

NO. A08-1478

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.

APPELLANTS' REPLY BRIEF

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LEGAL ARGUMENT

I. ABSENT A COMMITMENT, RESPONDENTS LACK LEGAL STANDING TO CLAIM EITHER STATUTORY IMMUNITY UNDER THE ACT OR COMMON-LAW QUASI-JUDICIAL IMMUNITY.

Respondent Allina Health System d/b/a United Hospital, and Dr. Goering, in their responsive memorandum (page 11) rely upon *Meyer v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) when they claim “Courts apply quasi-judicial immunity to persons who are an integral part of the judicial process. ([R]ecognizing that because judicial immunity protects judicial process, immunity “extends to persons who are integral parts of that process.)” The only act of the respondents that could possibly be considered an “integral part” of the judicial process was a commitment.

The reason immunity is offered to physicians and others involved in a commitment process is because they are acting on behalf of the government to fulfill its duty to protect its citizens. They only act on behalf of the government when they actually utilize the authority under the Act. Respondents claim a right to immunity when no commitment occurred. This position cannot be reconciled with existing Minnesota law. Until the authority is exercised, the protection (either statutory or common-law) does not attach and they have no legal right to seek protection from a common-law medical negligence wrongful death claim. This is a “legal standing” issue or at least analogous to a “legal standing” issue and requires analysis of whether the respondents are entitled, as a matter of law, to the benefit of a legislative enactment.

Standing may be raised at any time. *Cochrane v. Tudor Oaks Condominium Project*, 529 N.W.2d 429, 433 (Minn. App. 1995) review denied (May 31, 1995). When the facts are undisputed, standing is a legal issue that the Court of Appeals may determine. *Professional Management Associates, Inc., v. Coss*, 598 N.W.2d 406, 412 (Minn. App. 1999). The legal issue of standing is reviewed de novo. *Peterson v. Johnson*, 733 N.W.2d 502, 505 (Minn. App. 2007).

Standing is a legal requirement that a party have a sufficient stake in a justiciable controversy to seek relief from a court. *Lorix v. Crompton Corporation*, 736 N.W.2d 619, 624 (Minn. 2007). The primary goal of the standing requirement is to ensure that the factual and legal issues before the courts will be vigorously and adequately presented. *Id.* Standing is acquired two ways: either the party pursuing the claim has suffered some “injury-in-fact” or the party pursuing the claim is the beneficiary of some legislative enactment granting standing. *Id.* An injury-in-fact is a concrete and particularized invasion of a legally protected interest. *Id.*

A. Without a commitment, statutory immunity does not attach and respondents have no legal standing to seek such protection.

Here the respondents brought summary judgment motions claiming they were entitled to immunity under the Commitment and Treatment Act even though no commitment had taken place. Their claim of a legally protected interest in the immunity offered by the statute was not legally cognizable until a commitment or

procedural steps of a commitment was accomplished. The facts here do not support their claim. Respondents do not have a protected right to the immunity under the Act until a commitment takes place. Respondents have not suffered an injury-in-fact and as a matter of law are not entitled to the benefits of statutory immunity when no commitment took place.

B. Common-law quasi-judicial immunity protection is not available without a commitment.

The respondents are all private individuals or corporations. They are asking this court to extend quasi-judicial immunity protection when no judicial or quasi-judicial act was performed. The interest that the respondents seek to protect (immunity from a professional negligence claim) is not within the zone of interests meant to be regulated by the statutory immunity in question.

The respondents were not court-appointed by order. Absent a commitment, they were not serving in either a judicial or quasi-judicial capacity in a judicial proceeding. Absent a commitment, the respondents were not a substitute decision-maker for the court. Absent a commitment, they were not an “integral part” of the judicial process. Absent a commitment, every act of the respondents was within the physician-patient relationship that Ryan Miller could have terminated at will. The zone of interest that was meant to be protected by the immunity (either statutory or common-law), required a commitment procedure.

II. CLAIMS UNDER THE ACT AND COMMON-LAW MEDICAL NEGLIGENCE WRONGFUL DEATH CLAIMS ARE SEPARATE AND DISTINCT.

Respondent Allina Health System d/b/a United Hospital, and Dr. Goering, in their responsive memorandum (page 17) claim the appellants “cannot legally maintain a common law claim against the hospital defendants.”

A. Minnesota law does not bar a statutory claim that parallels a common-law claim. The two claims are separate and distinct.

In this case there are two legal remedies for the same wrongful conduct. One of those remedies, arguably in theory, may have been barred by the immunity in the Commitment and Treatment Act (the Act) if the respondents had indeed acted in good faith when implementing a commitment. The other remedy is a common-law remedy. The common-law remedy remains viable even if the statutory claim were barred. In Minnesota, parallel actions (statutory and common-law) can be maintained. *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 377 (Minn. 1990). In *Wirig*, an employee sued her employer for sexual harassment under the Minnesota Human Rights Act (MHRA), common-law battery, and defamation. The Minnesota Supreme Court addressed the question of whether a plaintiff can maintain both a statutory cause of action for sexual harassment and a common law cause of action for battery when both claims arise from the same set of operative facts. It is presumed that statutory law is consistent with common-law. *Id.* If a statutory enactment is to abrogate common law, the abrogation must be by express wording or necessary implication. *Id.*

Nothing in the immunity clause of the Commitment and Treatment Act expressly abrogates a common-law medical negligence wrongful death claim. The contrary is true. The immunity clause expressly limits the immunity to the acts pursuant to the Act itself and says nothing about common-law medical negligence wrongful death claims.

B. There is no preemption of common-law by statute where separate duties are owed.

There is no preemption where separate duties are owed under a statute and under common law. *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 744-45 (Minn. 1997). The appellants' common-law claims however, must be founded on a duty of care independent from the duty owed under the statute. *Id.*

The Commitment and Treatment Act establishes that those involved in a commitment have a duty to act in "good faith." As long as the acts performed pursuant to the Commitment Chapter are done in good faith, the actors are immune from a statutory claim arising out of the Act. The "good faith" standard would apply if a claim had been brought under The Act.

The appellants' medical malpractice wrongful death claims however, are brought under the common-law which requires application of a different duty standard. A person providing professional services is under "a duty to exercise such care, skill, and diligence as persons in that profession ordinarily exercise under like circumstances." *Blatz v. Allina Health Services*, 622 N.W.2d 376, 384 (Minn. App. 2001). The duty required in the common-law professional negligence

claims is independent of the “good faith” duty required under the Act. Appellants’ common-law claims are separate and distinct from a statutory claim brought under the Act. Appellants have never claimed breach of the duty to act in good faith which is the standard of care that would enable the claim under the Act.

Not only are there separate duties owed under these parallel claims, the duty that is owed is to different parties. The duty to act in good faith is a duty that the respondents owed to the person being committed. The duty under common-law to exercise such care, skill, and diligence as persons in that profession ordinarily exercise under like circumstances is a duty the respondents owed to both Ryan Miller and those who would foreseeably be harmed if the psychosis was not properly treated with admission.¹

C. The availability of the immunity depends on the duty being discharged by the respondents.

The duty that is being discharged when a private practice physician places a patient on an emergency hold under the commitment chapter is the state’s duty to protect its citizens from dangerous persons. See *County of Hennepin v. Levine*, 345 N.W.2d 217, 219 (Minn. 1984). Absent a commitment, the duty being discharged by the respondents was not the duty that would qualify them for immunity under the Act. Private practitioners cannot enjoy immunity under the Commitment Act until those acting pursuant to the chapter are serving the state’s

¹ The trial court denied the respondents’ Motions for Summary Judgment based upon duty. That ruling is not the subject of this appeal. (A-195).

interest in its duty to protect its citizens. Immunity only attaches when the respondents were acting to fulfill the state's duty to protect its citizens.

III. THE *ENGLE* DECISION IS NOT DICTA.

Respondent Minnesota Epilepsy Group, Dickens, and Penovich, in their responsive memorandum claim that the ruling by this court in *Engle* was dicta. (*Respondent Minnesota Epilepsy Group, Dickens, and Penovich's brief.* (page 23 -24)).

In *Engle*, the plaintiff brought a medical negligence wrongful death claim against Hennepin County. *Engle v. Hennepin County*, 412 N.W.2d 364 (Minn. App. 1987). The county moved for summary judgment on the basis of immunity granted under either The Commitment Act, Minn. Stat. § 253B.23 (1982), or Minn. Stat. § 466.03, subd. 6 (1982), protecting a municipality from liability for its discretionary acts. Both legal theories were presented at the trial court and appellate court levels. This court ruled "Because *Engle* was never committed, we do not need to discuss the Minnesota Commitment Act, Minn. Stat. §253B.23." It was not (as the Amicus Curiae claims) a matter of this court declining "to reach the immunity issue under Chapter 253B because it had already determined that the respondents were entitled to discretionary immunity as a matter of law." *Brief of Amicus Curiae Minnesota Medical Association and Fairview Health Services*, (page 10). An explicit ruling without discussion, on one of two discreet legal issues presented, briefed, and argued is not dictum.

Where two or more issues are before the court and are argued by counsel, and the court places its decision on both even though a decision on one of the issues might have been sufficient to dispose of the case, the decision is equally binding as to both issues. *State ex. rel. Foster v. Naftalin*, 74 N.W.2d 249, 266 (Minn. 1956). Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other. *Id.* Whenever a question fairly arises in the course of the proceeding and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense be called mere dictum. *Id.* It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular consideration of the cause, something else was found in the end which disposed of the whole matter. In *Foster*, the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended. *Id.* The question actually before the court and argued by counsel are thoroughly investigated, deliberately considered with care, and when so investigated and considered, a decision on those issues is entitled to respect in future cases. *Id.*

Even if the *Engle* ruling was dictum, it was judicial dictum and “is entitled to considerable weight and should not be lightly disregarded.” *Brink v. Smith*

Companies Construction, Inc., 703 N.W.2d 871, 877 (Minn. App. 2005). Dictum is divided into two distinctive categories: judicial dictum and obiter dictum. *Id.* Judicial dictum involves a court's expression of its opinion on a question directly involved and argued by counsel though not entirely necessary to the decision *Id.* Also, judicial dictum is an expression emanating from the judicial conscience and the responsibilities that go with it. *Id. citing State v. Rainer*, 103 N.W. 2d 389, 396 (Minn. 1960). If the opinion offered by the court bears directly upon the theory upon which the decision proceeded and upon an issue of law it is treated as decisive. *Id.*

The *Engle* decision is precedent in Minnesota.

IV. RESPONDENTS' BRIEFS ARE NON-RESPONSIVE TO APPELLANTS' APPEAL AND MISSTATE APPELLANTS' APPELLATE ARGUMENTS.

A. Appellants have never and do not now claim the Commitment and Treatment Act is Unconstitutional.

It is Appellants' position that the immunity under the Commitment and Treatment Act, when interpreted narrowly, as required by Minnesota law, does not violate the Minnesota Constitution. (*Appellants' Appellate Brief* page 24). The violation of appellants' constitutional right did not occur until the trial court issued the erroneous ruling. The ruling itself violates appellants' constitutional right to redress, not the statute.

The trial court's ruling, not only violated appellants' constitutional rights, it dictated new common-law for Minnesota. In Minnesota, it is the province of the legislature to modify common-law. *Larson v. Wasemiller*, 738 N.W. 2d 300, 303

(Minn. 2007). The Act expressly limited the immunity to acts performed pursuant to The Act and is silent to common-law claims. When a question of statutory construction involves a failure of expression rather than an ambiguity of expression, courts are not free to substitute amendment for construction and thereby supply the omission of the legislature. *Id.*

Minnesota has long recognized common-law claims brought against private practitioners for commitment related issues. There is no case law where Minnesota courts have granted immunity for a common-law claim against a private party involving a failure to commit a dangerous person. The only case law where a health care provider claimed immunity under the Commitment and Treatment Act was brought by Respondent Minnesota Epilepsy Group, Dickens, and Penovich's counsel. *Bouley v. Windschitl*, 2008 WL 73297 (Minn. Ct. App. Jan. 8, 2008). *Amici. A.1* This court ruled, "But because we affirm the district court's summary judgment on its stated basis of lack of causation, we need not consider whether an immunity defense applies to bar appellant's claim." *Id.*

None of the respondents were able to provide case law supporting application of immunity under The Act for a common-law claim against a private practitioner when no commitment occurred.

When the trial court denied a common-law medical negligence wrongful death claim because of immunity under the Commitment and Treatment Act, it dictated new restrictions on long-standing Minnesota common-law. In doing so,

the trial court invaded the domain of the Minnesota legislature and the ruling must not stand.

The constitutional right to redress has been protected even when a common-law claim was brought against municipalities. In these cases, the courts have determined that operational decisions performed negligently are not protected under municipal immunity. *Terwilliger v. Hennepin County*, 561 N.W.2d 909 (Minn. 1997). The legislature did not intend that immunity for performance of government functions would “swallow” the general rule providing for recovery for injuries negligently inflicted in the performance of government functions. *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn. 1988). There is a distinction between policy making and the negligent implementation of that policy. The courts have addressed this similar issue involving firefighters. In *Invest Cast v. City of Blaine*, 471 N.W.2d 368 (Minn. App. 1991), this court ruled that the decision on how many firefighters and trucks to send to a fire is a policy decision protected by discretionary immunity. *Id.* at 371. How the firefighters actually fight the fire is not protected. *Id.* Because the methods used in fighting the fire raised a material issue of fact as to whether the fire department exercised reasonable care in fighting the fire, the case was remanded back to the district court for trial. *Id.* The right to redress must be given the full weight of a constitutional mandate.

B. Appellants have never and do not now claim the respondents acted in bad faith.

Good faith is an “honest belief, the absence of malice and the absence of design to defraud or seek an unconscionable advantage.” *Rahman v. Mayo Clinic*, 578 N.W. 2d 802, 805 (Minn. App. 1998). Although the standard under The Commitment and Treatment Act is a duty to act in “good faith” standard, the respondents, in their memorandums, erroneously argue a “bad faith” standard and then compound the confusion by commingling the concepts of “negligence” and “bad faith.”

Appellants have brought a professional negligence claim. Negligence is proved by measuring one’s conduct against an objective standard of reasonable care or competence. *Florenzano v. Olson*, 387 N.W. 2d 168, 173 (Minn. 1986). Bad faith is “dishonesty of belief or purpose.” *Black’s Law Dictionary* 134 (7th ed. 1999). “It is clear that bad faith is not equivalent to negligence.” *Prichard Brothers, Inc., v. The Grady Company*, 436 N.W.2d 460, 466 (Minn. App, 1989). Bad faith requires a fraudulent intent. *Id.* Negligence does not rise to the level of bad faith. *Id.*

Appellants have never claimed the respondents acted in bad faith and are not required to establish the element of bad faith. Appellants have never claimed the respondents failed to act in good faith and are not required to establish such. Appellants are required to show a departure from accepted standards of medical practice which is “a duty to exercise such care, skill, and diligence as persons in that profession ordinarily exercise under like circumstances.” Respondents’

argument further establishes the separate and distinct nature of claims brought under the Act and common-law claims.

C. Appellants have never and do not now claim the respondents failed to warn of danger.

Appellants never presented nor argued a “failure to warn” claim. Appellants were very aware of the danger involved and that is why they sought care for Ryan Miller from the respondents. The “failure to warn” issue was resolved at the summary judgment hearing before the trial court:

The Court: ...He says he didn't have – you don't have a – a duty to warn claim. It looks like you don't in your Complaint. Do you think you do?

Mr. Dornik: No.

The Court: Okay. Go ahead.

Mr. Dornik: We have a duty to control claim and that's –

The Court: Yeah. All right.

Mr. Dornik: – you know, duty to treat a psychotic patient is a duty to control.

(A-240-A-241).

D. Appellants have never and do not now claim the respondents were negligent in anyway related to a voluntary admission.

The negligence of the respondents is related to the discharge of Ryan Miller, not his admission to the hospital. The statute says nothing about

discharges. The negligence was not in what the respondents did – the negligence claim rests in what the respondents did not do. The precise conduct being challenged is the discharge and any argument referencing an admission to the hospital is misplaced.

E. Appellants have never and do not now claim the respondents' negligent acts were limited to the failure to commit Ryan Miller.

Respondents were negligent at every stage of the care and treatment of Ryan Miller, including the initial evaluation, assessment, diagnosis, planning, implementation, evaluation and re-evaluation stages. (See Plaintiff Expert Affidavits (A-129 - A-145) Minn. Stat 253B.23 subd. 4 does not provide immunity for any of these claims.

F. Appellants' expert affidavit is not at issue in this appeal.

The trial court refused to hear arguments and later ruled against Respondents' motions to dismiss based on inadequate expert disclosures. Respondent's agreed to the ruling at the time of the hearing and never appealed the trial court's ruling. Despite this, their responsive memorandum claims they are entitled to dismissal on the inadequate expert affidavits issue because the district court "never ruled on this issue." (*Respondent Allina Health System d/b/a United Hospital, and Dr. Goering's Responsive Memorandum. Page 21*). This misstates the facts.

Court: The Plaintiff argues that – or to take maybe the easiest issue first, and that is the expert witness affidavits, I thought the

Plaintiff had some merit in saying, hey, we've got to have time to correct it. And maybe we can just agree that that – we won't get into that, one today because I think they do have a chance – they need to have a chance to correct it. And we can talk about procedurally what we need to do.

(A-203 lines 10-18).

The parties then came to an agreement.

Court: And the parties agree that the Plaintiff should have time to seek to cure their expert affidavits if in fact they believe there is an issue.

(A-203 line 24 – A-204 Line 1).

Contrary to Respondent Allina Health System d/b/a United Hospital, and Dr. Goering's claim, the trial court has ruled on the expert affidavit issue. (A-195) The ruling (which ostensibly applies to these Respondents) was consistent with the agreement of all the parties at the time of the hearing. Respondents have not appealed the trial court's ruling and cannot now assert an appeal in a responsive memorandum.

CONCLUSION

The Appellants respectfully request that the Minnesota Court of Appeals reverse the judgment entered in favor of the respondents in regard to immunity

under the Commitment and Treatment Act and remand the case to the Ramsey County District Court for further proceedings. It is requested that this Court hold that immunity under the Commitment and Treatment Act only applies when statutory procedural steps of a commitment occur and that Appellants' common-law medical negligence action is separate, distinct, and not precluded by immunity under the Commitment and Treatment Act. The Appellants also request costs and fees in connection with this appeal.

Respectfully submitted,

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NO. A08-1478

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,**

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vs.

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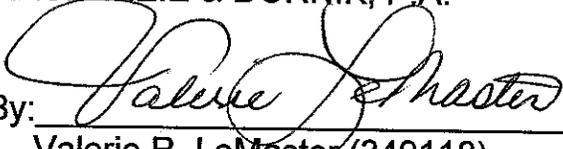
Respondents.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional font. The length of this brief is 368 lines or 3,650 words. This brief was prepared using Microsoft Word, Version 2003.

DATED: 12-18-08

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