

Nos. 22 EAP 2022 & 23 EAP 2022

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

SANDRA DINARDO a/k/a SANDRA AFFATATO,
As Power of Attorney on behalf of Cosmo DiNardo,
Appellant,

v.

CHRISTIAN KOHLER, M.D., HOSPITAL OF THE UNIVERSITY OF
PENNSYLVANIA, UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM,
and TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,
Appellees.

Appeal by Allowance from the Order and Judgment of the Superior Court Entered
January 26, 2022 at Nos. 1905 EDA 2020 and 1906 EDA 2020, Affirming in Part
and Reversing in Part the Order Entered on July 20, 2020 in the Court of Common
Pleas, Philadelphia County, Civil Division at No. 460 July Term 2019

**BRIEF OF *AMICI CURIAE* AMERICAN PSYCHIATRIC ASSOCIATION
AND PENNSYLVANIA PSYCHIATRIC SOCIETY
IN SUPPORT OF APPELLEES**

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November 7, 2022

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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Amicus American Psychiatric Association, with more than 37,000 members, is the nation's leading organization of physicians who specialize in psychiatry. Its member physicians work to ensure high-quality care and effective treatment for all persons with mental health disorders. Association members engage in psychiatric treatment, education, research, and forensic activities, and many of them regularly perform roles in the criminal justice system.

Amicus Pennsylvania Psychiatric Society is a non-profit professional association that serves 1,400 psychiatrists and their patients in the Commonwealth of Pennsylvania. The mission of the Pennsylvania Psychiatric Society is to fully represent Pennsylvania psychiatrists in advocating for their profession and their patients, and to assure access to psychiatric services of high quality, through activities in education, shaping of legislation, and upholding ethical standards.

The American Psychiatric Association and the Pennsylvania Psychiatric Society and their members have a strong interest in protecting patients' access to psychiatric care. The vast majority of psychiatric patients are non-violent. It is nevertheless critical to ensure that government policies and legal rules do not have the effect of restricting access to psychiatric care for people who may pose an

¹ No party or counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

increased risk of harm to themselves or other people. *See* Am. Psychiatric Ass’n, *Position Statement on Firearm Access, Acts of Violence and the Relationship to Mental Illness and Mental Health Services* (2018). Expanding the duties of psychiatrists to victims of crimes committed by their patients, including by permitting those patients to pursue indemnification claims in connection with lawsuits brought by their victims, would seriously threaten such access and conflict with settled limits on psychiatrists’ duties to third parties. *Amici* therefore submit this brief to provide context for the Court’s review of the important limitations on legal liability implicated by this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Emerich v. Philadelphia Center for Human Development, Inc.*, 720 A.2d 1032 (Pa. 1998), this Court recognized that the Pennsylvania common law places strict limits on the duty of psychiatrists to protect third parties from injuries inflicted by psychiatric patients. *Emerich* dealt specifically with the claim that mental health providers had a duty to warn that a patient might pose a danger to third parties. While this Court did not categorically reject the existence of such a duty, it recognized that any such duty is “extremely limited” – that is, it exists only when a patient makes a “specific and immediate threat” against “a specifically identified or readily identifiable victim.” *Id.* at 1040. The Court’s decision was rooted in the recognition that imposing any less restrictive limits on the liability of

psychiatrists and other mental health care providers could undermine patients' access to and the effectiveness of psychiatric treatment – which would in turn harm both patients and the public. And just two years ago, this Court again refused to broaden psychiatrists' duties to third parties, finding that such duties would likely discourage physicians from treating certain patients. *See Leight v. Univ. of Pittsburgh Physicians*, 243 A.3d 126, 142 (Pa. 2020).

Plaintiff-Appellant Sandra DiNardo, acting on behalf of her son, Cosmo DiNardo, seeks indemnification for damages sought in wrongful-death lawsuits filed by the families of Mr. DiNardo's four murder victims. Plaintiff's appeal primarily concerns application of the "no felony conviction recovery" rule, which defendants-appellees fully address. The purpose of this brief is to stress that allowing plaintiff's indemnification claim to go forward would expose defendant health care providers to potentially enormous liability in wrongful-death lawsuits stemming from the crimes committed by Mr. DiNardo. Imposing such potential liability would conflict with this Court's ruling in *Emerich*, which sharply limited the circumstances under which a mental health care provider owes any duty to a third party.

Moreover, as was true in *Emerich* and *Leight*, imposing such a duty here would threaten patients' access to psychiatric care in Pennsylvania. A growing body of research confirms the sound reasons for limiting psychiatrists' duties to

third parties. Most individuals with mental illnesses are not violent, and recent studies establish that it is very difficult for psychiatrists to predict whether any individual patient will commit an act of violence. When physicians are exposed to potentially catastrophic liability for treating patients with conditions that may be associated with any appreciable risk of violence, they are strongly disincentivized from treating those individuals, including because of the escalating cost of insurance and the expense and stress attendant to litigation. As a result, some individuals are unable to access the psychiatric treatment they require. And the empirical research is clear that, when at least some patients are unable to access psychiatric care, they become more likely to harm themselves or others. Limiting the “no felony conviction recovery” rule to allow claims for compensatory damages in this case to proceed would risk these same harmful consequences.

ARGUMENT

I. Psychiatrists Do Not Owe a Duty To Protect Third Parties, Except in Extremely Narrow Circumstances

A. An Action for Indemnification Is Available Only When the Indemnitor Owes a Duty to the Injured Party

The common-law right of indemnity “is a fault shifting mechanism, operable only when a defendant who has been held liable to a plaintiff solely by operation of law, seeks to recover his loss from a defendant who was *actually responsible* for the accident which occasioned the loss.” *Sirianni v. Nugent Bros., Inc.*, 506 A.2d

868, 871 (Pa. 1986) (emphasis added). Here, plaintiff seeks indemnification “for (1) attorney fees and litigation costs associated with defense of the criminal prosecution and civil actions brought by estates of individuals whom Son pleaded guilty to killing, and (2) money that Son pays to the decedents’ estates in the civil actions against him.” (Appellant’s Br. App. B at 3). To establish any claim, plaintiff must therefore demonstrate that the defendant health care providers were “actually responsible” for (and could have prevented) her son’s decision to murder four people. The claim accordingly turns on the assertion that the defendant health care providers owed a duty to the victims and their families by virtue of treatment provided to Mr. DiNardo.

Accordingly, this case squarely implicates the strict limits that this Court has placed on any duty that psychiatrists and other mental health professionals owe to third parties. “Generally speaking, a medical professional has no duty under the common law to control the conduct of a patient or warn or protect a third party from a threat by a patient in his or her care” *Leight*, 243 A.3d at 130. This Court has recognized only a single exception to this general rule: when a patient communicates a “specific and immediate threat” against “a specifically identified or readily identifiable victim,” the psychiatrist may owe a duty to warn the threatened individual. *Emerich*, 720 A.2d at 1040.

Plaintiff does not allege that the defendant health care providers failed to warn a specifically identified or readily identifiable victim. And while plaintiff briefly alludes to this Court's decision in *Emerich*, plaintiff fails to acknowledge that the exception recognized by the Court in that case is "extremely limited." *Id.* The Court expressly rejected the proposition that psychiatrists owe any broader duty to protect third parties injured by a patient that is not under their control. Here, "it is an unreasonable extension of the concepts of duty and foreseeability to broaden a physician's duty to a patient and hold a physician liable to the public at large." *Est. of Witthoeft v. Kiskaddon*, 733 A.2d 623, 630 (Pa. 1999).

B. This Court Has Consistently Barred Courts from Imposing on Psychiatrists a General Duty to Third Parties Because Doing So Would Harm Psychiatric Patients

The strict limitations this Court has established on mental health care providers' duties to third parties reflect urgent concerns that expansive liability would impair patients' access to psychiatric care. This Court has repeatedly warned that imposing on psychiatrists a general duty to third parties will (1) undermine the trust between patient and psychiatrist; (2) result in at least some psychiatrists refusing to treat certain patients; and (3) undermine insurance markets. Moreover, by imposing liability *ex post*, such a rule ignores the fact that it is extraordinarily difficult for physicians to predict whether a patient will, in fact, commit an act of violence.

Undermining the Patient-Psychiatrist Relationship. In *Emerich*, this Court enumerated several “[s]trong reasons” supporting its decision to strictly cabin any duty to protect third parties. 720 A.2d at 1040-41. This Court recognized that “the nature of therapy encourages patients to profess threats of violence, few of which are acted upon,” and that the “disclosure of every generalized threat would vitiate the therapist’s efforts to build a trusting relationship necessary for progress.” *Id.*; *see also Seebold v. Prison Health Servs., Inc.*, 57 A.3d 1232, 1244 (Pa. 2012) (noting the “material difference between providing advice to a patient within the contours of a confidential physician-patient relationship and disclosing protected medical information to third-party non-patients”). Though the duty to warn is not directly implicated in this case, the Court’s concerns are still germane – expanding the duties psychiatrists (and other mental health providers) owe to third parties may require those providers to more frequently breach doctor-patient confidentiality in order to protect themselves from unbounded litigation risk. And, as this Court has warned, this will in turn impair the quality of care that psychiatrists can provide their patients.

Reducing Access to Psychiatric Care. This Court has previously recognized that “a broad imposition of liability” on psychiatrists would “potentially discourage health care workers from treating patients who exhibit mental ailments.” *Leight*, 243 A.3d at 142. Recognition of any cause of action for indemnification in these

circumstances would have this very effect. If psychiatrists may be held liable for any violent acts committed by their patients – an exposure to potentially catastrophic liability – they may be unwilling to treat those who may significantly benefit from psychiatric care.

This Court has also correctly noted that exposing psychiatrists to increased liability might prejudice physicians' treatment choices. Specifically, the Court has found that expanding psychiatrists' statutory liabilities "would encourage the over commitment of patients to avoid potential liability." *Id.* The expansive duty of care – and resulting liabilities – implicated by plaintiff's indemnification claims could thus impair health care providers' ability to treat their patients in the most effective and least restrictive manner. *Cf. id.* at 130 ("[T]reatment on a voluntary basis is preferable to involuntary treatment, and, in all instances, the least restrictive approach consistent with adequate treatment should be utilized.").

Undermining Insurance Markets. A failure to restrict duties to third parties also threatens access to mental health care more generally by inflating the cost of malpractice insurance for mental health care providers. This Court has recognized that "potentially expansive exposure to liabilities" may create further "instability in the medical liability insurance arena." *Seebold*, 57 A.3d at 1247. Increased insurance costs are inevitably passed on to patients and health insurers, creating further barriers to accessible care.

Lack of Foreseeability. Imposing duties on psychiatrists to third parties also ignores the reality that few individuals with mental illness ever commit acts of violence, making it effectively impossible for psychiatrists to foresee whether any individual poses a risk of violence. This Court has cautioned that, if mental health professionals were required to warn the public every time any patient made a generalized threat against an unidentified person, it would “produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public.” *Emerich*, 720 A.2d at 1041. The difficulty in determining who will commit such an act means that “the circumstances in which a duty to warn a third party arises are extremely limited.” *Id.* at 1040.

More generally, the low *ex ante* risk of violence means that imposition of liability *ex post* can create perverse incentives that undermine access to effective care. When the alleged consequences of a treatment decision may subject the mental health care provider to enormous liability, a provider will understandably overcompensate to avoid that risk. Such considerations risk distorting treatment decisions to patients’ detriment.

II. Plaintiff’s Claim for Indemnification Would Expand Psychiatrists’ Liability, Which Would Harm Patients and the General Public

The concerns that led this Court to limit duties to warn in *Emerich* have been amply borne out in empirical research. Recent studies show that expanding

psychiatrists' liability harms psychiatric patients because it discourages physicians from treating the patients most in need of care.

A. Most Individuals with Mental Illnesses Are Not Violent; Psychiatrists, Moreover, Are Largely Unable To Predict Whether a Patient Will Commit an Act of Violence

Although well-publicized – and tragic – incidents fuel public concern that those who suffer from mental illness pose dangers to others, an extensive body of research demonstrates that most psychiatric patients do not commit acts of violence. Studies show that “[m]ost patients with stable mental illness do not present an increased risk of violence” to themselves or others. Marie E. Rueve & Randon S. Welton, *Violence and Mental Illness*, 5 *Psychiatry* 34, 36 (2008). And other studies have found that psychiatric patients who suffered from mental illness other than a substance abuse disorder “had no higher risk of violent behavior than their neighbors in the community.” Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 *Ann. Epidemiol.* 366, 368 (2015). Most recently, researchers at Columbia University concluded that most mass murderers do not suffer from severe mental illness and that “focusing on mental illness, particularly psychotic

illness, when talking about mass school shootings risks is missing other factors that contribute to the vast majority of cases.”²

These low overall rates of violent conduct among individuals with mental illness are closely related to the recognized difficulty in predicting and thus preventing violent conduct. Mental health professionals agree that “health care clinicians are poor predictors of when a patient will act violently.” Jennifer L. Piel & Rejoice Opara, *Does Volk v DeMeerleer Conflict with the AMA Code of Medical Ethics on Breaching Patient Confidentiality to Protect Third Parties?*, 20 *AMA J. Ethics* 10, 15 (2018). And “[l]ow base rates make accurate prediction of who will become a mass killer statistically impossible” for psychiatrists. Phillip Resnick & Adrienne Saxton, *Malpractice Liability Due to Patient Violence*, 17 *Focus* 343, 343 (Am. Psychiatric Ass’n 2019). Because violent crime is likely to be the product of a variety of causal factors, there is no reliable way to determine that a patient’s mental illness will be associated with (much less cause) an act of violence. There is thus no justification to conclude that a psychiatrist – despite training in the treatment of conditions that may be associated with some elevated risk of violent conduct – owes a duty of care to any person their patient may harm.

² Columbia Univ. Dep’t of Psychiatry, *Columbia Study Finds Mass School Shootings Not Caused by Mental Illness* (Oct. 28, 2022), <https://www.columbiapsychiatry.org/news/columbia-study-finds-mass-school-shootings-not-caused-mental-illness>.

B. Psychiatrists May Avoid Treating “High-Risk” Patients if They Are Exposed to Catastrophic Liabilities

Studies also show that increasing physicians’ duties to third parties is empirically linked with patient harm. First, expanding the duties a physician owes to third parties causes at least some physicians to avoid treating patients they perceive as posing an elevated risk of violent conduct. Scholars have found that, with expanded psychiatrist liability, “doctors may engage in strategic screening” in which they “try to distinguish the high-risk from the low-risk patients to lower their expected liability.” J. Shahar Dillbary et al., *Why Exempting Negligent Doctors May Reduce Suicide: An Empirical Analysis*, 93 Ind. L.J. 457, 473 (2018). And among physicians generally, “[a]voidance of procedures and patients that were perceived to elevate the probability of litigation was also widespread.” David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 JAMA 2609, 2612 tbl.2 (2005).

These concerns are particularly acute as applied to psychiatrists. As explained above, empirical research shows that psychiatrists are largely unable to accurately predict which of their patients is likely to commit a violent act; they may therefore resort to screening out entire classes of patients based on their illnesses and risk profiles. This would, of course, further impair patients’ efforts to obtain the psychiatric care they require.

C. Previous Expansions of Psychiatrists' Liability Have Created Barriers to Psychiatric Care, Which Harm Both Patients and the Public

For decades, courts and academics have warned that expanding psychiatrists' liabilities could prove disastrous for patients. More than 20 years ago, the Illinois Supreme Court cautioned that, if psychiatrists could be held liable for a patient's suicide, "no health care provider would want to risk the liability exposure in treating . . . a patient [with symptoms of suicidality], and, thus, suicidal persons would be denied necessary treatment." *Hobart v. Shin*, 705 N.E.2d 907, 911 (Ill. 1998); *see also Williamson v. Liptzin*, 539 S.E.2d 313, 323 (N.C. Ct. App. 2000) ("Imposing liability on a psychiatrist in an outpatient, short-term care setting for the actions of a patient that were at most based on risk factors and not foreseeability would have adverse effects on psychiatric care."). Scholars, too, have raised the concern that exposing psychiatrists to catastrophic liability could discourage physicians from treating certain patients "because of the associated liability" or "could encourage doctors to commit more patients in order to reduce their risk." Maggie Murray, *Determining a Psychiatrist's Liability When a Patient Commits Suicide: Haar v. Utwelling*, 39 N.M. L. Rev. 641, 661, 663 (2009).

Decreasing access to psychiatric care is empirically linked to patient harm. For example, one study found that states that allowed psychiatrists (but not other doctors) to be liable for malpractice resulting in suicide experienced a 9.3%

increase in suicides. Dillbary et al., 93 Ind. L.J. at 457. The authors found that psychiatrists “are in a relatively strong position to screen patients” and that “[d]octors may change their behavior in response to tort liability.” *Id.* at 459, 460. These changes in behavior harmed psychiatric patients because “contacts with health providers can clearly make a difference” to patients. *Id.* at 459. Another study similarly determined that states with laws requiring health care providers to warn others in breach of doctor-patient confidentiality experienced a roughly 9% increase in teen suicides (with no such effect among adults). *See* Griffin Edwards, *Tarasoff, Duty to Warn Laws, and Suicide*, 34 Int’l Rev. L. & Econ. 1, 5 (2013).

Studies also show that, when psychiatrists are exposed to increased liabilities, the public is harmed as well. One study found that “mandatory duty-to-warn laws cause an increase in homicides of 5 percent,” in part because such laws impair trust between patient and physician and also “incentivize those professionals to not treat the most at-risk patients.” Griffin Edwards, *Doing Their Duty: An Empirical Analysis of the Unintended Effect of Tarasoff v. Regents on Homicidal Activity*, 57 J.L. & Econ. 321, 344 (2014). The study concluded that eliminating psychiatrists’ duties to third parties “should decrease homicides.” *Id.*

In Pennsylvania, an estimated 5.15% of the population, or nearly 660,000 people, have a serious mental illness.³ Moreover, the state currently suffers from “a shortage of mental health providers, especially in rural areas.”⁴ Expanding the scope of liability of health care professionals would further strain the mental health care system by increasing the costs of patient care and, in turn, place both patients and the general public at greater risk. Also, increased liability may discourage individuals from entering the mental health field and cause attrition of those already practicing in this area.

In sum, research continues to confirm that imposing expansive duties on psychiatrists harms both patients and the public. In *Emerich*, this Court emphasized that the “recognition of a duty is in essence one of policy considerations.” 720 A.2d at 1039. Those considerations weigh heavily against allowing the indemnification claim against the defendant health care providers in this case to proceed.

³ Substance Abuse & Mental Health Servs. Admin., *2019-2020 National Survey on Drug Use and Health: Model-Based Prevalence Estimates (50 States and the District of Columbia)* tbl.28 (Dec. 29, 2021), <https://www.samhsa.gov/data/report/2019-2020-nsduh-state-prevalence-estimates>. The term “serious mental illness” refers to mental health conditions that can last a long time and impair function, such as schizophrenia, bipolar disorder, and major depressive disorder.

⁴ Hanke Heun-Johnson et al., USC Schaeffer, *The Cost of Mental Illness: Pennsylvania Facts and Figures* 3 (Feb. 2017), <https://healthpolicy.usc.edu/wp-content/uploads/2018/07/PA-Facts-and-Figures.pdf>.

D. Limiting the “No Felony Conviction Recovery” Rule Would Have the Same Consequences

Plaintiff also seeks compensatory damages for Mr. DiNardo’s emotional distress and physical pain. The superior court found plaintiff’s claim barred by the “no felony conviction recovery” rule because these damages flow from Mr. DiNardo’s criminal conduct. Although plaintiff’s claim for compensatory damages does not require recognizing a duty owed by psychiatrists to third parties, limiting the “no felony conviction recovery” rule to allow recovery for such a claim would entail the same harmful consequences.

CONCLUSION

The superior court’s decision should be affirmed.

Respectfully submitted,

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November 7, 2022

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that this brief complies with the type-volume limit of Pa. R.A.P. 531(b)(3) because, excluding the portions of the brief exempted by Pa. R.A.P. 2135(b), this brief contains 3,497 words, as determined by the word-count feature of Microsoft Word 2016, the word-processing program used to prepare this brief.

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CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 127

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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I hereby certify that, on November 7, 2022, I served the Brief of *Amici Curiae* American Psychiatric Association and Pennsylvania Psychiatric Society in Support of Appellees upon counsel listed below via PACFile eService, which satisfies the requirements of Pa. R.A.P. 121, and will, within 7 days, file the required number of paper copies with the Court.

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