STATE OF MICHIGAN

IN THE SUPREME COURT

ALICE DUVALL AND
WILLIAM DUVALL,

Plaintiffs-Appellees,

v

MORRIS GOLDIN, M.D.,

Defendant-Appellant.

L.C. No. 78-2853-NI
C.A. No. 74082
S.C. No. 75635

BRIEF IN SUPPORT OF THE MICHIGAN PROTECTION AND ADVOCACY SERVICE FOR DEVELOPMENTALLY DISABLED CITIZEN'S PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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STATEMENT OF QUESTIONS PRESENTED

Whether the Court of Appeals committed reversible error by holding that a physician may owe a duty to unidentified third parties for failure to warn when the physician knew, or should have known, of the patient's potential risk to society.

The Court of Appeals answers: NO

Plaintiff-Appellee answers: NO

Defendant-Appellant answers: YES

Michigan Protection and Advocacy Service for Developmentally Disabled Citizens, Inc., and the Epilepsy Center of Michigan answer: YES

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STATEMENT OF FACTS

Plaintiffs were struck by a vehicle driven by Michael Hubbard on March 6, 1977. Plaintiffs originally brought suit against Hubbard alone and later amended their complaint to include Defendant Dr. Goldin. (Hubbard is not a party to this appeal.) Plaintiffs amended complaint alleged that defendant knew or should have known that his patient had epilepsy and that defendant failed to warn his patient not to drive on the public highways.

Defendant moved for summary judgment pursuant to GCR 1963, 117.2(1). Initially defendant's motion was denied; however, upon rehearing it was granted; the trial court ruling that defendant owed no duty to plaintiffs as a matter of law.

Plaintiffs appealed the trial court's decision to the Michigan Court of Appeals. The Court of Appeals reversed

the trial court's decision. Now Defendant Goldin has sought leave to appeal to this Court. Michigan Protection and Advocacy Service for Developmentally Disabled Citizens and the Epilepsy Center *of* Michigan seek leave to file an Amicus Curiae Brief in Support of Defendant's Request for Leave to Appeal.

ARGUMENT

I. The present case involves legal issues of major significance to Michigan Protection and Advocacy Service for Developmentally Disabled Citizens and Epilepsy Center of Michigan and the jurisprudence of the State; therefore, the Court should permit P&A Service and ECM to file an Amicus Curiae Brief in support of Defendant-Appellant. (MCR 7.302 (B)(3).

Michigan Protection and Advocacy Service for Developmentally Disabled Citizens, Inc., (hereinafter P&A Service) is a nonprofit corporation established to protect and advocate for the rights of persons with developmental disabilities. The governor has authorized the P&A Service to pursue legal, administrative and other appropriate remedies to insure the welfare and protect the rights of persons with developmental disabilities. MCLA 330.1927; MSA 14.800(927). Epilepsy is one of the impairments listed within the Mental Health Code as a developmental disability. MCLA 330.1500(h); MSA 14.800(500).

The Epilepsy Center of Michigan (hereinafter ECM) is a nonprofit corporation established to provide consultation and coordination of resources for individuals and organizations concerned about epilepsy. ECM also provides specialized medical and community services and research on epilepsy.

P&A Service and ECM are extremely interested in the present case because of the possible adverse effects it could have on persons with epilepsy. Currently, persons with epilepsy

may not drive unless they have a certificate from a physician stating that they have been seizure free for six months and that their seizures are under medical control. P&A Service and ECM fear that the Court of Appeals' decision will result in fewer physicians certifying a patient as having their seizures under control. Without certification persons with epilepsy will be stranded both vocationally and socially. Another concern is that an increased number of drivers with epilepsy will not inform the Secretary of State of their impairments, resulting in persons with uncontrolled seizure obtaining drivers licenses.

ECM and P&A Service believe that this issue is of great significance to their organizations and all persons with epilepsy; and, therefore, of great significance to the jurisprudence of the State. ECM and P&A Service request this Honorable Court to grant their motion for leave to file a brief as Amicus Curiae and grant Appellant's Application for Leave to Appeal.

11. This Court should reverse the decision of the Court of Appeals and limit the potential liability of a physician to unknown third parties.

A. Public Policy favors the limitation of a physician's liability to third parties.

As it has been stated in the facts and in Appellant's brief, the Appellees contend that Appellant has a duty to warn his patients with epilepsy not to drive; or at least that he had a duty to warn this particular patient with epilepsy not to drive a vehicle. Further, that the physician owes this

to them, as fellow motorists on the highway. The Court of Appeals agreed with Appellees by weighing the policy considerations for and against the recognition of the asserted duty and foreseeability of the risk of harm.

It is proper when determining if a duty is owed by one to another to consider public (or social) policy. Davis v Lhim, 124 Mich App 291; 335 NW2d 481 (1983), Moning v Alfono, 400 Mich 425; 254 NW2d 459 (1974), Freese v Lemon, 210 NW2d 576 (Iowa 1973), (dissenting opinion). Justice LeGrand in his dissenting opinion in Freese examines the policy considerations in great detail. In a case with the same issue, Justice LeGrand opined that a physician does not have such a duty to warn a patient with epilepsy not to drive. Factors to be considered which preclude liability are the availability and cost of health care, the fear that physicians will shun patients who could expose them to limitless liability, the possibility that physicians would resort to an ultraconservative approach to treatment, and the cost of health insurance. Supra p 584. In determining that the costs of finding a physician liable in light of these factors, Justice LeGrand relies heavily on the opinion of Justice Cardozo Ultramares Corp v Touche, 255 NY 170; 174 NE 441; 74 ALR 1139 (1931). Ultramares was a case involving a third party claim against an accountant for negligently preparing a financial statement. Justice Cardozo's opinion as quoted in Freese was that the risk of potential limitless

liability to unknown third parties was too great. Supra at 582, quoting Ultramares at 444.

Public policy would not stand for liability in a situation where the physician doesn't know the injured party; doesn't diagnose or treat the patient for the benefit of the third party: and the third party doesn't rely on the physician's statements to his patient. If a physician is required to consider unknown third parties every time he makes a diagnosis or has a discussion with a patient, the physician will become a public servant rather than a personal physician. Surely, the Court would not require a physician to consider societal risks of nuclear waste when prescribing nuclear testing.

Nor should a physician be required to consider the state of the law in Michigan when treating a patient. The Court of Appeals' decision requires physicians to be aware of the limitations the legislature and Secretary of State have placed on obtaining a driver's license for people with epilepsy. In its decision, the Court of Appeals states that, since there is a statute restricting the licensure of persons with physical disabilities, it is not rare that an auto accident could result from not warning a person not to drive. Are we then to assume that a physician has a duty to warn his patient about all laws involving the patient in order to fulfill a duty to the public? This would be too great a burden on the practice of medicine.

B. The Court of Appeals decision removed the boundaries restricting a physician's liability to third parties.

In addition *to* public policy factors, the Court must also review the foreseeability of the risk of harm when determining if a defendant owes a duty to a third party. Moning at 437; Davis at 300; Knight v Michigan, 99 Mich App 226 at 236; 297 NW2d 889 (1980). Prior to the case at bar, the Court of Appeals had decided that a physician's liability to third parties extended only to readily identifiable potential victims. Davis at 304-5.

Although the facts in Davis differ from the instant case, the legal conclusions of the court should be applied as stated and not expanded further. In Davis the court held a physician owes a duty to readily identifiable persons. Expanding liability further requires a physician to foresee all unknown persons possibly injured by a patient. The court is indeed requiring physicians to be insurers of highway accidents regardless of its statement to the contrary.

Davis and Knight hold that a duty of care is owed to persons reasonably and foreseeably at risk *of* injury by a patient. A physician's potential liability must not be taken out of context of the Knight decision. In Knight the court was deciding whether a state hospital was negligent in placing a patient with mental retardation on Plaintiff's dairy farm without disclosing the patient's alleged distructive tendencies.

In deciding if defendant had a duty to plaintiffs the court discussed when a person could have a duty to a third party.

> However, the concept of duty is interrelated with the foreseeability that the third person would engage in that particular type of conduct which caused the harm. McNeal v Henry, 82 Mich App 88; 266 NW2d 469 (1978); Halloway v Martin Oil Service, Inc., 79 Mich App 475; 262 NW2d 858 (1977), lv den 402 Mich 932 (1978).

In the same paragraph, the court continues to discuss control of that person.

> Thus, [t]he custodian of an insane person ordinarily is not liable for the tortious acts of such person which he could not reasonably anticipate, but he may be liable where he fails to exercise reasonable care under the circumstances. (Footnotes omitted.) 44 CJS, Insane Persons, § 125, p 282. Cf. In re Jones Estate, 52 Mich App 628, 635; 218 NW2d 89 (1974), lv den 392 Mich 770 (1974).

Knight and Davis both deal with a psychiatrist's ability to warn a known individual about the harm caused by a patient over whom they have some control. See also Bradley Center v Wessner, 287 SE2d 716 (GA 1982).

The Court of Appeals in the instant case extended this duty far beyond the limits of Knight and Davis. The Court of Appeals now requires physicians to protect unknown parties from the acts of a patient. Not only are they responsible for some of the patient's conduct, they are now responsible for all actions of patients over whom they have no control.

The court in Davis relying on Tarasoff v Regents of University of California, 17 Cal 3d 425; 131 Cal Rep 14; 551 P2d 334 (1976), held that psychiatrists should not have a duty to warn the public at large. In expanding the duty of a physician to unknown third parties the Court of Appeals in the present case reviewed decisions from other jurisdictions and based its decision in part on Gooden v Tips, 651 SW2d 364 (Tex 1983), and Kaiser v Suburban Transportation System, 65 Wash 2d 461; 398 P2d 14; 401 P2d 350 (1965). Both Gooden and Tips stand for the duty of a physician to unknown third parties when a physician negligently failed to warn a patient about the side effects of a drug.

It is important to differentiate the facts of Gooden and Kaiser from the facts presented here. The doctors in Gooden and Kaiser prescribed a drug to their patients. The drug prescribed had potentially dangerous side effects and the doctor failed to warn them of these side effects. The patients, as a result of the drugs they received from the physicians, were in vehicle accidents and third parties were injured. These patients were given the drugs by their doctor, and the patients knew nothing about the drugs because their doctor failed to warn them.

Here we have allegations that the physician failed to prescribe anti-convulsant medication and failed to warn the individual not to drive a vehicle. At first blush it may appear that there is no difference between providing a drug with

potentially dangerous side effects and warning a patient about the risks of driving when one has epilepsy. An important distinction does exist. The patients in Gooden and Kaiser had no knowledge of the possible effects on their driving, and a physician could not assume that they would be aware of the side effects. Here, Appellant's patient, as a person with epilepsy, would know of physical or mental limitations resulting from epilepsy.

It is understandable that a physician should warn a patient about side effects of a drug he is prescribing. However, it is not conceivable that a physician should have a duty to warn a patient about possible limitations placed on them by statute and Secretary of State Policy. Further, the secretary's policy only requires suspension if a person has not been seizure free for six months. Why, then, should the court place a duty on physicians to tell patients not to drive in a more restrictive manner than State policy? (Exhibit B, Motion for Leave to File Amicus Curiae Brief)

III. Issue for the Legislature.

The legislature, realizing that people with epilepsy may create a risk of harm while operating a motor vehicle, has addressed this issue. MCLA 257.320(1)(a); MSA 9.2020. By this statute the legislature delegated its power to the Secretary of State.

> Operator's or chauffeur's license; suspension or revocation, grounds:
>
> (1) The secretary of state after notice as provided in this section may conduct an investigation and reexamination of a person, based upon one or more of the following:
>
> (a) The secretary of state has reason to believe that the person is incompetent to drive a motor vehicle or is afflicted with a mental or physical informity or disability rendering it unsafe for that person to drive a motor vehicle.

While the Secretary has not exercised its rule-making authority, department policies have been developed. (Exhibit B of Motion for Leave to File Amicus Curiae Brief in Support of Defendant-Appellant) Nowhere within the statute or policy has the duty to report that a person has epilepsy been placed upon a physician. The only time an individual has the duty to report that another has epilepsy is when a person is adjudged epileptic. The duty is then placed on the Probate Court making the adjudication. MCLA 257.304; MSA 9.2004.

Other states have placed the burden or reporting on the treating physician: California, Connecticut, Delaware, Illinois, Indiana, Nevada, New Jersey, Oregon and Pennsylvania.* The legislature for the state of Kentucky specifically stated

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"California, Health and Safety Code, Sec 2542 and Sec 410; Connecticut, Motor Vehicle Code, Sec 14-46; Delaware, 24 Del C 1763; Illinois, (physician must notify of change in condition) 92 Ill Ad Code **1030.10;** Indiana, Health and Hospital Code, Chapt 6, Sec 16-14-6-1; Nevada, N Rev Stat 439-270; New Jersey, Ad Code, Sec 39: 3-10.4; Oregon, Vehicle and Small Water Craft, Sec 482.141; Pennsylvania, Motor Vehicle Code, Sec 1518

that physicians would not be subject to civil liability absent a showing of bad faith for making recommendations regarding the ability of a person with epilepsy to drive. This state has yet to place the burden of reporting on the treating physician and, unlike Kentucky, has failed to address the issue of civil liability.

In light of the legislature's recognition that the Secretary *of* State may want to limit the licensure of people with epilepsy to drive, the Court of Appeals should have deferred the issue of a physician's duty to report to the legislature. It is not up to the Court of Appeals to decide what is in the best interests of the public -- that falls within the police power of the state. If the legislature has not found it necessary to require physicians to report persons with epilepsy to the Secretary (and it has placed such a duty on the Probate Court) then it must be assumed that the legislature does not want to place such a duty on the medical community.

What is in the best interests of society, or whether society needs further protection, is for the legislative branch to determine. Thus far it has been established that the duty to report is upon the person with epilepsy. The statute and policy are for the protection of the public from persons driving while their seizures are uncontrolled. While a physician may be able to state whether a person's seizure activity is

medically controlled, a physician can not control the acts of a patient. It can only be assumed that the legislature recognize that the burden should lie with the person with epilepsy to repor to the Secretary rather than the physician. The Court *of* Appeals should not have tried to second-quess the desires of the legislature by supplementing the Motor Vehicle Code with a requirement that a physician has a duty to limit the driving of a patient.

CONCLUSION

P&A Service and ECM contend that the legal issues resulting from the Court of Appeals' decision are *of* great significance and require review by the Supreme Court. We request this Honorable Court to grant Appellant's request for leave to appeal. Further, that the Court of Appeals' decision, if it stands, will result in negative effects for persons with epilepsy and potentially all physicians and, therefore, the decision should be reversed.

Respectfully submitted,

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