a mentally retarded youth

with long history of pyromania; youth started a fire killing one person and seriously injuring another). Rejecting immunity and threatening to impose liability would undermine that state policy because it would encourage more restrictive judgments and undercut the liberty interests of patients. *See id.*; *cf. Johnson*, 553 N.W.2d at 47 (recognizing policy favoring open door treatment rather than custodial detention of the mentally ill).

MMA and Fairview note that a lawsuit against a medical professional for failing to order an emergency hold or to seek a civil commitment is not out of the ordinary, but is a real risk that medical professionals face. *See, e.g., Bouley v. Windschitl*, 2008 WL 73297, * 1 (Minn. Ct. App. Jan. 8, 2008); *Engle v. Hennepin County*, 412 N.W.2d 364, 365-66 (Minn. Ct. App. 1987) (social worker case aide "did not believe there was justification for a 72 hour emergency hold to be placed on Engle since he was not a serious threat to himself or others"). To avoid second-guessing and in light of this risk, the Legislature granted immunity to medical professionals when they act pursuant to the authority the Legislature granted them under the statute.

In *Bouley v. Windschitl*, this Court affirmed summary judgment for the respondents hospital and doctor against a claim that they "failed to evaluate [a] decedent adequately and admit her under a 72-hour hold under Minn. Stat. § 253B.05, subd. 2(a)." This Court declined to reach the issue of immunity, which had not been raised below, because it determined as a matter of law that there was no causation between any alleged negligence and the decedent's death more than 48 hours later. *Id.* ("any negligence in evaluating or releasing Bouley unsupervised on the night of March 18 could be a direct

cause of Bouley's death only if appellant could establish that Bouley died as a result of a delay in diagnosis or treatment occurring before she was delivered to her own mental-health provider on March 20;" "[f]urther, any causal link between respondents' conduct and Bouley's death is attenuated because of the nearly 48-hour delay between Bouley's release from the hospital and her accident"). Similarly, in *Engle*, this Court declined to reach the immunity issue under Chapter 253B because it had already determined that the defendants were entitled to discretionary immunity as a matter of law. *Engle*, 412 N.W.2d at 367.

Minnesota's public policy to treat patients in the least restrictive manner possible will not be served by creating an incentive to detain patients against their will, even for 72 hours. In rejecting the grant of immunity and allowing claims of this type to proceed, this Court will encourage health professionals to place emergency holds on individuals rather than risk suit and a jury's second-guessing. Minnesota should not, in effect, create a duty to commit. Just as there is no right to be committed, *Matter of Elam*, 393 N.W.2d 391, 393 (Minn. Ct. App. 1986), there should be no duty to commit an individual, or to place them on an emergency hold.

Encouraging more emergency holds also will exacerbate an already over-taxed mental health system. Minnesota currently faces a crisis in available mental health capacity. The scarce number of mental health beds is of particular concern in the Twin Cities metropolitan area. Ombudsman Discussion Paper at 1-2. To address the state-wide shortage, the Board of Trustees for the MMA in March 2008 adopted a strategic goal to increase the number of available psychiatric hospital beds in Minnesota. *See*

http://www.minnesotamedicine.com/PastIssues/April2008/MMANewsApril2008/tabid/2512/Default.aspx. A task force studying the issue noted that Minnesota has fewer beds per resident than the national average, 16.8 beds per 100,000 residents in Minnesota compared with 28.2 beds per 100,000 residents nationally. *Id.* Creating an incentive that encourages more emergency holds will decrease even further the number of beds available for in-patient treatment.

III. The Commitment Act is constitutional.

Plaintiffs have raised a belated assertion that the Act is unconstitutional, but apparently concede that the Act, on its face, is constitutional. Appellants' Brief at 24 ("[i]mmunity under the Commitment and Treatment Act, when interpreted narrowly, does not violate the Minnesota Constitution"). Instead, Plaintiffs argue that, as applied, the Act's immunity provision is somehow unconstitutional.

MMA and Fairview believe that the Act is constitutional, both on its face and as applied in this case. Statutes are presumed to be constitutional. *Wegan v. Village of Lexington*, 309 N.W.2d 273, 279 (Minn. 1981). Of significance, Minnesota courts have routinely upheld the constitutionality of Minnesota's commitment statutes. *E.g., Enberg*, 331 N.W.2d at 737-40; *Matter of Atkinson*, 443 N.W.2d 864, 866 (Minn. Ct. App. 1989). Plaintiffs' constitutionality challenge also ignores that courts should not exercise their authority to declare a statute unconstitutional unless absolutely necessary. *See id.*; *Medill v. State*, 477 N.W.2d 703, 704 (Minn. 1991). Plaintiffs have not established such an absolute necessity in this case and their challenge should be rejected.

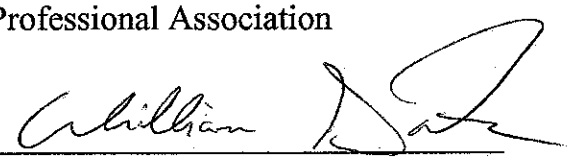
Plaintiffs also have not shown that they had a vested common-law right to pursue a wrongful death claim against a doctor and hospital for allegedly failing to place an emergency hold on an individual. The Legislature's decision to grant immunity as it did falls within its constitutional authority to decide matters of public policy. *See Johnson*, 553 N.W.2d at 43. Because the Legislature properly exercised its authority, this Court should reject Plaintiffs' constitutional challenge.

Conclusion

For all the foregoing reasons, the district court's decision applying the immunity the Legislature granted in Chapter 253B was correct and the decision should be affirmed.

Dated: December 9, 2008

Lind, Jensen, Sullivan & Peterson
A Professional Association



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