IN THE SUPREME COURT OF FLORIDA

REBECCA A. TUTEN, etc.,

Petitioner,

v.

ALEXANDER FARIBORZIAN, et al.,

Respondents.

Case No. SC12-575
L.T. No. 1D11-641

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

The decision below holds that mental health care providers who hold a suicidal patient involuntarily under the Baker Act owe no duty of care in determining that he is competent to refuse further treatment and discharging him. Rebecca A. Tuten, the personal representative of the estate of her deceased husband, James Tuten, invokes this Court's conflict jurisdiction based on decisions of other district courts recognizing a duty of care in making these kinds of treatment determinations.

In September 2007, Mr. Tuten began receiving outpatient treatment for depression and suicidal ideations at Meridian Behavioral Healthcare, Inc., a psychiatric facility. (App. 2.) After a suicide attempt that November, he was admitted to Meridian for three days of inpatient treatment and was released with medication upon his request. (App. 2.) Two months later, he again attempted suicide by overdosing on the medication and was admitted to the intensive care unit of a hospital. (App. 2.) He was then transferred to Meridian and placed under the care of psychiatrist Dr. Alexander Fariborzian. (App. 2.) Three days later, Meridian denied Mr. Tuten's request for a discharge and, the day after that, filed petitions for involuntary placement and for adjudication of incompetence to consent to treatment under the Baker Act, both of which were based on Dr. Fariborzian's opinion. (App. 2.)

Meridian kept Mr. Tuten in the facility involuntarily for the next five days pending the hearing on the petitions. (App. 2.) Two days before the scheduled hearing, Mr. Tuten again requested a discharge. (App. 2.) This time, Dr. Fariborzian certified that Mr. Tuten was competent to refuse treatment. (App. 2.) Based on that certification, Meridian discharged Mr. Tuten, and he fatally shot himself the next day. (App. 2.)

Mrs. Tuten filed a wrongful death action against Dr. Fariborzian and Meridian.[1] (App. 3.) She alleged that Dr. Fariborzian was negligent in certifying that Mr. Tuten was competent to refuse treatment and in approving his discharge. (App. 3.) She claimed that Meridian was both directly negligent and was vicariously liable for Dr. Fariborzian's negligence. (App. 3.) The trial court dismissed Mrs. Tuten's amended complaint with prejudice. (App. 3.)

The district court concluded that the respondents owed no duty of care under either the Baker Act or the common law with regard to their decision to discharge Mr. Tuten. (App. 3-11.) As to the Baker Act, the court held that the respondents were required to discharge Mr. Tuten once Dr. Fariborzian determined he was competent to refuse treatment. (App. 3-6.) It concluded that the defendants owed Mr. Tuten no duty to use reasonable care in determining whether he was competent

[1] As the decision below notes, Mr. Tuten had also shot Mrs. Tuten. (App. 2.) She obviously survived the shooting, but she is not suing for her own injuries or claiming that Dr. Fariborzian or Meridian owed any duty to her.

to refuse treatment and in discharging him in light of the uncertainty involved in predicting when a patient will try to commit suicide. (App. 6-10.) Although the court recognized that the district court in *Paddock v. Chacko*, 522 So. 2d 410 (Fla. 5th DCA 1988), had held that a defendant owes a duty of care to protect a suicidal patient in his custody, the court rejected that reasoning based on other case law declining to hold a psychiatrist liable for failing to involuntarily commit a patient in the first place or for failing to warn third parties of a patient's dangerous mental condition. (App. 6-10.) It held that *Paddock* is "factually distinguishable" because Mr. Tuten was no longer in the defendant's custody when he killed himself. (App. 9.) The court affirmed the dismissal of Mrs. Tuten's complaint because the risk that a patient may commit suicide is so unforeseeable, there can be no duty of care. (App. 10.) Mrs. Tuten timely invoked this Court's conflict jurisdiction.

SUMMARY OF ARGUMENT

Every other district court to have considered the issue has held that a mental health provider owes its own patients, particularly those in custody, a duty to use reasonable care to prevent them from attempting suicide. By contrast, the First District held that the law imposes no such duty. Under the First District's holding, even egregious mistakes in discharging a patient – whether negligent, reckless, or even intentional – are immunized from liability when the patient kills himself.

Under this holding, all a mental health care facility need do to avoid any potential liability to a suicidal patient is push him out the door, a result that is contrary to Florida public policy, especially under the Baker Act, which was the source of the defendant's control over Mr. Tuten in the first place. That is not the law in the Second, Third, or Fifth Districts, and psychiatric patients and their families should not be without a remedy in the First District either.

ARGUMENT

THE COURT HAS AND SHOULD EXERCISE CONFLICT JURISDICTION TO DETERMINE WHETHER HEALTH CARE PROVIDERS OWE A DUTY TO TAKE REASONABLE MEASURES TO PREVENT THEIR SUICIDAL PATIENTS FROM ATTEMPTING SUICIDE.

The Court has jurisdiction because the First District's decision expressly and directly conflicts with *Sweet v. Sheehan*, 932 So. 2d 365 (Fla. 2d DCA 2006), *Paddock v. Chacko*, 522 So. 2d 410 (Fla. 5th DCA 1988), and *N. Miami Gen. Hosp. v. Krakower*, 393 So. 2d 57 (Fla. 3d DCA 1981), on the same question of law. Art. V, § 3(b)3, Fla. Const. *Sweet*, *Krakower*, and *Chacko* each hold that health care providers who are actively treating suicidal patients, particularly those in custodial care, owe their patients a duty of reasonable care to prevent a suicide attempt. The First District held directly to the contrary in concluding that the respondents here owed no such duty to Mr. Tuten.

In *Sweet*, a patient with a history of depression and suicidal ideations sued the psychiatrist with whom he had been treating for failing to take reasonable steps to prevent an unsuccessful suicide attempt that resulted in severe neurological damage. 932 So. 2d at 366-67. The trial court had granted summary judgment based on its conclusion that the psychiatrist owed no duty to prevent the suicide attempt. *Id.* at 367-68. In reversing, the Second District explained:

> Florida law unquestionably recognizes that physicians owe their patients a duty to "use the ordinary skills, means and methods that are recognized as necessary and which are customarily followed in the particular type of case according to the standard of those who are qualified by training and experience to perform similar services in the community or in a similar community."… Thus, the relevant inquiry is not whether Dr. Sheehan had a duty, but whether Dr. Sheehan breached that duty by failing to treat Sweet in accordance with the standard of care required of him, and if so, whether this failure resulted in Sweet's injuries.

Id. at 368 (citations omitted).

In *Chacko*, a mental patient sued her psychiatrist for failing to hospitalize her before an unsuccessful suicide attempt and recovered a substantial judgment. 522 So. 2d at 411. The trial court entered a defense judgment notwithstanding the verdict based on a finding that the defendant had no duty to involuntarily take the patient into his custody. *Id.* at 412. On appeal, the Fifth District recognized that the law was clear that

> [w]here a patient has surrendered himself to the custody, care and treatment of a psychiatric hospital and its staff, liability may be

> predicated upon the hospital's failure to take protective measures to prevent the patient from injuring himself.

Id. at 417. But the court affirmed the defense judgment because the patient in that case was under her parent's control and the defendant "was not in a position to do anything, other than offer his professional advice as to what methods of treatment were most suitable to his patient's needs." *Id.* at 415-16. The court was unwilling to extend the duty of care to require a doctor to take his patient into custody in the first place. *Id.* at 417. In distinguishing cases holding that a defendant owes a duty of care to a patient in its custody, the court noted, "Upon release of the patient, this duty ceases." *Id.* at 416. But it immediately qualified that statement by acknowledging

> that liability could be predicated upon the allegation that the defendant released the decedent from the hospital when they knew or should have known that he was suffering from a severe mental disturbance which rendered him helpless to care for himself.

Id. at 416 n.8 (citing *Nesbitt v. Community Health of S. Dade, Inc.*, 467 So. 2d 711 (Fla. 3d DCA 1985)).

In *Krakower*, the estate of a custodial patient with known suicidal tendencies brought a wrongful death action against a hospital for failing to prevent the patient from jumping from the fire escape to his death. 393 So. 2d at 58. In affirming the judgment against the hospital, the Third District held that the "duty of a hospital to

adequately safeguard a patient of known suicidal tendencies is recognized by the law." *Id.*

By contrast, the First District held that the defendants in this case, who had kept Mr. Tuten in the facility involuntarily for seven days following a failed suicide attempt, owed him no duty to use reasonable care in discharging him. (App. 2, 6-8.) It attempted to distinguish *Chacko* because Mr. Tuten's suicide occurred outside the hospital (App. 8-9), but the negligent act at issue here was the determination that Mr. Tuten was competent to refuse treatment and should be discharged, a decision that was made while he was in the facility. (App. 2.) The First District's refusal to recognize that the respondents had a duty of reasonable care in making that decision expressly conflicts with the rules pronounced not just in *Chacko*, but also in *Sweet* and *Krakower*.

The decision below also conflicts, though less directly, with this Court's long line of cases recognizing that although a defendant might not otherwise owe a duty to protect a plaintiff, once the defendant voluntarily undertakes to do so, he assumes a duty of reasonable care going forward. *See Wallace v. Dean*, 3 So. 3d 1035, 1041 (Fla. 2009) (holding that "one who *undertakes to act*, even when under no obligation to do so, thereby becomes obligated to act with reasonable care" (quoting *Un. Park Mem. Chapel v. Hutt*, 670 So. 2d 64, 66-67 (Fla. 1996))); *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1186 (Fla. 2003) (same); *Slemp v.*

North Miami, 545 So. 2d 256, 258 (Fla. 1989) (same). Even if the defendants may have had no duty to involuntarily detain Mr. Tuten in the first instance, once they did, this Court's case law required them to exercise reasonable care in their subsequent decisions, which must include the decision to discharge him.

The issue in this case is extremely important given the purpose of the Baker Act, which is to protect mentally ill patients from harming themselves. § 394.453, Fla. Stat. (2008); *see also Sanchez v. State*, 949 So. 2d 1059, 1065 (Fla. 3d DCA 2007) (noting, in criminal case, that the purpose of the defendant's "Baker Act commitments was to protect him from himself"). Under the First District's holding, even the most egregious mistakes by a provider are immune from liability, no matter how negligent or reckless the decision to discharge the patient. Even an intentional decision to release a patient the provider firmly believes will commit suicide would not be actionable under the First District's holding. This Court should exercise its discretion to resolve the conflict and ensure that psychiatrists and hospitals throughout the state have the same duty of care in making decisions regarding a mental health patient's treatment and discharge.

In short, the First District's decision insulates hospitals and psychiatrists from any liability whatsoever in discharging a suicidal patient, even after they undertook to keep the patient involuntarily for treatment. Indeed, it creates a perverse incentive for Baker Act health care providers to push their most unstable

patients out the door before they can attempt suicide in their facility. Once they wash their hands of the patient, however negligent, grossly negligent, or even reckless that act may be, all liability ceases under the decision below. This Court should exercise its discretion to resolve the conflict created by this decision to ensure that a uniform duty is imposed on psychiatrists and hospitals throughout the state when they make the key decision to discharge a suicidal patient.

CONCLUSION

For the foregoing reasons, this Court has and should exercise discretionary jurisdiction over the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by email[2] to Michael R. D'Lugo, Esq., counsel for the Appellees, at MDLugo@wickersmith.com, on this 16th day of April, 2012.

_____
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

_____
Attorney

[2] The parties have agreed to accept service by email at the listed addresses in lieu of U.S. Mail and have further agreed that electronic service will be deemed service by mail for purposes of Fla. R. App. 9.420(e).