**IN THE SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Docket No. A-001255-18T3

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| TRACEY L. VIZZONI, as Executrix of the Estate of JUDITH A. SCHROPE<br><br>Plaintiff,<br><br>v.<br><br>BARBARA MULFORD-DERA, JOSEPH DERA, ATLOCK FARM, STEFAN LERNER, JOHN/JANE DOE DOCTORS/ PHARMACISTS 1-10 (Fictitious Defendants), and ABC Employer 1-10(Fictitious Defendants),<br><br>Defendants. | On Interlocutory Appeal from THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, SOMMERSET COUNTY<br><br>DOCKET NO.: SOM-L-575-15<br><br>Sat Below:<br>Hon. Yolanda Ciccone, A.J.S.C.<br><br>Civil Action |

# AMICI CURIAE BRIEF OF AMERICAN MEDICAL ASSOCIATION AND MEDICAL SOCIETY OF NEW JERSEY

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## PRELIMINARY STATEMENT

This appeal raises the issue of whether physicians and other health care professionals owe a duty to a plaintiff, such as Tracey Vizzoni in her capacity as executrix of the estate of Judith Schrope, to protect her from the negligence of a patient. The American Medical Association and Medical Society of New Jersey, as amici curiae in this appeal, urge the Court to uphold the trial court's ruling in favor of summary judgment that Dr. Lerner, who treated Ms. Mulford-Dera, had no such duty to Ms. Schrope. A physician's duty is ordinarily owed to the patient and does not extend to third parties among the public at-large.

In rare and limited circumstances, New Jersey courts have expanded a physician's duty to encompass a non-patient, but only when the third party has a defined, special relationship with the physician or patient. As other courts have cautioned, there is profound harm that would result by expanding a physician's legal obligations to the general public. Physicians would be subject to liability to an infinite, undefinable pool of people and could face litigation whenever someone alleges harm from a patient that could arguably be tied to that patient's care.

## INTEREST OF *AMICI CURIAE*

The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and

specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including New Jersey, and in every medical specialty.

The Medical Society of New Jersey (MSNJ), founded in 1766, is the oldest professional society in the United States. Today, MSNJ is the largest physician organization in New Jersey and is comprised of medical students, residents and physicians from all specialties. MSNJ's mission is to promote the betterment of the public health and the science and the art of medicine, to enlighten public opinion in regard to the problems of medicine, and to safeguard the rights of the practitioners of medicine. The organization and its members are dedicated to a healthy New Jersey, working to ensure the sanctity of the physician-patient relationship. In representing all medical disciplines, MSNJ advocates for the rights of patients and physicians alike, for the delivery of the highest quality medical care. MSNJ supports initiatives that allow the medical community to respond to patient needs, and develop an ethical and compassionate environment in order to create a healthy Garden State and

healthy citizens. The AMA and MSNJ are representing the AMA Litigation Center in this matter.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

*Amici* adopt and incorporate Defendant's Procedural History and Statement of Facts to the extent needed for the arguments stated herein. This case involves allegations that Ms. Mulford-Dera was driving her car and collided with the decedent, Judith Schrope, who was cycling in the roadway. Dr. Lerner had been treating Ms. Mulford-Dera for psychological conditions, including major depression, panic disorder and attention deficit disorder. As part of her treatment, Dr. Lerner prescribed several medications for Ms. Mulford-Dera. Plaintiff alleges that the medications influenced Ms. Mulford-Dera's driving, and, therefore, was a cause of the accident. Plaintiff is suing Dr. Lerner, alleging he is responsible for the accident because he prescribed these medications to Ms. Mulford-Dera and did not caution her adequately about the medications' side effects.

The trial court granted summary judgment to Dr. Lerner for Ms. Schrope's injuries and death because he did not have a tort duty to her, either directly or as derivative claim through Ms. Mulford-Dera. Neither Dr. Lerner nor Ms. Mulford-Dera had any relationship with the decedent; she was an unidentifiable member of the public who, tragically, was at the wrong place at the wrong time. New Jersey law does not recognize a duty on

physicians to protect such members of the public; there are highly restricted circumstances where a physician can have liability to third parties, and none of them exist here.

## LEGAL ARGUMENT

New Jersey's General Assembly and Supreme Court have developed a system of laws governing the delivery of health care that properly prioritizes the sanctity of the patient-physician relationship. A physician's duty is to the patient, which facilitates a bond of trust that is particularly important in the mental health context such as the case here. Medical treatment that mental health care physicians provide, including prescribing important medications to combat depression and other life-affecting conditions, are vital to the patient's well-being and, at times, even the safety of the larger community.

There are few circumstances where the patient-physician bond is broken to protect third parties. In the 1970s, several courts, including in New Jersey, created a direct duty to a third party in the very narrow circumstance when reasonable care was needed to protect an identifiable, intended third party target of the patient from violent danger. See McIntosh v. Milano, 168 N.J. Super. 466 (Law Div. 1979); Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976). When the New Jersey legislature codified this rule, it provided physicians with "immun[ity] from any civil liability" to a third party

except in these rare circumstances. N.J.S.A. 2A:62A-16. Specifically, a duty to a third party arises only when the patient communicated the "threat of imminent, serious physical violence against a readily identifiable individual" or the physician could reasonably determine that the patient "intended to carry out an act of imminent, serious physical violence against a readily identifiable individual." Id. Neither exception applies here. Plaintiff was not a readily identifiable victim; she was a member of the general public whose death was purely accidental.

Here, Plaintiff is seeking to attach her claim to Dr. Lerner's duty to Ms. Mulford-Dera. Such derivative claims, though, are equally circumscribed. As discussed below, the N.J. Supreme Court has not extended derivative tort duties to third parties except when there is a "foreseeable risk to an identifiable person." Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 318 (2013). Although Vertus arose in another context, many courts around the country with nearly identical allegations as here have also rejected third party duties of care. See Mavrogenis v. Hall, 970 P.2d 590, 591 (N.M. 1998) (joining a "substantial number of jurisdictions declining to extend physicians' duties to non-patients for prescription-involved situations"). The concern is that liability to non-

patients could have a "chilling effect on the use of prescription medication" that their patients need. Id. at 593.

In this case, Ms. Schrope was the tragic victim of a car accident, for which there are longstanding liability rules. The Court should not change New Jersey's tort law by imposing broad new duties on physicians for harms to non-patients. There is no relationship between a physician and a member of the public giving rise to a special responsibility to protect them. As the state Supreme Court has recognized, plaintiffs such as Ms. Schrope may rightly deserve compassion, but "the function of the law, and in particular the common law governing tort recoveries, cannot be driven by sympathy or overshadowed by the effects of tragedy." Vertus, 214 N.J. at 329-30. Otherwise, car accident cases would turn into complex trials over the many products and circumstances that might have affected one's driving.

## I. New Jersey Law Does Not Support a Physician Duty of Care Under the Facts of this Case

In New Jersey and other states, the foundational principles of tort law recognize that a person does not have a legal duty to protect a member of the public from the acts of another, except in defined circumstances. See id. ("[A]bsent circumstances in which the definition of the duty can be applied both generally and justly, this Court should stay its hand."); People Express Airlines v. Consol. Rail Corp., 100 N.J. 246,

252-53 (1985) ("Some limitation [to tort liability] is required."). The Supreme Court has been clear that imposing such a duty involves considerations of fairness and public policy, as well as foreseeability. See Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996); Vertus, 214 N.J. at 325 ("Fairness, not foreseeability alone, is the test.").[1] Courts assess the defined relationship of the parties, the nature of the risk, the ability to exercise the needed care, and the public interest in the proposed solution. See Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993).

As indicated above, in order for a physician to have a duty to a third party, that third party must have been readily identifiable to the physician and under immediate threat of violent danger. See Safer v. Estate of Pack, 291 N.J. Super. 619, 625-26 (1996); N.J.S.A. 2A:62A-16(b). New Jersey statutes are similarly constrained for when a physician has a duty to notify the State of patients that present a foreseeable risk to the public, such as epilepsy or a seizure disorder in a driving-age individual, or a communicable or infectious disease. See N.J.S.A. 26:4-15, 39:30-10.4. These exceptions are drawn narrowly to avoid placing the physician or therapist "in the

[1] See also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53, at 358 (5th ed. 1984) ("'[D]uty' . . . is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.").

untenable position" of serving two, potentially competing interests. Marshall v. Klebanov, 188 N.J. 23, 36 (2006). A physician's priority should be providing care to the patient.

Accordingly, many courts have refused to extend a physician's duty to members of the general public, including in cases highly comparable to the one at bar. For example, in Kansas, a bicyclist who was hit by a motorist who had fallen asleep at the wheel sued the neurologist who had treated the motorist for a sleep disorder. See Calwell v. Hassan, 925 P.2d 422, 430 (Kan. 1996). The Kansas Supreme Court held that there was no special relationship between the doctor and the cyclist that would impose a duty to warn the motorist not to drive to prevent her from harming a third party. See id. Likewise, the Iowa Supreme Court dismissed a case brought by an injured bicyclist against physicians who recommended providing a license to a driver with juvenile muscular degeneration, finding the physicians had no duty to protect unidentified third persons. See Kolbe v. State, 661 N.W.2d 142, 146 (Iowa 2003).

The concern that these and other courts have expressed in denying such liability is that it would improperly intrude on the patient-physician relationship and undermine patient care. The risk-benefit analysis for prescribing medication is supposed to be limited to the benefits and risks for the patient. See AMA Principles of Medical Ethics § 10.015 (stating a physician

is ethically required to use sound medical judgment holding the best interest of the patient paramount). Physicians should not have divided loyalty. They should never hesitate to provide patients with treatments that have inherent risks and potential side effects because of fear of liability to the public. See Gilhuly v. Dockery, 615 S.E.2d 237, 239 (Ga. Ct. App. 2005) (explaining that such liability "would be forcing the physician to weigh the welfare of unknown persons against the welfare of his patient") (internal quote omitted). If this were to occur, patients would have reduced access to beneficial treatment.

In addition, courts have expressed concern that physicians would have no ability to avoid litigation; they cannot ascertain the impact of medications on patients at the time of an accident or whether the patient recognized the risks of driving at that moment and should have pulled over to the side of the road. See Hall, 970 P.2d at 597 (explaining the physician's "warnings may not be effective to eliminate the risk in many cases"). Also, physicians might have to defend against such litigation by disclosing confidential patient information and communications or testifying that the patient regularly forgets information the physician provides. A patient may improperly blame others in an effort to deflect responsibility, giving rise to unjustified liability. Both paths will destroy the patient-physician bond needed to foster effective medical and mental health care.

Finally, courts have pondered where the demarcation point would be drawn to ensure that liability remains principled. At what point would the bounds of the physician's duty to motorists, cyclists and other members of the general public end? Such liability is not definable and should not be allowed.

## II. In New Jersey, Third Party Duties of Care Are Highly Restricted and Do Not Extend to Members of the Public

The national case law discussed is consistent with the way the New Jersey Supreme Court has restricted duties to third parties derived from existing duties to others. Much like a physician has a duty to a patient, a property owner may owe a duty to a worker on its property. The state high court has been clear in such property owner cases that derivative duties cannot extend to members of the general public.

In these cases, employees and contractors at a job site worked around toxic substances, such as asbestos. After work, they carried the toxic substances off the premises on their clothes. See, e.g., Schwartz v. Accuratus Corp., 255 N.J. 517 (2016); Olivo v. Owens-Illinois, Inc., 186 N.J. 394 (2006). Third parties alleged injury from exposure to the toxic substances on the workers' clothes and sued the premises owner. The allegations generally echo those here: the premises owner had a duty to warn the worker of toxic chemical risks—much like a physician had a duty to warn a patient of potential medication

risks—and had it abided by this duty, the worker would not have worn their work clothes off the premises and caused the injury.

In Olivo, a worker's spouse brought the claim. In assessing the elements of duty in that situation, the New Jersey Supreme Court allowed the duty to extend to the spouse. However, it explained that such a duty cannot extend past an identifiable individual: "The duty we recognize in these circumstances is focused on the particularized foreseeability of harm to plaintiff's wife." 186 N.J. at 399. In response to fears that this ruling would lead to broad liability, the Court clarified that such liability does not reach the general public. Id. (calling such fears "overstated"). The Court affirmed this principle in Vertus, stating derivative premises owner duties can arise only out of "a foreseeable risk to an identifiable person" and that it would not support "unbounded liability" to the general public. Vertus, 214 N.J. at 319. There must be a "clear or single relationship that we can identify to which the proposed duty would attach or in which it would be binding." Id. at 323. Because no relationship existed in Vertus, as here, the Court found there could be no tort duty to the third party.

A clear majority of courts around the country presented with this scenario have declined to recognize any take-home liability, including to spouses and children, let alone to unidentifiable members of the public. See Gillen v. Boeing Co.,

40 F. Supp. 3d 534, 541 (E.D. Pa. 2014) (stating with few exceptions, "courts throughout the country who have confronted this issue [of take-home exposure] have declined to recognize such a duty"); see also CSX Transp., Inc. v. Williams, 608 S.E. 2d 208, 209 (Ga. 2005)("expanding traditional tort law concepts beyond [such] manageable bounds [would] create an almost infinite universe of potential plaintiffs"). The rulings are fully in concert with the N.J. Supreme Court's holding that a "chance contact" does "not suffice to create a duty of care." Schwartz, 255 N.J. at 529.

To this end, courts around the country have rejected attempts at derivative duties in car accident cases. For example, an Illinois court dismissed a third party's case against a hospital when one of its physicians fell asleep at the wheel after working excessive hours and injured the third party. See Brewster v. Rush-Presbyterian-St. Luke's Med. Ctr., 836 N.E.2d 635, 638-39 (Ill. Ct. App. 2005). Likewise, in Missouri, parents of a motorist killed in a head-on collision with a driver who had become unconscious sued the driver's employer, alleging that on-the-job exposure to dangerous fumes led the driver to lose consciousness. See Berga v. Archway Kitchen & Bath, Inc., 926 S.W.2d 476, 479-80 (Mo. Ct. App. 1996). The court dismissed the claim against the employer, finding it had no duty to prevent harm to third parties. See id.

Medication is only one factor that can influence a driver. Reversing the trial court's summary judgment ruling could broadly expand litigation to many others whom a plaintiff could claim impaired or otherwise affected the driver's actions.

## III. Allowing Third Party Liability Here Could Have Major Detrimental Impacts on Mental Health Care

Of particular concern to amici is the impact that any vast new third party liability would have on mental health care. If the Court creates the liability sought by plaintiffs, amici are concerned that it could chill the ability of psychiatrists to prescribe treatment and medications for serious mental health issues. Such a result would exacerbate challenges in treating mental illness and impede the substantial progress made to raise mental health awareness and encourage people to seek treatment.

Today, one in five adults in the United States experiences a mental illness, and one in twenty-five adults live with a serious mental illness. See Nat'l Alliance on Mental Illness, Mental Health by the Numbers.[2] Studies also show that serious mental health conditions, such as adult suicidal ideation and major depressive episodes in youth, are on the rise. See Mental Health Am., 2019 State of Mental Health in America (2019), at 5.[3]

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[2] https://www.nami.org/NAMI/media/NAMI-Media/Infographics/GeneralMHFacts.pdf.

[3] http://www.mentalhealthamerica.net/download-2019-state-mental-health-america-report.

At the same time, the "United States is suffering from a dramatic shortage of psychiatrists and other mental health providers" to serve these populations. Stacy Weiner, Addressing the Escalating Psychiatrist Shortage, Ass'n of Am. Med. Colleges, Feb. 13, 2018 (stating "the shortfall is particularly dire in rural regions, many urban neighborhoods, and community mental health centers that often treat the most severe mental illnesses").[4] A 2017 report prepared for the National Council for Behavioral Healthcare estimates that demand for psychiatrists may outstrip supply by more than 15,000 psychiatrists by 2025. See Nat'l Council Med. Dir. Inst., The Psychiatric Shortage: Causes and Solutions 15 (Mar. 2017).[5]

This shortage is, in part, due to greater awareness for mental health services, which has resulted from a long struggle by individuals suffering from serious mental illness to overcome societal stigmas and legal obstacles. See Altha Stewart, M.D., 175 Years of Caring: A Celebration, Am. Psychiatric Ass'n, Dec. 2018.[6] The New Jersey Supreme Court has recognized this history and the need to protect "the rights of persons suffering from

[4] https://news.aamc.org/patient-care/article/addressing-escalating-psychiatrist-shortage/.

[5] https://www.thenationalcouncil.org/wp-content/uploads/2017/03/Psychiatric-Shortage_National-Council-.pdf.

[6] https://psychnews.psychiatryonline.org/doi/10.1176/appi.pn.2019.1a23.

mental illness" to seek proper care. Matter of Commitment of Edward S., 118 N.J. 118, 124 (1990). "As doubts concerning the fairness of society's treatment of the mentally ill grew, legislative provisions affording greater protection were adopted, reflected in, and to some extent triggered by judicial decisions on the subject." Id. at 124-25; In re Grady, 85 N.J. 235, 245 (1981) ("After a history of isolation and neglect, the mentally [infirm] members of our society are finally being accorded their basic civil rights.").

Expanding the scope of liability of psychiatrists would not improve treatment for the mentally ill, it would make it worse. It also would increase the costs of patient care. The lawsuit environment extracts a heavy toll on our health care system: rising professional liability insurance premiums for physicians; rising health care costs of patients; overly defensive (and thus more expensive) medical practices; early retirement for physicians; and physician relocation to states that have adopted more effective medical negligence laws. Limited medical resources should be spent on patients.

## CONCLUSION

For the foregoing reasons, amici respectfully request the Court to affirm the trial court's ruling granting summary judgment for Dr. Lerner.

Respectfully submitted,

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Dated: January 16, 2019

## CERTIFICATE OF SERVICE

I certify that on January 16, 2019, two copies of the foregoing Brief were sent via the United States Postal Service in a first-class postage-prepaid envelope addressed to the following:

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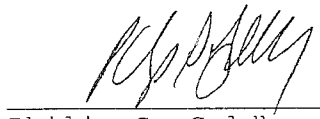

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