STATE OF WISCONSIN
SUPREME COURT

No. 2011 AP 2864-CRAC

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent-Petitioner,

v.

SAMUEL C. JOHNSON, III,

Defendant-Respondent-Cross-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING IN PART AND REVERSING IN PART AN ORDER OF THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE EUGENE A. GASIORKIEWICZ PRESIDING

AMICUS CURIAE BRIEF OF NON-PARTY, T.S.

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The State's proposed mechanism of compelling under Wis. Stat. §146.82(2)(a)4. the production of privileged records of T.S. and others in her position in the absence of their consent violates the public policy, codified by the legislature in §950.01, "to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity" and to ensure that the rights of victims and witnesses of crime "are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants."

Authorizing production of T.S.'s records under §146.82 would undermine the very purpose of the privilege under §905.04 and, too, the policies underlying the exceptions to the privilege that the legislature and this court have carefully delineated in §905.04(4) and *Schuster v. Altenberg*, 144 Wis. 2d 223, 424 N.W.2d 159 (1988).

In the cases the State cites wherein the Supreme Court of Wisconsin has found a public policy exception to the

therapist-patient privilege and confidentiality under Wis. Stat. §905.04, the exception has been grounded in a concern that effective treatment be provided to patients. In both of the cases, the propriety of the treatment provided by the treating therapists was at issue. Neither case involved a *Shiffra* issue.

In *Schuster v. Altenberg*, 144 Wis. 2d 223, 424 N.W.2d 159 (1988), the husband and daughter of psychiatrist Altenberg sued Altenberg alleging he was "negligent in his management and care for [his patient] in failing to recognize or take appropriate actions in the face of her psychotic condition, including failing to seek her commitment, to modify her medication, to alert and warn the patient or her family of her condition or its dangerous implications. . . ." *Id.*, 144 Wis. 2d at 226. The plaintiffs asserted Altenberg's negligence was a substantial contributing factor in causing an automobile accident in which the patient was fatally injured and her daughter was paralyzed. *Id.* at 227.

The Supreme Court considered the respondents' argument on appeal that the need to protect confidential

patient-therapist communications should prevent liability from being imposed on therapists who fail to warn third parties of the danger posed by a patient or who fail to seek confinement of the patient. *Id*. at 249-255. The court noted the codified exception to patient privilege set forth in §905.04(4)(a) which sets forth that "[T]here is no privilege under this rule [§905.04] as to communications and information relevant to an issue in proceedings to hospitalize the patient for mental illness. . . if the physician . . or psychologist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization." *Id*. at 250-251.

The court further noted a study that psychotherapists rarely find it sufficient to merely warn others of a patient's dangerousness without also seeking commitment of the patient as part of the appropriate treatment of the patient - - thereby making applicable the codified exception under §905.04(4)(a) for any disclosures made in the course of seeking hospitalization. *Id*. at 258 citing Melella, Travin & Cullen, *The Psychotherapist's Third-Party Liability for Sexual Assaults Committed By His Patient*, 15 J.Psych. & Law 83, 100 (1987);

Mills, Sullivan & Eth, *Protecting Third Parties: A Decade After Tarasoff*, 144 Am. J. Psych. 68, 73 (Jan. 1987).

It is hard to imagine "those limited circumstances where the public interest in safety from violent assault is threatened" (*Schuster*, 144 Wis. 2d at 249) by a patient which would not amount to circumstances requiring steps to be taken to hospitalize or commit the patient such that the exception under §905.04(4)(a) would apply. As the *Schuster* court articulated, ". . . [I]t is the patient, perhaps himself or herself a 'victim' of mental disease, who must be temporarily removed from the streets until treatment assures that the patient is no longer an imminent threat to himself of herself or to the community." *Id.* at 256.

In *Johnson v. Rogers Memorial Hospital, Inc.*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, the Wisconsin Supreme Court held that there was an exception to the therapist-patient privilege based on public policy in the extremely limited instance when an adult child accuses her parents of physical and sexual abuse based on memories recovered during

therapy and the parents sue the patient's therapists claiming negligent treatment by the therapists. In that case, the patient's parents claimed negligent treatment was provided to their daughter that initially resulted in her falsely believing that she had been sexually and physically abused by her parents and, too, that continuous negligent therapy reinforced the false memories when the therapists failed to provide counseling to determine the validity of the memories. *Id.* at ¶¶ 9, 29.

The Wisconsin Supreme Court, in considering whether the treatment records should be provided to the plaintiffs, noted the United States Supreme Court declaration in *Jaffee v. Redmond*, 518 U.S.1, 10 (1996) recognizing that the purpose for the privilege protecting the confidentiality of such records is successful treatment for patients:

> Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the

> mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

The *Johnson* court cited the United States Supreme Court's recognition that "the privilege serves as a means to facilitate frank discussion in order to provide 'effective psychotherapy,' with the ultimate end aimed at 'successful treatment.'" *Johnson*, at ¶62, quoting *Jaffee*, 518 U.S. at 10.

The *Johnson* court found an exception to the privilege where the efficacy of the treatment, itself, is at issue. In such cases - - when "the end is divorced from the means . . . such that 'negligent therapy' is left to flourish within the confines of the therapist-patient relationship, the privilege no longer serves its purposes. What was meant to be a device to help care for problems becomes a shelter to protect careless and negligent practices." *Johnson*, at ¶62. The court found that public policy allowed an exception to the privilege under these particular circumstances because "no utility can be derived from protecting careless or inappropriate therapists and their practices." *Id*. at ¶63.

The underlying purpose for the privilege protecting the confidentiality of treatment records is effective treatment for patients. "Further, articulating the exception 'more generally' for the protection of the patient and the community, the supreme court solidly anchored its decision [in *Schuster*] in the very principles of the psychotherapeutic professions." *State v. Agacki*, 226 Wis. 2d 349, 360, 595 N.W.2d 31, 37 (Ct. App. 1999). Both the privilege *and* its exceptions are based in public policies that promote effective treatment for patients.

Authorizing production of T.S.'s or any non-consenting patient's records under §146.82 would undermine the very purpose of the privilege under §905.04 and, too, the policies underlying the exceptions to the privilege that the legislature and this court have carefully delineated in §905.04(4) and *Schuster*.

"The public policy underpinning this privilege is to encourage patients to freely and candidly discuss mental health concerns with their therapists by ensuring that those concerns will not be unnecessarily disclosed to third parties."

State v. Denis L.R., 2005 WI 110, ¶37, 283 Wis. 2d 358, 374, 699 N.W. 2d 154. The public's interest in promoting effective treatment for those, like T.S., who could benefit from treatment will be ill served by making patients mistrustful and insecure because they cannot count on the confidentiality of their communications with their treatment providers.

Eviscerating the privilege and adopting a policy of forcing production, inspection, and disclosure of confidential patient communications without the consent of patients will specifically deter T.S. and will generally deter other Wisconsinites from seeking professional assistance with medical and, especially, mental health concerns.

Common sense dictates that, without the protection afforded to confidential communications, candor between patients like T.S. and their health care providers and therapists will evaporate. Patients may withhold important information from their providers, crucial to effective treatment, out of privacy concerns. This may prevent patients like T.S. from

receiving needed and appropriate treatment - - the very purpose of the privilege under §905.04 *and* its exceptions.

Forcing disclosure of confidential communications goes to the heart of what is often an objective of treatment: helping a patient gain control after suffering trauma or upset.

Forcing disclosure of confidential communications made in therapy can work a violation upon a patient as great or greater than any perceived violations at issue in litigation in which the patient may be a witness.

CONCLUSION

State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) sets forth a procedure which ensures that witnesses like T.S. are treated with dignity, respect, courtesy and sensitivity. It also ensures that the rights of victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants. Its procedures should not be replaced by mechanisms that would eviscerate the privilege afforded

patients under §905.04 and that would undermine the public's interest in best assuring that those who would benefit from mental health treatment obtain it in a way that promotes the best chance for appropriate and effective treatment.

Dated this 28th day of January, 2013.

Respectfully submitted:

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CERTIFICATION OF CONFORMITY
WITH §809.19(8)(b) and (c)

I, Kathleen M. Quinn, hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a nonparty brief produced with proportional serif font. The length of this brief is 1,562 words according to the word count function of the word processor available in WordPerfect 9.

Signed:

_____

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I, Kathleen M. Quinn, hereby certify that I have submitted an electronic copy of the brief and that the electronic brief is identical in content and format to the printed form of the brief filed.

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