

1990

Kathy Lynn Higgins, individually and as guardian
ad litem for Shaundra Higgins, her daughter, v.
SALT LAKE COUNTY, by and through SALT
LAKE COUNTY MENTAL HEALTH, DR.
WILLIAM KUENTZEL, SHERYL STEADMAN,
THE UNIVERSITY OF UTAH and THE
UNIVERSITY OF UTAH MEDICAL CENTER
: Reply Brief

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BRIEF

900255

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHY LYNN HIGGINS, individually
and as guardian ad litem for
SHAUNDRA HIGGINS, her daughter,

Plaintiff-Appellant,

v.

SALT LAKE COUNTY, by and through
SALT LAKE COUNTY MENTAL HEALTH,
DR. WILLIAM KUENTZEL, SHERYL
STEADMAN, THE UNIVERSITY OF UTAH,
and THE UNIVERSITY OF UTAH
MEDICAL CENTER,

Defendants-Appellees.

Case No. 90255

Priority 16

REPLY OF APPELLANT TO AMICUS CURAE VALLEY MENTAL HEALTH, INC.

On Appeal from the Judgments of the Third District Court
In and For Salt Lake County
Honorable James S. Sawaya, Judge

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Clerk Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHY LYNN HIGGINS, individually	:	
and as guardian ad litem for	:	
SHAUNDRA HIGGINS, her daughter,	:	
	:	
Plaintiff-Appellant,	:	
	:	Case No. 90255
v.	:	
	:	Priority 16
SALT LAKE COUNTY, by and through	:	
SALT LAKE COUNTY MENTAL HEALTH,	:	
DR. WILLIAM KUENTZEL, SHERYL	:	
STEADMAN, THE UNIVERSITY OF UTAH,	:	
and THE UNIVERSITY OF UTAH	:	
MEDICAL CENTER,	:	
	:	
Defendants-Appellees.	:	

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Appellant submits this Reply to the brief of Valley Mental Health, Inc. ("Valley").

I.

INTRODUCTION

Valley asserts a host of "public policy" arguments with regard to third party liability that are not supported in the record, do not apply to this case and have been expressly rejected in the majority of cases that have analyzed the "duty" of psychotherapists/mental health providers. The arguments, such as concerns of providing treatment to the mentally ill in the least restrictive setting and the alleged unpredictability of dangerous patients, do not warrant "the certain preclusion of recovery in cases by victims of dangerous patients whose harm has resulted directly from the negligence of the psychotherapist." Schuster v. Altenberg, 424 N.W.2d 159, 175 (Wis. 1988).

Further, the courts that have carefully considered the points made by Valley addressing the social utility of the psychotherapist's conduct, the magnitude of guarding against injury to victims and the consequences of placing the burden on the psychotherapist, expressly recognize that there is no indication that "the fears expressed by [mental health providers] have come true in the majority of jurisdictions that have adopted the special relationship theory." Mahomes-Vinson v. U.S., 751 F. Supp. 913, 921 n. 11 (D. Kan. 1990).

Similarly, Valley's argument that Utah case law requires a victim be "identified" inaccurately portrays the holdings and

reasoning of this Court, and ignores the holdings of the majority of jurisdictions that indicate a psychotherapist owes a "duty" to third persons who are not specifically identified. The duty exists when the therapist knows, or should know, using appropriate standards of care, that the patient's condition endangers others.

Finally, Valley erroneously attempts to retroactively apply Utah Code Ann. § 78-14A-102 by suggesting it "codified" the common law.¹ This attempt contradicts the principle that statutes cannot be retroactively applied and contradicts the legislative intent of the statute to permit recovery in cases like this. The Utah legislature in floor debate expressly acknowledged the "duty" of the psychotherapist to exercise reasonable care and meet professional standards to protect even unidentified victims from dangerous patients and deliberately limited the statute to permit a claim for the breach of the duty.

II.

ARGUMENT

- A. VALLEY'S PROCLAIMED INTEREST IN THIS CASE OF PROTECTING ITS "MISSION" IS NOT FACTUALLY SUPPORTED AND DEFIES ITS PROFESSIONAL OBLIGATION TO PROTECT THE VICTIMS OF THE MENTALLY ILL.

¹ Valley's injection of Utah Code Ann. § 78-14A-102 is improper. The only remaining defendant in this case is Salt Lake County Mental Health ("SLCMH") which did not raise or rely upon this statute at all in the court below or in this Court. The University of Utah Medical Center did raise the statute but then settled. In a similar circumstance, the Seventh Circuit Court of Appeals held it could not consider an argument by an amicus because it was "not properly before us." National Com'n on Egg Nutrition v. F.T.C., 570 F.2d. 157 (7th Cir. 1977).

Psychotherapist/mental health providers like Valley have filed amicus briefs in several cases in an effort to defeat the imposition of "duty." The courts, in virtually every case, have refused to accept the arguments of the amici, including the arguments that Valley now makes.

One argument often rejected is the suggestion that Valley makes at the beginning of its brief that government employed psychiatrists will be discouraged from treating patients. (Valley Brief at 2). There is no support for this claim in the record, and the same claim by amici in other cases has been deemed to be "unpersuasive." Naidu v. Laird, 539 A.2d 1064, 1074 (Del. 1988) (citing McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500, 514 (1979)).

This argument is not persuasive because there is no factual support for it. Naidu v. Laird, 539 A.2d at 1074. Moreover, psychotherapists recognize they have an obligation to protect the victims of their patients. The Court in Schuster v. Altenberg, 424 N.W.2d 159, 175 (Wis. 1988) convincingly indicates:

[I]mposition of a duty to protect third persons from the violent propensities of a patient has been found to be consistent with the clinical obligations perceived by psychotherapists to govern their behavior notwithstanding any legal obligations. [Citing Givelber, Bowers and Blitch, Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action, 1984 Wis. L. Rev. 443, 465-67; Mills, Sullivan & Eth, Protecting Third Parties: A Decade After Tarasoff, 144 Am. J. Psych. 68, 71 (Jan. 1987)].

Imposition of "duty" in this case does not undermine the "interests" of psychotherapists. Requiring psychotherapists to

meet accepted standards to avoid assaults on innocent victims will only serve to fulfill Valley's stated mission of promoting the emotional and physical well being of the community.²

B. VALLEY'S "ISSUES" DO NOT RECOGNIZE THE RELATIONSHIP BETWEEN SLCMH AND TRUJILLO AND THE STATUS OF SHAUNDRA HIGGINS AS AN ENDANGERED VICTIM.

Valley's "Statement of Issues" sidesteps crucial and significant facts. Valley casts the issue as whether a duty was owed to take precautions to protect "an unidentified victim." (Valley Brief at 3). In framing the issue this way, Valley does not acknowledge that throughout the 70's and early to mid-1980's, Trujillo received both voluntary and involuntary in-patient and out-patient treatment from SLCMH, and that during this period she incessantly displayed violent behavior. Nor does the "issue" properly conform to the standard applied by the majority of cases that does not require the victim be "identified" as a prerequisite to liability. As shown below, the courts allow recovery by unidentified victims endangered by the risk engendered by the patient's condition.

²Valley's appearance as an amicus curiae is a way for SLCMH, the predecessor-in-interest to Valley, to argue its case twice. Valley's appearance really serves as an example of the misapplication of governmental immunity principles by Appellee SLCMH. SLCMH has consistently argued that it is entitled to "governmental immunity." This argument denies that "governmental immunity" applies where a function is undertaken "which only government can perform." Standiford v. Salt Lake City, 605 P.2d 1230 (Utah 1980). Since Appellant's claims arise out of activities that can be performed by non-governmental entities like Valley, a private corporation, and since those activities are not exclusively "governmental," there can be no immunity. See Schultz v. Conger, 755 P.2d 165 (Utah 1988).

Considering the facts in Appellant's favor, it is clear Shaundra and Kathy Higgins were endangered victims. The record shows Kathy and Shaundra were neighbors of Trujillo. It further shows that Trujillo had a history of violence and had earlier stabbed a neighbor who was coming from a local convenience store, just like Shaundra. Trujillo committed the stabbing of Shaundra after brooding about an imagined incident between Shaundra and her daughter for six months and responded to an auditory hallucination, like those that had plagued her for years, that directed her to stab Shaundra. A jury could easily determine from these facts that Shaundra was a victim because she was endangered by the risk of Trujillo's condition.

C. VALLEY IGNORES CRITICAL FACTS THAT COMPEL
THE IMPOSITION OF DUTY.

Valley's Statement of Facts properly acknowledges that SLCMH took Trujillo into its residential care shortly before the stabbing and then "discharged" her into the same neighborhood where she had committed the previous stabbing. (Valley Brief at 5). But Valley does not acknowledge this control of Trujillo was negligent and fails to set forth other relevant facts regarding the long-standing criminal and psychological history of Caroline Trujillo and her involuntary and voluntary associations with SLCMH. As noted in Appellant's Brief and Reply to SLCMH, these facts are sufficient to impose duty under the "special relationship" analysis of the Restatement (Second) of Torts § 315, the general obligation owed by medical professionals to victims, and the obligations imposed by court orders.

Further, despite Valley's recognition that the facts which are relevant to the issue of duty must be considered in the light most favorable to Shaundra and Kathy Higgins, Valley purposely avoids a critical fact when it suggests that Caroline Trujillo was stimulated to attack Shaundra Higgins by "voices" which instructed her to "hurt someone." (Valley Brief at 5). Although there is one instance where Caroline Trujillo stated this, the overwhelming evidence shows Trujillo was preoccupied with Kathy and Shaundra Higgins for months preceding the attack on Shaundra and responded to a voice telling her to stab Shaundra. Trujillo was interviewed after the stabbing by Jean A. Nohava, a psychologist at the Utah State Hospital. Trujillo told psychologist Nohava that:

[A]pproximately 6 months prior to the incident, this young girl (a neighbor) had beaten up her daughter, a 10-year old. She stated that this girl and her mother would pass the house and laugh at Caroline. She stated that at one time she observed the mother stick her tongue out at her. Caroline relates that she spent much of her time by herself, and that she brooded a great deal about the aforementioned incidents.

On the day of the attack, Caroline states that she was thinking about this and was getting quite agitated as she worried over it. She states that one of her 'voices' told her what to do. . . .

Upon the suggestion of the 'voice' which told her to get a knife and stab the child, she obtained a knife and began walking towards the victim's house. She saw the little girl leaving her house, walking in the opposite direction, so she ran after her and attacked her. Caroline maintains that she was not trying to kill the little girl, only to hurt her and her mother. She continues to see nothing wrong with her action. She expressed the thought that it was not an 'evil deed' and

that she would most likely do the same thing again under the same circumstances. [R. at 2067-2068].

Trujillo made similar statements to other psychologists and psychiatrists after the stabbing. She told Dr. Robert J. Howell, Ph.D., that "she knew this girl and this girl had been beating up on her daughter and so she stabbed the girl." [R. at 652]. Trujillo also told Dr. Allen Jeppson, a psychiatrist, that "the victim had previously hurt her daughter by hitting her," that "if the girl hit her daughter again that she would stab her again" and that "she wished she would have died." [R. at 629].

In addition to the facts asserted by Valley, there are also material facts relating to Utah Code Ann., § 78-14(a)-102 (Supp. 1988) which Valley argues should be retroactively applied in this case. These undisputed facts are:

1. The cause of action upon which the Appellant brought this case arose on or before April 10, 1984.

2. Four years later, the legislature enacted U.C.A. § 78-14(a)-101 et seq., which is attached to Valley's brief (hereinafter "the Utah Act"). The Utah Act did not become effective until April 25, 1988, pursuant to Utah Constitution, Article 6, Section XXV.

3. As originally drafted as House Bill No. 2, the Utah Act, followed and used a California statute as a model, which granted total immunity to psychotherapists from violent acts of their patients except in situations where the patient communicated violence against a reasonably identifiable victim. [R. at 1778].

4. The original wording of House Bill No. 2 provided that "[A] therapist is immune from liability and no cause of action arises against him for failure to predict, warn, or take precautions to provide protection from any violent behavior of his client or patient, unless that client or patient communicated to the therapist an actual threat of physical violence against a clearly identified or reasonably identifiable victim." [R. at 1820].

5. House Bill No. 2 was objected to by representative Stanley Smedley as being broader than its stated purpose. In the floor debate, Representative Smedley and the sponsor, Representative Arrington had the following exchange:

[Representative Smedley:] To the sponsor and then could I reserve the right to suggest a possible amendment. The concern I have, my understanding is that the desire you would have is if a patient receives a threat, for instance, to someone's life, that therapist may go through certain procedures to notify the authorities or that individual if the threat has been made, the therapist would then be relieved from obligation or liability. Is that correct?

[Representative Arrington:] That's the purpose of the bill.

[Representative Smedley:] Okay. The concern I would have then is the bill seems to go far beyond that as I see it, in that it releases a therapist from any liability of any kind regardless of what may take place in the course of his counseling and then it goes on to say that if a threat is made he's released from liability if he notifies certain individuals. As an example, if a therapist is over a person in a state institution, such as the State Hospital, he makes a recommendation that the person be released from care and his recommendation is a really poorly evaluated decision. That person then goes back into society and creates an offense which other

therapists would look at and say he never should have been released. It seems to me that the person who is injured should have a right to say to that therapist: "You have a responsibility and an obligation to society and your profession to act within a certain standard of care." But this bill seems to absolve him from any responsibility of any kind, as I see it.

[Representative Arrington:] I don't think it does, no. You are talking about something that is not included. You know your standard of care. If a therapist or a doctor whoever might be willfully disregards the safety of society or individuals there isn't a law in the world that protects him from that. And your standard of work ethic and the ethics of the professions would preclude any immunity from liability of something of that nature.

[Representative Smedley:] I think that this bill does that very thing, though, Irby and that's the concern I have, is that it cuts off any responsibility that the therapist has. . .

[R. at 1824-1828].

6. Pursuant to the objection in floor debate, the bill was tabled in order for it to be amended to remove the broad immunity from liability, and was redrafted to apply only to the fact situation referred to in the statute. [R. at 1822; Aff'd of Representative Stan Smedley; R. at 1835].

D. THE EXISTENCE AND SCOPE OF "DUTY" IS A LEGAL
ISSUE DEPENDENT UPON THE FACTS IN THE RECORD.

Valley asserts that this Court's decision on the existence and scope of duty can be made without considering the quality of "medical" care provided by SLCMH. (Valley Brief at 4). This assertion ignores that SLCMH exerted "control" over Trujillo by its "medical care." There is no dispute that SLCMH breached profes-

sional standards by failing to admit Trujillo to its in-patient unit and "discharging" her into the same environment where she had committed the prior stabbing.

Ignoring the medical care also allows Valley to avoid the fact that Trujillo's medical treatment resulted in the stabbing. The record clearly shows SLCMH did not administer the medications that it prescribed and knew were necessary for treatment of Trujillo's violence and psychotic state. Not only is it appropriate to consider the medical care, it is necessary to fully consider Appellant's claims.

Further, Valley's repeated suggestion that Trujillo was a "voluntary patient" myopically denies her history with SLCMH. That history demonstrates an association over nine years with "voluntary" and "involuntary placements." As noted by the Appellant in her Reply to SLCMH, the "status" of Trujillo on the day of the stabbing as being "voluntary" does not eliminate "duty." (Appellant's Reply to SLCMH at 13-15).

Moreover, this Court has expressly recognized the Restatement (Second) of Torts § 315 can impose a duty to control a person. See Owens v. Garfield, 784 P.2d 1187, 1189 (Utah 1989). The Owens case was recently cited in Mahomes-Vinson v. U.S., 751 F. Supp. 913 (D. Kan. 1990), where the court applied the "special relationship" theory to a case like this where the assailant was "voluntary" on the day of the assault but had a long psychiatric history that included "involuntary" commitments. Particularly important, the court also considered Hokansen v. United States, 868 F.2d 372 (10th

Cir. 1989), the federal case interpreting Kansas law upon which SLCMH relies to claim no duty is owed when the patient is "voluntary." Despite Hokansen, the court in Mahomes-Vinson still allowed recovery in Kansas under the special relationship analysis. The court writes at 920:

A majority of jurisdictions have recognized a duty to control pursuant to § 315. Under the Restatement approach, the psychotherapist/patient relationship has been found to be a sufficient basis for imposing an affirmative duty on the therapist for the benefit of third persons. See, e.g., Naidu v. Laird, 539 A.2d 1064 (Del. 1988) (psychiatrist-discharged mental patient); Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (1982) (mental health hospital-outpatient); Evans v. Morehead Clinic, 749 S.W.2d 696 (Ky. 1988) (psychotherapist-discharged mental patient); Duval v. Golden, 139 Mich. App. 342, 362 N.W.2d 275 (1984) (psychiatrist-outpatient); Littleton v. Good Samaritan Hospital and Health Center, 529 N.E.2d 449 (Ohio 1988) (psychiatrist-outpatient); Peck v. Counseling Serv., 146 Vt. 61, 499 A.2d 422 (1985) (mental health hospital/counselor-outpatient); c.f. Hasenei v. United States, 541 F. Supp. 999 (D. Md. 1982) (psychiatrist-outpatient); Fischer v. Metcalf, 543 So.2d 785 (Fla. Dist. Ct. App. 1989) (psychiatrist-outpatient).

Valley does not mention this long line of cases. Instead, Valley erroneously asserts that decisions from this Court that do not address the psychotherapist/patient relationship have analyzed the scope of the "special relation" theory to hold in other cases "that no duty was owed" to control or warn (Valley Brief at 10) and that there can be no "relationship" giving rise to a cognizable duty "unless a specific victim is identified." (Valley Brief at 11.)

Valley overstates its argument and its conclusions cannot be fairly derived from this Court's decisions. For example, Valley erroneously claims that the Court analyzed the scope of the "special relation" exception in Christensen v. Hayward, 694 P.2d 612 (Utah 1984) and Ferree v. State, 784 P.2d 149 (Utah 1989). Even a cursory reading of Christensen shows the Court did not address the "special relationship" analysis. Christensen addressed a factual circumstance in which a police officer did not arrest an intoxicated motorcyclist prior to his fatal accident. The Court specifically indicated the facts before it were different than those concerning injuries to third parties. 694 P.2d at 614.

Likewise, Ferree v. State, 784 P.2d 149 (Utah 1989) is not a "special relationship" case under the Restatement (Second) of Torts § 315. Ferree is a parole custody case in which a wrongful death claim against the State of Utah Board of Corrections was made. Ferree examined the "duty" owed by a governmental agency and its agents to protect the public against injury by a parolee who had no history of violence. The Court, in reaching the conclusion that liability should not be imposed on corrections officials, relied upon the factual circumstances that the parolee had "no prior history of violence or of making threats, and corrections officials had no reason to know of any physical threat that [the parolee] might pose to a victim." 784 P.2d at 152.

Ferree is distinguishable from this case for several obvious reasons. First, unlike Ferree, there are no sound, public policy reasons to preclude liability of mental health care providers,

especially where the duty imposed is to diagnose and treat the patient within the parameters set by accepted standards in the profession. Second, in this case, Trujillo had an extensive and well-documented history of violence. If proper diagnostic and treatment procedures had been followed, her condition and violent propensities would have been properly evaluated and the required steps to protect her victims could have been taken.

Finally, Owens v. Garfield, 784 P.2d 1187 (Utah 1989) does not aid Valley. Owens recognized there is a duty to control under the Restatement (Second) of Torts § 315. In Owens, the Court concluded, and the plaintiff conceded, that there was not a sufficiently close relationship between an unlicensed babysitter and the State for there to be a "special relationship" under Section 315. 784 P.2d at 1189. In reaching this conclusion, the Court specifically compared the association between the babysitter and the State with the close "special relationship" of the state hospital and psychiatrist and a discharged patient in the case of Petersen v. State, 100 Wash.2d 421, 671 P.2d 230 (1983). Petersen affirmed a claim made by a member of the public who had been injured when a mental patient purposely drove into the victim's car. The Washington Supreme Court squarely held the psychiatrist had a duty to protect "any person who might foreseeably be endangered" by the patient's condition. 100 Wash.2d at 428-29, 671 P.2d at 237.

Valley also argues from Owens and Ferree that there is no duty owed unless a specific victim is identified. Owens and Ferree do not so narrowly limit "duty." As demonstrated in Appellant's Reply

to SLCMH, Owens recognized that a police officer detaining an intoxicated driver may owe duty to unidentified third parties. In this circumstance, it is the ability, either practically or as a matter of statute, to control the dangerous person that defines the duty. In Ferree, the Court focused on the fact that the parolee, while in the control of the State, was not known to be dangerous or even have the potential to be dangerous and there "was no reason" to suspect the parolee to be violent "toward a particular person or a particular type of person." 784 P.2d at 152.

A careful analysis of these opinions shows the Court did not impose the requirement that a victim be "identified," especially where the assailant is violent and there is a right or ability to control the patient. Indeed, the Court has permitted claims by unidentified third parties when the assailant has a history of violence and the ability to control exists. See, e.g., Doe v. Arguelles, 716 P.2d 279 (Utah 1985).

In many ways the Court's analysis in these cases is consistent with that employed in the jurisdictions that have recognized the "duty" of psychotherapist/mental health care providers. See, e.g., Mahomes-Vinson v. U.S., 751 F. Supp. 913, 923 (D. Kan. 1990) (duty owed by V.A. hospital and psychotherapist to persons endangered by the patient's condition and not limited to "identified" victims); Perreira v. State, 768 P.2d 1198, 1214 (Colo. 1989) (the absence of specific threats or overt violent behavior is not necessarily conclusive in that a psychiatrist is obliged to take reasonable precautions, consistent with accepted psychiatric standards of

practice, to protect potential victims from the patient's propensity for violence); Naidu v. Laird, 539 A.2d 1064, 1072 (Del. 1988) (duty requires the psychiatrist or other mental health professional to initiate whatever precautions are reasonably necessary to protect potential victims of the patient); Petersen v. State, 671 P.2d 230 (Wash. 1983) (duty to protect victims endangered by the patient's condition); McIntosh v. Milano, 168 N.J. Super. at 489, 403 A.2d at 511-12 (psychiatrist or therapist may have a duty to take whatever steps are reasonably necessary to protect a potential victim of his patient).

The criteria employed in these cases leads to the conclusion that Shaundra Higgins was owed "duty." Shaundra Higgins was a neighbor about whom Trujillo had brooded, and the stabbing of her followed a nearly identical stabbing. As a result of the first stabbing, Trujillo was sentenced to the care and custody of SLCMH which knew of the prior similar stabbing.

Shaundra was also a person that the Utah mental health statutes are designed to protect. The statutes expressly indicate that a psychotherapist may exercise control over a patient that is a "danger" to others. For example, the Utah mental health statutes in 1984 provided for admission of a voluntary patient for care and observation. Utah Code Ann. § 64-7-29 stated that a "mental health facility [SLCMH was so designated] . . . may admit for observation, diagnosis, care and treatment any individual who is mentally ill or who has symptoms of mental illness . . ." In addition, Utah Code Ann. § 64-7-31 allowed for SLCMH to exercise control over a

voluntary patient to restrict release of a voluntary patient if it was "unsafe for the patient or others." SLCMH could have refused to discharge Trujillo if she demanded release for up to 48 hours during which time SLCMH could have tried to persuade her to be hospitalized by voluntary admission, or so that involuntary commitment procedures could be commenced. Utah law specifically provided that if a patient was a danger to self or others, there was a basis for an involuntary commitment. Utah Code Ann., § 64-7-34 and 36.³

In this case, Caroline Trujillo voluntarily sought hospitalization prior to the stabbing. The concern of infringing on her "liberty" interest evaporated. Because she was obviously psychotic and had a well-documented history of violence, SLCMH only had to admit her to its in-patient unit where control is implicit. See Littleton v. Good Samaritan Hospital and Health Center, 529 N.E.2d 449, 460 (Ohio 1988) (discussing duty in a voluntary hospitalization context). See also Hamman v. County of Maricopa, 775 P.2d 1122 (Ariz. 1989) (affidavits from experts, like those submitted in this case, required issue of control and ability to control to be resolved at trial). Instead, SLCMH negligently controlled her by admitting her at ARTU and discharging her to the Higgins' neighbor-

³Valley's argument that "duty" should not be imposed due to the inability to predict "dangerousness" belies the thrust of the mental health statutes which requires a prediction of dangerousness for involuntary commitment. The heart of the statutes require a "prediction" and to hold that the standard is uncertain raises serious questions as to the entire basis for commitment. Schuster v. Altenberg, 424 N.W.2d at 169; McIntosh v. Milano, 403 A.2d at 514.

hood. Even if Trujillo had resisted hospitalization, SLCMH could have admitted her by "involuntary commitment." See Mahomes-Vinson v. U.S., 751 F. Supp. 913, 922, n.14 (D. Kan. 1990).

E. PUBLIC POLICY RECOGNIZES THE DUTY OF THE PSYCHOTHERAPIST TO TAKE PRECAUTIONS TO PROTECT OTHERS.

1. The Predominant Policy Allows For a Victim To Recover Where Professional Standards are Breached.

Valley's "public policy" arguments do not mention the predominant policy advanced by the courts when addressing the duty issue. Every thoughtful opinion, after carefully weighing "public policy," concludes that innocent victims in certain circumstances are entitled to be compensated for injuries caused by dangerous and mentally ill patients. The courts do not automatically impose liability, but require the plaintiff, as she did in this case, to show the psychotherapist did not use reasonable care, in accordance with the knowledge and skill ordinarily possessed by psychiatric practitioners under similar circumstances, to protect the victim from future acts of violence by the patient. See, generally, Lipari v. Sears, Roebuck & Co., 497 F. Supp. at 193; Naidu v. Laird, 539 A.2d at 1072-73; McIntosh v. Milano, 168 N.J. Super. at 489-90, 403 A.2d at 511-12; Littleton v. Good Samaritan Hospital and Health Center, 39 Ohio St. 3d 86, 99, 529 N.E.2d 449, 460 (1988); Petersen v. State, 100 Wash. 2d at 428, 671 P.2d at 237; Schuster v. Altenberg, 144 Wis. 2d at 268-69, 424 N.W.2d at 174.

The legitimate policy of allowing victims to recover in these circumstances was acknowledged by the Utah State Legislature when it considered the Therapist Liability Act enacted in 1988 at Utah

Code Ann. § 78-14(a)-101, et seq., which Valley wrongfully suggests "codified the common law" to preclude recovery.⁴ At the core of Valley's argument is the misconception that the statute's "policy" supports SLCMH. A careful reading of the legislative history of Utah Code Ann. § 78-14(a)-102 and the affidavit of Senator Stan Smedley who was instrumental in the passing of the statute [R. at 1835] shows that if any "policy" was codified, it was the policy of permitting victims to recover where generally recognized professional standards of care are not met in the treatment of violent and mentally ill patients, and injury to the innocent victim results.

The floor debates for this statute make this clear. Utah Code Ann. § 78-14(a)-102 was debated and narrowly redrafted in order to only address the specific question of a therapist's duty in a situation where the therapist receives information about a threat of violence. The statute was never meant to confer a blanket immunity from liability to a psychotherapist/mental health provider that fell below the standard of care and refused to admit and

⁴The statute did not become effective until April 25, 1988, over four years after Appellant's cause of action accrued. Valley's interpretation of the statute to eliminate Appellant's claim violates the principle that the statute cannot be retroactively applied. Stevens v. Henderson, 741 P.2d 952, 953-54 (Utah 1987). The courts in other jurisdictions where legislatures have passed statutes that broadly provide for "immunity," which our legislature refused to do, have not given the statutes any retroactive application either directly or by retroactive application of policy. See, e.g., Michael E. L. v. County of San Diego, 228 Cal. Rptr. 139, 183 Cal. App. 3d 525 (Cal. App. 4th Dist. 1986); and Evans v. Morehead Clinic, 749 S.W.2d 696 (Ky. 1988).

properly treat a dangerous psychotic who presented a danger to "society or individuals."⁵

Rather than address this dominant "policy," Valley claims that "duty" should not be imposed due to concerns of treating the mentally ill in a "least restrictive setting," the "difficulty of predicting dangerousness" and the desire to avoid detention of the mentally ill. Not one of these "policies" have convinced the courts to not impose duty.

2. Imposing Duty Does Not Conflict With the Policy of Placing a Patient in the Least Restrictive Environment.

Valley's contention that imposing "duty" conflicts with the goal of placing mental patients in the least restrictive environment is misplaced.

The "liberty" interest of Caroline Trujillo is not an issue in this case. The record is absolutely clear that Trujillo and her family made numerous attempts to have Trujillo hospitalized. There is no concern that her "freedom" would have been jeopardized if

⁵Valley's suggestion that the statute "codified the common law," to protect a psychotherapist unless there is an identified victim is wrong. The legislature originally considered a model California statute which was designed to eliminate the California common law and grant total immunity to psychotherapists from violent acts of patients, except in situations where the patient communicated violence against a "reasonably identifiable" victim. As a result of the strong objection on the Utah legislature floor, that the statute was too broad and would potentially relieve a therapist who breached standards of care, the legislature deliberately redrafted the statute to apply only to the fact situation referred to in the statute. If anything, the statute "codified" the common law that a therapist must meet the standard of care in evaluating and treating a violent patient and in protecting her victims.

SLCMH had followed the standard of care and met Trujillo's and her family's requests.

Furthermore, Valley's contention misinterprets the nature of the duty imposed on the therapist. The recognition of "duty" does not make the therapist liable for any harm caused by the patient, but "makes him liable when his negligent treatment of the patient caused the injury in question." Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 192 (D. Neb. 1980).

Moreover, there is no factual support for Valley's claim. In Schuster v. Altenberg, 424 N.W.2d 159, 175 (Wis. 1988) the Court specifically addressed the suggestion that the imposition of "duty" since the landmark case of Tarasoff v. Regents of California, 551 P.2d 334 (Cal. 1976) has led to increased use of involuntary commitments of patients:

[D]ata collected in a survey of the impact of Tarasoff demonstrated that 'Tarasoff has not discouraged therapists from treating dangerous patients, nor has it led to an increased use of involuntary commitment of patients perceived as dangerous.' Givelber, Bowers and Blitch, Tarasoff, Myth and Reality: An Empirical Study of Private Law In Action, 1984 Wis. L. Rev., supra at 486. See, also, Melella, Travin and Cullen, supra p. 171, at 100 . . . Likewise, we have considered the legislative policy . . . which seeks to provide for the 'least restrictive treatment . . .' As to this concern, we find the rationale articulated by the court in Lipari compelling:

The recognition of this duty does not make the psychotherapist liable for any harm caused by his patient, but rather makes him liable only when his negligent treatment of the patient caused the injury in question. . . . 'Thus, despite the defendant's protest to the contrary, a

psychotherapist is not subject to liability for placing his patient in a less restrictive environment, so long as he uses due care in assessing the risks of such a placement. This duty is no greater than the duty already owing to the patient.' 497 F. Supp. at 192-93

Finally, the mere initiation of detention or commitment proceedings does not threaten the patient's constitutionally protected liberty. [The commitment statute] assures a constitutionally proper procedure which must be followed in order to secure the emergency detention or commitment of an individual.

Thus, despite Valley's argument, a psychotherapist will not be liable for placing a patient in a less restrictive environment, so long as due care is used in assessing the risks of the placement. Lipari, 497 F. Supp. at 192-93. However, in a case like this, where SLCMH was negligent in its decision to treat Trujillo at ARTU and "discharge" her, and misled the Trujillos about "lack of bed space," then there is no reason to not impose duty.

3. The Alleged Difficulty of Predicting Dangerousness
Does Not Justify Denying the Victim Relief.

Similarly, Valley's notion that the difficulty in evaluating dangerousness should bar a victim's recovery has not been accepted. The recent Colorado opinion, Perreira v. State, 768 P.2d 1198, 1213-14 (Colo. 1989) states the rationale for the express rejection of Valley's claims:

A psychiatrist is not expected to render a full proof prediction of future violence. Lipari, 497 F. Supp. at 192. On the contrary, '[t]he concept of due care in appraising psychiatric problems, assuming proper procedures are followed, must take account of the difficulty often inevitable in the definitive diagnosis.' Hicks v. United States, 511 F.2d

407, 417 (D.C. Cir. 1975). What is required of the psychiatrist is to exercise the reasonable degree of skill and knowledge ordinarily possessed by practicing psychiatrists in arriving at an informed and realistic assessment of the patient's present mental condition and propensity for violence so that an informed judgment can be made as to whether the release of the patient will create an unreasonable risk of serious bodily harm to others. See Lipari, 497 F. Supp. at 193; Durflinger, 234 Kan. at 490-91, 673 P.2d at 92-93; Evans, 749 S.W.2d at 699.

In Schuster v. Altenberg, 424 N.W.2d 169 (Wis. 1988), another recent decision, the Wisconsin Supreme Court made the point quite convincingly that psychiatrists can effectively evaluate dangerousness:

[a] survey of psychotherapists suggests that practitioners are quite confident of their ability to assess dangerousness. . . [t]he task of assessing dangerousness is not viewed as being beyond the competence of individual therapists or as a matter upon which therapists cannot agree.

And, in Naidu v. Laird, 539 A.2d 1064, 1074 (Del. 1988), the court rejected the Valley argument:

[T]he argument for the defense ignores the fact that courts have recognized that under some circumstances, psychiatrists and mental hospitals may be held liable for failing to predict the dangerous propensities of their patients. See Hicks v. United States, D.C. Cir., 511 F.2d 407, 415-17 (1975); Lipari v. Sears, Roebuck & Co., D. Neb. 497 F. Supp. 185, 191 (1980); Baker v. United States, S.D. Iowa, 226 F. Supp. 129, 132-35 (1964), aff'd. 8th Cir. 343 F.2d 222 (1965); Tarasoff v. Regents of the University of California, Cal. *supra*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 20, 551 P.2d 334, 340 (1976); Bradley Center, Inc. v. Wessner, 166 Georgia App. 576, 287 S.E.2d 716, 720-21, aff'd. Georgia, *supra*, 250 Ga. 199, 296 S.E.2d 693 (1982); Rum River Lumber Company v. State, M. Super. 282 N.W.2d 882,

885 (1979); McIntosh v. Milano, N.J. Super., 168 N.J. Super. 466, 403 A.2d 500, 511 (1979); Peterson v. State, Wash. Super., 100 Wash. 2d 421, 671 P.2d 230, 237 (1983). Although we recognize the inherent difficulty confronted by mental health professionals in determining whether a patient imposes an unreasonable threat of harm to himself or others, this factor alone does not justify barring recovery in all cases. Lipari v. Sears, Roebuck & Co., 497 F. Supp. at 192.

4. Imposition of Duty Does Not Lead to Unnecessary Restrictive Detention.

Finally, Valley's argument that the imposition of "duty" will lead to the unnecessary commitment of the mentally ill has no support in the record. The same argument has been called "speculative at best," unsupported "by any reliable statistical data" and rejected. Perreira v. State, 768 P.2d at 1219 (citing McIntosh v. Milano, 168 N.J. Supp. 466, 403 A.2d 500 (1979)). See also Schuster v. Altenberg, 434 N.W.2d 159, 175 (Wis. 1988); Lipari v. Sears, Roebuck & Co., 497 F. Supp. at 192-93 (citations omitted).

F. BRADY V. HOPPER DOES NOT APPLY TO THIS CASE.

Valley mistakenly relies upon Brady v. Hopper, 570 F. Supp. 1333 (D. Colo. 1983), aff'd. 750 F.2d 329 (10th Cir. 1984) as the "best" case to examine duty. Brady, a relatively early case in a developing area of the law, does not hold, as Valley suggests, that the special relationship analysis results in the conclusion that there can never be "duty." Brady indicates that the psychotherapist/patient relationship does create a legal duty in favor of third persons:

It is implicit in the majority of cases in this area that the therapist/patient relation-

ship is one which under certain circumstances will give rise to a duty on the part of the therapist to protect third persons from harm.

* * *

Moreover, the doctor-patient relationship between Dr. Hopper and Hinckley was one which gave rise to certain duties on the part of Dr. Hopper.

570 F. Supp. at 1338.

Thus, Brady explicitly holds that a duty is owed but finds that under the case's unique fact situation that there was no breach of duty.

Furthermore, Brady is a 1983 federal district court case that interpreted Colorado law before the Colorado courts had examined the "duty" issue. The language in Brady to which Valley now clings, "specific threats to specific victims," was not followed by the Colorado Supreme Court. In Perreira v. State, 768 P.2d 1198 (Colo. 1989), the court factually distinguished Brady from cases such as this one by pointing out that Brady fell into the least duty-intensive cases because Hinckley was not seeking hospitalization, had no history of prior violent propensities, and had never made overt threats against anyone. Perreira v. State, 768 P.2d at 1210.

Other jurisdictions have also refused to follow Brady. For example, the Arizona Supreme Court recently reversed an Arizona intermediate court that adopted the Brady test of specific threats and identified victims. In Hamman v. County of Maricopa, 161 Ariz. 58, 775 P.2d 1122 (Ariz. 1989), the Arizona Supreme Court writes:

We believe the Brady approach is too narrow. Tarasoff envisioned a broader scope of a psychiatrist's duty when the court stated: '[o]nce a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25. Additionally, we agree with those cases interpreting Tarasoff which state that a psychiatrist should not be relieved of this duty merely because his patient never verbalized any specific threat.


Id. at 1127. Appellant respectfully asserts Brady is too narrow, does not comport with the majority of cases, and should not be followed.

CONCLUSION

The common law and social policy all provide that SLCMH owed duty to Shaundra and Kathy Higgins as victims endangered by Trujillo's dangerous and psychotic condition. The trial court's judgment should therefore be reversed in this Court and the case should be remanded for trial.

RESPECTFULLY SUBMITTED this 17th day of April, 1991.

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(11) The word "designee" means a physician who has responsibility for medical functions including admission, treatment, and discharge.

History: C. 1943, 85-7-55, enacted by L. 1951, ch. 113, § 3; L. 1971, ch. 172, § 4; 1975, ch. 198, § 16.

Compiler's Notes.

The 1971 amendment substituted "in a mental health facility" for "in a hospital pursuant to this act" at the end of subsec. (2); substituted "or" for "and" before "a medical officer" in subsec. (3); substituted "division of mental health" for "department of public welfare" in subsec. (4); added subsecs. (5) and (6); and made minor changes in style.

The 1975 amendment substituted numerical for lettered designations of subsections; substituted subsec. (1) for former

subsec. (a) which read: "The words 'mentally ill individual' mean an individual having a psychiatric or other disease which substantially impairs his mental health"; inserted "preferably a psychiatrist" near the beginning of subsec. (4), and added to the end of the first sentence of subsec. (4) "or another licensed mental health professional * * * in the treatment of mental or related illness" and added the last two sentences to subsec. (4); added subsecs. (7) to (11); and made minor changes in punctuation.

Cross-Reference.

Limitation of application as to criminally insane, 64-7-54.

64-7-29. Admission of voluntary patient for observation or care—Age of patient.—The superintendent of the Utah State Hospital or director of a mental health facility or either of their designees may admit for observation, diagnosis, care, and treatment any individual who is mentally ill or has symptoms of mental illness and who, being sixteen years of age or over, applies therefor, and any individual under sixteen years of age who is mentally ill or has symptoms of mental illness, if his parent or legal guardian applies therefor in his behalf.

No person over sixteen years of age may be hospitalized or continue to be hospitalized against his will, except as provided in this chapter.

History: C. 1943, 85-7-56, enacted by L. 1951, ch. 113, § 3; L. 1971, ch. 172, § 5; 1975, ch. 198, § 17.

Compiler's Notes.

The 1971 amendment inserted "or director of a mental health facility" after "superintendent of the Utah State Hospital" at the beginning of the section.

The 1975 amendment inserted "or either of their designees" near the beginning of the section; and added the second paragraph.

Cross-Reference.

Limitation of application as to criminally insane, 64-7-54.

64-7-30. Discharge of patient.—The superintendent or director of a mental health facility shall discharge any patient who in the opinion of the superintendent or director, has recovered and may discharge any patient whose hospitalization is determined to be no longer advisable except as provided by section 78-3a-40, but an effort shall be made to assure that any further supportive services required to meet the patient's needs upon release will be provided. If the patient has been hospitalized under judicial proceedings, procedures under 64-7-42 and 64-7-43 shall be followed.

History: C. 1943, 85-7-57, enacted by L. 1951, ch. 113, § 3; L. 1975, ch. 198, § 18.

Compiler's Notes.

The 1975 amendment rewrote this section which read: "The superintendent of the hospital shall discharge any voluntary

patient who has recovered and may discharge any voluntary patient whose hospitalization he determines to be no longer advisable."

Cross-References.

Application for release by one commit-

ted after having been found not guilty of crime by reason of insanity, 77-24-16.
Limitation of application as to criminal-ly insane, 64-7-54.

7 C.J.S. Asylums § 7; 41 C.J.S. Hospitals § 7; 44 C.J.S. Insane Persons § 72.
41 Am. Jur. 2d 583-586, Incompetent Persons §§ 44-48.

Collateral References.

Asylums↔5; Hospitals↔5; Mental Health↔59.

Habeas corpus on ground of restoration to sanity of one confined as an incompetent other than in connection with crime, 21 A. L. R. 2d 1004.

64-7-31. Release of voluntary patient.—A voluntary patient who requests release or whose release is requested, in writing, by the patient's legal guardian, parent, spouse, or adult next of kin shall be released forthwith except that:

(1) If the patient were admitted on the patient's own application and the request for release is made by a person other than the patient, release may be conditioned upon the agreement of the patient thereto, and

(2) If the patient, by reason of age, was admitted on the application of another person, any release prior to becoming sixteen years of age may be conditioned upon the consent of the patient's parent or guardian, and

(3) If the superintendent or director of the mental health facility or either of their designees is of the opinion that release of a patient would be unsafe for the patient or others, release of the patient may be postponed for up to 48 hours excluding weekends and holidays provided that the superintendent or director or either of their designees must cause to be instituted involuntary hospitalization proceedings with the district court within the specified time period unless cause no longer exists for instituting such proceedings. Written notice of such denial with the reasons for such denial must be given to the patient without undue delay. No judicial proceedings shall be commenced with respect to a voluntary patient unless release of the patient has been requested by the patient or, if under the age of sixteen, by the patient's parent or guardian.

History: C. 1943, 85-7-58, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1971, ch. 172, § 6[a]; 1975, ch. 198, § 19.

Compiler's Notes.

The 1953 amendment deleted the subsection designation "(a)" before the present introductory paragraph; added a proviso to subd. (3) which was essentially the fourth paragraph formerly designated as "(b)"; deleted "Notwithstanding any other provision of this act" from the beginning of the proviso; and made a minor change in phraseology.

The 1971 amendment deleted "of the hospital" after "superintendent" and inserted "or director of the mental health facility" in subd. (3).

The 1975 amendment rewrote subd. (3), which read: "If the superintendent or director of the mental health facility, within forty-eight hours from the receipt of the request, files with the district court or a judge thereof a certification that in his

opinion the release of the patient would be unsafe for the patient or others, release may be postponed on application for as long as the court or a judge hereof determines to be necessary for the commencement of proceedings for judicial hospitalization, but in no event for more than five days, provided that judicial proceedings for hospitalization shall not be commenced with respect to a voluntary patient unless release of the patient has been requested by himself or the individual who applied for his admission"; and made numerous changes in phraseology and punctuation.

Laws 1951, ch. 113 added two sections appearing in Code 1943, Supp. numbered identically as 85-7-58. The sections are compiled herein as 64-7-31 and 64-7-32.

Laws 1971, ch. 172, contained two sections designated as "section 6."

Cross-Reference.

Limitation of application as to criminally insane, 64-7-54.

Collateral References.

Asylums↔5; Hospitals↔5; Mental Health↔59.

7 C.J.S. Asylums § 7; 41 C.J.S. Hospitals § 7; 44 C.J.S. Insane Persons § 72.

41 Am. Jur. 2d 583-586, Incompetent Persons §§ 44-48.

Habeas corpus on ground of restoration to sanity of one confined as an incompetent other than in connection with crime, 21 A. L. R. 2d 1004.

64-7-32. Involuntary hospitalization procedures.—The following ways are available for involuntary hospitalization:

- (1) Emergency procedures for temporary hospitalization.
 - (a) Hospitalization on medical certification; emergency procedure.
 - (b) Hospitalization without endorsement of medical certification; emergency procedure.
- (2) Hospitalization on court order; judicial procedure.

History: C. 1943, 85-7-58, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1971, ch. 172, § 6[b]; 1975, ch. 198, § 20.

Compiler's Notes.

The 1953 amendment made no change in this section.

The 1971 amendment deleted "of the hospital" after "superintendent" and inserted "or director of the mental health facility" at the beginning of the former introductory paragraph; and made a minor change in phraseology.

The 1975 amendment substituted "The following ways are available for involuntary hospitalization" at the beginning of the section for "The superintendent or director of mental health facility is authorized to receive therein for observation, diagnosis, care, and treatment any individual whose admission is applied for under any of the following procedures"; inserted "Emergency procedures for temporary hospitalization" at the beginning of subsec. (1); deleted former subd. (a) which read: "Hospitalization on medical certification; standard nonjudicial procedure"; redesignated former subds. (b) and (c) as subds. (1)(a) and (1)(b); and redesignated former subd. (d) as subsec. (2).

Laws 1971, ch. 172, contained two sections designated as "section 6."

Cross-References.

Criminal prosecutions, inquiry into defendant's sanity, 77-24-15, 77-48-1 et seq., 77-49-1 et seq.

Limitation of application as to criminally insane, 64-7-54.

Collateral References.

Mental Health↔37-46.

44 C.J.S. Insane Persons §§ 14-34.

41 Am. Jur. 2d 547-564, 577-582, Incompetent Persons §§ 8-25, 39-42.

64-7-33. Repealed.**Repeal.**

Section 64-7-33 (C. 1943, 85-7-59, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1963, ch. 159, § 1; 1967, ch. 174, § 130;

1971, ch. 172, § 7), relating to admission to the Utah State Hospital on certification by examiners was repealed by Laws 1975, ch. 198, § 35.

64-7-34. Admission to mental health facility—Requirements and procedure—Costs.—(1) Any individual may be admitted to a mental health facility upon:

(a) Written application by a responsible friend, relative, spouse, or guardian of the individual, a mental health or peace officer, or the head of any institution as defined in section 64-7-28 stating belief that the individual is likely to cause injury to himself, herself or others if not immediately restrained, and the grounds for such belief, and

(b) A certification by at least one licensed physician that the physician has examined the individual within a three-day period immediately pre-

ceding said certification and is of the opinion that the individual is mentally ill and, because of the individual's illness, is likely to injure himself, herself or others if not immediately restrained.

(c) Such a certificate upon endorsement for such purpose by a judge of the district court or a member of the board of county commissioners of the county in which the individual is present, shall authorize any mental health or peace officer to take the individual into custody and transport the individual to a mental health facility.

(2) If a duly authorized mental health or peace officer observes a person involved in conduct which leads the officer to have probable cause to believe that such person is mentally ill, as defined by this act, and that, because of such apparent mental illness and conduct, there is a substantial likelihood of serious harm to that person or to others pending proceedings for examination and certification as provided in this act, the officer may take the person into protective custody. Immediately thereafter, the officer shall transport the person to a mental health facility and there make application for the person's admission therein. The application shall be upon a prescribed form and shall include the following:

(a) A statement by the officer that he believes on the basis of personal observation that the person is, as a result of a mental illness, a danger to self or others.

(b) The specific nature of the danger.

(c) A summary of the observations upon which the statement of danger is based.

(d) A statement of facts which called the person to the attention of the officer.

(3) Any person admitted under this section may be held for a maximum of 24 hours. At the expiration of 24 hours time the person shall be considered a voluntary patient subject to the provisions of sections 64-7-29, 64-7-30 and 64-7-31 and notice of such status shall be given to the patient.

(4) Costs of all proceedings under this section shall be paid by the county in which such person is found unless the person is financially able to pay the same in which event he shall pay.

History: C. 1943, 85-7-60, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1963, ch. 159, § 1; 1971, ch. 172, § 8; 1975, ch. 198, § 21.

Compiler's Notes.

The 1953 amendment inserted the reference to "a member of the board of county commissioners" in subsec. B.

The 1963 amendment rewrote the first part of subd. A(1) which read: "Written application by any health or peace officer or by any other person stating his belief * * *."

The 1971 amendment substituted "a mental health facility" for "the Utah State Hospital" in both subsecs. A and B.

The 1975 amendment rewrote this section which read: "A. Any individual may be admitted to a mental health facility upon

"(1) Written application by a friend, relative, spouse, or guardian of the individual, a health or public welfare or peace officer, or the head of any institution as defined in section 64-7-33 stating his belief that the individual is likely to cause injury to himself or others if not immediately restrained, and the grounds for such belief, and

"(2) A certification by at least one licensed physician that he has examined the individual and is of the opinion that the individual is mentally ill and, because of

his illness, is likely to injure himself or others if not immediately restrained.

"An individual with respect to whom such a certificate has been issued may be admitted on the basis thereof at any time before the expiration of three days after the date of examination.

"B. Such a certificate, upon endorsement for such purpose by the head of a local board of health, a judge of the district court or a member of the board of county commissioners of the county in which the individual is present, shall authorize any health or peace officer to take the individual into custody and transport him to a mental health facility."

Cross-Reference.

Limitation of application as to criminally insane, 64-7-54.

Collateral References.

Mental Health ~~64-7-37~~ 37-46.

44 C.J.S. Insane Persons §§ 14-34.

41 Am. Jur. 2d 547-564, 577-582, Incompetent Persons §§ 8-25, 39-42.

Right without judicial proceeding to arrest and detain one who is, or is suspected of being, mentally deranged, 92 A. L. R. 2d 570.

64-7-35. Repealed.

Repeal.

Section 64-7-35 (C. 1943, 85-7-61, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1971, ch. 172, § 9), relating to pro-

tective custody pending examination and certification, was repealed by Laws 1975, ch. 198, § 35.

64-7-36. Involuntary hospitalization—Examination of patient—Hearing—Power of court—Mental health commissioner, appointment and duties—New hearing procedure — Costs. — (1) Proceedings for the involuntary hospitalization of an individual may be commenced by the filing of a written application with the district court of the county in which the proposed patient resides or is found, by a responsible friend, relative, spouse or guardian of the individual, or by a licensed physician, a mental health, public welfare or peace officer, or the head of any public or private institution in which such individual may be. Any such application shall be accompanied by a certificate of a licensed physician stating that within a seven-day period immediately preceding the certification the physician has examined the individual and is of the opinion that the individual is mentally ill and should be hospitalized, or a written statement by the applicant that the individual has been requested to but has refused to submit to examination by a licensed physician. Said application shall be sworn to under oath and shall state the facts upon which the application is based. Prior to filing the application, the court may require the applicant to consult a mental health facility or may direct a mental health professional from a mental health facility to interview the applicant and the proposed patient to determine the existing facts and report them to the court. Proceedings for the involuntary hospitalization of an individual under the age of eighteen years who is under the continuing jurisdiction of the juvenile court may be commenced by the filing of a written application with the juvenile court in accordance with the provisions of this section and said court shall have jurisdiction to proceed in such case in the same manner and with the same authority as the district court.

(2) Upon receipt of an application or the report the court shall give written notice of the proceeding to the proposed patient, to the legal guardian, if any, and to the spouse, parents, and nearest known other relative or friend.

Notice to the proposed patient shall set forth the allegations of the application and any reported facts.

If the court finds from the application and any reported facts that there is probable cause that the proposed patient's mental condition requires hospitalization pending the hearing, the court shall order that the proposed patient be taken to and detained in whatever mental health facility or other location is most appropriate.

If there are no appropriate mental health resources within the district, the court may in its discretion transfer the case to any other district court within the state of Utah provided that said transfer will not be adverse to the interest of the proposed patient.

(3) If the application avers that the proposed patient is in such condition that the patient is in immediate danger of destroying property, or injuring himself, herself, or others, or if the proposed patient has refused to submit to examination either upon request of the applicant or upon interview with a mental health professional as directed by the court, the court shall issue an order directed to any mental health or peace officer to take the proposed patient forthwith to any mental health facility for the purpose of an examination by two designated examiners as provided in subsection (4). If a proposed patient refuses to submit to an examination by the designated examiners, the proposed patient shall promptly be taken before a judge of a district court who shall advise the proposed patient of proceedings filed for involuntary hospitalization and the requirements of the law and order the proposed patient to submit to such examination if good cause appears therefor. If the individual refuses to submit to such examination, the court may order that the proposed patient be taken to a mental health facility and examined.

(4) Within twenty-four hours after the order for detention or examination is given, the court shall appoint two designated examiners to examine the proposed patient. The examination shall be held at the home of the proposed patient, a hospital or other medical facility, or at any other suitable place not likely to have a harmful effect on the patient's health. Said examiners shall orally or in writing report to the court their findings as to the mental condition of the proposed patient within forty-eight hours after said appointment exclusive of weekends or holidays. If the report is given orally, a written report shall thereafter be forwarded to the court.

If the report of the designated examiners is to the effect that the proposed patient is not mentally ill, the court may without taking any further action terminate the proceedings and dismiss the application; otherwise, it shall forthwith fix a date for hearing to be held not more than ten days from receipt of the initial report.

(5) At the hearing, an opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither the patient nor others provide counsel, the court shall appoint counsel. In the case of an indigent patient, the payment of reasonable attorneys fees for counsel as determined by the court shall be made by the county in which the

patient resides or was found. The proposed patient, the applicant, and all other persons to whom notice is required to be given shall be afforded an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses, and the court may in its discretion receive the testimony of any other person. The court is authorized to exclude all persons not necessary for the conduct of the proceedings. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered subject to the rules of evidence.

The mental health facility or the physician in charge of the patient's care shall provide to the court at the time of the hearing the following information: the admission notes, the diagnosis, any doctors' orders, the progress notes, the nursing notes and the medication records pertaining to the current hospitalization. Said information shall also be supplied to the patient's counsel at the time of the hearing and at any time prior thereto upon request.

(6) The court shall order hospitalization if, upon completion of the hearing and consideration of the record, the court finds beyond a reasonable doubt that the proposed patient:

- (a) Is mentally ill, and
- (b) Because of the patient's illness there is an immediate danger that the proposed patient will injure himself, herself or others if allowed to remain at liberty, or
- (c) Is in need of custodial care or treatment in a mental health facility and, because of the patient's illness, either
 - (i) lacks sufficient insight to make responsible decisions as to the need for care and treatment as demonstrated by evidence of unwillingness or inability to follow through with treatment, the need for said treatment having been adequately demonstrated to the court, or
 - (ii) lacks sufficient capacity to provide himself or herself with the basic necessities of life, and
- (d) There is no appropriate less restrictive alternative to a court order of hospitalization, and the court has determined that the hospital or mental health facility in which the individual is to be hospitalized pursuant to this act can provide the individual with treatment that is adequate and appropriate to the individual's conditions and needs. In the absence of the required findings of the court after the hearing, the court shall forthwith dismiss the proceedings.

(7) The order of hospitalization shall state whether the individual shall be detained for a temporary period not to exceed six months or an indeterminate period. If hospitalization for a designated temporary period is ordered, the patient shall not be retained for a longer period unless upon a hearing held pursuant to this section within such designated temporary period. Unless otherwise directed by the court, it shall be the

responsibility of the division of mental health to assure the carrying out of the order within such period as the court shall specify.

(8) The court is authorized to appoint a mental health commissioner to assist in the conduct of hospitalization proceedings who shall be an attorney licensed to practice law in the state of Utah and knowledgeable about mental health. In any case in which the court refers an application to the commissioner, the commissioner shall promptly cause the proposed patient to be examined and on the basis thereof shall either recommend dismissal of the application or hold a hearing as provided in this section and make findings of fact and recommendations to the court regarding the order for involuntary hospitalization of the proposed patient.

(9) In the event that the designated examiners are unable, because of refusal of a proposed patient to submit to an examination, to complete such examination upon the first attempt to conduct the same, the court shall fix a reasonable compensation to be paid to such designated examiners for services in the cause.

(10) Any person hospitalized under this act or his legally designated representative who is aggrieved by the findings, conclusions and order of the court, shall have the right to a new hearing upon a petition filed with the court within thirty days of the entry of the court order. In the event the petition alleges error or mistake in the medical findings, the court shall appoint three impartial medical examiners previously unrelated to the case who shall conduct an additional examination of the patient. The new hearing shall in all other respects be conducted in the manner otherwise permitted in this act.

(11) Costs of all proceedings under this section shall be paid by the county in which the proposed patient resides or is found.

History: C. 1943, 85-7-62, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1963, ch. 60, § 1; 1967, ch. 174, § 131; 1971, ch. 172, § 10; 1975, ch. 198, § 22.

Compiler's Notes.

The 1953 amendment inserted subsec. D, designated former subsecs. D to I as E to J, and added subsec. K.

The 1963 amendment, in subsec. G, substituted "consistent" for "considered" in the third sentence and substituted "the court shall" for "the court may, in its discretion" in the last sentence and, in subd. H(2), substituted "there is an immediate danger that the proposed patient will injure himself" for "is likely to injure himself."

The 1967 amendment substituted "division of mental health" for "department of public welfare" in subsec. I.

The 1971 amendment substituted "mental health facility" for "mental hospital" or "hospital" throughout the section; added subsec. L; and made numerous changes in phraseology, punctuation and style.

The 1975 amendment rewrote this section which read: "A. Proceedings for the

involuntary hospitalization of an individual may be commenced by the filing of a written application with the district court of the county in which the proposed patient resides or is found, by a friend, relative, spouse or guardian of the individual, or by a licensed physician, a health or public welfare or peace officer, or the head of any public or private institution in which such individual may be. Any such application shall be accompanied by a certificate of a licensed physician stating that he has examined the individual and is of the opinion that he is mentally ill and should be hospitalized, or a written statement by the applicant that the individual has refused to submit to examination by a licensed physician; provided, that when an application is not accompanied by the certificate of a licensed physician, the court shall proceed in accordance with section 64-7-36.5.

"B. Upon receipt of an application the court shall give notice thereof to the proposed patient, to his legal guardian, if any, and to his spouse, parents, and nearest known other relative or friend. If, however, the court has reason to believe

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 1991, four copies of the foregoing Reply of Amicus Curae Appellee Valley Mental Health, Inc. were mailed, postage prepaid thereon, to the following:

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