651.290.6500
8519 Eagle Point Boulevard, Suite 100
Lake Elmo, Minnesota 55042
info@jlolaw.com

JLO Newsletter Fall 2022

Minnesota Supreme Court Expands Liability For Mental Healthcare Providers

By: Natalie M. Thomas

The Minnesota Supreme Court recently departed drastically from long-held Minnesota precedent regarding healthcare provider liability and the duty to control patients in *Smits, as Trustee for the next of kin for Brian Short, Karen Short, Madison Short, Cole Short, Brooklyn Short v. Park Nicollet Health Services*[1]. The Court held that Minnesota healthcare providers can be held liable for violent acts committed by their patients while receiving outpatient treatment with antidepressant and antianxiety medications.

This case arose out of a familicide that occurred in September 2015. Brian Short, husband to Karen, and father to Madison, Cole, and Brooklyn, began treating at Defendant Park Nicollet for anxiety and depression less than 3 months before murdering his family and then killing himself. Brian had received outpatient treatment at Park Nicollet, including urgent care, primary care, and psychiatric treatment, as well as therapy with a licensed social worker.

Brian had no history of anxiety or depression, nor had he ever been diagnosed with psychological issues. When Brian first sought care on June 16, 2015, he complained of tightness and pressure in his chest, which he attributed to anxiety caused by recent financial troubles at his company. This was confirmed by a Park Nicollet physician's assistant who prescribed Brian Xanax for anxiety. Brian denied having suicidal or homicidal ideations. Two days later, Brian saw his primary care physician because of recent weight loss and depression. The physician prescribed Zoloft at 50mg per day, and told Brian to come back in 5 weeks if he was still experiencing symptoms. At this appointment, Brian again denied suicidal ideation. On June 27th, Brian returned to urgent care because he was having difficulty sleeping, and felt that the Xanax wore off and the Zoloft was not yet helping. He again denied having suicidal ideations, and was prescribed Ativan in the interim while the Zoloft took full effect. When Brian returned to his primary physician on July 6th, he had lost an additional 11 pounds, and was still experiencing continued anxiety with occasional panic attacks. The physician increased his Zoloft dose from 50mg to 100mg, changed his sleeping medication to Trazodone, and referred Brian to mental health counseling.

On July 15th, Brian received his first psychiatric treatment with an Advanced Practice Registered Nurse (APRN). He underwent a PHQ-9 assessment[2] and scored a 23. Brian indicated in the assessment that he had some idle thoughts of suicide; however, he specifically denied any plan or intent, and he denied ever making any attempts. The APRN diagnosed Brian with "major depression, single episode, severe without psychosis," and determined it was too early in his treatment to evaluate the Zoloft dose. She also referred Brian to therapy, and told him to return in 4 weeks, or sooner.

On July 16th, Brian attended his first therapy session with a licensed social worker. Brian again scored a 23 on the PHQ-9 assessment and responded that he had thought of suicide and self-harm on several days, however, he handwrote next to it "I wouldn't say several days but a few." Brian reported that he continued to feel anxious and depressed, but denied suicidal or homicidal ideations, plans, or intent when asked by the social worker. The social worker created a treatment plan for Brian which included attending therapy until his PHQ-9 score was a 3 or below for three continuous visits. On July 28th, Brian called leaving a message for the APRN stating that his medications were not helping with his anxiety, so Brian's Zoloft dose was increased from 100mg to 150mg. Brian returned for therapy with the social worker on August 4th and 12th.

On August 14th, Brian returned to see the APRN and reported that his symptoms were unchanged or worse, other than his ability to sleep, which had improved. A PHQ -9 was administered in which he scored a 20. He again specifically denied any suicidal or homicidal ideations, plans, or intent, but did state that he experienced thoughts of suicide or self-harm on several days. The APRN changed Brian's antidepressant to Lexapro and told him to return in four to six weeks. Brian had a therapy session scheduled for August 27th, but rescheduled it for September 10th. Brian died before the September 10th appointment. In total, Brian was seen a total of nine times by Park Nicollet providers.

On September 6th, Brian purchased a shotgun which he used to kill his family and himself on or about September 10th. David Smits, as trustee for the next of kin, brought this wrongful death action on behalf of Brian and his family alleging that Park Nicollet was negligent in its treatment of Brian's depression and anxiety, and they deviated from the accepted standard of care.

Park Nicollet moved for summary judgment, which the district court granted, arguing that it did not owe a duty to Brian or his family members because there was no special relationship, nor was the harm foreseeable. The court of appeals reversed and remanded for trial holding that Park Nicollet did owe a duty of care to Brian as his mental healthcare provider and that his suicide did not negate that duty. The court of appeals also held there were genuine issues of material fact regarding whether the risk to Brian's family was foreseeable.

There were two issues on appeal: 1) Whether Park Nicollet owed a duty of care to Brian even though he committed suicide, and 2) whether Park Nicollet did not owe a duty to Brian's family because as a matter of law his acts of violence against his family were not foreseeable.

The majority held that Park Nicollet did owe Brian, its patient, a duty of care which was of the degree and skill possessed and exercised by practitioners engaged in the same type of practice under like circumstances. While Park Nicollet did not have an absolute duty to prevent Brian's suicide, it did have a duty to provide reasonable medical care. Therefore, a jury should determine whether Park Nicollet breached the standard of care and whether the breach was the proximate cause of Brian's actions. Although a special relationship did not exist between Park Nicollet and Brian—since Park Nicollet did not assume control over him—the majority still held that Brian's resulting conduct could be foreseeable which is a question for the jury.

On the second issue, that Park Nicollet did not owe a duty to Brian's family members because the harm was unforeseeable, tort law generally does not recognize a duty to prevent harm to a third party unless there is either a special relationship or the harm is foreseeable. Here, Brian's family members were not patients of Park Nicollet, nor were they in contact with Park Nicollet in any way. Brian sought treatment for depression, denied any homicidal thoughts or thoughts of harming his family, had no history of violence, said his sleep was improving, discussed commitment to his treatment, and his only references to his family during treatment were to indicate they were supportive. Thus, although Brian may have suffered from severe depression, his actions were not foreseeable as he did not display any warning signs to suggest that he was going to be a danger to those around him. Additionally, because medical malpractice cases require a patient-physician relationship, there is no medical malpractice claim against Park Nicollet for Brian's family members.

The dissent opined that Park Nicollet owed no duty to Brian because Brian took the independent and uncontrollable act of taking his own life. Liability cannot be imposed where the harm caused is self-harm. Previous decisions have only imposed liability for suicide on providers when the treatment is inpatient rather than outpatient. Absent this special custodial relationship, a medical provider cannot be held liable for a patient's suicide. If the Court creates a new cause of action, imposing liability on mental healthcare providers when their patients commit suicide, it is overstepping the role of the Legislature.

Additionally, the dissent held there was a fact issue as to whether Brian's acts of violence against his family were foreseeable because he suffered from debilitating depression, which Park Nicollet was aware of, and Brian showed several risk factors that should have suggested to Park Nicollet providers that there was a foreseeable risk of harm to others. The dissent heavily relied on the opinions of the expert witnesses in determining that there was a foreseeable risk of harm.

This decision will have significant effects on the duties imposed on mental healthcare providers because it expands the foreseeability scope. When the scope of what is deemed a foreseeable event is broadened, so

too is the duty of medical providers to their patients. Likewise, the liability medical providers are subject to also expands. Imposing this risk of liability on mental healthcare providers could potentially steer people away from practicing in an area of healthcare that is in dire need of more professionals. Furthermore, courts should be wary of imposing an additional stigma on an already stigmatized population.

[1] A20-0711 (Sept. 7, 2022)

[2] The PHQ-9 Assessment is a standardized assessment used by medical providers to assess whether a patient is suffering from depression with a maximum score of a 27. A score greater than 20 indicates severe depression.

Firm Updates

Congratulations to **Mollie A. Buelow, Richard A. Sauceda** and **Natalie M. Thomas**, on passing the Minnesota Bar and joining the JLO Team as Associate attorneys!

Mollie earned a Bachelor of Science and a Bachelor of Arts from the University of St Thomas. She got her J.D. from the University of St. Thomas School of Law. She looks forward to helping her clients in the areas of Employment Law, Health Law and Civil Litigation.

Richard received a Bachelor of Science from Southern Utah University. He got his J.D. from the University of Minnesota Law School. He will be aiding clients in the area of Civil Litigation.

Natalie earned a Bachelor of Science and a Bachelor of Arts from the University of Minnesota in 2019. She got her J.D. from the University of St Thomas School of Law. She will be assisting her clients in the area of Civil Litigation.

2022 Legislative Update

By: Mollie A. Buelow

The 2022 Session of the Minnesota Legislature included many changes and additions to state statutes. Below is a summary of significant legislation, which impacts workers' compensation, recreation activities, and city zoning

Law extends COVID-19 presumption for frontline workers

As the Coronavirus carried into 2022, a new law reinstates the COVID-19 workers' compensation presumption for frontline workers. The law continues to be limited to peace and police officers; firefighters; paramedics; emergency medical technicians; health care providers, nurses or assistive employees in a health care, home care, or a long-term care setting who work with COVD-19 patients; correctional officers or security counselors at correctional facilities; and child-care providers who are required to provide child care for the children of first responders and health care workers under the governor's executive orders. (Chapter 32 - HF1203/SF1203)

The law applies to frontline workers who contract COVID-19 on or after Feb. 3, 2022, the law maintains that if a worker contracts COVID-19, it is presumed they did so during the course of their employment and are eligible for workers' compensation benefits. The law is set to expire on Jan. 13, 2023.

Some Edible Cannabinoids Now Legal

It is now legal to sell certain edibles and beverages infused with tetrahydrocannabinol (THC), the cannabis ingredient extracted from hemp. This alteration to state law may now encourage cities to consider regulating sellers of THC. Additionally, regulations and employee policies may need to be updated due to this new law.

Many stakeholder groups and legislators were surprised by the full extent of the law as they hoped to pass regulations to reign in the selling of delta-8, a substance manufactured from hemp-derived cannabidiol that has similar intoxicating effects as the more commonly known cannabinoid delta-9. Instead, the language authorized certain amounts of both delta-8 and delta-9 in edible CBD products. The new law was passed by the Legislature as part of Chapter 98. Article 13 makes several changes to Minnesota Statutes, section 151.72 regarding the sale of certain cannabinoid products. The changes took effect on July 1.

Civil penalties increased for snowmobile and off-highway vehicle provisions

In an attempt to promote responsible snowmobile and off-highway vehicle use, and to protect individuals who allow their land to be used for trails, civil penalties will increase for certain off-highway vehicle violations and new civil penalties are created for certain snowmobile violations and violations of trespass laws involving an off-highway vehicle or a snowmobile.

Fines for snowmobile and off-highway vehicle operation and trespass violations will increase from $100 to $250 for a first offense, $200 to $500 for a second offense and $500 to $1,000 for third and subsequent offenses. (Chapter 46 - HF2819/SF3063)

City Zoning

A new law regarding intermediate care facilities in single-family residential areas requires cities to allow increased capacities for certain types of residential care facilities in areas zoned for single-family residential use.

Under the new law, licensed residential care services provided to more than four people with developmental disabilities in a supervised living facility, including in an intermediate care facility for people with developmental disabilities, are allowed as a permitted single-family residential use. These providers are now permitted to have a licensed capacity of seven to eight people. Previously, these types of facilities were only allowed a capacity of six people. However, if a city, town, or county zoning regulation is already in place that prohibits this type of facility as a single-family residential use, then it does not have to permit this use. It amends Minnesota Statutes, section 245A.11, subdivision 2. The requirement is effective from July 1, 2022, to July 1, 2023.

Congratulations

Congratulations to **Pat Collins**, **Joe Flynn** and **Jake Peden** who obtained a successful motion to dismiss on behalf of two Roseville police officers in *Bell v. Arneson*, No. 21-692 (DWF/ECW), 2022 WL 2835068 (D. Minn. July 20, 2022). The two Roseville police officers were accused of violating Mr. Bell's Fourth Amendment right against excessive force by allegedly putting a knee on Mr. Bell's neck while attempting to arrest him. The district court granted the motion to dismiss on the basis of judicial estoppel, finding that Mr. Bell purposely failed to disclose his cause of action against the officers on his post-incident Chapter 7 bankruptcy filings. The district court found that Mr. Bell had motive to conceal his claims from the bankruptcy court, because if he had scheduled the claim against the police officers in his bankruptcy (as he was required to do), his trustee could have moved to make any proceeds from the lawsuit available to Mr. Bell's bankruptcy creditors. Mr. Bell's failure to amend his bankruptcy schedules to include his cause of action was "clearly inconsistent" with maintaining the lawsuit against the police officers and warranted dismissal as a matter of law because it was not an inadvertent or good faith mistake.

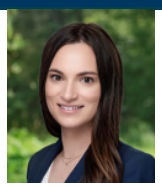
Congratulations to **Pat Collins**, **Joe Flynn** and **Trevor Johnson** who obtained summary judgment on behalf of Fridley Police Officer Brian Desjardins and the City of Fridley in *Weber v. Pierce Cnty, Wisconsin Dep't of Human Servs*, 2022 WL 4103931 (W.D. Wis. Sept. 8, 2022). Plaintiffs alleged that Officer Desjardins violated their substantive due process rights to family integrity under the Fourteenth Amendment by not allowing Mr. Weber to take custody of his minor child, who was the subject of a protective plan in Wisconsin based on allegations of drug use and neglect against the Webers, and by placing a Minnesota Police Hold on the minor child. Further, Plaintiffs alleged that Officer Desjardins and the City of Fridley violated their procedural due process rights under the Fourteenth Amendment by allegedly not affording the Plaintiffs a hearing within 72 hours of taking custody of their minor child. Finally, the Plaintiffs maintained that Officer Desjardins and the City of Fridley violated Minnesota Statute § 609.26 which criminalizes abduction by noncustodial parents. The district court granted summary judgment for Officer Desjardins and the City of Fridley by finding that: 1) Officer Desjardins was entitled to qualified immunity; 2) Plaintiffs' procedural due process rights were not violated because the minor child was not in Defendants' custody for more than 72 hours; and 3) there is no civil cause of action for allegedly violating Minnesota Statute § 609.26.

Congratulations to **Pat Collins** and **Joe Flynn** who obtained summary judgment on behalf of the City of Edina and Edina Police Officers Nicholas Pedersen and Benjamin Wenande in *Quinones v. City of Edina*, 20-CV-1329 (PJS/BRT), 2022 WL 2954028 (D. Minn. July 26, 2022). Decedent Brian Quinones, after saying goodbye to family members, drove off in his car. While in his car, the decedent was driving erratically and blew through a red light right in front of Officer Pedersen while live streaming on Facebook. Officer Pedersen followed the decedent's vehicle, activated his squad lights and sirens, and radioed that he was pursuing a vehicle that was failing to stop. Officer Wenande, along with officers from Richfield, heard Officer Pedersen's radio call and they rapidly responded to provide backup for Officer Pedersen. After about five minutes of pursuit, decedent abruptly stopped his vehicle, grabbed a large knife, disobeyed orders to drop the knife while coming toward Officer Pedersen with the knife and shouting "do it!" As Officer Wenande and other officers from Richfield arrived on scene, decedent ran directly toward Officer Pedersen with the knife in his hand. Officer Pedersen, along with two other Richfield officers, fired their guns. However, the decedent did not stop or drop his knife. Instead, he continued to disregarded orders to drop the knife and advanced toward Officer Wenande and three other Richfield officers with the knife. Officer Wenande and the three Richfield officers fired their guns at the decedent, who eventually fell to the ground and released the knife. The decedent's widow, Ashley Quinones, filed suit against Officers Pedersen and Wenande, along with the Richfield officers, alleging they violated decedent's Fourth Amendment rights by allegedly using excessive force and failing to intervene to stop the alleged Constitutional violations. Ms. Quinones also asserted Monell claims against Edina and Richfield, along with a number of state law torts. The district court granted summary judgment finding that Officers Pedersen and Wenande were entitled to qualified immunity because the use of deadly force was reasonable under the circumstances. Also, because Officers Pedersen and Wenande did not violate the decedent's constitutional rights, the district court dismissed the Monell claim against the City of Edina.

About the Authors

Natalie M. Thomas
Associate
nthomas@jlolaw.com
651-290-6545

Natalie Thomas is an Associate at Jardine, Logan & O'Brien, P.L.L.P. She received her J.D. from the University of St. Thomas School of Law, Minneapolis, Minnesota. Natalie's practice is focused on Civil Litigation



Mollie A. Buelow
Associate
mbuelow@jlolaw.com
651-290-6546

Mollie Buelow is an Associate at Jardine, Logan & O'Brien, P.L.L.P. She received her J.D. from the University of St. Thomas School of Law, Minneapolis, Minnesota. Mollie's practice is focused on Civil Litigation.

About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

A ***referral*** is the best compliment you can give an attorney. If you know of anyone who may be interested in receiving this newsletter, please email the following information to info@jlolaw.com: Name, Company, Phone Number, and Email.

To opt out of receiving this newsletter, please reply with ***Newsletter Opt Out*** in the subject line.

Disclaimer