

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' BRIEF AND APPENDIX

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STATEMENT OF THE LEGAL ISSUES

I. CAN IMMUNITY UNDER THE CIVIL COMMITMENT AND TREATMENT ACT BE GRANTED DESPITE NO INITIATION OF A COMMITMENT?

Trial court granted summary judgment on all counts for defendant in common-law medical malpractice wrongful death action despite no commitment.

Apposite Authorities:

Minn. Stat. §253B.23 Subd. 4

Minn. Stat. § 253B.05

Engle v. Hennepin County, 412 N.W.2d 364 (Minn. App. 1987). *Rev. denied Nov. 18, 1987.*

Hoppe v. Lapperich, 224 Minn. 224, 28 N.W.2d 780 (Minn. 1947).

II. AS A MATTER OF LAW DOES IMMUNITY UNDER THE COMMITMENT AND TREATMENT ACT PRECLUDE A SEPARATE AND DISTINCT COMMON-LAW MEDICAL NEGLIGENCE WRONGFUL DEATH CLAIM?

Trial court granted summary judgment on all counts for defendant in common-law medical malpractice wrongful death action relying solely on immunity under the Commitment and Treatment Act.

Apposite Authorities:

Bruegger v. Faribault County Sheriff's Department, 497 N.W. 2d 260 (Minn. 1993).

Becker v. Mayo Foundation, 737 N.W.2d 200 (Minn. 2007).

III. DID TRIAL COURT ERR AS A MATTER OF LAW IN INTERPRETING STATUTE PRECLUDES A COMMON-LAW MEDICAL NEGLIGENCE WRONGFUL DEATH CLAIM?

Trial court interpreted statute offering immunity for acts pursuant to Chapter 253B to preclude a common-law medical negligence wrongful death claim.

Apposite Authorities:

Minn. Stat. §253B.23 Subd. 4.

Gomon v. Northland Family Physicians, Ltd, 645 N.W. 2d 413 (Minn. 2002).

Minn. Stat. 645.16 (2000).

Angell v. Hennepin County Regional Rail Authority, 578 N.W.2d 343 (Minn. 1998).

IV. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN FINDING PUBLIC POLICY REQUIRED GRANTING IMMUNITY FOR DAY TO DAY TREATMENT DECISIONS?

Trial court determined public policy in Minnesota required providing blanket and absolute immunity for common-law medical negligence wrongful death liability based upon immunity offered under the Commitment and Treatment Act.

Apposite Authorities:

Tenwilliger v. Hennepin County, 561 N.W.2d 909 (Minn. 1997).

V. DID TRIAL COURT'S DENIAL OF A COMMON-LAW MEDICAL NEGLIGENCE WRONGFUL DEATH CLAIM FOR INJURIES VIOLATE PLAINTIFFS' CONSTITUTIONAL RIGHT TO REDRESS?

Trial court granted summary judgment in common-law medical negligence wrongful death claim without providing alternative means of redress for injuries.

Apposite Authorities:

Minn. Const. Art. 1 § 8.

Hickman v. Group Health Plan, Inc., et al., 396 N.W.2d 10 (Minn. 1986).

Hoeff v. Hennepin County, 754 N.W.2d 717 (Minn. App. 2008).

STATEMENT OF THE CASE

This is a common-law medical negligence wrongful death action. Plaintiffs allege the defendants departed from accepted standards of medical practice while providing medical care to Ryan Miller in late July and early August of 2003. Ryan Miller was brought to his treating neurologist after a change in his seizure medication regime triggered an acute change in his behavior. He was admitted to United Hospital on July 28, 2003, and was diagnosed with "acute psychosis." Following admission, the neurologist from Minnesota Epilepsy Group requested a psychiatric consultation from Respondent Goering to evaluate for possible transfer to the psychiatric unit. Despite demonstration of dangerous behavior, the psychiatrist and neurologist discharged Ryan Miller on July 29, 2003. Ryan Miller was discharged without any discharge planning, referral to psychiatrist, or plan for monitoring or follow-up. In the ensuing two weeks, Ryan Miller's parents contacted the neurology clinic multiple times with concerns regarding ongoing symptoms and concerns about the treatment regime. On August 12, 2003, Ryan Miller shot and killed his mother and shot and injured his father and step-mother.

Plaintiffs' common-law medical negligence wrongful death suit was commenced in July of 2006.

Defendants moved for summary judgment based upon immunity protection under The Commitment and Treatment Act (*Minn. Stat.* Chapter 253B). Motions were heard on February 27th, 2008 by Ramsey County District Court Judge Kathleen Gearin.

On April 28, 2008, summary judgment was granted for defendants Minnesota Epilepsy Group, P.A., Deanna L. Dickens, MD., and Patricia E. Penovich, MD, for the

claims of negligence made for failure to place a 72-hour hold on Ryan Miller pursuant to Minn. Stat. 253B. Their motion as to duty and the other negligence claims was denied without analysis. No judgment was entered for these defendants.

On April 28, 2008, summary judgment was granted on all claims asserted by Allina Health System, d/b/a United Hospital, and Paul Goering, M.D. Judgment for these defendants was entered on July 10, 2008. In granting the Respondents' motion for summary judgment, the court relied solely upon the immunity granted under 253B.23 Subd. 4. This interlocutory appeal is a result of that ruling.

STATEMENT OF THE FACTS

Ryan Miller had a history of seizures since childhood. A temporal lobectomy was performed in 1988. (Dickens History and Physical p.1) **(A-104)** The neurologists at Minnesota Epilepsy Group treated Ryan's seizure disorder for many years with good results. **(A-103)**. In June of 2003, his seizure medication was changed. **(A-106)**

In July of 2003, Ryan Miller experienced an acute change in his behavior. **(A-106)** On July 28, 2003 Ryan's mother contacted his treating neurologists at Minnesota Epilepsy Group stating:

* Bizarre behavior- obsessed with typing stories about spirits talking with him & God told him he didn't have epilepsy.... Parents want full eval. Patient agreeable to testing i.e. EEG, MRI, neuropsych.... *WANTS ADMITTED NOW.

(Minnesota Epilepsy Group Clinic Telephone Log, p. 2) **(A-99)**.

Ryan was admitted to United Hospital on July 28, 2003. Upon admission to United, Ryan was evaluated by Defendant Dickens of the Minnesota Epilepsy Group. Defendant Dickens documented that Ryan was:

...hearing voices which were spirits of both living and dead individuals. He also reports contact with deceased individuals such as Marilyn Monroe. Many of these auditory hallucinations focus on military campaigns in war type settings. He is described as being obsessed with typing stories that he hears and the patient reports he is doing this to make money.

(Dickens History and Physical p.1) **(A-104)**. The writings, referenced above, were typed by Ryan and though obviously influenced by the psychosis, were replete with references to Ryan shooting his family members, death in general, guns, and animosity towards his family. (Writings by Ryan Miller)**(A-146 to A-154)**.

Some of the writings were made to appear by Ryan as though they were written by his mother and sister. The writings included statements regarding Ryan murdering his family members:

I feel to say I was a very little girl when dad died I never felt my brother would be so cruel to murder all of us. (A-151) Then you got all psychotic and murdered us we felt very sorry I was a victom of your soul. (A-152). I felt we were very in touch and was very very in love with our family I saw this when ryan was with me on meds and never answered I felt he was killing my soul but in reality he was healing it for me. I want to thank you kids for curing my soul and never being a jerk in the after life. (A-152).Yes ryan we were buried on the farm like an old family would be. (A-152).

There were also references to death in general:

She's your sister you are her brother its family that matters and yes she was gona die but she knows your gona be here forever so will she. (A-152). Our parents lived into their 100's from what ryan did for us. (A-152). I was wondering why he quit crying when mom said he was killing himself and I had no idea why. (A-150). I got a past life freed by my brother who figured out how lost souls are trapped. I felt pain in him as my parents in our past lives harassed him. (A-151). We had no idea we were dead till my brother figured out a way to free souls. (A-151). I went to my mom and told her she was with her son now. Yes shes passed. I want to tell you she started to cry too. It was hard enough for her not to cry as a mom that lost her son but to know she was with him again cause of a nobody. (A-151).

The writings referenced to guns:

I feel I should say you will also have a gun from me I was issued the Thompson. And yes it will be the sub machinegun. (A-146). I feel you deserve that Thompson and all the ammo. Id. we got a kick out of the screaming you heard. (A-146). I had am M1 like your grandfather (A-146). I feel I owe you a gun myself. It is another M1 garand and yes you are immune to that too. (A-147). I felt honored to be your soldier and to train all the others. I feel you deserve more also but you will get the M1 I was issued also. (A-147). I was a cook and I had a M1 carbine as mine. You heard right from that guy the browings M1's and the 1911's were good although he left that one out. (A-148).

There were references to animosity towards his father and putting a "hit" on family members:

I feel I should let you know they are leaving cause your father is annoying them to hell which is where they and you are right now. **(A-148)**. I know you hate those 2 families and I don't disagree it was wrong to put a hit on them though and you saw that so don't worry about doing something wrong you know where to shoot as you just proved. **(A-148)**.

Defendant Dickens diagnosed "an acute psychosis with medication change as the only potential correlate." (Dickens History and Physical) **(A-106)**. The standard Minnesota Epilepsy Group admission orders were signed by Defendant Dickens. She also ordered "psych consult today evaluate for transfer secondary to psychosis." (Hospital Physician's Orders) **(A-110)**. A video EEG was also ordered.

On July 29th, Defendant Goering, a psychiatrist employed by Defendant United Hospital, performed the requested consultation for possible transfer to the psychiatric unit. Defendant Goering documented:

I do not see the patient as holdable given the absence of imminent risk. However, I am concerned about his long term risk. He is moderately psychotic and he does have poor insight. As well, it appears that at least once he responded to hallucination by stopping his medications. If he develops more dangerous behavior, certainly the consideration of admitting him under a 72-hour hold would be reasonable. ... At this time, though, I do not see the patient as psychiatrically holdable.

(Goering Consultation Report, p. 3) **(A-114)**.

Dr. Goering charted:

He denies that the letters that appear in his chart are his. In fact, we reviewed them together. "My mom and dad wrote those." ...The patient states, "I think my mother and father need to see a psychiatrist."... He declines to allow me to speak with his mother at all.

(Goering Consultation Report, p. 2) **(A-113)**. Dr. Goering never spoke with either of Ryan's parents after talking with Ryan. (Goering Depo., pp. 12-13) **(A-159 to A-160)**.

On July 29th at 13:15, Ryan developed the "more dangerous behavior" defendant Goering had feared. The video EEG shows, Ryan, without any warning or provocation,

pulling off the EEG wires and abruptly leaving the room. (Penovich EEG Report) (A-155). The nurse documented the circumstances:

Patient not responding to nurse and mother while trying to give noon pills – finally took pills. When nurse and mom left the room within 5 minutes, patient was standing in circle, had pulled off EEG wires and pulled I.V. out – became physical with staff resisting attempts to bring back to room – RPR called. Patient ran down the stairs & out front door before tackled by security – I.V. site bleeding- patient transferred to ICU after incident – mom aware of transfer.

(Patient Care Summary) (A-117).

Another nurse testified that Ryan was bleeding from the I.V. site and physically pushed her aside and left the nursing unit. (Sarah Engkjer Deposition pp. 49-50) (A-118). She then followed him down the stairwell, through the main lobby and out the entrance of the hospital. (A-118). Throughout this time, Ryan was yelling “fuck off” and “fuck you.” (A-118). Two or three security personnel and possibly other staff caught up with Ryan outside the hospital. (A-119). They physically grabbed Ryan by the arms and wrestled him to the ground and held him there. (A-119). They used their bodies to restrain him. (A-120).

Ryan resisted and was spitting at them. He tried to strike and kick them and struggled to free his arms. (A-120). This episode took 5-7 minutes until they were able to place him on a gurney and lock him in five-point restraints. (A-120). Ryan was then taken up to the ICU. (Sarah Engkjer Deposition Pages 50-62) (A-118 to A-121).

Once Ryan arrived in the ICU at 1430, he was restrained. It was determined that he was a threat to himself and others. (Restraint/Seclusion Documentation Care Plan) (A-123). Despite this determination, no emergency hold was initiated nor was there a reevaluation by a psychiatrist. While in restraints, Ryan continued to spit, and yell

profanities and struggle to get free of the restraints. Again, while in this angry and violent state of mind, Ryan expressed anger towards his mother, blaming her for everything. (Sarah Engkjer Deposition Pages 66 -67) **(A-122)**.

Defendant Dickens telephoned defendant Goering with the updated information regarding the events that transpired. A decision was made to discharge Ryan. (Dickens Deposition Testimony pp. 99-100) **(A-122)**.

Very shortly thereafter, at 1620, Defendant Dickens ordered that the restraints be discontinued. (Physician's Orders) **(A-110)**. At 1630, Ryan signed the Discharge Instructions and was discharged home. No referral to a psychiatrist was made. Prior to discharge, Risperdal, an antipsychotic medication, was ordered. (Discharge Instructions) **(A-124)**. Additionally, because of Ryan Miller's violent propensities, Dr. Dickens instructed the family to remove potentially harmful objects/weapons from the home while Ryan was exhibiting limited judgment and insight. (Discharge Summary from United Hospital p. 2) **(A-157)**.

Ryan was taken home by his father. At some point in time, defendant Dickens updated defendant Penovich on the events that transpired during the hospitalization. (Dickens Deposition Testimony p. 134) **(A-128)**.

In the subsequent days, Ryan's parents contacted the clinic with multiple concerns. On July 31, 2003, Ryan's mother contacted the clinic to get prescriptions for the medications that had been ordered at discharge from the hospital. (Minnesota Epilepsy Group Telephone Log, p. 3) **(A-100)**. On August 6, 2003, Ryan's mother called the clinic with concerns regarding medications. **(A-102)**. On August 11, 2003, Ryan's father, Randy Miller, called the clinic with concerns regarding Ryan's medications. Mr.

Miller also reminded the clinic that Ryan needed a referral to a psychiatrist. He was told, "Must have [psychiatrist] change medications. If hearing voices, do not change till then. Not safe." (A-103). Still there was no referral or suggestion that Ryan should be brought in for reevaluation. It was Ryan's father's understanding that the clinic was working on trying to find a psychiatrist to refer Ryan to for care. (Randolph Miller deposition p.144-148) (A-125 to A-126). On August 12, 2003 Ryan Miller, without provocation, shot and killed his mother, Deborah Miller. Randolph Miller, Ryan's father and Laurie Miller, Ryan's step mother, were also shot and injured by Ryan. This medical negligence wrongful death suit has been brought seeking damages for those injuries.

Plaintiffs claim defendant Goering failed to properly and thoroughly assess Ryan for the presence or absence of dangerousness, failed to recognize and act upon ample evidence of the potential for imminent danger, failed to make a good faith effort to gather information from sources that had insight into Ryan Miller's behavior, failed to reconcile the conflicting data, failed to admit Ryan under a 72-hour hold, failed to recommend an appropriate dose of antipsychotic medication, and failed to do an additional assessment when an acutely psychotic patient became unmanageable. (Menahem Krakowski, M.D. Expert Affidavit) (A-129 to A-140). and (Jordan L. Holtzman, M.D. Expert Affidavit) (A-141 to A-145).

Plaintiffs claim defendant Dickens failed to properly assess, document, and treat an acutely psychotic patient, failed to appropriately prescribe antipsychotic medication, failed to observe the effects of the medication, failed to reevaluate, failed to perform proper discharge planning, and failed to refer to a specific psychiatrist with a detailed

letter. (Krakowski Expert Affidavit) **(A-129 to A-140)**. and (Holtzman Expert Affidavit) **(A-141 to A-145)**.

Plaintiffs claim defendant Penovich failed to appropriately prescribe antipsychotic medication, failed to refer to a specific psychiatrist with a detailed letter, failed to order adequate follow-up once the medication was initiated, and failed to perform an appropriate reassessment when family members called with questions and concerns surrounding the medication. (Krakowski Expert Affidavit) **(A-129 to A-140)**. and (Holtzman Expert Affidavit) **(A-141 to A-145)**. Minn. Stat 253B.23 subd. 4 does not provide immunity for any of these claims.

Partial discovery was conducted by the parties and all defendants brought motions for summary judgments. The respondents moved for summary judgment based in part upon immunity granted under the Commitment and Treatment Act. The trial court relied solely upon public policy reasoning for granting the Respondent's summary judgment motion.

Part of the negligence claims asserted against the defendants by the plaintiff involve the fact that neither Dr. Goering nor Dr. Dickens placed a 72-hour hold on Ryan during his July 28-29 hospitalization at United. The Court agrees with the argument submitted by the attorneys for United Hospital and Dr. Goering regarding Minn. Stat. 253B.23 subd. 4. This statute grants immunity to physicians who determine in good faith based upon their actual knowledge and the information they have available that they cannot place an emergency hold on a person because that person does not meet the requirement of Minn. Stat. 253B.95. If the Court were to interpret the statute in the way that the plaintiffs want it to be interpreted, it would result in encouraging physicians to make their medical decisions based on fear of legal liability and not upon their good faith judgment. Dr. Goering and Dr. Dickens believed that they could not, in good faith, make Ryan stay in the hospital because he agreed to take his medication and agreed that he would seek out follow-up psychiatric care. Predicting future dangerousness is an art. Experience and scientific training can aid a physician in making this prediction, but there is no amount of scientific training that can result in predictions being made with certainty.

Order by the Honorable Kathleen Gearin (A-194 to A-198).

This appeal is a result of the summary judgment granted on the basis of Minn. Stat. 253B.23 subd. 4 immunity.

LEGAL ARGUMENT

Standard of Review

On an appeal from summary judgment, two questions are addressed: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The evidence must be viewed in a light most favorable to the nonmoving party, *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). (citations omitted), but is not bound by nor need give deference to the district court's application of the law. *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). The application of immunity is a question of law and is reviewed de novo. *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996). Interpretation of statutes is also subject to de novo review. *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985). "[S]tatutorily created immunity should be construed narrowly." *Bol v. Cole*, 561 N.W.2d 143, 147 (Minn. 1997). The party asserting immunity has the burden of showing particular facts that indicate entitlement to immunity. *Fear v. Indep. Sch. Dist.* 911, 634 N.W.2d 204, 209 (Minn. App. 2001).

I. THE TRIAL COURT ERRED IN GRANTING IMMUNITY UNDER THE CIVIL COMMITMENT ACT WHEN THERE WAS NO COMMITMENT.

Immunity under *Minn. Stat.* §253B.23 subd. 4 (The Commitment and Treatment Act) does not apply when the patient was never committed. In their motion briefs and arguments, respondents claimed immunity under The Act which provides:

All persons acting in good faith, upon either actual knowledge or information thought by them to be reliable, who act pursuant to any provision of this chapter or who procedurally or physically assist in the commitment of any individual, pursuant to this chapter, are not subject to any civil or criminal liability under this chapter. Any privilege otherwise existing between patient and physician, patient and psychologist, patient and examiner, or patient and social worker, is waived as to any physician, psychologist, examiner, or social worker who provides information with respect to a patient pursuant to any provision of this chapter.

Minn. Stat. §253B.23 subd. 4. Emphasis Added.

The defendants failed to offer any case law supporting application of immunity under the Commitment and Treatment Act when no commitment had been initiated. Such case law does not exist. Immunity under the Commitment and Treatment Act does not apply when no commitment occurred. In *Engle v. Hennepin County*, a widow of a patient at a county detoxification center brought a wrongful death action against the county medical center and employees of the center alleging the center's negligence caused the patient's death. The medical center moved for summary judgment on the basis of immunity granted under either the Minnesota Commitment Act, *Minn. Stat.* §253B.23 (1982), or *Minn. Stat.* §466.03 Subd. 6 (1982) protecting a municipality from liability for its discretionary acts. This court held: "Because Engle was never committed, we do not need to discuss the Minnesota Commitment Act, *Minn. Stat.* 253.23." *Engle v. Hennepin County*, 412 N.W.2d 364, 367 (Minn. App. 1987). *Rev. denied Nov. 18, 1987.*

Physicians are vested with quasi-judicial powers in commitment matters when they prepare and submit medical evaluations related to judicial proceedings. *Sloper v. Dodge*, 426 N.W.2d 478, 479 (Minn. App. 1988). The physician operates outside of the quasi-judicial jurisdiction (authority) if none of the procedural requirements of the commitment statute are initiated and hence is not protected by immunity offered by the Commitment and Treatment Act.

The defendants chose not to open the door and step over the threshold into the arena covered by the Commitment and Treatment Act. Every act and consideration of the defendants was part of the professional judgment required of them as treating physicians. There were no acts performed that took them outside of their treating physician role and into the quasi-judicial jurisdiction of the Commitment and Treatment Act. They each made affirmative decisions not to initiate a commitment. Immunity under the Commitment and Treatment Act cannot apply.

This court's finding in *Engle* is supported by a parallel analysis that is instructive on the immunity doctrine when no immunity triggering act was taken. In *Hoppe v. Klapperich*, a municipal judge was held liable for issuing a warrant without first having a complaint reduced to writing and subscribed as required by law. The Court held:

Obviously, jurisdictional facts must exist before jurisdiction is acquired....[the justice of the peace] acted wholly outside his jurisdiction and in a nonjudicial capacity, and for such act he can claim no immunity from liability in a civil suit for damages. He was not functioning as a judge, but as a private individual liable in damages for his tortuous act.

Hoppe v. Lapperich, 224 Minn. 224,236, 28 N.W.2d 780, 789 (Minn. 1947). 173 A.L.R. 819 (1947).

Here, the defendants made an affirmative decision not to initiate an emergency hold procedure. Emergency holds under Minnesota law require very specific steps be taken.

(Minn. Stat. 253B.05) (A-250 to A-252). None of the steps required by the statute were done. Dr. Goering refused to talk with the family as mandated by §253B.05 Subd. 1(b). None of the physicians made a written statement that would serve as the basis of an emergency hold as mandated by §253B.05 Subd. 1(b) and (c). A copy of the examiner's statement was never personally served upon Ryan Miller immediately upon admission or kept at the treatment facility as required by §253B.05 Subd. 1(c). Ryan Miller was never given notice of his right to leave after 72-hours, his right to a medical examination within 48 hours, or his right to request a change to voluntary status under §253B.05 Subd. 2b. (A-251). In the absence of any act essential to the emergency hold procedure there was not even a colorable invocation of quasi-judicial jurisdiction.

The defendants failed to bring their jurisdictional power into operative effect and cannot now seek refuge under the immunity attached to that jurisdictional power. Immunity under the Commitment and Treatment Act does not apply.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT IMMUNITY UNDER THE COMMITMENT AND TREATMENT ACT PRECLUDES A COMMON-LAW MEDICAL NEGLIGENCE CLAIM.

Common-law medical negligence claims are separate and distinct from claims arising out of the Commitment and Treatment Act. Common-law medical negligence claims have been long recognized as an independent cause of action in Minnesota. The requirements placed upon a physician by his or her profession stand alone as the basis for a professional negligence action. A common-law claim arises when injury occurs as a result of the physician's failure to meet the standards established by their profession. This common-law cause of action is not extinguished if the acts required by accepted standards of practice overlap with acts identified in the Commitment and Treatment Act.

By creating statutory immunity, the legislature intended to reinforce separation of powers by preventing judicial second guessing of legislative or executive policy decisions through the medium of tort suits. *Janklow v. Minnesota Board of Examiners for Nursing Home Administrators, et al.*, 552 N.W.2d 711, 715 (Minn. 1996). A common-law medical negligence claim however, is driven, not by judicial second guessing, but rather by the accepted standards established by the medical profession itself.

In *Bruegger v. Faribault County Sheriff's Department*, 497 N.W. 2d 260 (Minn. 1993), the plaintiffs attempted to bring a private cause of action against law enforcement agencies which failed to inform crime victims of their rights to seek reparations under Crime Victims Reparations Act. The court found that the statute did not create a cause of action. Although the *Bruegger* Court did not find a common-law cause of action, the reasoning by the court determined statutory causes of action and common-law causes of action are separate and distinct. The Court held, "statutes are presumed not to alter or modify the common-law unless they expressly so provide." *Id.* at 262. The immunity granted under the Commitment and Treatment Act is limited to those "who act pursuant to any provision of this chapter" and who assist in a commitment "pursuant to this chapter." Those who do act pursuant to the chapter are not subject to liability "under this chapter." The immunity is limited to liability under the Commitment and Treatment Act; it does not in any manner alter or modify a common-law medical negligence wrongful death claim.

This separate and distinct nature of the two cause of actions was made manifest in *Becker v. Mayo Foundation*, 737 N.W.2d 200 (Minn. 2007). The plaintiffs in *Becker* brought a common-law medical malpractice claim for breach of medical standards. One

of the claims asserted by the plaintiffs was that the defendant failed to notify authorities of suspected child abuse. The defendant *Mayo Foundation*, brought a motion to strike all allegations that the physicians failed to report suspected child abuse claiming that there was not a private cause of action for such failure under the Minnesota Child Abuse Reporting Act (CARA), Minn. Stat. § 626.556. In *Becker*, the Supreme Court found that a claim asserting that physicians deviated from accepted standards of professional skill and care by not reporting suspected child abuse to outside authorities was a distinct claim from a civil cause of action based upon the CARA statute. Statutory immunity does not preclude a common-law claim under a different legal theory. Like the *Becker* case, the plaintiffs here assert that the defendants deviated from accepted standards of professional skill and care. Any immunity that might be available under the Commitment and Treatment Act does not extend immunity to a common-law medical negligence wrongful death claim, which is a separate and distinct claim.

III. THE STATUTORY IMMUNITY GRANTED UNDER THE COMMITMENT ACT IS LIMITED TO ACTS PURSUANT TO A COMMITMENT AND DOES NOT PRECLUDE A COMMON-LAW MEDICAL NEGLIGENCE CLAIM.

A. The Trial Court Incorrectly Interpreted the Statute

The trial court held that the statute grants immunity to physicians who "... cannot place an emergency hold on a person that does not meet the requirement of Minn. Stat. 253B.95." This interpretation is inconsistent with the actual language of the statute. The statute grants immunity only to those who act pursuant to the chapter. Common-law medical negligence claims are not pursuant to the chapter. These claims are separate and distinct.

1. Standard for Statutory Interpretation

When interpreting a statute, a court must first determine whether the statute's language, on its face, is clear or ambiguous. *Gomon v. Northland Family Physicians, Ltd*, 645 N.W. 2d 413, 416 (Minn. 2002). The statute is only ambiguous when the language therein is subject to more than one reasonable interpretation. *Id.* Thus, the court must give plain reading to any statute it construes, and when the language of the statute is clear, the court must not engage in any further construction. The defendants argue that the statute applies to those "who act pursuant to any provision of this chapter" but fail to identify any provisions that were acted upon. None of the provisions outlined in the §253B.05 Emergency Hold provisions were initiated.

The trial court erroneously and effectively extended the immunity language to include those "*who consider acting* pursuant to any provision of this chapter." The documentation by the defendants in the medical records establishes that they made an affirmative decision not to pursue a 253B commitment. Despite deciding not to pursue commitment under 253B the trial court granted immunity from a medical malpractice wrongful death claim as though the defendant had indeed acted.

The statutory immunity offered by 253B.23 subd. 4 does not apply here. The class of persons that 253B.23 applies to and is designed to protect are those involved in a commitment procedure. There was no 253B commitment or emergency hold to trigger the claim of immunity. Consultation by a psychiatrist "to evaluate for transfer" or application of restraints to an inpatient is not a Chapter 253B commitment.

The canons of statutory construction must guide the court's analysis of this issue. The applicable rule of law is set forth in *Minn. Stat.* 645.16 (2000) which provides in pertinent part:

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;

The mischief to be remedied by the immunity clause is to ensure physicians and others who do, in fact, participate in the commitment process would not be unduly burdened by concern of liability for initiating the commitment process. It was meant to facilitate emergency holds when necessary – not to offer immunity for medical negligence when a hold was needed but not even attempted. The statute says nothing about immunity when the commitment process was never initiated.

2. Immunity statutes in general must be interpreted narrowly

Minnesota courts have consistently interpreted statutory immunity narrowly. *Angell v. Hennepin County Regional Rail Authority*, 578 N.W.2d 343, 346 (Minn. 1998). The first step in analyzing statutory immunity claim is to identify the conduct at issue. *Id.* This is not a claim brought by Ryan Miller for assault, false imprisonment, or violation of constitutional rights as a result of being tackled by security guards, and placed in leather restraints. If that were the case, the defendants' claim of 253B immunity might very well be legitimate if those acts were coupled with initiation of § 253B provisions governing emergency holds.

The conduct at issue before this court is a medical negligence wrongful death action where the plaintiffs claim a breach of accepted standards of medical practice resulted in injury and death. The plaintiffs' claims are not limited to defendants' failure to admit Ryan Miller on an emergency hold. The failure to hold Ryan Miller is only one of several theories of liability pursued by the plaintiffs and supported by expert opinion.

Plaintiffs claim defendant Goering failed to properly and thoroughly assess Ryan for the presence or absence of dangerousness, failed to recognize and act upon ample evidence of the potential for imminent danger, failed to make a good faith effort to gather information from sources that had insight into Ryan Miller's behavior, failed to reconcile the conflicting data, failed to admit Ryan under a 72-hour hold, failed to recommend an appropriate dose of antipsychotic medication, and failed to do an additional assessment when an acutely psychotic patient became unmanageable. These claims are supported by expert opinion. The Commitment and Treatment Act does not provide immunity from any of these claims.

B. Case law relied upon by defendants is distinguishable.

The defendants were unable to cite any 253B.23 subd. 4 immunity case law where no commitment was attempted but immunity was still applicable. This is not a surprise. Minn. Stat. § 253B is not applicable in the absence of some affirmative steps toward a commitment procedure. Every case cited by the defendants involved initiation of a 253B commitment. The plaintiff in *Mjolsness* was held on a 72-hour emergency hold and then the county attorney served a "petition to commit" upon the plaintiff. The petition was subsequently dismissed. *Mjolsness v Riley*, 524 N.W.2d 528, 529-530 (Minn. 1994).

In the *Rueter* case, an ambulance was called by a police officer, the officer prepared “a form application for a 72-hour medical hold pursuant to *Minn. Stat.* 253B.05 subd. 2 (1988).” The plaintiff was taken by ambulance to the ER and later released. The plaintiff in *Rueter* later asserted claims against the police officer for assault, false imprisonment and other constitutional claims. It was not a claim for failure to initiate an emergency hold. *Rueter v. City of New Hope*, 449 N.W.2d 745, 748 (Minn. App. 1990).

In both *Mjolsness* and *Rueter*, the court appropriately applied the immunity statute because Chapter 253B commitments were initiated and the basis of the civil claims were the actions taken to forward the commitment process. In contrast, the defendants in this matter did not take steps to forward a Chapter 253B commitment and the acts and omissions that form the basis of the plaintiffs’ claims is the defendants’ departure from accepted standards of medical practice.

IV. TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING PUBLIC POLICY REQUIRED THAT IMMUNITY BE GRANTED TO PRIVATE PHYSICIANS WHO CHOSE NOT TO ACT

The ruling by the trial court far exceeds a permissible interpretation of the scope of the statutory immunity granted by the Commitment and Treatment Act. In granting the defendants’ motion for summary judgment, the trial court relied solely on public policy analysis. The holding is clearly untenable and cannot be supported by reason or authority.

Trial court’s public policy reasoning is inconsistent with previously affirmed public policy regarding physician’s common-law liability for commitment decisions. While a discretionary function analysis is inappropriate for a common-law medical negligence claim involving private practitioners, public policy analysis performed by the court in

official immunity cases is instructive and germane to the public policy question presently before this court.

The Minnesota Supreme Court's public policy determination regarding common-law claims against physicians involved in treating the mentally ill is clearly stated in *Terwilliger v. Hennepin County*, 561 N.W.2d 909 (Minn. 1997). In *Terwilliger*, the widow filed a common-law medical negligence wrongful death claim against a psychiatrist and county facility for the alleged failures to hospitalize, to adequately monitor, and to properly treat her husband. The county and the psychiatrist sought shelter under statutory and official immunity. The Supreme Court upheld the Court of Appeals' determination that the defendants were not entitled to statutory immunity and that official immunity was inapplicable. The Court declared the activity operational and addressed the public policy regarding commitment decisions:

[The facility] employed a professional staff to implement [the policy of treating mentally ill patients] by consulting with, counseling, and treating mentally ill patients. To do so, those professionals must review and assess each patient's complaints and medical history. Clearly, the professional decision whether to hospitalize a patient or to treat him by counsel or medication on an outpatient basis involves a complex analysis of each patient's symptoms and needs. But these decisions do not amount to public policy decisions, although they must be viewed in the light of modern public policy commitment to the least restrictive treatment of the mentally ill. Such day-to-day treatment decisions- despite the professional discretion involved in their making- are operational decisions that do not ordinarily fall within statutory immunity.

Terwilliger, 561 N.W.2d at 912.

Day to day treatment decisions "do not amount to public policy decisions." *Id.* at 913.

Public policy is not served by allowing practitioners to make complex medical decisions involving treatment of acutely psychotic patients that depart from accepted standards of professional practice.

The purpose of the emergency hold provision of the Commitment and Treatment Act is to provide a means for hospitalization when there is insufficient time to get a court order. Immunity for acts pursuant to the Act is granted to protect those who participate in the commitment process in good faith. The policy behind every component of the Commitment and Treatment Act is for confinement of ill persons for their protection or the protection of others. The Act is both procedural and substantive. It serves as a guideline and enabling authority as to the proper manner to address persons who are a danger to themselves or others. The purpose is to facilitate this much needed garrison of protection for vulnerable patients and the public. To allow physicians to discharge dangerous patients in violation of accepted standards of their profession without fear of civil consequence violates the very heart of the Commitment and Treatment Act.

Even more inimical to justice is blanket and absolute immunity granted for all non-judicial acts in the absence of a decision to initiate an emergency hold. The plaintiffs' claims against Defendant Goering went beyond the decision to place Ryan Miller under an emergency hold. The claims include departures from accepted standards of medical practice in regards to assessment, medication recommendations, communication, discharge planning, re-evaluation and monitoring. The trial court in one svelte sweep dismissed each and every allegation against Dr. Goering.

If physicians could enjoy blanket and absolute immunity for a decision not to initiate an emergency hold, it is difficult to find a stopping point for the immunity. Such a finding would encourage every physician to simply document in the patient records, just as Dr. Goering and Dr. Dickens did, that an emergency hold was considered. Phrases such as: "I do not see the patient as holdable" would serve as an insurance policy

against all medical malpractice claims for all admissions and discharges of patients with mood or thought disorders. It would be their "get out of court free" card. If the trial court's ruling is allowed to stand, documentation of consideration of an emergency hold will show up in virtually every medical record. This documentation could even be reduced to placing an "X" in the appropriate box. Physicians will be permitted to act contrary to accepted standards of medical practice with no concern for consequence.

To remove the physician's common-law duty to adhere to accepted standards of their profession when assessing and treating a patient for dangerousness would be to remove one of the last bastions of protection for the public against dangerous persons. This indeed would violate public policy.

V. TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING THE MEDICAL NEGLIGENCE CLAIM FOR INJURIES AND PLAINTIFFS' CONSTITUTIONAL RIGHT TO REDRESS WAS VIOLATED.

Immunity under the Commitment and Treatment Act, when interpreted narrowly, does not violate the Minnesota Constitution. Trial Court's overbroad interpretation of that immunity statute however does. The far-reaching interpretation strips plaintiffs of a right to redress that has been deemed important enough to warrant inclusion in the constitution. Minnesota Constitution Article 1 § 8 guarantees:

§. 8. Redress of injuries or wrongs

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

This right to a certain remedy for all injuries or wrongs only protects remedies for which the legislature has not provided a reasonable substitute. *Hickman v. Group*

Health Plan, Inc., et al., 396 N.W.2d 10, 14 (Minn. 1986). No reasonable substitute is available for persons injured when a physician fails to meet accepted standards of medical practice and admit dangerous persons under a 72-hour emergency hold. A common-law medical negligence action is their only option. The construction of the statute as contended for would destroy a long-existing common-law right without giving anything in return. Such a ruling would be unwise in policy as tending to promote carelessness among physicians and is repugnant to justice.

While the Remedies Clause does not guarantee redress for every wrong, it does enjoin the legislature from eliminating those remedies that have vested at common-law, without a legitimate legislative purpose. *Hoelt v. Hennepin County*, 754 N.W.2d 717,726 (Minn. App. 2008). If the trial court's overbroad interpretation is allowed to stand, these plaintiffs are stripped of all remedies for the injuries caused by the failure to comply with accepted standards of medical practice.

Admittedly, there are times that it is permissible to abrogate a common-law right; this is not one of those times. Plaintiffs do not seek redress under the Commitment and Treatment Act. They seek a common-law remedy. By using the Act to eliminate the common-law remedy, all rights to redress are eliminated. Allowing the trial court's ruling to stand would not only destroy a longstanding common-law right but it would make a mockery of the Commitment and Treatment Act. Limiting the Commitment and Treatment Act immunity to those "who act pursuant to any provision of this chapter" as mandated by the language of the statute would serve the intent of the statute and preserve plaintiffs' constitutional right to redress.

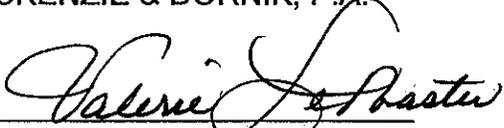
CONCLUSION

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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