1997

The Strict Application of the Restatement, Ohio Law and the Rules of Civil Procedure: Estates of Morgan v. Fairfield Family Counseling Center

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THE STRICT APPLICATION OF THE RESTATEMENT, OHIO LAW AND THE RULES OF CIVIL PROCEDURE: *ESTATES OF MORGAN v. FAIRFIELD FAMILY COUNSELING CENTER*

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I. INTRODUCTION

Considered by some in the mental health profession as the imposition of an onerous duty,[3] the Ohio Supreme Court's decision in *Estates of Morgan v. Fairfield Family Counseling Center*[4] represents an extension of the recognized

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[1]University of Utah (B.A., 1993), Case Western Reserve University (J.D., 1996).

[2]Ball State University (B.S., 1980), Capital University (J.D., 1983).

[3]*See Morgan Family Wins Wrongful Death Suit*, 16 NEWS BRIEFS (Alliance for the Mentally Ill of Ohio), No. 2, at 5 (Spring, 1997) (citing an internal Ohio Psychological Association memorandum); Letter from Debra M. Belinky, Ohio Department of Mental Health, to Executive Committee, et al. (Mar. 20, 1997)(on file with author).

[4]673 N.E.2d 1311 (Ohio 1997). The syllabus of the court read as follows:
1. Generally, a defendant has no duty to control the violent conduct of a third person as to prevent that person from causing physical harm to another unless a "special relation" exists between the defendant and the third person or between the defendant and the other. In order for a special relation to exist between the defendant and the third person, the defendant must have the ability to control the third person's conduct
2. R.C. 5122.34 does not preclude the finding that a special relation exists between the psychotherapist and the outpatient which imposes a common law duty on the therapist to take affirmative steps to control the patient's violent conduct.

legal duty imposed upon mental health practitioners who treat inpatients to those who treat outpatients. The interests of society are better protected by a uniform standard. The mentally ill eligible to receive treatment as outpatients, having greater freedom to function as members of society, are protected from negligent practitioners who seek to avoid liability by claiming an inability to control the patient.

II. THE MORGANS' STORY

On July 25, 1991, Matt Morgan shot and killed his parents, Jerry and Marlene Morgan, and seriously wounded his sister Marla, as the family played cards.[5] This incident manifested both Matt Morgan's schizophrenia and the far reaching impact of negligent treatment of a psychiatric patient.

Matt Morgan's problems began during his senior year of high school when his attendance and grades declined.[6] He became unable to maintain employment due to his increasingly abusive and disrespectful attitude. Finally in January of 1990, Matt was forcefully removed from his home in Lancaster, Ohio, because of his threats against his father and the fear that he had instilled in his parents.[7]

After a period of homeless drifting, Matt went to Thomas Jefferson University Hospital in Philadelphia, Pennsylvania, in a frantic condition.[8] He was subsequently transferred to C.A.T.C.H. Respite, a residential mental health facility, manifesting a schizophreniform disorder.[9] Miles C. Landenheim, M.D., confirmed this diagnosis, and Matt received treatment for his disease, responding positively to the drug Navane.[10] Matt's condition improved as he complied with his treatment and took his medication.[11] After several months, Matt willingly returned to his family in Ohio and received outpatient treatment

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3. The relationship between the psychotherapist and the patient in the outpatient setting constitutes a special relation justifying the imposition of a duty upon the psychotherapist to protect against and/or control the patient's violent propensities.
4. When a psychologist knows or should know that his or her outpatient represents a substantial risk of harm to others, the therapist is under a duty to exercise his or her best professional judgment to prevent such harm from occurring.

Id.

[5] *Id.* at 1314.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Morgan*, 673 N.E.2d at 1315.

[10] *Id.*

[11] *Id.*

at Fairfield Family Counseling Center (FFCC).[12] Harold T. Brown, M.D., a consultant contract psychiatrist with FFCC, oversaw Matt's treatment. Dr. Brown's treatment consisted of three visits: July 19, 1990, August 16, 1990, and October 11, 1990. Dr. Brown's "treatment" of Matt totaled one hour.[13] Dr. Brown never reviewed Matt's chart from C.A.T.C.H. Respite, never contacted Dr. Landenheim, repeatedly reduced Matt's dosage of Navane, and eventually diagnosed Matt with "atypical psychosis."[14] After October 11, 1990, Dr. Brown never saw Matt again, terminated his prescription for Navane, and referred him back to FFCC for vocational training and other psychotherapy.[15] Dr. Brown's overriding concern throughout his limited contact with Matt was that Matt was a malingerer seeking disability payments.[16]

Once Matt's medication ran out, his condition deteriorated.[17] Matt exhibited many of the same aggressive and bizarre traits that he manifested prior to his hospitalization in Philadelphia.[18] His hostility towards his parents, particularly his father, returned. During this period, Matt's erratic attendance and participation in psychotherapy caused the center to terminate his therapy, leaving his psychiatric care to a vocational counselor.[19]

Matt's condition deteriorated rapidly. He refused to comply with treatment, became weak, refused to eat, threatened others repeatedly, hallucinated frequently, and demonstrated paranoia.[20] The change in Matt's behavior and attitude raised serious concerns, causing his parents to repeatedly contact FFCC to determine if Matt could be involuntarily hospitalized.[21]

FFCC refused to involuntarily commit Matt due to its unwritten policy that it would not initiate involuntary hospitalization proceedings.[22] Unfortunately, Jerry and Marlene Morgan unknowingly found themselves in a situation that resulted in their deaths: the probate court would not initiate involuntary commitment proceedings without the approval and participation of FFCC, and FFCC would not initiate or participate in involuntary commitment proceedings until a family had initiated them.[23] On July 20, 1991, Jerry and

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[12] *Id.*

[13] *Id.*

[14] *Morgan*, 673 N.E.2d at 1315-16.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 1316.

[18] *Id.*

[19] *Morgan*, 673 N.E.2d at 1316.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 1316-17.

[23] *Id.*

Marlene Morgan sent a letter to FFCC again seeking assistance.[24] However, the employees of FFCC again refused to assist the Morgans in involuntarily committing Matt.[25] The last entry made in Matt's chart at FFCC was made on July 25, 1991, the day he shot his parents and sister: "it is apparent that Matt is . . . decompensating. FFCC is unable to assist since he refuses medication or psychiatric care."[26]

The estates of Jerry and Marlene Morgan, and Marla Morgan, individually, brought an action against Dr. Brown, FFCC, and its employees alleging their negligence caused the deaths of Jerry and Marlene and resulted in Marla's personal injuries. The trial court entered summary judgment in favor of all the defendants.[27] The grant of summary judgment was reversed by the court of appeals with respect to Dr. Brown; however, the judgment for FFCC and its employees was affirmed.[28] The Ohio Supreme Court granted a discretionary appeal to the plaintiffs and Dr. Brown.[29] The Ohio Supreme Court reversed the

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[24] *Morgan*, 673 N.E.2d at 1317.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1318.

[28] *Id.*

[29] *Morgan*, 673 N.E.2d at 1318. Estates of Morgan v. Fairfield Family Counseling Center, No. 94CA11, 1994 Ohio App. LEXIS 6053, at *1 (Ohio Ct. App. Dec. 8, 1994). The court unanimously reversed the trial court's grant of summary judgment to Dr. Brown. *Id.* The court determined that the trial court improperly applied the standard announced in Littleton v. Good Samaritan Hosp. & Health Ctr., 529 N.E.2d 449 (Ohio 1988), when the trial court determined that as a matter of law it was "most evident Dr. Brown has no liability here." *Morgan*, 1994 Ohio App. LEXIS 6053, at *18. The court of appeals affirmed judgment for FFCC and its employees, holding that there was no evidence that they had not acted with good faith and were thus immune under OHIO REV. CODE ANN. § 5122.34 (West 1997). Judge William B. Hoffman, in a dissenting opinion as to the liability of FFCC and its employees, astutely noted that even if it was eventually determined that the statute applied to the case, the issue of good faith was an issue for the finder of fact and could not be determined as a question of law:

> I believe reasonable minds could conclude that Fairfield Family Counseling Center may not have acted in good faith in making the decision not to hospitalize Matt Morgan. I believe the "unwritten policy" of the center not to initiate probate proceedings for patients who otherwise satisfied the statutory criteria (R.C. 5122.10), when considered together with: 1) the repeated notices to the counseling center of Matt's deteriorating condition; 2) Matt's known psychiatric history; and 3) the fact that the decision not to hospitalize was apparently not made by the center's chief clinical officer in derogation of R.C. 5122.10 are sufficient to place this issue before a jury. Though a jury may well conclude after hearing all the evidence that the unwritten policy did not guide the counseling center in its decision not to hospitalize Matt Morgan, such decision remains a jury question. Accordingly, the trial court erred in finding the statutory immunity set forth in R.C. 5122.34 applicable to the Fairfield Family Counseling Center at the summary judgment level.

decision of the court of appeals with respect to the summary judgment for FFCC and its employees and affirmed the reversal of summary judgment for Dr. Brown, remanding the case for trial.[30]

III. THE DUTY TO CONTROL IN THE OUTPATIENT SETTING

The Ohio Supreme Court's decision in *Morgan* addresses the question explicitly left open by the court's decision in *Littleton v. Good Samaritan Hospital & Health Center*: do psychotherapists treating outpatients have a duty to control dangerous patients?[31] The extension of the holding of *Littleton* to the outpatient setting is neither illogical nor impractical. The court arrived at its decision in *Morgan* as a result of a three-step process. First, the court looked to traditional tort principles in finding that the defendants owed the plaintiffs a duty to control the patient. *Morgan* represents the logical application of Restatement (Second) of Torts, Section 315[32] as recognized by the court's earlier decision in *Gelbman v. Second National Bank*.[33] Second, the court strictly interpreted existing Ohio law in addressing the relationship and privileges of psychotherapists and their patients. Third, the court adhered to procedural dictates for reviewing a grant of summary judgment. When the case is analyzed using this three-part analysis, it is apparent that the Ohio Supreme Court acted in a restrained and proper manner in arriving at its decision.

A. Restatement (Second) of Torts: Traditional Tort Analysis

Morgan applies the duty announced in *Littleton*, derived from Section 319 of the Restatement (Second) Torts,[34] to the outpatient setting by operation of section 315. As is the case in most other American jurisdictions, the California Supreme Court's decision in *Tarasoff v. Regents of the University of California*[35] was the starting point for the Ohio Supreme Court's analysis of the duty imposed upon professionals rendering psychiatric treatment in an outpatient setting. However, as noted by the court, California's Supreme Court "did not engage in a traditional Restatement analysis" in coming to its determination that the defendant owed a duty to the plaintiff.[36] While *Tarasoff* represented a

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Morgan, 1994 Ohio App. LEXIS 6053, at *30-31.

[30] *Morgan*, 673 N.E.2d at 1335.

[31] *Littleton*, 529 N.E.2d at 455 n.3 ("We are not deciding whether a psychiatrist's duty to protect a person from the violent propensities of the psychiatrist's patient extends to the outpatient setting.")(citing Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976)).

[32] RESTATEMENT (SECOND) OF TORTS § 315 (1965).

[33] 458 N.E.2d 1262, 1263 (Ohio 1984).

[34] RESTATEMENT (SECOND) OF TORTS § 319 (1965).

[35] *Tarsoff*, 551 P.2d at 334.

[36] *Morgan*, 673 N.E.2d at 1320.

bold statement of the psychotherapist's duty to third parties, it "does not enjoy universal acceptance."[37] Most importantly, the holding of *Tarasoff* dealt with the duty to warn and not the duty to control asserted by the plaintiffs in *Morgan*.[38]

Tarasoff is instructive as it directed the court to the Restatement. The California Supreme Court did not strictly follow the relevant sections of the Restatement, but referred to them as "reflective of an overall principle that affirmative duties to control should be imposed whenever the nature of the relationship warrants social recognition as a special relation."[39] To arrive at its decision, the California Supreme Court engaged in a two-part analysis. First, the court analogized the situation to cases where physicians were liable for a failure to diagnose and warn of a patient's contagious disease.[40] Under such circumstances, the physician's duty runs to both the patient and any third person that is known to be threatened by the patient.[41] Second, the court weighed the public policy concerns arising from the interests of the psychotherapist, the patient, and the public at large.[42] It determined that the public's interest in safety outweighed the interests safeguarding the confidential characteristic of psychotherapist-patient communications and the difficulty in predicting dangerousness.[43]

The Ohio Supreme Court noted that although the analysis in *Tarasoff* possesses certain theoretical problems, a majority of courts have found the psychotherapist-outpatient relationship to constitute a special relationship giving rise to a duty to control.[44] Determining that a duty exists requires situational analysis of the facts presented in each case. This approach does not result in a universal checklist for controlling a patient. Rather, the specific facts of each case demonstrate which acts must be undertaken to comply with the duty to control.[45]

The Ohio Supreme Court's assessment of the control necessary to give rise to a duty is confusing but logical. The court noted that sufficient elements of

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[37] *Id.* at 1321.

[38] *Tarasoff*, 551 P.2d at 341-42. The court held that the first and fourth causes of action, failure to detain and abandonment of a dangerous patient, were barred by governmental immunity and the third cause of action failed as a matter of law because exemplary damages were unavailable in a wrongful death action. *Id.*

[39] *Morgan*, 673 N.E.2d at 1320 (citing *Tarasoff*, 551 P.2d at 343).

[40] *Id.* at 1324.

[41] *Id.*

[42] *Id.* at 1325-26.

[43] *Id.* at 1326.

[44] *Morgan*, 673 N.E.2d at 1320.

[45] *Id.* at 1321.

control exist in the outpatient setting to impose the duty set forth in *Littleton*.[46] The lesser degree of control present in the outpatient relationship, as opposed to inpatient treatment, does not preclude the finding of a duty.[47] To determine if a psychotherapist possessed sufficient capacity to control in the outpatient setting, the court looked to the control the provider could have exercised over the patient. Among the indicia of control present in the outpatient setting are the prescription of medicine, the creation of a treatment program, the actions necessary to control or limit the patient's access to weapons, the persuasion of the patient to voluntarily enter a hospital, the notification of appropriate law enforcement officials of a threat, and even the initiation of involuntary commitment proceedings.[48] The ability or need to exercise such measures "embod[y] sufficient elements of control to warrant a corresponding duty to control."[49] The factors determining control are intertwined with the elements of the standard of care or the issue of what a practitioner meeting the *Littleton* test could have or should have utilized. Thus, "it is within the contemplation of the Restatement that there will be diverse levels of control which give rise to corresponding degrees of responsibility."[50]

This duty is obvious from the explicit language of the Restatement. While Section 314[51] states the general rule that there is no duty to act to protect another, Section 315[52] presents a general exception that is examined in detail in subsequent sections.[53] While the duty in *Littleton* arose from Section 319,[54]

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[46] *Id.* at 1327.

[47] *Id.* at 1321.

[48] *Id.*

[49] *Morgan*, 673 N.E.2d at 1323.

[50] *Id.* at 1322.

[51] RESTATEMENT (SECOND) OF TORTS § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

[52] RESTATEMENT (SECOND) OF TORTS § 315 (1965) reads:
There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless:
(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
(b) a special relation exists between the actor and the other which gives to the other a right to protection.
Id.

[53] *Morgan*, 673 N.E.2d at 1320.

[54] RESTATEMENT (SECOND) OF TORTS § 319 (1965) reads as follows:
One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.
Id.

which addresses "taking charge" of another, the Ohio Supreme Court adhered to the general standard found in section 315. Section 315 discusses control generally, while section 319 sets forth a specific circumstance where the duty to control exists. The court recognized that "charge" and "control" represent different approaches taken by other courts.[55] However, the analysis of the existence of a duty, and application of Restatement principles to the facts here, demonstrate the irrelevance of whether the case was decided under section 319 or section 315. They are the general and specific extension of the exceptions to section 314. They represent different classifications within the same continuum.[56] The fact that such differing levels of the ability to control exist does not preclude the imposition of a duty to control.[57]

Finding a duty by utilizing a "control" analysis, the court looked to public policy concerns to address the imposition of the duty. The court followed the same balancing test employed in *Tarasoff*, weighing the psychotherapist's ability to control, the public's interest in safety, the difficulty in assessing a patient's violent proclivities, the desirability of obtaining optimum treatment for a patient, and society's interest in maintaining the confidentiality of patient-therapist communications.[58] Balancing these same issues, courts throughout the country have taken different approaches in determining if a duty to control exists in the outpatient setting and whether the duty should be imposed.[59] The Ohio Supreme Court first returned to the indicia of control that are manifest in the outpatient setting.[60] The court noted that the plaintiffs' expert testimony, when contrasted to the testimony of the defendants, demonstrated a reasonable difference of opinion as to the propriety of Dr. Brown's actions and whether they met the professional judgment test announced in *Littleton*.[61] The court determined that the outpatient relationship embodied sufficient elements of control that the duty to control could be imposed.[62] The scope of this analysis is not what the psychotherapist did but what the psychotherapist could have done under the circumstances.[63] This determination requires the court to look to the facts of each case.[64]

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[55] *Morgan*, 673 N.E.2d at 1321.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 1322.

[59] *Id.*

[60] *Morgan*, 673 N.E.2d at 1323.

[61] *Id.*

[62] *Id.* at 1324.

[63] *Id.*

[64] *Id.* at 1323.

The court addressed the interrelation of society's interest in security and the importance of confidentiality to the psychotherapist-patient relationship.[65] By explaining that society looks to these professionals to identify, contain, and reduce the risk mentally ill patients pose to the community, the court analogized this situation to the issue in *Jones v. Stanko*, involving the threat individuals with communicable diseases pose to the community and the duty health care providers treating them owe to the community.[66] The court applied *Jones* to the facts in *Morgan*, noting that it was relevant for four reasons:

> First, it demonstrates that Ohio common law recognizes that a physician can have a duty to others with whom he has professional relationship. Second, it accepts that a duty can arise by virtue of the public interest in containing certain risks. Third, it places a duty upon the physician to act affirmatively to protect others from a danger not only of which he is aware, but also of which he should be aware. Fourth, the duty owed by the physician to diagnose and treat his patient's condition for the benefit of others is the same duty already owing to the patient.[67]

Ohio recognizes that where a conflict exists between confidentiality and the safety of the public or another individual, a patient's propensity for violence requires imposition of a duty of control even at the expense of the communication privilege.[68]

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[65] *Morgan*, 673 N.E.2d at 1324, 1326.

[66] *Id.* at 1324.

[67] *Id.* The court's strong reliance upon and reaffirmation of the principles of *Jones* is important in light of confusion exhibited by courts in Ohio not only on the issue of duty to third parties but also the interplay of the public's interest in health and safety and a patient's interest in confidential communication. In a decision that can only be the result of poor advocacy on behalf of the plaintiff and even poorer judgment and research by a court, the court of appeals of Trumbull County rendered an opinion that could have benefited from such insight into *Jones* in D'Amico v. Delliquadri, 683 N.E.2d 814 (Ohio Ct. App. 1996). The plaintiff had contracted genital warts from her boyfriend and sued his treating physician alleging negligence. The court held that any duty to third parties was very limited. *Id.* The court further held that the plaintiff had no direct cause of action against the physician because she could not assert any exception to the statutory privilege enacted governing the confidentiality of patient-physician communication. *Id.* The court's ruling was not appealed, but the validity of the court's holding is highly questionable as it conflicts not only with *Jones*, but also the analysis of privilege found in *Morgan* and *Littleton*. *Morgan*, 673 N.E.2d at 1324, 1326; *Littleton*, 529 N.E.2d at 459 n.19.

In *Littleton*, the court recognized that liability exists for unauthorized disclosure of confidential medical information. However, the court also recognized the longstanding exception for the disclosure of information that is necessary to protect an individual or public welfare. *Id.* Furthermore, the court noted that the American Medical Association had long recognized the exception. *Id.*

[68] *Morgan*, 673 N.E.2d at 1376.

The court rejected the claim that a duty should not be imposed due to the difficulty psychotherapists have in forecasting dangerousness.[69] Although predicting a patient's potential dangerousness may be difficult, that difficulty is not enough to preclude liability, considering the court in *Littleton* required the psychotherapist to make an informed assessment of the propensity for violence.[70] The court noted there would be no basis for civil commitment under Ohio's statutory structure, and thus the civil commitment statute would be meaningless, if a patient's propensity for violence could not be assessed.[71]

Finally, the court addressed the inherent conflict between society's security and the interest of the patient not to be unnecessarily confined. The court rejected the claim that imposition of a duty to control in this case would result in the unnecessary and defensive commitment of nonviolent psychiatric patients.[72] Although unnecessary commitment is an important concern in protecting a patient's freedom, the court found there was no empirical data to support this argument.[73] The court noted that the decision in *Tarasoff* "has not discouraged therapists from treating dangerous patients, nor has it led to an increased use of involuntary commitment of patients perceived as dangerous."[74] Thus, the interests of society dictated the imposition of the duty to control upon the defendants in this case.[75]

The Ohio Supreme Court's finding of a duty to control is consistent with other jurisdictions. The treatment of patients in an outpatient setting "embodies sufficient elements of control to warrant imposition of such a duty."[76] In its attempt to balance the interests of society, psychotherapists, and patients, the court noted that imposition of the duty to control protects the public from potentially violent mental patients in a manner consistent with existing Ohio law without significantly interfering with the psychotherapist-patient relationship.[77] Thus, a duty to control exists in the outpatient setting, and the duty to control was imposed upon the defendants in *Morgan*.

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[69] *Id.* at 1324.

[70] *Id.* at 1324-25.

[71] *Id.* at 1325.

[72] *Id.*

[73] *Morgan*, 673 N.E.2d at 1325.

[74] *Id.* (citing Daniel Givelber, et al., *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 486 (1984)).

[75] *Id.* at 1327.

[76] *Id.*

[77] *Id.*

B. Stare Decisis and Strict Statutory Application

Morgan represents the logical analysis and extension of Ohio law. In rendering its opinion, the Ohio Supreme Court followed its earlier decision in *Littleton* and strictly construed § 5122.34 of the Ohio Revised Code.[78]

1. *Littleton*

As noted above, *Morgan* addresses the question left open by the *Littleton* decision.[79] In *Littleton*, the court applied the "professional judgment standard" to inpatient treatment.[80] Under *Morgan*, psychotherapists who treat outpatients are held to the same standard of care as those who treat inpatients.[81] A competent, non-negligent psychotherapist, regardless of the setting for his or her practice, must consider all viable treatment alternatives in order to avoid liability.[82] Evaluation and treatment must be thorough, not merely a selection of one of several different options which do not include all possible treatments.[83]

The subjective knowledge and actions of the psychotherapist must be considered to determine if the practitioner has complied with the professional judgment rule.[84] A decision has not been made in good faith if the practitioner subjectively knew the chosen course of treatment would not be effective.[85] However, the professional judgment rule does not punish a practitioner, acting in good faith, who makes a treatment decision after evaluating all treatment

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[78] OHIO REV. CODE ANN. § 5122.34 (Banks-Baldwin 1997) states that:

> Persons, including, but not limited to, boards of alcohol, drug addiction, and mental health services and community mental health agencies, acting in good faith, either upon actual knowledge or information thought by them to be reliable, who procedurally or physically assist in the hospitalization or discharge, determination of appropriate placement, or in judicial proceedings of a person under this chapter, do not come within any criminal provisions, and are free from any liability to the person hospitalized or to any other person. No person shall be liable for any harm that results to any other person as a result of failing to disclose any confidential information about a mental health client, or failing to otherwise attempt to protect such other person from harm by any such client. This section applies to expert witnesses who testify at hearings under this chapter.

Id.

[79] *Littleton*, 529 N.E.2d at 458.

[80] *Id.*

[81] *Morgan*, 673 N.E.2d at 1328-29.

[82] *Id.* at 1329 n.7.

[83] *Id.*

[84] *Id.*

[85] *Id.*

options that subsequently proves to be wrong.[86] The rule is evaluated in terms of the duty that is imposed.[87]

The elements of the professional judgment rule are clearly stated in the syllabus to *Littleton*:

> A psychiatrist will not be held liable for the violent acts of a voluntarily hospitalized mental patient subsequent to the patient's discharge if (1) the patient did not manifest violent propensities while being hospitalized and there was no reason to suspect the patient would become violent after discharge, or (2) a thorough evaluation of the patient's propensity for violence was conducted, taking into account all relevant factors and a good faith decision was made by the psychiatrist that the patient had no violent propensities, or (3) the patient was diagnosed as having violent propensities and after a thorough evaluation of the severity of the propensities and a balancing of the patient's interests and the interests of potential victims, a treatment plan was formulated in good faith which included discharge of the patient.[88]

As applied to psychotherapists, the professional judgment rule analyzes liability in terms of the "'good faith, independence and thoroughness' of a psychotherapist's decision not to commit a patient."[89] The court reaffirmed its decision in *Littleton*, applying it to outpatient treatment:

> the professional judgment rule . . . seeks to strike an appropriate balance by not allowing the psychotherapist to act in careless disregard of the harm presented to others by violently inclined patients, yet preserving the confidence, autonomy, and flexibility necessary to the psychotherapeutic relationship. There is nothing in the analysis itself that would suggest a different result in the outpatient setting.[90]

Morgan extends *Littleton* to all psychotherapists, not just those who treat inpatients.

2. OHIO REVISED CODE § 5122.34

The Ohio Supreme Court also rejected the claim of immunity asserted by FFCC and its employees under section 5122.34 of the OHIO REVISED CODE.[91] FFCC interpreted the statute to provide blanket immunity for mental health

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[86] *Morgan*, 623 N.E.2d at 1329.

[87] *Id.*

[88] *Littleton*, 528 N.E.2d 449 syllabus.

[89] *Id.* at 458 (quoting Currie v. United States, 644 F. Supp. 1074, 1083 (M.D.N.C. 1986)).

[90] *Morgan*, 673 N.E.2d at 1328.

[91] *Id.* at 1327.

professionals who do not become involved in committing a patient.[92] The court determined the statute also appears to "preclude *Tarasoff*-type liability"[93] even absent affirmative acts to commit a patient.

On its face, immunity under the statute is available only if a mental health professional acted in good faith. Establishing good faith requires individuals to establish they subjectively believed they were acting properly.[94] A finding of good faith cannot be made as a matter of law, as it is for the finder of fact to assess the credibility of the individual asserting the immunity.[95]

Although the court could have applied this analysis to reject the trial court's grant of summary judgment and reverse the court of appeal's affirmation of such, the court went further. It looked to the context and the plain language of the statute and found it inapplicable to FFCC and its employees.[96] Rejecting the defendants' arguments and the arguments raised by some commentators,[97] the court held that the statute only applies in the area of participation in civil commitment.[98] FFCC and its employees neither initiated nor participated in civil commitment proceedings of Matt Morgan due to their policy against initiating or becoming involved in civil commitment proceedings.[99]

The court held that immunity only exists if the party asserting it has "procedurally or physically assist[ed]" in confinement proceedings under section 5122.[100] This interpretation and application gives meaning to the actual terms used by the General Assembly in enacting the statute. The court explained that if the General Assembly intended the meaning FFCC ascribed to the statute, it would not have limited immunity to those who "procedurally or physically assist" in the decision to hospitalize, discharge, or make a change in the patient's placement.[101] It would have immunized everyone, not just those acting in "good faith" who "procedurally or physically assist[ed]" in committing a patient.[102] It is clear that as FFCC and its employees refrained

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[92] *Id.* at 1326.

[93] *Id.* at 1326-27.

[94] *Id.* at 1326.

[95] *Morgan*, 673 N.E.2d at 1334. *See also supra* note 29.

[96] *Morgan*, 673 N.E.2d at 1327.

[97] *Id.* at 1327 (citing EAGLE & KIRKMAN, BALDWIN'S OHIO MENTAL HEALTH LAW 127-29 (2d ed. 1990)); Hulteng, *The Duty to Warn or Hospitalize: The New Scope of Tarasoff Liability in Michigan*, 67 U. DET. L. REV. 1, 11 (1989).

[98] *Id.* at 1327.

[99] *Id.* at 1316-17.

[100] *Id.* at 1327.

[101] *Morgan*, 673 N.E.2d at 1327.

[102] *Id.*

from assisting the Morgans in obtaining Matt's involuntary commitment, they cannot claim such immunity under the statute.[103]

By applying the statute only to those circumstances stated in the statute, the court adhered to the language implemented by the General Assembly. Furthermore, the court's decision adheres to its prior statements on the interpretations of statutes. "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion . . . [to resort] to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted."[104] The court applied the statute finding that, as the defendants admittedly did nothing to "assist,"[105] they were not immune from suit.

C. Civil Procedure and Review of a Summary Judgment

The court's analysis and decision must be viewed from the procedural setting of the case: the trial court granted summary judgment for all of the defendants.[106] This was reversed with respect to Dr. Brown by the court of appeals, but the judgment for FFCC and its employees was affirmed.[107]

The test for summary judgment is clear but often misapplied:

> A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.[108]

Construing the evidence most strongly for the nonmoving party requires all inferences that could be reasonably made by the finder of fact be drawn for the nonmovant.[109] All the evidence presented by both the movant and nonmovant is subject to this standard. This requires that any inference that can be drawn on the issue of credibility, honesty, or truthfulness of a witness in fact be drawn in favor of the nonmovant.[110] Any question as to the credibility, honesty, or truthfulness of any of the movant's witness must be drawn against the movant and for the nonmovant.[111] Summary judgment is inappropriate if facts integral

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[103] *Id.*

[104] Sears v. Weimer, 55 N.E.2d 413 (Ohio 1994).

[105] *Morgan*, 673 N.E.2d at 1327.

[106] *Id.* at 1318.

[107] *Id.*

[108] OHIO R. CIV. P. 56(C) (West 1997).

[109] Turner v. Turner, 617 N.E.2d 1123, 1127 (Ohio 1993).

[110] *Id.*

[111] *Id.*

to the claims "can only be resolved by the finder of fact because they may be reasonably resolved in favor of either party."[112]

Although the existence of a duty is a question of law, breach of duty and foreseeability of injury are questions of fact.[113] "The foreseeability of a criminal act depends on the knowledge of the defendant, which must be determined by the totality of the circumstances."[114] Foreseeability "includes what ever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct."[115] In analyzing liability for acts of third parties and determining foreseeability, courts look to the knowledge or experience of the defendant to determine if it should have known or anticipated an injury to the plaintiff.[116] Thus, contrary to Dr. Brown's claim and that of the dissent,[117] the remoteness of Matt's acts from Dr. Brown's treatment does not preclude imposition of a duty. Temporal remoteness implicates the issues of foreseeability and proximate cause and not the existence of a duty.[118] The lapse in time between a negligent act and the occurrence of a foreseeable injury does not affect the existence of a duty,[119] and it is not an issue that can be resolved as a matter of law.[120]

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[112]Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

[113]Cascone v. Herb Kay Co., 451 N.E.2d 815, 820 (Ohio 1983).

[114]Evans v. Ohio State Univ., 680 N.E.2d 161, 173 (Ohio Ct. App. 1996). *See also* Menifee v. Ohio Welding Prods., Inc., 472 N.E.2d 707, 710 (Ohio 1984).

[115]Bigbee v. Pacific Tel. & Tel. Co., 665 P.2d 947, 952 (Cal. 1983).

[116]*See* Kerans v. Porter Paint Co., 575 N.E.2d 428 (Ohio 1991); Rush v. Lawson Co., 585 N.E.2d 513 (Ohio 1990); Mauter v. Toledo Hosp., Inc., 571 N.E.2d 470 (Ohio 1989); Federal Steel & Wire Corp. v. Ruhlin Constr. Co., 543 N.E.2d 769 (Ohio 1989); Howard v. Rogers, 249 N.E.2d 804 (Ohio 1969).

[117]Justice Stratton argued in her dissent:

> Would Dr. Brown's liability for Matt's actions have ended twelve months after his last visit? Or would potential liability exist for two years, five years or ten years? The majority provides no answers to these difficult questions. A popular axiom is that bad facts make bad law. The facts in this case are so tenuous that bad law has indeed been created.

Morgan, 673 N.E.2d at 1337. However, no determination had been made as to Dr. Brown's liability. The issue was whether sufficient evidence existed to allow the finder of fact to make a determination of whether plaintiffs' failure to present facts entitling them to relief entitled defendants to judgment as a matter of law. *Id.* Remoteness, as an element of foreseeability or probable cause, is for the finder of fact to evaluate.

[118]*Morgan*, 673 N.E.2d at 1332.

[119]*Id.* at 1334.

[120]*Id.* at 1332. The court cited Prosser & Keeton's analysis of remoteness:

> Remoteness in time or space may give rise to the likelihood that other intervening causes have taken over the responsibility. But when causation is found, and other factors are eliminated, it is not easy to discover any merit whatever in the contention that such physical remoteness should itself bar recovery. The defendant

Morgan reaffirms the impropriety of summary judgment where jurors must evaluate the credibility of the parties and their witnesses in applying the law to the facts. Affirming the court of appeals' reversal as to Dr. Brown, the court noted that under the *Littleton* test, reasonable jurors could find Dr. Brown's failure to review Matt's medical records from C.A.T.C.H. Respite and failure to contact Matt's previous treating psychiatrist constituted "something less than the exercise of professional judgment."[121] The court's finding is interesting in that it had cited extensively from the pretrial discovery testimony of plaintiffs' experts' criticism of Dr. Brown in its presentation of the facts of the case.[122] However, the court did not return to those opinions in affirming the reversal of summary judgment for Dr. Brown, relying upon Dr. Brown's own admissions.[123]

Once it found a duty and imposed that duty upon Dr. Brown, the court invoked the proper test of a summary judgment motion: could reasonable jurors, looking at these facts, decide that the defendant was negligent?[124] If the answer is affirmative, summary judgment is improper. Summary judgment is only proper where the facts are so clearly in favor of the moving party, that jurors would be compelled to render a verdict for the moving party.

IV. THE IMPORTANCE OF *Morgan*

The Ohio Supreme Court's decision in *Morgan* is both conservative and judicially sound. Using *Tarasoff* as a starting point rather than a destination, the Court avoided many of the dangers other courts have encountered in addressing psychotherapist negligence. While *Tarasoff* is instructive and informative, the law and facts of that case are problematic. First, the case is

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> who sets a bomb which explodes ten years later, or mails a box of poisoned chocolates from California to Delaware, has caused the result, and should obviously bear the consequences.

W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 43, at 283 (5th ed. 1984).

[121] *Morgan*, 673 N.E.2d at 1333.

[122] Dr. Ronald C. Goff criticized Dr. Brown extensively during the discovery deposition conducted of Dr. Goff. Dr. Goff testified that Dr. Brown negligently failed to diagnose schizophrenia, failed to obtain an adequate history, did not read Matt's treatment records, did not contact his prior treating psychiatrist, discontinued Matt's medication, did not monitor Matt's condition after discontinuing his medication, and delegated his responsibility to FFCC. *Id.* at 1317. Dr. Emmanuel Tanay reaffirmed Dr. Goff's criticism of Dr. Brown and noted that he was "a psychiatrist unable to make a diagnosis of serious mental illness." *Id.* at 1318.

[123] *Id.* at 1315 (noting that Dr. Brown never read Matt's chart, even though he had requested it, never contacted Matt's physician, never followed up with Matt after he terminated his prescription for Navane, and that Dr. Brown admitted that his "diagnosis of atypical psychosis is a kind of waste basket diagnosis").

[124] The issue of credibility cannot be evaluated as a matter of law. Thus, it is for a jury to decide if the defendants met the standard announced in *Littleton*. *Littleton*, 529 N.E.2d at 449.

limited to the duty to warn.[125] Although the plaintiffs in *Tarasoff* alleged the defendants failed to detain a dangerous patient, failed to warn of a dangerous patient, abandoned a dangerous patient, and breached a duty to the patient and the public, the only cause of action recognized under California law was the duty to warn.[126]

Morgan is not a case about the duty to warn,[127] although many of the issues that arise in a duty to warn case resemble those found in psychiatric negligence actions. The duty to warn case is a subset of the larger class of psychiatric negligence. The specific victim-specific threat or readily identifiable victim standards have no application outside of the duty to warn case.[128] Traditionally, foreseeability analysis is more appropriate to the psychiatric negligence and failure to commit situations,[129] because the patient's dangerous propensities towards himself or the public are sufficient to merit commitment without the identification of a specific victim.[130] Matt Morgan's aggressive and violent behavior imposed a duty on the defendants to control his behavior regardless of a specific threat. Application of a specific victim-specific threat standard to the duty to commit would preclude liability for the negligent treatment of an individual who exhibits antisocial and violent behavior to-

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[125] *Tarasoff*, 551 P.2d at 341-42.

[126] *Id.*

[127] Although the case is instructive on what duty is owed, *Tarasoff* is inapplicable due to California's governmental immunity barring the duty to commit claim. *Tarasoff*, 551 P.2d at 340.

[128] *Morgan*, 673 N.E.2d at 1330.

[129] The Ohio Supreme Court approvingly cited Currie v. United States, 644 F. Supp. 1074, 1080 (M.D.N.C. 1986), *aff'd on other grounds*, 836 F.2d 209 (4th Cir. 1987), which noted that:

> The court does not believe that it is wise to limit any duty to commit according to the victim. Arguably the patient who will kill wildly (rather than specifically identifiable victims) is the one most in need of confinement. In negligent release cases, a defendant's duty generally has not been limited to readily identifiable victims, and the court believes a similar rule is appropriate here. Citizens outside of the "readily identifiable" sphere but still within the "foreseeable zone of danger" are potential victims a therapist should consider if he has a duty to them and a means of adequately protecting them.

Id. at 209.

[130] *Currie*, 644 F. Supp. at 1079.

> [T]he therapist in a duty to commit case need only know that the patient is dangerous generally in order to adequately commit him. As a practical matter, the victim's identity is irrelevant to whether the doctor can adequately act -- by committing the patient the therapist is able to protect all possible victims.

Id.

ward society.[131] As a result, the specific victim-specific threat standard is applicable, if at all, only in the duty to warn case.

The use of foreseeability analysis in assessing the existence of a duty to commit gives practitioners more guidance in making the commitment decision and fulfilling their duty to society and their patients. If an outpatient is a candidate for involuntary commitment due to violent or antisocial behavior, then logically imposition of a duty to control provides more protection to society and the individual than waiting for a specific threat against a specific victim. The specific victim-specific threat standard in reality provides minimal protection to society or the mentally ill under most circumstances. This formulation of the duty to control is consistent with traditional tort law: "It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone."[132]

The Ohio Supreme Court followed a legally sound course using *Tarasoff* to frame its discussion of the issues in *Morgan*. However, it proceeded to address the case in terms of traditional Ohio tort principles previously recognized by the court.[133] The court was compelled to follow its decision in *Littleton*. It had explicitly left the issue of a duty of control in the outpatient setting open for future consideration. Although the outpatient and inpatient settings for treatment of mental illness present different levels of control, imposition of a duty based upon the specific facts of each case, and what control a psychotherapist could exert, is appropriate in light of the social goals of treating mental patients in the least restrictive environment and preventing unnecessary confinement.[134] The need for a uniform standard in both the outpatient and inpatient settings is further mandated by the reality of modern mental health treatment: many patients that formerly were institutionalized are now being treated as outpatients. To absolve a negligent practitioner of liability as a result of the fortuity of practicing in an outpatient clinic as opposed to an inpatient facility would be a great disservice not only to society, but also to the mentally ill.

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[131]The inapplicability of this standard to the negligent failure to commit psychiatric negligence case is readily available. Matt Morgan's manifestation of antisocial and violent behavior, contrasted with his marked improvement when treated with medication and his compliance in receiving treatment during his stay at C.A.T.C.H. Respite, demonstrate that it was foreseeable that Matt would react violently and possibly injure others if his schizophrenia were not treated. *Morgan*, 673 N.E.2d at 1322.

[132]Di Gildo v. Caponi, 247 N.E.2d 732, 736 (Ohio 1969).

[133]Gelbman v. Second Nat'l. Bank, 458 N.E.2d 1262 (Ohio 1984).

[134]*Morgan*, 673 N.E.2d at 1322.