DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANITA GRAHAM, individually and as statutory representative of MARCUS GRAHAM and JORDAN GRAHAM; HENRY L. GRAHAM and ONEDIA GRAHAM, a married couple, Plaintiffs/Appellees, v. VALUEOPTIONS, INC., a Virginia corporation; VO OF ARIZONA, INC., an Arizona corporation; STATE OF ARIZONA, Defendants/Appellants.	No. 1 CA-CV 09-0431 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-010027

The Honorable Bethany G. Hicks, Judge

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

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S W A N N, Judge

¶1 This negligence action requires us to determine the scope of the duty that a mental health provider owes to third parties following the Arizona Supreme Court's decision in *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (2007). ValueOptions, Inc., VO of Arizona ("VO-AZ"), and the State (collectively "Appellants") appeal from a judgment on a jury verdict that awarded the Grahams $11 million in compensatory damages and $25 million dollars in punitive damages after Patrick Graham was shot and killed by Edward Liu, an outpatient of ValueOptions and

VO-AZ. We hold that in the circumstances of this case, the jury properly found that Appellants' duty extended to Mr. Graham. We also conclude that the trial court properly admitted sanction letters, court monitor reports, and the Grahams' summary of Liu's medical records. Because there was insufficient evidence to support an award of punitive damages, however, we reverse that portion of the judgment.

FACTS AND PROCEDURAL HISTORY

¶2 On August 23, 2005, Edward Liu ("Liu") shot and killed Mr. Graham and Anthony Spangler, who were strangers to Liu. The Grahams brought this action, alleging that VO and VO-AZ negligently monitored Liu and failed to petition the court for an order of involuntary confinement. The Grahams also claimed that the State was vicariously liable for Appellants' negligence.

¶3 To provide care for the chronically mentally ill, the State contracts with Regional Behavioral Health Authorities ("RBHAs"). In 1991, Liu began receiving mental health services from the State of Arizona to manage his paranoid schizophrenia. In 1999, when ValueOptions became the RBHA for Maricopa County, Liu came under its care. According to ValueOptions' records from 1999, Liu required ongoing outpatient treatment, which

included a yearly psychiatric evaluation, monthly contact, and monitoring of his medications and signs of decomposition.[1]

¶4 In July 2004, ValueOptions assigned its contract with the State to VO-AZ. In September 2004, Sherry Young, a licensed nurse practitioner, became Liu's psychiatric prescriber. During his September 2004 visit, Liu reported ongoing paranoia and increased levels of anxiety. But Liu denied any suicidal or homicidal ideations or hallucinations, and Young did not observe any relapse indicators at that time.

¶5 After a November 2004 visit, however, Young noted the presence of relapse indicators. Nonetheless, her assessment determined that Liu was not a threat to himself or others.[2] Young also noted that Liu was delusional and experiencing hallucinations and was having difficulty functioning. Liu reported that he had stopped taking his Xanax, which was prescribed to reduce anxiety, one to two months earlier. Young

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[1] In 1991, before receiving treatment with ValueOptions, Liu reported that his "illness gets worse every year." And in 1993, Liu reported that frequently he would lose his temper, and that he was worried about who he might meet when he was out of his house, as he suffered from "paranoid feelings which are not normal." Medications and scheduled doctors' visits assisted in stabilizing Liu's condition.

[2] When asked how she could report that Liu was relapsing but not that he was a danger to himself or others, Young explained that relapse indicators do not indicate whether someone is suicidal or homicidal. Rather, relapse indicators assist in addressing the needs of the patient.

determined that Liu's case needed to be staffed "due to concerns/safety and functionality."

¶6 During a December 20, 2004 appointment, Liu requested a three-month prescription. Young refused, explaining the need for Liu to return for monthly evaluations. After this appointment, Young recommended that a case manager conduct a home visit and ordered monthly psychiatric evaluations to determine whether Liu was relapsing and would represent a danger to himself or others.

¶7 In May 2005, Karen Conoley, Liu's case manager, attempted without success to contact Liu at his home. She left Liu a telephone message and Liu returned her call, stating that he wanted to "get back on his medications." An appointment was set for June 2, 2005, which Liu later cancelled. A new case manager was assigned to Liu's case, and in August 2005 the case manager attempted a home visit and tried to talk with Liu by telephone, but was unable to make contact. On August 23, 2005, Liu shot and killed Patrick Graham and Anthony Spangler.

¶8 On August 14, 2006, the Grahams filed a Complaint alleging that VO-AZ and ValueOptions negligently monitored Liu and that they had a duty to seek a court order confining him for involuntary treatment. The Complaint asserted claims against VO-AZ and ValueOptions for negligence (count 1) and medical

negligence (count 2), and a claim against the State for its own independent negligence (count 3).[3]

¶9 Appellants moved for summary judgment on liability and partial summary judgment on the issue of punitive damages. In their motion for summary judgment, Appellants argued that they owed no duty to the Grahams, because Mr. Graham was not a foreseeable victim. In their motion for partial summary judgment, Appellants argued that punitive damages were not legally recoverable because there was no evidence that they acted with the requisite culpable state of mind. Without ruling on punitive damages, the court ruled that Appellants owed a duty to the Grahams and set the case for trial.

¶10 The claims against VO-AZ and ValueOptions were tried to a jury, which resulted in a verdict in favor of the Grahams for $11 million in compensatory damages and $25 million in punitive damages. The court entered judgment on the verdict against VO-AZ and ValueOptions,[4] and Appellants filed motions for judgment as a matter of law ("JMOL"), new trial and remittitur. The court denied these motions. Appellants timely appeal from

[3] The State and the Grahams subsequently entered into a settlement agreement as to the independent-negligence claim with respect to count 3, and agreed to a voluntary dismissal of the third count. The Grahams also claimed the State was vicariously liable for VO-AZ's and ValueOptions' negligence.

[4] The court also entered a separate judgment against the State "for vicarious liability based on the acts and omissions of ValueOptions Inc and [VO-AZ]."

the underlying judgments and the denial of their post-trial motions. Appellants raise three issues on appeal: (1) whether they owe a duty to the public; (2) whether two trial court evidentiary rulings were erroneous; and (3) whether punitive damages were unavailable on this record as a matter of law. We consolidated the appeals and have jurisdiction pursuant to A.R.S. § 12-2101(D) and (F)(1).

DISCUSSION

I. DUTY

¶11 A claim for negligence requires a plaintiff to "prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. at 143, ¶ 9, 150 P.3d at 230. Duty is a matter of law for the court to determine. *Id.* Breach, causation and injury are factual issues usually determined by the jury. *Id.*

¶12 Without a legal duty, an action for negligence must fail. *Id.* at 143, ¶ 11, 150 P.3d at 230. Therefore, "a conclusion that no duty exists is equivalent to a rule that, for certain categories of cases, defendants may not be held accountable for damages they carelessly cause, no matter how

unreasonable their conduct." *Id.* at 143-44, ¶ 11, 150 P.3d at 230-31.

¶13 Before *Gipson,* our supreme court considered the scope of the duty that psychiatrists owe to third parties who are injured by patients. *Hamman v. County of Maricopa*, 161 Ariz. 58, 775 P.2d 1122 (1989). In *Hamman*, a psychiatric patient who had not made specific threats of violence attacked his stepfather after his psychiatrist refused to admit him for inpatient treatment. *Id.* at 59-60, 775 P.2d at 1123-24. The court held:

> We reject the notion that the psychiatrist's duty to third persons is limited to those against whom a specific threat has been made. . . When a psychiatrist determines, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, the psychiatrist has a duty to exercise reasonable care to protect the *foreseeable victim* of that danger. The foreseeable victim is one who is said to be within the zone of danger, that is, subject to probable risk of the patient's violent conduct.
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> . . . .
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> *We hold that the duty extends to third persons whose circumstances place them within the reasonably foreseeable area of danger where the violent conduct of the patient is a threat.*

Id. at 64-65, 775 P.2d at 1128-29 (second emphasis added).[5] It is undisputed that the victims in this case were unknown to Mr. Liu or his mental health providers.

¶14 Before *Gipson, Hamman* would have required dismissal of plaintiffs' case absent a judicial determination that Mr. Graham was within the foreseeable geographic zone of danger given the warning signs of which Appellants were aware. In *Gipson*, however, the Supreme Court categorically held that "foreseeability is not a factor to be considered by courts when making determinations of duty," and it rejected "any contrary suggestion in prior opinions." 214 Ariz. at 144, ¶ 15, 150 P.3d at 231. Instead, foreseeability "is more properly applied to the factual determinations of breach and causation than to the legal determination of duty." *Id.* at ¶ 17. The trial court relied on *Gipson* to conclude that a duty existed in this case.

¶15 Appellants argue that *Hamman* is controlling on the issue of duty -- they contend that because the victims in this case were not foreseeable, no duty existed as a matter of law. The Grahams acknowledge that *Gipson* did not explicitly overrule

[5] After *Hamman* was decided, the legislature acted swiftly to limit the duty to those against whom specific threats had been made by enacting A.R.S. § 36-517.02. That statute was held unconstitutional in *Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc.*, 186 Ariz. 97, 105, 919 P.2d 1368, 1376 (App. 1995), and *Hamman* remains the authoritative holding on the duty of psychiatrists to third parties.

Hamman, but contend that the court could not have disregarded the effect of *Gipson* on the determination of duty without committing reversible error. Accordingly, we turn our attention to the interplay between *Gipson* and *Hamman*.

¶16 When the relationship between the parties does not itself support a duty, "[p]ublic policy may support the recognition of a duty of care." *Gipson*, 214 Ariz. at 145, ¶ 23, 150 P.3d at 232. Applying *Tarasoff v. Regents of Univ. of Cal.,* 17 Cal. 3d 425, 551 P.2d 334 (Cal. 1976), the *Hamman* court had no difficulty concluding that Arizona law supports a duty that can render psychiatrists liable for the violent acts of their patients. *Hamman,* 161 Ariz. at 63-64, 775 P.2d at 1127-28. *See also* Restatement (Second) of Torts § 315. The bulk of the court's analysis concerned a choice between three definitions of that duty: (1) a duty that extended to the public at large, (2) a duty limited to those against whom specific threats had been made, and (3) a duty limited to foreseeable victims. The court held that the latter definition governed in Arizona, but neither held nor implied that the duty could never extend to cases involving foreseeable victims who were previously unknown to the patient. Though *Hamman* expressly declined to hold that a duty extends as a matter of law to the public at large, its conclusion that a duty exists in the first instance was premised on policy, not foreseeability.

¶17 By eliminating the concept of foreseeability from the legal determination of duty and placing it within the factual determination of breach, *Gipson* did not undermine the rule in *Hamman.* And *Gipson* cannot fairly be read to hold that because foreseeability is no longer a valid *legal* consideration, the Supreme Court intended that psychiatrists "may not be held accountable for damages they carelessly cause, no matter how unreasonable their conduct." The trial court therefore correctly determined that a duty existed. In our view, *Gipson* is properly read simply as transferring the question of foreseeability from the judge to the jury. *Gipson* did not extend unlimited liability to the public in all cases, and neither do we -- we observe merely that while foreseeability remains an element of liability, it is not a consideration for the court in its determination of the existence of a duty.

¶18 In this case, the jury was instructed that the "general character of the event or harm" must be foreseeable. Though that instruction could perhaps have been worded more precisely to express the rule in *Hamman*, Appellants have not challenged the instruction on appeal. The principle articulated in *Hamman* -- that liability will not extend to unforeseeable victims -- was therefore properly preserved for the jury's consideration. We presume that the jury followed its instructions, and made all necessary findings to support its

verdict. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). We therefore conclude that the verdict cannot be reversed on the grounds that no duty existed.

II. EVIDENTIARY RULINGS

¶19 Appellants argue that the trial court erroneously admitted prior act evidence and a summary of Liu's clinical records. We disagree.

A. *Arnold* Court Monitor Reports and Sanction Letters

¶20 Before trial, Appellants filed motions in limine regarding *Arnold* court monitor reports (the "Reports")[6] and sanction letters (the "Letters").[7] During arguments on the

[6] Pursuant to *Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 775 P.2d 521 (1989), ValueOptions and VO-AZ were subject to court monitoring to ensure the delivery of timely and necessary behavioral health services to those determined to have a serious mental illness ("SMI").

[7] On January 7, 2005, the Arizona Department of Health Services (the "Department") sanctioned ValueOptions $20,000 for failing to complete a minimum of seven assessment reviews per week of five targeted clinical sites. Subsequently, on March 24, 2005, the Department sanctioned ValueOptions $25,000 for failing to timely and adequately provide coverage of services for Title XIX persons (those eligible for Medicaid, who include SMI patients). On April 8, 2005, the Department imposed two sanctions on ValueOptions of $100,000 each for failing to have an available clinician, staff mistreatment of a client, deficient assessment and service planning, failing to ensure timely delivery of services, failure of the assigned clinical liaison to oversee the delivery of case management service and to ensure that those services were actually provided, poor communication of critical information among clinical team members, and outreach/engagement deficiencies. On May 6, 2005, the Department again sanctioned ValueOptions $25,000 for failing to meet the required ratio of one case manager for every thirty consumers.

motion regarding the Reports, Appellants agreed that they could be used for impeachment purposes and to lay foundation for expert testimony. But Appellants argued that the Reports were inadmissible for substantive purposes as they were hearsay, and because Ariz. R. Evid. 404 required that they be precluded as evidence of prior bad acts. The trial court ruled that the Reports did not constitute public records under the hearsay exception, but it allowed them to be admitted for the limited purposes of impeachment and foundation.

¶21 At trial, the Grahams's behavioral health expert witness testified to the content of the Reports.[8] Appellants objected, arguing that the court's pretrial ruling precluded the introduction of the Reports, except for purposes of impeachment or notice. When the court asked Appellants whether they agreed that the Reports "go to notice that [ValueOptions and VO-AZ] were not in compliance," Appellants objected on hearsay grounds. The trial court overruled Appellants' objections.[9]

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[8] The expert testified, in part, that in 2004, only ten percent of the clients reviewed had an appropriate clinical team. But in 2000, forty-two percent of the clients had an appropriate clinical team. During the court monitoring, therefore, the availability of services decreased rather than increased as one might expect. He also noted that the 2004 report cited instances where "many clients had decompensated and . . . the team of case managers had made no effort to meet their needs."

[9] The court provided the jury with limiting instructions that prohibited the jury from using the Reports or the Letters as

¶22 In their motion in limine regarding the Letters, Appellants argued that the sanctions imposed against ValueOptions were irrelevant and prohibited by Ariz. R. Evid. 404(b). Additionally, Appellants argued that the probative value was substantially outweighed by the risk of unfair prejudice. During arguments on the motion, Appellants argued that the prior acts were inadmissible unless they were "substantially similar to the factual situation" in the instant case. They contended that because the prior incidents involved conduct related to two SMI patient suicides, they were distinguishable from the murders in this case.

¶23 Counsel for the Grahams argued that the Letters should be admitted for the purposes of notice, impeachment and punitive damages, as the "act needs only be similar enough to be relevant and the differences in the acts and the separation of time go to weight, not admissibility of the act." The trial court ruled that the Letters could be introduced at trial for the limited purposes of notice, knowledge, impeachment and punitive damages. At trial, Appellants renewed their objection to the introduction of the Letters, which was overruled. On appeal, Appellants argue that the trial court erred when it admitted the Reports and the Letters as evidence that they had notice of their

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evidence of the Appellants' case management of Liu. The court explained that they could only be used as evidence of notice and to rebut any testimony presented by Appellants.

deficient treatment procedures because the conduct detailed in the documents was dissimilar to the treatment provided to Liu. Alternatively, Appellants argue that the Grahams used the Reports and the Letters for purposes beyond the trial court's limiting instruction. We discern no error.

¶24 Pursuant to Ariz. R. Evid. 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that Appellants failed to comply with *Arnold* relates to their systemic capacity to provide proper care and is therefore relevant to the question whether they fell below the standard of care in this case. *See Am. Smelting & Ref. Co. v. Wusich*, 92 Ariz. 159, 164, 375 P.2d 364, 367 (1962) (customary practices are relevant to whether a party fell below the standard of care). Of course, evidence of prior acts is not admissible to prove action in conformity therewith. Ariz. R. Evid. 404(b). The purpose of the rule is to avoid having a jury render a verdict against a defendant merely because he is a "bad man." *State v. Mulligan*, 126 Ariz. 210, 215, 613 P.2d 1266, 1271 (1980).

¶25 But when the evidence is not used to prove inductively that one bad act implies another, it may be admissible for other purposes. *See* Ariz. R. Evid. 404(b). Here, the Letters and the

Reports were used to show that a systemic defect caused the failure to timely deliver necessary behavioral health services to the seriously mentally ill. Such evidence could properly support an inference that those working within such a system would be unreasonably impeded in their efforts to provide adequate services as required by *Arnold*. And while the repeated failure to comply with the standards required by *Arnold* is not dispositive of the question whether Appellants were negligent in this case, the jury could properly consider it. *See Wusich*, 92 Ariz. at 164, 375 P.2d at 367 (customs or practices do not necessarily define the standard of care required); *see also Wendland v. AdobeAir, Inc.*, 223 Ariz. 199, 205, ¶ 22, 221 P.3d 390, 396 (App. 2009) (OSHA standard may be considered as some evidence of the standard of care).

¶26 To be sure, there are distinctions between the conduct exhibited in the present case and the sanctionable conduct that existed in the two cases that resulted in suicides. But "[i]t is not necessary . . . to show that such incidents occurred under circumstances precisely the same as those of the one in question -- similarity in general character suffices." *Purcell v. Zimbelman*, 18 Ariz. App. 75, 83, 500 P.2d 335, 343 (1972). The Grahams alleged, *inter alia*, that Appellants failed to respond adequately to patient needs, to provide effective supervision of clinical services, and to communicate critical

information to team members. These deficiencies of conduct were also noted in the Letters and the Reports. The trial court, therefore, did not abuse its discretion in permitting the Letters and the Reports to be introduced for the limited purposes of notice and foundation for expert testimony on the standard of care.[10]

B. Exhibit 12

¶27 Appellants argue that the trial court erred when it admitted Exhibit 12, an index of Liu's clinical records, into evidence because (1) it was misleading and (2) the Grahams failed to make the author of the exhibit available for cross-examination. During discovery, Appellants stipulated to the use of Exhibit 12 during one deposition and the Grahams used it during two additional depositions without objection. During his deposition, Angelo Edge, the Vice President of Regional IT Services for ValueOptions, was asked to compare the excerpts contained in Exhibit 12 with the original clinical records. He verified that "the information contained within the excerpts under [the heading] description is accurate and reflected in the actual document . . . ." Nonetheless, Appellants filed a motion

[10] Appellants complain that the trial court did not make any preliminary findings before allowing the Letters and the Reports to be admitted. But inherent in the trial court's ruling on the motion in limine is the finding that the probative value of the Letters and the Reports outweighed the potential for prejudice. *See State v. Bolton*, 182 Ariz. 290, 302, 896 P.2d 830, 842 (1995).

in limine arguing Exhibit 12 violated the rule of completeness. They contended that the excerpts contained in Exhibit 12 were taken out of context and misrepresented Liu's actual condition.

¶28 During arguments on the motion, Appellants argued that Rule 1006 requires a person who prepared the summary or some other such knowledgeable person to confirm that the document is an accurate summary of voluminous information. Because counsel for the Grahams prepared Exhibit 12 himself, Appellants contended "the exhibit itself is problematic." The court admitted the exhibit and ruled that Liu's complete medical history must be attached or included in the record.

¶29 We perceive no abuse of discretion. The Grahams provided foundation for the admission of Exhibit 12 in the form of a defense witness who testified concerning the accuracy of the excerpts, and Appellants were given the opportunity to challenge the summary by reference to the full universe of documents it represented. Rule 1006 requires nothing more.

III. PUNITIVE DAMAGES

¶30 Finally, ValueOptions and VO-AZ contend that punitive damages are unavailable on this record as a matter of law.[11] We review de novo the trial court's denial of ValueOptions and VO-AZ's motion for JMOL regarding the sufficiency of the evidence

[11] The State stipulated to dismiss its appeal on the issue of liability for punitive damages.

to support an award of punitive damages, and view the evidence in the light most favorable to the Grahams as the nonmoving parties. *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 486, ¶ 37, 212 P.3d 810, 824 (App. 2009).

¶31 Punitive damages may be awarded to punish the tortfeasor and to deter others from engaging in similar conduct. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986). But such damage awards should be reserved for "the most egregious cases," and only if a jury finds by clear and convincing evidence that the wrongdoer "possessed an 'evil mind' while engaging in aggravated and outrageous conduct." *Hudgins,* 221 Ariz. at 486, ¶ 38, 212 P.3d at 824.

¶32 To subject oneself to punitive damages, "[t]he wrongdoer must be consciously aware of the wrongfulness or harmfulness of his conduct and yet continue to act in the same manner in deliberate contravention to the rights of the victim." *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679. Mere gross negligence or reckless disregard of the circumstances will not suffice. *Hudgins*, 221 Ariz. at 487, ¶ 40, 212 P.3d at 825. To determine whether sufficient evidence exists to support a finding that a defendant acted with "an evil mind, a court examines factors such as the reprehensibility of the conduct, the severity of the harm that was actually or potentially

imposed and the defendant's awareness of it, the duration of the misconduct, and any concealment of the risk of harm." *Id.*

¶33 The Grahams contend that ValueOptions' and VO-AZ's long-standing knowledge of their failure to comply with *Arnold* supports the jury's award of punitive damages. While the consistent lack of compliance with *Arnold* might support a finding of gross negligence or a reckless disregard of the danger Mr. Liu posed, it does not amount to clear and convincing evidence of an "evil mind." The Grahams point to no support in the record for the contention that ValueOptions or VO-AZ deliberately shunned their responsibilities to Mr. Liu or the foreseeable victims of his potential misconduct. And unlike the 2004 *Arnold* monitor report, which charged that in many cases *no* effort was made to meet the needs of clients who had decompensated, here the attempts to reengage Liu in services demonstrate that there was *some* effort, albeit ineffective and limited, to respond to Liu's worsening condition.

¶34 Nor are we persuaded that ValueOptions' and VO-AZ's failure to sufficiently train or supervise its employees can support an award for punitive damages. The contention that ValueOptions and VO-AZ "masterminded the very disconnect between the training materials and practices that deliberately put the public at a significant risk," finds no substantial support in the record. Without clear and convincing evidence from which a

reasonable jury could find proof of ValueOptions' or VO-AZ's "evil mind," we conclude that the trial court erred when it submitted the issue of punitive damages for the jury's consideration.

CONCLUSION

¶35 For the reasons stated above, we affirm the trial court's evidentiary rulings and its ruling with respect to duty. We reverse the judgment with respect to punitive damages and remand for entry of an amended judgment.

/S/

PETER B. SWANN, Judge

CONCURRING:

/S/

SHELDON H. WEISBERG, Judge

K E S S L E R, J., specially concurring:

¶36 I concur with the result reached by the majority, but on the issue of duty conclude that Valueoptions, Inc. and VO of Arizona, Inc. ("Appellants"), owe a duty to Patrick Graham for

reasons different than those posited by the majority. Given my reading of *Hamman v. County of Maricopa*, 161 Ariz. 58, 775 P.2d 1122 (1989), and *Gipson v. Kasey,* 214 Ariz. 141, 150 P.3d 228 (2007), I conclude we must defer to the Legislature on the issue of duty. Accordingly, I would hold that, unless other facts or policies are present, mental health providers only have a duty to prevent harm to third persons caused by a patient if the patient communicated to the provider an explicit threat of imminent serious physical harm or death to a clearly identified or identifiable victim and the patient has the apparent intent and ability to carry out such a threat. *See* Arizona Revised Statutes ("A.R.S") section 36-517.02(A)(1)(2009). In this case, other facts and policies apply to create a broader duty for Appellants to unidentified victims of a patient, such as Graham.

¶37 The majority correctly points out that in *Hamman*, the supreme court held that mental health providers owe a duty to warn "third persons whose circumstances place them within the reasonably foreseeable area of danger where the violent conduct of the patient is a threat." *Supra*, ¶ 13 (quoting *Hamman*, 161 Ariz. at 65, 775 P.2d at 1129). The majority also correctly concludes that in *Gipson*, the supreme court held that duty cannot be premised on foreseeability, but must arise from the relationship between the parties or from a public policy. 214 Ariz. at 144-45, ¶¶ 15-23, 150 P.3d at 231-32. *Supra*, ¶ 14.

¶38 Where I differ from the majority, however, is in the next step of the analysis. The majority concludes that since *Gipson* prevents use of forseeability to determine duty, *Hamman* still stands but any limitation on a provider's duty to third persons for harm caused by a patient based on forseeability is precluded. Thus, despite the majority's disclaimer, its holding effectively results in mental health providers facing potential unlimited liability under *Hamman* if they fail to protect anyone in the world from harm caused by patients. *Supra*, ¶¶ 16-17. I disagree with that conclusion for three reasons. First, that conclusion ignores other Arizona decisions cited in *Gipson* rejecting the idea of such an unlimited duty and the holding in *Gipson* itself that even if there was a duty to the world, it could be limited by public policy concerns. 214 Ariz. at 146 n.4, ¶ 24, 150 P.3d at 233 n.4.

¶39 Second, I cannot agree with the majority's conclusion that while foreseeability is no longer a factor in determining duty, it is left to the jury to determine liability based on foreseeability, thus arguably avoiding unlimited liability to all healthcare professionals. *Supra*, ¶¶ 17-18. Duty is still an issue for the court. *Gipson*, 214 Ariz. at 143, ¶ 9, 150 P.3d at 230; *Vasquez v. Arizona*, 220 Ariz. 304, 311, ¶ 22, 206 P.3d 753, 760 (App. 2008). Merely transferring a determination of foreseeability from the court in a duty analysis to a jury in determining liability does not do justice to *Gipson* and leaves all potential

defendants facing jury trials based on unlimited duty to the world, rather than permitting a court to avoid costly jury trials if there is no duty.[12]

¶40 Third, that analysis overlooks the other basis for finding or limiting a duty – public policy. *Gipson*, 214 Ariz. at 146 n.4, ¶¶ 23-26, 150 P.3d at 233 n.4. The majority extends the *Hamman* duty to all third persons, without anchoring that duty to public policy.

¶41 At least in this context, the primary source of public policy is the legislature. *Gipson*, 214 Ariz. at 146, ¶ 24, 150 P.3d at 233. The legislature expressly attempted to limit the scope of the *Hamman* duty by enacting A.R.S. § 36-517.02(A)(1). That statute limits a mental health provider's duty to a "clearly identified or identifiable victim or victims" when the "patient has communicated to the . . . provider an explicit threat of imminent serious physical harm or death [to that person] . . . and the patient has the apparent intent and ability to carry out such

[12] Moreover, foreseeability has no bearing on a fact-finder's determination of standard of care or causation. Compare Restatement (Second) of the Law of Torts (1965) §§ 289 cmt j (in determining standard of care, actor should realize that surrounding circumstances make his conduct likely to cause harm to another, but not stating he must foresee potential victim), 290, cmt b (that actor is required to know habits of human beings means consciousness of existence of a fact, not addressing foreseeability of identity of victim) and 435(1) ("If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable").

threat." *See also* A.R.S. §§ 32-2061(t)(Supp. 2009) (defining unprofessional conduct for psychologists as a failure to take reasonable steps to inform or protect a client's *intended* victim) and -3251(cc)(2008) (defining unprofessional conduct for other behavioral health professionals as a failure to take reasonable steps to inform potential victims if the licensee learns that a client's condition indicates a clear and imminent danger to the client or others). In the normal course, that legislative creation of a duty in § 36-517.02(A) should be the public policy upon which we base the scope of duty for mental health providers.[13]

¶42 This, however, does not end the analysis. Graham is not arguing that all mental health providers have an unlimited duty to protect unidentified third persons from harm caused by a patient, but only that RBHAs such as Appellants have such a duty based in part on statutes and contract. On this record, I agree. As

[13] The majority points out that this Court held § 36-517.02 unconstitutional under the anti-abrogation clause because the statute limited a common-law cause of action based on foreseeability. *Supra,* n.5 (citing *Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc.*, 186 Ariz. 97, 919 P.2d 1368 (App. 1995)). However, the doctrinal basis for *Little* was that *Hamman* created a broader scope of duty based on foreseeability and the Legislature could not abrogate that cause of action by limiting the duty to identified or identifiable victims. 186 Ariz. at 105, 919 P.2d at 1376. Just as the foreseeability component of *Hamman* has been abrogated by *Gipson*, the constitutional holding of *Little,* premised on the *Hamman* duty being based on foreseeability, can no longer stand. In sum, the holding of *Little* can no longer withstand analysis and the limitations of § 36-517.02 are the public policy of the state to which we should defer.

pointed out in *Arnold v. Ariz. Dep't of Health Srvs.*, 160 Ariz. 593, 595-96, 775 P.2d 521, 523-24 (1989), the Arizona Legislature created a public-supported system of providing mental health benefits to the chronically[14] mentally ill because by definition they have emotional or behavioral functioning which is so impaired as to interfere substantially with their capacity to remain in the community without such treatment. A.R.S. § 36-550(4) (2009). The court in *Arnold* recognized that the need for such a system was a result of the accelerated deinstitutionalization of such persons in the 1960's and 1970's. *Id.* (citing *Westwood Homeowners' Ass'n v. Tenhoff*, 155 Ariz. 229, 231 n.1, 745 P.2d 976, 978 n.1 (App. 1987)). Thus, the legislative purpose was not simply to assist the seriously mentally ill, but also to protect the public from dangers of the deinstitutionalization of persons who, without proper mental health care, posed a danger to the community. *See also* A.R.S. § 36-3412(E) (2009) (upon declaration of governor, state may contract with RBHA when safety of the public would be threatened without government intervention to provide behavioral health services); *Gipson*, 214 Ariz. at 146, ¶¶ 24 & 27, 150 P.3d at 233 (source of public policy can arise from a statute that is silent on creating liability); *Arnold,* 160 Ariz. at 610-11, 775 P.2d at 538-39 (giving examples of the cost to society of an inadequate mental health care

[14] Now defined as "seriously mentally ill". A.R.S. §§ 36-550(4) (2009) and -3407 (2009).

system, listing for the most part, cases recounting dangers to the public in general from the deinstitutionalization of seriously ill mental health patients). In contrast to the private mental health care system, RBHAs are required to go out into the community and attempt to find seriously mentally ill persons who need their services. Ariz. Adm. Code § R9-21-302. And, as indicated below, the public providers have an obligation to re-engage seriously mentally ill clients who have stopped services.

¶43 This purpose alone would suffice to expand the duty of mental health providers such as Appellants who agreed to treat the chronically mentally ill under Arizona's public system of care. In contrast to providers who treat patients privately, whose fundamental duty is to the patient himself, and only collaterally to identified or identifiable victims, RBHAs such as Appellants are treating seriously mentally ill persons who may pose a danger to the public without proper mental health treatment. A necessary component of the system's objective is the protection of the public through the treatment of the seriously mentally ill with institutionalization as one alternative of treatment.

¶44 Additionally, Appellants expressly contracted for such a broader duty. For example, the Arizona Department of Health Services provider manual for Valueoptions provides that Valueoptions and its contractors have to participate in screening individuals for possible institutionalization if they are a danger

to themselves or others and permits disenrollment in the system *only* if either (1) the treatment is completed and services are no longer needed or (2) the client refuses ongoing services and the client does not meet clinical standards for possible civil commitment as a danger to others or themselves. Moreover, as Appellants themselves admitted, "Valueoptions' job was to look out for the community . . . ." That duty includes going out into the community to clients who are not responding and attempting to re-engage them in treatment.

¶45 Given both the statutory purpose for the public system of providing mental health services in this context and the provider manual which applied to Appellants, the limited scope of duty to third persons applicable to most mental healthcare providers was broadened from identifiable or identified persons to the community at large. Accordingly, I agree that the judgment against Appellants be affirmed.

/s/

DONN KESSLER, Acting Presiding Judge