S230568

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a public entity; ALFRED BACHER; CARY PORTER; ROBERT NAPLES; and NICOLE GREEN, public employees,

Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent.

KATHERINE ROSEN, an individual,

Plaintiff and Real Party in Interest.

COURT OF APPEAL, SECOND DISTRICT, DIVISION 7, CASE NO. B259424
SUPERIOR COURT OF LOS ANGELES COUNTY, CASE NO. SC108504
THE HONORABLE GERALD ROSENBERG, JUDGE

APPLICATION TO FILE *AMICI CURIAE* BRIEF; *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS

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APPLICATION TO FILE *AMICI CURIAE* BRIEF.

The California Psychiatric Association ("CPA"), the American Psychiatric Association ("APA"), and the California Association of Marriage and Family Therapists ("CAMFT") (collectively, "Amici") respectfully request permission to file the attached brief as *amici curiae*. Amici request that the Supreme Court affirm the portion of the Court of Appeal's decision which unanimously orders summary judgment pursuant to Civil Code Section 43.92 in favor of Dr. Nicole Green, the only Defendant in this matter who is a psychotherapist employed by Defendant Regents who diagnosed or treated Mr. Damon Thompson.

CPA is a nonprofit corporation responsible for carrying out judicial, legislative, regulatory, educational, advocacy, and public affairs activities on behalf of organized psychiatry in California. CPA works to ensure that patients with psychiatric disorders will have access to high quality medically necessary treatment. CPA has over 3,000 members, is the largest professional association of psychiatrists in California and is affiliated with APA. CPA participates as amici curiae in important cases involving mental health. Some cases concerning such issues in which CPA has participated or is participating are *The People Of The State of California v. Ignacio Garcia* (California Supreme Court Case No. S218197); *Lewis v. Superior Court* (California Supreme Court Case No. S219811); *Menendez v. Superior Court* (1992) 3 Cal.4th 435; *People v. Wharton* (1991) 53 Cal.3d 522, *cert. denied*, (1992) 112 S.Ct. 887; and *Scull v. Superior Court* (1988) 206 Cal.App.3d 784.

APA, with more than 36,000 members, is the Nation's leading organization of physicians who specialize in psychiatry. Its member physicians work to ensure humane care and effective treatment for all

persons with mental disorders. APA has filed numerous amicus curiae briefs in the United States Supreme Court, the United States Courts of Appeals, and State Supreme Courts, in cases involving matters of interest to the profession of psychiatry. The APA participated as amicus curiae in *Jaffee v. Redmond* (1996) 518 U.S. 1, which recognized a psychotherapist-patient privilege under the Federal Rules of Evidence. The APA has a strong interest in ensuring that duties imposed under state law do not unduly narrow the scope of the privilege, thereby discouraging individuals with mental illness from seeking needed treatment.

CAMFT is an independent professional organization of over 32,000 members representing the interests of marriage and family therapists in California. It is dedicated to maintaining high standards of professional ethics, to upholding the qualifications for the profession, and to advancing the profession. CAMFT is the largest association of Marriage and Family Therapists ("MFTs") in the country.

CPA and APA are respectively the largest professional organizations representing psychiatry in the State of California and in the United States, while CAMFT is the largest association of MFTs in the United States. As such, each has a strong interest in the issues presented in this case, particularly the circumstances under which a psychotherapist must breach confidentiality to protect others from a patient's threat of violence. This Court's construction of Civil Code Section 43.92 will have a significant impact on the practice of psychotherapy in the State of California and the rights, well-being and safety of the public and of patients suffering from mental illness.

The attached *amici curiae* brief focuses primarily on the issues which led the Court of Appeal unanimously to grant summary judgment in favor of Dr. Nicole Green. Those issues concern the practice of psychotherapy as impacted by Civil Code Section 43.92.

As counsel for Amici, I have reviewed the extensive record and briefs filed in this case and believe the Court can benefit from additional briefing by Amici, whose members have experience dealing with the issues presented in this matter.

The attached brief is entirely authored by counsel for Amici and entirely funded by Amici. Amici believe they have unique perspectives to bring to issues herein which will not duplicate the parties' briefing in this case. Hence, Amici respectfully request that this Court accept and file their *amici curiae* brief, which is attached to this Application.

Dated: July 12, 2016

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AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS

I. INTRODUCTION.

CPA, APA, and CAMFT urge the California Supreme Court to affirm the portion of the Court of Appeal's decision which unanimously grants summary judgment based on Civil Code Section 43.92 ("Section 43.92") to Dr. Nicole Green ("Dr. Green"), the only Defendant who is a UCLA psychotherapist who diagnosed or treated Mr. Damon Thompson ("Mr. Thompson"). That ruling rests on the limitation of liability of a psychotherapist pursuant to Section 43.92 when her patient attacks and injures another.

Section 43.92 provides that a psychotherapist has no duty of care to a victim of her patient's violence unless "the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." In this case, the Court of Appeal ruled unanimously that Dr. Green was entitled to summary judgment because there was no material issue of fact as to whether, prior to Mr. Thompson's assault on Plaintiff, any threat which identified Plaintiff Ms. Katherine Rosen ("Plaintiff" or "Ms. Rosen") as an intended victim (or rendered her identifiable as an intended victim) was communicated to or was made known to Dr. Green. Because Plaintiff failed to meet her burden of establishing that Dr. Green owed her any duty, summary judgment was appropriate.

Plaintiff has taken extensive discovery, has reviewed the records of Mr. Thompson's treatment, and is unable to rebut the extensive evidence that Dr. Green and the other psychotherapists, who diagnosed and treated Mr. Thompson at UCLA, repeatedly probed before the attack, including in their last session shortly before the attack, whether Mr. Thompson intended to harm others or himself. In that session Mr. Thompson specifically

denied any intent to harm others or himself. Indeed, Plaintiff was never identified as someone whom Mr. Thompson was threatening or had threatened violence. Hence, summary judgment in favor of Dr. Green is required because Defendants have provided affirmative evidence that no threat against Ms. Rosen was ever communicated to any psychotherapist treating Mr. Thompson and Ms. Rosen has failed to present any contrary evidence.

II. CIVIL CODE SECTION 43.92 PROTECTS A PSYCHOTHERAPIST FROM LIABILITY TO A PERSON INJURED BY HER PATIENT UNLESS "THE PATIENT HAS COMMUNICATED TO THE PSYCHOTHERAPIST A SERIOUS THREAT OF PHYSICAL VIOLENCE AGAINST A REASONABLY IDENTIFIABLE VICTIM OR VICTIMS".

In 1974, the California Supreme Court issued its subsequently withdrawn decision in *Tarasoff v. The Regents of The University of California* (1974) 118 Cal.Rptr. 129, 135-138 holding that a psychotherapist may be held liable "for negligent failure to warn" an intended victim when a patient "informed" his therapist "that he was going to kill an unnamed" victim who was "readily identifiable". (*Id.*, 118 Cal.Rptr. at 132). The 1974 decision was withdrawn and replaced by a 1976 California Supreme Court decision (*Tarasoff v. The Regents of The University of California* (1976) 17 Cal.3d 425, 431) which held that "[w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." Under the circumstances alleged, the Court concluded the duty to protect may require the psychotherapist "to warn the intended victim or others likely to apprise the victim of the

danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." (*Id.*)

From 1976 to 1985, psychotherapists labored under the uncertainties created by the *Tarasoff* decision and struggled with how to balance the conflict between the obligation to maintain the confidentiality which is essential to psychotherapy[1], and the duty to predict and protect others from a patient's serious danger of violence. The duty to protect required the therapist, judged by "the standards of his profession," to determine whether "his patient presents a serious danger of violence to another..." (*Id.* at 431.) This standard of care was and is impossible to attain. Scientific research has established that it is impossible for psychotherapists to predict with any acceptable degree of accuracy which patients will become

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[1] The California Legislature's purpose in enacting or affirming protection of psychotherapy information was described by this Court as follows in connection with the psychotherapist-patient privilege:

> "'Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life.... Unless a patient... is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment...depends....Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.' (Cal. Law Revision Com. Comment, reprinted in Deering's Ann. Evid. Code (2004 ed.) foll. §1014, p. 217.)" (*People v. Gonzales* (2013) 56 Cal.4th 353, 371-372.)

Available research reported in the United States Surgeon General's report on mental health (*Mental Health: A Report of the Surgeon General*, ch. 7 (1999)) strongly supports the conclusion that persons are more likely to seek mental health treatment if they believe the information they disclose in treatment will be kept confidential.

violent.[2] Justice Mosk's dissent in *Tarasoff* (*id.* at 451) states the problem as follows:

> "I cannot concur, however, in the majority's rule that a therapist may be held liable for failing to predict his patient's tendency to violence if other practitioners, pursuant to the 'standards of the profession,' would have done so. The question is, what standards? Defendants and a responsible *amicus curiae*, supported by an impressive body of literature discussed at length in our recent opinion in *People v. Burnick* (1975) 14 Cal.3d 306..., demonstrate that psychiatric predictions of violence are inherently unreliable."[3]

Section 43.92 was introduced and enacted in 1985 (Stats. 1985, ch. 737) "'to limit the psychotherapists' liability for failure to warn to those circumstances where the patient has communicated an "actual threat of violence against an identified victim," and to "abolish the expansive rulings

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[2] See the studies cited at pp. 11-15 of the *Amicus* Brief Of Jed Foundation, American College Counseling Association, And NASPA: Student Affairs Administrators In Higher Education In Support Of Writ Petition filed with the Court of Appeal herein. Typical of such studies is Swanson, J.W., et al. *Mental illness and reduction of gun violence and suicide: bringing epidemiological research to policy*, Annals of Epidemiology, Vol. 25 (2015) 366-376. http://dx.doi.org/10.1016/j.annepidem.2014.03.004 which reviews a number of research studies and concludes "violence is a complex societal problem that is caused, more often than not, by other things besides mental illness." (*Id.*, 368.) Even with the presence of the violence enhancing factor of substance abuse in addition to mental illness, a situation not applicable in the present case, "a clinician would be wrong nine times out of 10 with a blanket prediction that someone will commit a violent act merely because they have a combination of, for example, depression and alcohol use disorder." (*Id.*) The authors summarize the research as follows (*id.* at 370): "Although the existing research on aggressive or violent behavior and psychopathology is informative as far as it goes, the goal of synthesizing the evidence into a coherent, comprehensive explanation of violence risk in people with serious mental illness...remains elusive."

[3] Also see Justice Mosk's dissent in *Hedlund v. Superior Court* (1983) 34 Cal.3d 695, 707-710.

of *Tarasoff* and *Hedlund*...that a therapist can be held liable for the mere failure to predict and warn of potential violence by his patient.'" (Assem. Com. On Judiciary, Analysis of Assem. Bill No. 1133 (1985-1986 Reg. Sess.). May 14, 1985"; cited in *Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 816.).

Since its enactment in 1985, Section 43.92 has been amended on two occasions – by A.B. 733 in 2006 (Stats. 2006, ch. 136) and by S.B. 1134 in 2012 (Stats. 2012, ch. 149).[4] However, since its original enactment in

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[4] These amendments seek to resolve confusion caused by the fact that the 1976 *Tarasoff* decision (*supra*, 17 Cal.3d 425) replaced the duty to warn created by the 1974 *Tarasoff* decision (*supra*, 118 Cal.Rptr. 129) with a duty to protect. Section 43.92, when enacted in 1985 and amended in 2006 to limit the 1976 *Tarasoff* decision, refers to a "duty to warn and protect." The most recent amendment to Section 43.92 in 2012, after the events at issue in this matter, replaces all references to a "duty to warn and protect" with a reference to a "duty to protect" and states in Section 43.92, subds. (c) and (d) that the Legislature's intent is not to modify existing law. Existing law, as explained in the legislative history of the 2006 amendment to Section 43.92, became as follows with the enactment of A.B. No. 733 in 2006 (Senate Comm. on Judiciary, Analysis of Assem. Bill No. 733 (2005-2006 Reg. Sess.). June 13, 2006):

> "In Tarasoff, the California Supreme Court held when a psychotherapist 'determines...that [their] patient presents a serious danger of violence to another [the psychotherapist] incurs an obligation to use reasonable care to protect the intended victim against such danger.' [17 Cal.3d 425, 431.] To discharge their duty, psychotherapists may be required to 'warn the intended victim or others...' (*Id.*)"
>
> "In 1985, AB1133 (Chapter 737...) codified both the psychotherapists' duty and one method to discharge that duty. Specifically, AB1133 stated that a psychotherapist's duty to warn and protect shall be discharged upon 'making reasonable efforts to communicate the [patient's] threat to the victim or victims and to a law enforcement agency.'"...

1985, the provision of Section 43.92 at issue herein has never changed. Section 43.92 has always provided that "[t]here shall be no monetary liability on the part of, and no cause of action shall arise against" a psychotherapist for injury caused by "a patient's violent behavior" unless "the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." This provision of Section 43.92 limits the circumstances in which any duty to protect may arise, while also creating a limited immunity to that duty.

III. THE COURT OF APPEAL'S UNANIMOUS RULING GRANTING SUMMARY JUDGMENT IN FAVOR OF DR. GREEN BASED ON SECTION 43.92 SHOULD BE AFFIRMED.

Both the majority Justices and the dissenting Justice in the Court of Appeal agreed that summary judgment should be ordered for Dr. Green.[5] (Slip. Opn. 27-30; *The Regents Of The University Of California, et al. v. Superior Court of Los Angeles County* (Court of Appeal, Second Appellate District, Case No. B259525), Dis. Opn. 14-15, 21. .) As the majority noted, to establish a triable issue of material fact under Section 43.92 as to whether Dr. Green owed any duty to Ms. Rosen, plaintiff was required to produce evidence that Mr. Thompson had communicated to Dr. Green a serious threat of physical violence against Ms. Rosen. The Court of Appeal unanimously ruled that Ms. Rosen failed to produce any such evidence.

> "As amended June 5, 2006, this bill [Assem. Bill 733] would by implication clarify that a psychotherapist may fulfill that duty by taking reasonable actions 'other' than notifying a potential victim and law enforcement of a patient's threatened violent behavior."

[5] Citations will be to the page of the Court of Appeal majority opinion (Slip. Opn. ___), to the page of the dissent of Presiding Justice Perluss (Dis. Opn ___), and to the writ exhibits by volume and page (___ Exh. ___).

Ms. Rosen disagrees with the Court of Appeal's ruling and contends that, Defendants, including Dr. Green, bore the burden of "negating" that the duty-creating circumstances articulated in Section 43.92 were present and failed to do so.[6] (Plaintiff's Opening Brief On The Merits, 54-56; Plaintiff's Reply Brief On The Merits, 25-27.) That argument is incorrect. By its terms, the section 43.92 provides that "[t]here shall be *no* monetary liability on the part of, and *no* cause of action shall arise against, any person who is a psychotherapist . . . in failing to protect from a patient's threatened violent behavior or failing to predict and protect from a patient's violent behavior *except if* the patent has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims."[7] (Emphasis added.) Accordingly, to make out a prima facie case that a duty is owed, a plaintiff must proffer evidence that the duty-creating circumstances are present – otherwise, the statute provides that the psychotherapist owes no duty. The *absence* of any duty is the baseline rule that the plaintiff must overcome. Plaintiff does not claim that she can meet that burden.

Nevertheless, even if Ms. Rosen's contentions regarding the burden of proof as to Dr. Green were correct, Defendants would have met that burden by proffering evidence to establish that the patient, Mr. Thompson, never communicated a serious threat of violence against Ms. Rosen to Dr. Green or to any UCLA psychotherapist treating him. Plaintiff Ms. Rosen fails to present any evidence to the contrary although she, her counsel and

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[6] Plaintiff suggests that Defendants bore both the burden of production and the burden of persuasion with respect to this issue. See Opening Brief 55 ("burden to present evidence"); Reply Brief 25-27 ("burden to negate this basis of duty"). As explained in text, the statute makes clear that the Plaintiff bears the burden of production and persuasion to show that the psychotherapist owed her any duty.

[7] The current version of the statute is quoted; the changes from the prior version are not relevant to this argument.

her experts have had access to the complete psychotherapy treatment records for Mr. Thompson. The unrebutted evidence adduced by Dr. Green is as follows.

Plaintiff cites no evidence that Mr. Thompson ever made any threat of violence against the Plaintiff or that he even mentioned the Plaintiff to Dr. Green. Dr. Green was treating Mr. Thompson through UCLA Counseling and Psychological Services (CAPS). The only evidence that Plaintiff cites concerning any statement that Mr. Thompson made about Ms. Rosen concerns communications he made to a teaching assistant (Adam Goetz) in a chemistry course, claiming that Ms. Rosen was speaking about him in a derogatory manner. There is no evidence, however, that Thompson threatened to harm her. (4 Exh. 935-939). On September 30, 2009 – which is the only therapy session Mr. Thompson had after his conversation with Mr. Goetz – Mr. Thompson was specifically assessed and asked if he then or ever had an intent to harm others or himself. (3 Exh. 890-891). He denied ever having any such intent. (*Id.*) Plaintiff admits this is undisputed. (5 Exh. 1345-1346.) Although Plaintiff argues that the evidence "created an inference that Thompson never communicated such a threat and an equally plausible inference that he did," Reply Br. 25, the evidence recited above establishes that Mr. Thompson did not communicate any serious threat of violence against Ms. Rosen to Dr. Green, and there is no evidence to support any contrary "inference."

This unrebutted evidence thus establishes that Dr. Green is entitled to summary judgment based on Section 43.92 because Plaintiff has failed to adduce any evidence to establish that the patient ever communicated "a serious threat of physical violence against" Ms. Rosen to Dr. Green or to any other UCLA psychotherapist prior to his assault on Ms. Rosen. Hence, pursuant to Section 43.92, the summary judgment which the Court of Appeal unanimously granted Dr. Green should be affirmed.

IV. CONCLUSION.

For the foregoing reasons, the California Supreme Court is respectfully requested to affirm the Court of Appeal's decision in favor of Dr. Green.

Dated: July 12, 2016

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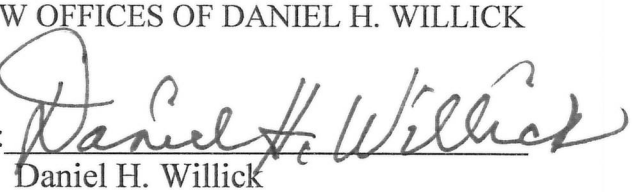
By: 

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 14(c)(1).)

This brief has been prepared using a proportionately spaced typeface, consisting of 13 points. Counsel has relied upon word processing software [Microsoft Word 2013] to determine the word count of this brief. As determined by this software, including footnotes, this brief consists of approximately 4,407 words.

Dated: July 12, 2016

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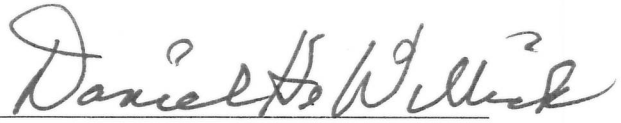
By: 

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PROOF OF SERVICE

1. I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. My business address is 1875 Century Park East, Suite 1600, Los Angeles, California 90067.

2. I served the document listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, addressed as follows:

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