AA-64571-5/20877129

Case No. SC12-575

SUPREME COURT OF FLORIDA

REBECCA A. TUTEN, as personal representative of the Estate of James Kenneth Tuten, deceased,
Petitioner,

vs.

ALEXANDER FARIBORZIAN, M.D. and MERIDIAN BEHAVIORAL HEALTHCARE, INC., a Florida Corp.,
Respondents.

RESPONDENTS' ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner, REBECCA A. TUTEN, as personal representative of the Estate of James Kenneth Tuten, deceased ("Ms. Tuten"), has presented a Statement of the Case and of the Facts in her Initial Brief on Jurisdiction. There is a fundamental flaw contained within Mr. Tuten's Statement of the Case and of the Facts, in that she has misrepresented both the underlying facts of the case and the holding of the First District Court of Appeal, in an effort to conjure a conflict that does not exist. The actual facts as developed in the record are far different than what is represented in Ms. Tuten's Statement of the Case and of the Facts. A review of the record as it truly exists clearly demonstrates that there is no conflict between the First District Court of Appeal's opinion and prior decisions of other District Courts of Appeal that would support this Court's exercise of its discretionary jurisdiction.

The first sentence of Ms. Tuten's Initial Brief on Jurisdiction is a cynical attempt to invite this Court to exercise its discretionary conflict jurisdiction by misstating the First District's conclusion. Ms. Tuten states: "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 in discharging him." Initial Brief on Jurisdiction at page 1. Ms. Tuten maintains throughout the entire course of her Initial Brief on

Jurisdiction that the decedent, James Kenneth Tuten, was an involuntary custodial patient of the Respondents at the time of his release from the Meridian facility. However, the actual facts demonstrate that this was not the case. The decedent no longer met the criteria to qualify as an involuntary custodial patient of the Respondents at the time of his release. This fundamental distinction, one which Ms. Tuten ignores throughout the Initial Brief on Jurisdiction, completely tarnishes Ms. Tuten's legal argument in support of her contention that the First District's opinion conflicts with earlier decisions of other District Courts of Appeal.

The facts as set forth in the District Court's opinion, which is an absolutely accurate recitation of the timeline for the last week of the decedent's life, demonstrate the fallacy of Ms. Tuten's argument in support of conflict jurisdiction. The decedent was admitted to the Respondent's mental health facility on February 5, 2008. This admission commenced the 72-hour evaluation period mandated by Florida's Mental Health Act. Florida Statutes § 394.451 *et seq.* (The "Baker Act"). At the conclusion of that 72-hour period, on February 8, 2008, the Respondents' administrator filed a Petition for Involuntary Placement and a Petition for Adjudication of Incompetence to Consent to Treatment pursuant to the terms of the Baker Act. A hearing on these petitions was scheduled for February 15, 2008.

After the mandatory 72-hour evaluation period had expired, and after the Respondents had filed the above referenced petitions, but prior to the scheduled hearing on those petitions, on February 13, 2008, the decedent requested his release from the Respondents' facility. On that date, the Respondent, Dr. Fariborzian, determined that the decedent no longer met the criteria for involuntary commitment, and certified that the decedent was competent to provide consent for a release. The decedent was released on that date with an order to receive follow up care. The following day, the decedent committed suicide.

Given this timeline, at the time of his release, the Respondents determined that the decedent no longer met the criteria for involuntary commitment at the Respondents' facility. The decedent was outside of the 72-hour window specified by the Baker Act for evaluation of mental health patients. The Respondents filed the appropriate petitions under the Baker Act in order to seek adjudication of incompetence. However, prior to that hearing taking place, the decedent presented a request for release from the facility. Under the explicit terms of the Baker Act, which require mental health care providers to provide the least restrictive treatment available under the circumstances, the Respondents, after conducting an evaluation, determined that the decedent's request had to be granted because he no longer met the criteria for involuntary commitment. Thus, contrary to Ms. Tuten's contention in her Initial Brief on Jurisdiction, at the time of his release, the

decedent was not an involuntary committed patient at the Respondents' facility, but rather he was a patient who sought his release based on his then existing circumstances. Under the explicit terms of the Baker Act, the Respondents released the decedent, as they were in fact required to do.

SUMMARY OF THE ARGUMENT

There is no conflict between the First District's opinion here and prior decisions of other District Courts of Appeal. The First District's opinion is entirely consistent with earlier decisions of other District Courts of Appeal that hold that a psychiatrist and a psychiatric facility are not under a duty to involuntarily commit a patient to a psychiatric facility for the patient's own safety. The three District Court decisions to which Ms. Tuten points as being in conflict with the First District's opinion in the instant appeal are not in conflict at all. In fact, one of the three asserted conflicts, with the Fifth District Court of Appeal in ***Paddock v. Chacko***, 522 So.2d 410 (Fla. 5th DCA 1988), is not a conflict at all, but rather is a decision that is in complete harmony with the First District's opinion here, as Judge Van Nortwick's opinion acknowledges. Because there is no conflict between the First District's opinion in this case and any of the cases Ms. Tuten has cited in her Initial Brief on Jurisdiction, this Court lacks conflict jurisdiction to

review the First District's opinion, and therefore the Petition for Review should be denied.

LEGAL ARGUMENT

I. THE DISTRICT COURT'S OPINION IS NOT IN CONFLICT WITH ANY OTHER DISTRICT COURT OF APPEAL OPINION.

The basis of Ms. Tuten's argument in support of her request that this Court invoke its discretionary jurisdiction to review the First District Court of Appeal's opinion is that the opinion is in conflict with prior decisions of other District Courts of Appeal. Specifically, Ms. Tuten contends that the District Court's opinion is in conflict with ***Sweet v. Sheehan***, 932 So.2d 365 (Fla. 2nd DCA 2006); ***Paddock***, *supra*; and ***North Miami General Hospital v. Krakower***, 393 So.2d 57 (Fla. 3rd DCA 1981). For the reasons set forth below, the District Court's opinion in the instant appeal is not in conflict with these other appellate decisions, and therefore this Court lacks jurisdiction to review the District Court's opinion.

The basis of Ms. Tuten's argument that a conflict exists is her contention that the District Court's opinion holds that a psychiatric facility owes no duty to its involuntarily committed patients to prevent them from committing harm to themselves. Of course, as noted above, Ms. Tuten's argument is based upon the factual flaw that, contrary to Ms. Tuten's contention, the decedent no longer met the criteria to remain as an involuntarily committed patient at the Respondents'

facility at the time he requested his release from that facility. This distinction is significant, as the cases to which Ms. Tuten cites as being in conflict are actually entirely consistent with the First District's opinion.

In ***Sweet***, the District Court ruled that a psychiatrist owed a duty to a patient to act within the prevailing professional standard of care. The District Court reversed a summary judgment that had been entered in favor of the defendant psychiatrist. The psychiatrist had moved for summary judgment relying in part on ***Paddock***, "in which the Fifth District held that as a matter of law a psychiatrist has no duty to involuntarily hospitalize a patient." ***Id.*** at 367. After this quote, the ***Sweet*** court wrote the following footnote:

> Dr. Sheehan's arguments rest largely on his contention that no Florida case holds that a psychiatrist has a duty to hospitalize a patient against his will. However, Sweet's complaint does not allege that Dr. Sheehan should have forced Sweet's commitment. This contention was advanced in regard to Sweet's presuit investigation only. While Sweet has indicated in his brief that he may attempt to reassert this contention based on testimony from Dr. Sheehan indicating that under some circumstances the applicable standard of care might require him to attempt involuntarily hospitalization, this issue was not before the trial court when Dr. Sheehan moved for summary judgment. Thus, it is not before us in this appeal, and we express no opinion regarding the merits of such a claim.

Id.

Thus, the ***Sweet*** court explicitly declined to express any opinion on the precise issue that is at the crux of the instant litigation, namely whether a

psychiatrist or a psychiatric facility has a duty to involuntarily commit a patient to a psychiatric facility. In light of the fact that the ***Sweet*** court explicitly declined to address this issue, it cannot form the basis of a conflict.

Likewise, the ***Paddock*** decision does not present a conflict with the District Court's opinion here. To the contrary, as the First District noted, these two decisions are entirely harmonious with one another. The ***Paddock*** decision stands for the proposition that a psychiatrist does not have a duty to involuntarily commit a patient to a psychiatric institution. In reaching this conclusion, the ***Paddock*** court noted:

> The science of psychiatry represents the penultimate grey area. Numerous cases underscore the inability of psychiatric experts to predict, within any degree of precision, an individual's propensity to do violence to himself or others. Indeed, psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession.

Paddock at 414. (Internal citations and quotations omitted). The First District Court of Appeal in the instant litigation quoted extensively from the ***Paddock*** opinion, noting that they were consistent with one another, and ultimately concluding:

> Essentially, the plaintiff argues that [the psychiatrist] was obligated to demand and insure that his patient be hospitalized for the benefit of her own safety.…We decline to force every psychiatrist to navigate between Scylla and Charybdis, in deciding whether or not to involuntarily detain and examine a patient.

District Court's decision at page 8, quoting ***Paddock*** at 414-415. Thus, the ***Paddock*** decision, far from being in conflict with the District Court's decision here, is actually entirely consistent with it. Both the First District and the Fifth District in ***Paddock*** concluded that a physician such as Dr. Fariborzian is not under a duty to involuntarily commit a patient to a psychiatric facility in order to protect that patient from harm. Thus, ***Paddock*** does not form the basis of a conflict that would support this Court's exertion of its discretionary jurisdiction.

Finally, the ***Krakower*** opinion also fails to create a conflict between the District Courts of Appeal that would support this Court's exertion of its discretionary jurisdiction. In ***Krakower***, unlike here, the psychiatric patient at issue was admitted to the psychiatric facility. This is a consistent misapprehension of the facts by Ms. Tuten in the instant litigation. The ***Krakower*** decision is inapposite to the instant matter, because here the decedent at the time of his request for release from the Respondents' facility was not an admitted patient. Instead, as the facts plainly reveal, the decedent was at this facility voluntarily after the 72-hour Baker Act period had elapsed, and prior to the hearing on the Petition for Involuntary Placement had taken place, at which point the Respondents determined that the decedent no longer met the criteria for involuntary commitment.

Under these circumstances, in order to comply with the specific terms of the Baker Act, the Respondents were required to allow the decedent to leave the

facility. The District Court here followed the consistent law of the state of Florida that a psychiatrist and a psychiatric facility do not have a duty to involuntarily commit a patient to a psychiatric facility in order to protect that patient from harm. Because ***Sweet***, ***Paddock***, and ***Krakower*** do not conflict with the District Court's decision below, this Court should deny Ms. Tuten's Petition to Invoke this Court's Jurisdiction.

CONCLUSION

For the reasons stated above, the Respondents respectfully request that this Court deny Ms. Tuten's Petition to Invoke the Discretionary Jurisdiction of this Court.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished via e-mail[1] this 11th day of May, 2012, to counsel for the Appellants: John S. Mills, Esquire @ jmills@mills-appeals.com; Andrew D. Manko, Esquire @ amanko@mills-appeals.com; and Helen W. Spohrer, Esquire @ hspohrer@sdlitigation.com.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the requirements of Fla. R. App. P.9.100 (l). This document is being submitted in Times New Roman 14 point font.

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[1] The parties have agreed to accept service by e-mail 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. P. 9.420(e).