

ORIGINAL

IN THE SUPREME COURT OF OHIO

JOHN T. FLYNN, et al.

Case No. 10-1881

Appellees,

:
:
:

On Appeal from the Cuyahoga County Court
of Appeals, Eighth Appellate District

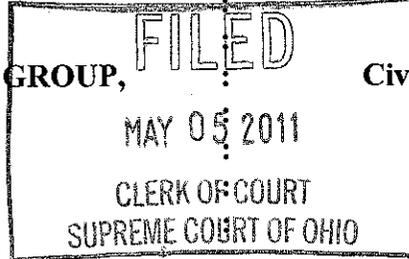
v.

Case No. CA-10-095695

SABER HEALTH CARE GROUP,
LLC, et al.,

Civil Action No. 2009-3975 MT

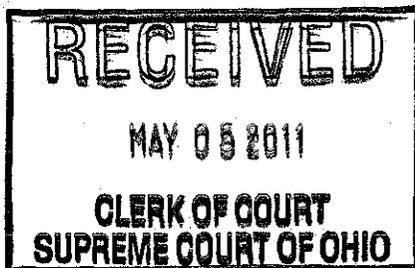
Appellants.



**APPELLEES BRIEF IN OPPOSITION TO APPELLANTS' JOINT MOTION TO
CONSOLIDATE ORAL ARGUMENT DATE**

Appellees, by and through undersigned counsel, hereby oppose Appellants' Joint Motion to Consolidate Oral Argument. Appellant's Joint Motion to Consolidate is nothing more than a thinly veiled attempt to mis-frame and mis-define the underlying issues to be determined by this Court, in this case. As demonstrated in Appellants' Merit Brief, (as well as the slew of *amicus* briefs submitted by the insurance industry and associated lobbyist organizations), Appellants are now contending that they requested bifurcation of trial as to Appellant's punitive damages claim, as provided in ORC §2315.21(B). Thus, Appellants want to link themselves arm in arm with the *Havel* appellants for purposes of oral argument. This case is not the *Havel* case. Appellees have the right to have their case heard and determined by this Court independently.

Appellants wish to argue this case as if it were *Havel* because their underlying Motion to Bifurcate now before this Court did not simply seek bifurcation as provided in ORC §2315.21(B). Although they requested "bifurcation" and referenced ORC §2315.21(B), an analysis of their Motion to Bifurcate reveals that they plainly sought relief not set forth in the statute:



R.C. 2315.21(B)(1) requires this Court to bifurcate Plaintiffs' claims for compensatory and punitive damages. Plaintiffs are not permitted to present any evidence that relates to the issue of punitive damages until such time that a jury returns a verdict against this Defendants [sic] awarding compensatory damages, and until such time that this Court makes a determination that Plaintiffs have presented evidence demonstrating malice or aggravated or egregious fraud as to permit the jury to consider the issue of punitive damages.

(Appellants' Brief in Support of Motion to Bifurcate, pp. 2-3).

Unlike *Havel*, in this case, the constitutionality of ORC §2315.21(B)(1), was not addressed by either the trial court or the appellate court. Appellees did not argue that ORC §2315.21(B)(1) was unconstitutional in the trial court or appellate court, and neither court found that it was. If this Court entertains arguments regarding constitutionality of ORC §2315.21(B)(1), it shall be the first to do so. Appellees opposed Appellants' Motion to Bifurcate because they did not request bifurcation as defined in ORC §2315.21(B)(1), but rather, sought a twisted and decidedly advantageous rewriting of the statute. For example:

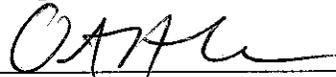
- (1) Appellants sought bifurcation of "Plaintiff's claims for compensatory and punitive damages," though the statute does not provide for any "claim bifurcation" and provides for bifurcation of damage determinations **as part of the same trial, by the same jury.** (Appellants' Brf. Sup. Mot. to Bif., p. 2-3).
- (2) Appellants sought some undefined evidentiary proceeding, to be conducted by the trial court after an award of compensatory damages, but before the presentation for the determination of punitive damages. (Appellants' Brf. Sup. Mot. to Bif., p. 2-3).
- (3) Appellants sought exclusion during the compensatory proceedings of "**any** evidence that relates to the issue of punitive damages," while the statute provides only for exclusion of "evidence that relates **solely** to the issue of whether plaintiff is entitled to recover punitive or exemplary damages." (Emphasis added, Appellants' Brf. Sup. Bif., p. 2-3; ORC §2315.21(B)(1)(a)).

The trial court refused to grant Appellants' Motion, which requested all of the above under the guise of ORC §2315.21(B)(1)(a), though the statute not only does not provide for these requests, and on at least one issue (the evidentiary issue of (3) above) is flatly contrary to what Appellants

requested. Although now Appellants very much want this Court to clairvoyantly divine that the trial court implicitly held ORC §2315.21 unconstitutional, it would have been nice of them to have actually asked the trial court to provide the relief stated in the statute, as opposed to what Appellants wish the statute provided. Had they done so, the trial court may have been faced with determining the constitutionality of the statute. Appellants did not, so the trial court was not. Since the trial court was not faced with that issue, the appellate court could not have been.

To now have this Court consolidate oral arguments in this matter with those to occur in *Havel* is nothing more than an attempt by Appellants to re-write their Motion to Bifurcate as if they had actually simply requested the statutory relief provided. Just as the trial court did not permit Appellants to re-write ORC §2315.21, this Court should not allow them to re-write their Motion to Bifurcate to get the benefits of the various arguments made in *Havel*. Accordingly, Appellees request that the Joint Motion of Appellants to Consolidate Oral Argument Date be denied.

Respectfully submitted,



David H. Krause (0070577)

Joyce E. Carlozzi (0038936)

SEAMAN GARSON, LLC

The Rockefeller Building, 16th Floor

614 West Superior Avenue

Cleveland, Ohio 44113

(216) 830-1000 / Fax: (216) 696-1700

dhkrause@seamangarson.com

jcarlozzi@seamangarson.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

A copy of the foregoing has been forwarded by email and regular U.S. Mail this 4th day of May, 2011 to the following:

Brant E. Poling (0063378)
POLING PETRELLO
1100 Superior Avenue, Suite 110
Cleveland, Ohio 44114

bpoling@poling-law.com

Attorneys for Appellants

Courtesy copy to:

Blake A. Dickson (0059329)

The Dickson Firm

3401 Enterprise Parkway

Suite 420

Cleveland, Ohio 44122

Attorney for Plaintiff-Appellee, Sandra Havel



David H. Krause (0070577)

ORIGINAL

IN THE SUPREME COURT OF OHIO

LICKING & KNOX COMMUNITY
MENTAL HEALTH

Plaintiff-Appellee,

vs.

T.B.,

Defendant-Appellant.

On Appeal from the
Franklin County Probate Court
Case No. MI-17218

Case No. 11APF-01-99

11-0753

DEFENDANT-APPELLANT T.B.'S
MEMORANDUM IN SUPPORT OF JURISDICTION

David A. Belinky, Esq. (0010810)
261 West Johnstown Road
Gahanna, Ohio 43230
Tel: 614/464-0400
Fax: 614/475-0348
Attorney for Plaintiff-Appellee

Brian M. Garvine, Esq. (0068422)
Law Office of Brian M. Garvine, LLC
5 East Long Street
Suite 1100
Columbus, Ohio 43215
Tel: 614/223-0290
Fax: 614/221-3201
Email: brian@garvinelaw.com
Attorney for Defendant-Appellant

FILED
MAY 05 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
I. EXPLANATION OF WHY THIS CASE IS OF GREAT PUBLIC OR GENERAL INTEREST.....	1
II. STATEMENT OF CASE AND FACTS	2
III. PROPOSITION OF LAW NO. 1	
The Tenth District’s Decision Finding Appellant To Be A Mentally Ill Person Subject to Hospitalization By Court Order Was Not Supported By Clear and Convincing Evidence	4
A. Appellant Does Not Pose A “Grave and Imminent Risk to the Substantial Rights of Others”.....	4
IV. PROPOSITION OF LAW NO. 2	
The Tenth District’s Decision to Forcibly Medicate Appellant Was Not Supported By Clear and Convincing Evidence	5
V. CONCLUSION.....	8
PROOF OF SERVICE.....	9
APPENDIX.....	10

TABLE OF AUTHORITIES

PAGE

OHIO STATUTES

Ohio Revised Code § 5122.01(B)..... 3

OHIO CASES

Steele v. Hamilton County Community Mental Health Board (2000), 90
Ohio St. 3d 176 7, 8

I. EXPLANATION OF WHY THIS CASE IS OF GREAT PUBLIC OR GENERAL INTEREST.

This case involves the proper application of the clear and convincing standard when analyzing expert witness testimony in civil matters. This issue impacts every civil case filed in the State of Ohio where expert witness testimony is analyzed under the clear and convincing standard. Accordingly, the case involves a great public or general interest.

II. STATEMENT OF THE CASE AND FACTS

On June 2, 2010, Appellee filed an Application for Continued Commitment. On July 2, 2010, Appellee filed a Motion for Court Approval of Medical Treatment and Administration of Medication. After several continuances, both issues were heard at a hearing held on December 23, 2010. At the conclusion of the December 23, 2010 hearing, the Magistrate entered a Judgment Entry of Commitment.

The Magistrate then proceeded with the hearing on the Appellee's Application to Authorize Involuntary Psychotropic Medications. At the conclusion of said hearing, the Magistrate entered a Judgment Entry granting the Appellee's Application to Forcibly Medicate Appellant.

On January 13, 2011, Appellant filed Objections to the Magistrate's decision. On January 31, 2011, the Probate Court affirmed the Magistrate's decision. On January 31, 2011, Appellant timely filed his Notice of Appeal to this Court. On March 22, 2011, the Tenth District Court of Appeals affirmed the judgment of the Franklin County Court of Common Pleas Probate Division.

At the Continued Commitment hearing, Dr. William Bates, psychiatrist, gave testimony. Dr. Bates was appointed by the Court, as he is in many of the Court's commitment hearings, as an expert for the purpose of offering his professional opinion as to the mental health of the Appellant. Dr. Bates testified that the Appellant respectfully declined to discuss the issues of the case with him, and explained that the Appellant said he needed to consult with his attorney prior to doing so. (Continued Commitment Hearing Transcript p. 7, hereinafter referenced as "CC T-__".) Dr. Bates acknowledged that he had seen the Appellant a number of times in the past under similar circumstances (CC T- 7) and noted that the Appellant had previously rejected Dr. Bates

as a possible independent expert in a prior commitment case because of the fact that Dr. Bates had testified against him at commitment hearings held in the past. (CC T-7.) Nevertheless, Dr. Bates answered in the affirmative when he was asked whether he was sufficiently familiar with the Appellant to enable him to give psychiatric testimony to a reasonable degree of medical certainty concerning the Appellant's present psychiatric condition. (CC T-7.)

Being the only witness to testify, it necessarily was Dr. Bates' testimony upon which the Probate Court relied in determining the facts and reaching its decision. (CC T-36.) The Probate Court found the Appellant to be a "mentally ill person subject to hospitalization by court order" and found that the Appellant met the definitions of such a person as set forth in subsections 2, 3 and 4 of R.C. §5122.01(B). (CC T-27.) The Probate Court further ordered that Appellant's commitment to the Licking County Alcohol Drug and Mental Health Board (ADAMH Board) be continued for a period not to exceed two years and that he be placed at Twin Valley Behavioral Healthcare (TVBH), a psychiatric hospital in Columbus, Ohio.

The Probate Court then proceeded with the Forced Medication hearing. Giri Singh, M.D., Appellant's treating physician, testified Appellant lacks the capacity to give or withhold informed consent to treatment. Appellant testified, and his testimony was in direct conflict with both testifying doctors (Dr. Bates also provided testimony). Despite the conflicting testimony, the Probate Court found there was clear and convincing evidence Appellant lacked capacity to give or to refuse informed consent.

The Tenth District affirmed the Probate Court's ruling.

III. PROPOSITION OF LAW NO. 1

THE TENTH DISTRICT'S DECISION FINDING APPELLANT TO BE A MENTALLY ILL PERSON SUBJECT TO HOSPITALIZATION BY COURT ORDER WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

A. Appellant Does Not Pose A "Grave And Imminent Risk To The Substantial Rights Of Others."

The Tenth District conceded,

Even though respondent had not performed any additional acts since he last violated a protection order that led to his commitment, Dr. Bates testified to the continuing nature of respondent's illness and stated respondent's mental state had not changed since he began his hospitalization. Additionally, Dr. Bates suggested respondent had not perpetrated any additional acts to place the judge in fear for her safety due to TVBH's policy not to allow respondent to contact the judge, by mail or otherwise, rather than to any improvement in respondent's condition or his delusions.

Despite those concessions, the Tenth District found Dr. Bates' testimony was clear and convincing.

The Tenth District went on to concede,

Even if the Probate Court lacked clear and convincing evidence to satisfy Revised Code 5122.01(B)(2), clear and convincing evidence supports the finding under Revised Code 5122.01(B)(4) that without the hospital treatment, respondent creates a grave and imminent risk to

The Tenth District again essentially concedes that the clear and convincing standard has not been met. Regardless, the Tenth District found that Dr. Bates' expert testimony satisfied the clear and convincing criteria. This error in application of the clear and convincing standard to expert witness testimony should not be precedent. Accordingly, this Court should accept jurisdiction to ensure correct legal precedent with respect to the application of the clear and convincing standard to expert witness testimony.

IV. PROPOSITION OF LAW NO. 2

THE TENTH DISTRICT'S DECISION TO FORCIBLY MEDICATE APPELLANT WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

Two qualified doctors testified that the Appellant lacked the capacity to give informed consent. On cross examination, Dr. Singh, the treating physician, was asked how he determines whether a patient lacks the capacity to give or withhold informed consent to treatment. He answered, "It's based on their mental state and their perception of the medication, how it's going to influence the illness. The first obstacle with [the Appellant] is admitting that he's mentally ill. Once they know that they're mentally ill, then the question is, how do you treat this mental illness." (Forcibly Medicate Transcript p. 14, hereinafter referred to as "FM T-__.")

He further stated, "So I have one, two obstacles here: First, acceptance of mental illness; second thing, you know, accepting medication to treat this mental illness. At both levels, I think he (the Appellant) lacks insight and, therefore, it is difficult to say that he has the capacity to give informed consent." (FM T-14.)

In rebuttal of Dr. Singh's testimony, as to the first obstacle, the Appellant testified on direct examination that he did in fact suffer from a mental illness. (FM T-24.) Appellant was, in fact, sure he suffered from a mental illness. (FM T-24.) Appellant testified that his diagnosis was a delusional disorder and that he agreed with the diagnosis. (FM T-26.) He testified that he recognizes that he's suffered from a delusional disorder ever since he started dating girls. (FM T-26.) Despite the testimony of both doctors that the Appellant denied being mentally ill, the Appellant clearly and convincingly stated that he understands he has a mental illness, that he knows what the diagnosis is, that he knows how long he's had it and that he agrees with the

diagnosis. The Appellant clearly acknowledged his illness. Dr. Singh's "first obstacle" was satisfied by Appellant.

Dr. Singh mentioned a second obstacle: "It's based on their mental state and *their perception of the medication, how it's going to influence the illness.*" (Italics added for emphasis.) Dr. Singh was asked if a patient readily acknowledges the existence of a mental illness and yet still doesn't agree or want to take medication or continues to refuse medication, would that be enough to determine that the patient lacked capacity. (FM T-15.) Dr. Singh stated, "No. At least that will open up a discussion on concerns about the medication, *the side effects*, any options he has. We always discuss these options, but then [the Appellant] shut the door for that discussion so, therefore, there was no discussion on it." (Italics added for emphasis.) (FM T-15.)

Dr. Singh further testified that if a patient is adamant about refusing medications, it doesn't necessarily mean that the patient lacks capacity to consent. However, he demonstrated that, in his opinion, that there is a direct correlation between a patient's capacity to give consent and his agreeability to accept medications. The more adamant the patient is about refusing medications, the less likely he is to have capacity. (FM T-15.)

Elaborating on the issue of the second obstacle, Dr. Singh also testified that the Appellant, "fails to understand that he is mentally ill and doesn't understand that in the past whenever he took the medication, those behaviors subsided. And he was like a model gentleman out there in the community when he was on his medication." (FM T-17.) The implication is that if the Appellant had appropriate insight into the benefit of medications, he would obviously opt to accept the medications as opposed to no treatment at all, and therefore, he would have sufficient capacity to give or refuse informed consent.

However, upon review of the transcript, it is evident that the Appellant is keenly aware of the likely benefits of the medication as well as the likely side effects he actually experienced. Appellant wants to leave the hospital. (FM T-25.) Appellant does not like being delusional. (FM T-26.) Appellant does not like being in the hospital. (FM T-26.) Appellant understands that if he were to accept the medicine, he would likely be discharged from the hospital sooner than if he continues to refuse it. (FM T-27.) Appellant has taken the medications on numerous occasions in the past. (FM T-26.) Appellant cannot tolerate the side effects of the medications because they make him feel like a “zombie,” they make him “jittery” and he finds it difficult to sleep or be comfortable, and that their effects are terrible. (FM T-26-28.) Appellant further testified that he has such an intolerance of the medications that he would rather forego his liberty interests and remain a patient in the hospital than have the medications introduced into his body. (FM T-28.) These statements clearly demonstrate that Appellant has insight as to the effects of the medication on his illness and also the capacity to make informed consent decisions.

Appellant clearly satisfied Dr. Singh’s two “obstacle” test for determining whether he has sufficient capacity to offer informed consent. However, as this Court is aware, there is no one accepted or standard bright line test to determine capacity. In fact, whether an involuntarily committed mentally ill patient lacks the capacity to give or withhold informed consent regarding treatment is uniquely a judicial, rather than a medical determination. As stated above, “[i]f a court does not find that the patient lacks such capacity, then the state’s *parens patriae* power is not applicable and the patient’s wishes regarding treatment will be honored, no matter how foolish some may perceive that decision to be.” *Steele v. Hamilton County Community Mental Health Board* (2000), 90 Ohio St.3d 176.

Steele assumes that there will be mentally ill patients, involuntarily hospitalized, who will have capacity but who will also continue to refuse medications for what may seem to be foolish reasons. In this case, the Appellant has clearly demonstrated an appreciation of his illness, and appreciation for his freedom, and most importantly, an appreciation for his body to be free from the intrusion and effect of forced psychotropic medication. The Probate Court's finding that the Appellant lacked capacity to give or to refuse informed consent was not supported by clear and convincing evidence and should be reversed.

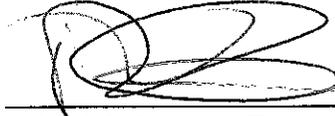
The Tenth District completely failed to even address Appellant's testimony in the Probate Court hearing and how that would affect application of the clear and convincing standard. Dr. Singh and Dr. Bates' testimony cannot be clear and convincing when it is completely contradicted Appellant's own testimony. Accordingly, this Court should accept jurisdiction to ensure the correct application of clear and convincing standard to expert witness testimony so that precedent is consistent in Ohio.

V. CONCLUSION

The Tenth District's decision affirming Appellant to be a mentally ill person subject to hospitalization by court order was not supported by clear and convincing evidence. The Tenth District's decision affirming forcible medication of the Appellant was not supported by clear and convincing evidence and was against the manifest weight of the evidence. Accordingly, this

Court should accept jurisdiction and decide this matter on the merits.

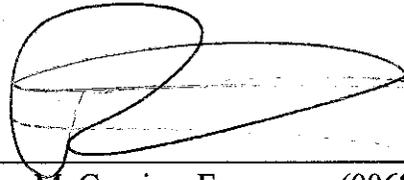
Respectfully submitted,



Brian M. Garvine, Esq. (0068422)
Law Office of Brian M. Garvine, LLC
5 East Long Street
Suite 1100
Columbus, Ohio 43215
Tel: 614/223-0290
Fax: 614/221-3201
Email: brian@garvinelaw.com
Attorney for Defendant-Appellant

PROOF OF SERVICE

The undersigned hereby certifies that the foregoing has been served via first class U.S. Mail, postage prepaid, upon counsel for Appellee, David A. Belinky, 261 West Johnstown Road, Gahanna, Ohio 43230, this 5 day of May, 2011.



Brian M. Garvine, Esq. (0068422)
Attorney for Defendant-Appellant

APPENDIX

March 22, 2011 Decision from Tenth Appellate District Court of Appeals

March 22, 2011 Judgment Entry from Tenth Appellate District Court of Appeals

Counsel

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2011 MAR 22 PM 12:02
CLERK OF COURTS

In re: T.B., :
 : No. 11AP-99
(Appellant). : (P.C. No. MI-17,218)
 : (ACCELERATED CALENDAR)

D E C I S I O N

Rendered on March 22, 2011

Law Office of Brian M. Garvine, LLC, and Brian M. Garvine,
for appellant.

David A. Belinky, for appellee Community Mental Health and
Recovery Board Serving Licking and Knox Counties.

APPEAL from the Franklin County Court of Common Pleas,
Probate Division.

BRYANT, P.J.

{¶1} Respondent-appellant, T.B., appeals from a judgment of the Franklin County Court of Common Pleas, Probate Division, that, consistent with the magistrate's December 23, 2010 decision, ordered T.B.'s continued commitment to the Licking and Knox County Alcohol, Drug Addiction and Mental Health Services and granted the application of petitioner-appellee, Community Mental Health and Recovery Board Serving Licking and Knox Counties, to authorize administration of forced psychotropic medications. Because clear and convincing evidence supports the probate court's

judgment ordering continued commitment and authorizing forced psychotropic medications, we affirm.

I. Facts and Procedural History

{¶2} On December 20, 2009, respondent was charged with violating a protection order concerning a local judge. Respondent appeared before a judge of the Franklin County Municipal Court who found respondent incompetent to stand trial with no substantial probability he could be restored to competency within the applicable time frame required by law. Accordingly, the municipal court filed an affidavit with the probate court for civil commitment. Following a hearing before a magistrate of the probate court, the probate court filed an entry on May 12, 2010 overruling respondent's objections and approving court-ordered 90-day hospitalization pursuant to R.C. 5122.01(B) and forced psychotropic medications to treat respondent. Petitioner filed a notice of appeal, and this court affirmed. *Licking & Knox Community Mental Health & Recovery Bd. v. T.B.*, 10th Dist. No. 10AP-454, 2010-Ohio-3487 ("*In re T.B. III*").

{¶3} On July 2, 2010, petitioner initiated the present proceedings seeking continued commitment and forced medication in anticipation of the 90-day commitment period's expiration. After several continuances, during which respondent remained hospitalized, the magistrate conducted a hearing on December 23, 2010. Petitioner called Dr. William Bates, a psychiatrist, to testify to the need for respondent's continued commitment; respondent presented no evidence on his behalf. At the conclusion of the hearing, the magistrate decided the court should enter a judgment of continued commitment for a period not to exceed two years at Twin Valley Behavioral Healthcare ("TVBH").

{¶4} At the same hearing, the magistrate took evidence on petitioner's application to authorize administration of involuntary psychotropic medications. Petitioner presented the testimony of Dr. Bates and Dr. Giri Singh, respondent's treating physician. Respondent presented no medical or psychiatric testimony but testified on his own behalf. At the conclusion of the hearing, the magistrate decided the court should grant petitioner's application to forcibly medicate respondent.

{¶5} Following respondent's objections to the magistrate's decision, the probate court on January 26, 2011 ordered commitment and forced medication in accord with the magistrate's decision.

II. Assignments of Error

{¶6} Respondent appeals, assigning the following errors:

I. THE PROBATE COURT'S DECISION FINDING APPELLANT TO BE A MENTALLY ILL PERSON SUBJECT TO HOSPITALIZATION BY COURT ORDER WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

II. THE PROBATE COURT'S DECISION TO FORCIBLY MEDICATE APPELLANT WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

III. First Assignment of Error – Continued Commitment

{¶7} Respondent's first assignment of error contends the order of continued commitment lacks the support of clear and convincing evidence. Stated another way, respondent alleges the continued commitment order is against the manifest weight of the evidence. Judgments supported by some competent, credible evidence addressing all the essential elements of the case will not be reversed on appeal as against the manifest

weight of the evidence. See *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279.

{¶8} "R.C. Chapter 5122 sets forth specific procedures to be followed when a person is committed to a mental hospital, whether voluntarily or involuntarily. When commitment is against a person's will, it is particularly important that the statutory scheme be followed, so that the patient's due-process rights receive adequate protection." *In re Miller* (1992), 63 Ohio St.3d 99, 101. "[T]he individual's right against involuntary confinement depriving him or her of liberty must be balanced against the state's interest in committing those who are mentally ill and who pose a continuing risk to society or to themselves." *In re T.B.*, 10th Dist No. 06AP-477, 2006-Ohio-3452, ¶5 ("*In re T.B. I*"), citing *In re Miller*. Although confining mentally ill persons adjudged to be a risk to themselves or society both protects society and provides treatment in the hope of alleviating the mental illness, the state nonetheless must meet a heavy burden to show that the individual in fact suffers from a mental illness and must be confined in order to treat the mental illness. *In re T.B. I* at ¶6, citing *State v. Welch* (1997), 125 Ohio App.3d 49, 52.

{¶9} "Under Ohio law there is a three-part test for an involuntary commitment. Each part of this test must be established by clear and convincing evidence. The first two parts of the test are found in R.C. 5122.01(A)." *In re T.B. I* at ¶7. Initially, "there must be a substantial disorder of thought, mood, perception, orientation, or memory." *Id.* Secondly, "the substantial disorder of thought, mood, perception, orientation, or memory must grossly impair judgment, behavior, capacity to recognize reality, or the ability to meet the ordinary demands of life. The third part of the test requires that the mentally ill person be

hospitalized for one of the reasons set forth in R.C. 5122.01(B)." (Citations omitted.) *Id.* at ¶7-8. See also *In re J.F.*, 10th Dist. No. 06AP-1225, 2007-Ohio-2360, ¶24. The standard for a continued involuntary commitment does not materially differ from that applied to an initial involuntary commitment. Cf. *In re T.B.*, 10th Dist. No. 06AP-769, 2006-Ohio-4789, ("*T.B. II*") (involving continued commitment) and *In re J.F.* (addressing continued commitment) with *In re D.F.*, 10th Dist. No. 08AP-252, 2008-Ohio-2294 (resolving an initial involuntary commitment).

{¶10} As a threshold matter, petitioner must establish respondent suffers from a substantial disorder of thought, mood, perception, orientation, or memory. Both parties stipulating to Dr. Bates' qualifications as an expert, Dr. Bates testified respondent suffers from a delusional disorder that is primarily a disorder of thought. According to Dr. Bates, respondent "has fixed false beliefs of a persecutory and actually of an amorous nature." (Continued Commitment Hearing Tr. 11.) Dr. Bates explained respondent has made no improvement "whatsoever" in his psychiatric condition since the probate court initially ordered respondent's hospitalization when he was found incompetent to stand trial on the charge of violating a protection order in December 2009. (CC Tr. 14.) Dr. Bates added that respondent is "in the exact same mental state that he was when he came in." (CC Tr. 23.) Dr. Bates' testimony meets the first prong of the three-part test in defining the substantial mental illness from which respondent suffers.

{¶11} The second prong of the test requires that the substantial disorder grossly impairs respondent's judgment, behavior, capacity to recognize reality, or the ability to meet the ordinary demands of life. Dr. Bates testified respondent's delusional disorder grossly impairs respondent's judgment and behavior and affects respondent's capacity to

recognize reality and meet the ordinary demands of his life. (CC Tr. 11.) Although Dr. Bates did not elaborate, his testimony nonetheless supports the probate court's determination consistent with his testimony and satisfies the second prong of the test. Indeed, respondent for the most part does not dispute the probate court's findings with respect to the first two prongs of the three-pronged test. Respondent, however, argues petitioner failed to present clear and convincing evidence to satisfy the third prong of the test.

{¶12} The third prong requires clear and convincing evidence under R.C. 5122.01(B)(1), (2), (3), or (4). Pursuant to R.C. 5122.01(B), a mentally ill person subject to hospitalization is one who (1) "[r]epresents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm"; (2) "[r]epresents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness"; (3) "[r]epresents a substantial and immediate risk of serious physical impairment or injury to self as manifested by evidence" he or she "is unable to provide for and is not providing" for his or her "basic physical needs because" of his or her "mental illness and that appropriate provision for those needs cannot be made immediately available in the community"; or (4) "[w]ould benefit from treatment in a hospital" for his or her "mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or the person." R.C. 5122.01(B)(1)-(4).

{¶13} The Supreme Court of Ohio established a totality of the circumstances test to determine whether a person is subject to hospitalization under R.C. 5122.01(B). *In re Burton* (1984), 11 Ohio St.3d 147, 149. The factors the probate court is to consider include, but are not limited to: (a) "whether, in the court's view, the individual currently represents a substantial risk of physical harm to himself or other members of society"; (b) "psychiatric and medical testimony as to the present mental and physical condition of the alleged incompetent"; (c) "whether the person has insight into his condition so that he will continue treatment as prescribed or seek professional assistance if needed"; (d) "the grounds upon which the state relies for the proposed commitment"; (e) "any past history which is relevant to establish the individual's degree of conformity to laws, rules, regulations, and values of society"; and (f) "if there is evidence that the person's mental illness is in a state of remission, the court must also consider the medically-suggested cause and degree of the remission and the probability that the individual will continue treatment to maintain the remissive state of his illness should he be released from commitment." *In re T.B. I* at ¶9, citing *In re Burton* at 149-50.

{¶14} Dr. Bates' above-noted testimony addressed some of the factors the Supreme Court delineated in *Burton*. Additionally, Dr. Bates testified the circumstances of respondent's initial commitment after he was charged with violating a protection order that forbade respondent from making contact with a local judge is "a pattern that he's repeated over and over in the past. It's part of his delusional disorder. He just violates protection orders." (CC Tr. 10.) Dr. Bates also stated respondent "passively * * * represents a danger to himself," that he is "a danger to others," and he has "made threats to the Judge in the past and caused her great mental distress." (CC Tr. 12.)

{¶15} In clarifying the nature of respondent's delusional disorder, Dr. Bates testified respondent's disease "is a chronic one" for which respondent has expressed symptoms for at least ten years. (CC Tr. 13.) Dr. Bates explained that when respondent does not take medication, respondent's delusional disorder "comes back very strongly." (CC Tr. 13.) Noting respondent has refused any treatment since his commitment following the December 2009 charge in the municipal court, Dr. Bates stated respondent "is essentially the same as he was back when he violated the protection order." (CC Tr. 13.) Familiar with respondent's history, Dr. Bates testified that whenever respondent is released from hospitalization, "he stops taking his medication and we see this repeat behavior." (CC Tr. 14.) Dr. Bates opined inpatient hospitalization is the least restrictive and "the setting to provide appropriate treatment at this point" because respondent has refused the recommended treatment as an outpatient and even continues to refuse medication during his commitment. (CC Tr. 15.) The probate court appropriately found the evidence satisfied R.C. 5122.01(B)(2), (3), and (4).

{¶16} Respondent argues petitioner failed to meet its burden to demonstrate respondent made any recent threats that place another in reasonable fear of violent behavior and serious physical harm under R.C. 5122.01(B)(2). To the contrary, respondent argues, petitioner presented no evidence of any "recent" threats at all. The hearing, however, was a continued commitment hearing, and Dr. Bates testified not only that respondent's condition continued from his previous commitment but that his conduct in violating the protection order caused the judge to be fearful. When asked on cross-examination how respondent could be considered presently dangerous, Dr. Bates responded, "Well, he's dangerous presently because he's in the exact same mental state

that he was when he came in in which he violated an order." (CC Tr. 23.) Indeed, throughout his testimony, Dr. Bates indicated respondent's condition had not changed and respondent was the same as when he began his hospitalization following the municipal court proceedings. Dr. Bates further explained the lack of recent threats was due to the controlled nature of respondent's hospitalization, pointing out TVBH, as part of respondent's care, does not allow respondent to have contact with the judge, even by mail.

{¶17} Under the totality of the circumstances, Dr. Bates' testimony presents clear and convincing evidence to support the trial court's finding that respondent is a mentally ill person who, because of his illness, represents a substantial risk of physical harm to others under R.C. 5122.01(B)(2). Even though respondent had not performed any additional acts since he last violated the protection order that led to his commitment, Dr. Bates testified to the continuing nature of respondent's illness and stated respondent's mental state had not changed since he began his hospitalization. Additionally, Dr. Bates suggested respondent had not perpetrated any additional acts to place the judge in fear for her safety due to TVBH's policy not to allow respondent to contact the judge, by mail or otherwise, rather than to any improvement in respondent's condition or his delusions. The circumstances regarding the protection order and subsequent commitment, coupled with respondent's refusal to accept treatment and his unchanging condition, are sufficient to show either "recent threats" or "other evidence of present dangerousness." See *In re T.B. II* at ¶¶15-16 (examining respondent's delusional disorder as a continuation of his past behavior and explaining respondent's need for continuing treatment as his condition had not changed since he began hospitalization).

{¶18} Even if the probate court lacked clear and convincing evidence to satisfy R.C. 5122.01(B)(2), clear and convincing evidence supports a finding under R.C. 5122.01(B)(4) that, without the hospital treatment, respondent creates a grave and imminent risk to the substantial rights of others. Dr. Bates specifically testified respondent's behavior substantially interferes with the judge's rights and respondent's condition has not changed in this regard since the previous commitment proceedings. (CC Tr. 23-24.) Dr. Bates further testified that respondent would greatly benefit from inpatient treatment as the only way to provide him with the medication he needs to improve his condition.

{¶19} Because clear and convincing competent, credible evidence supports the probate court's determination that respondent continue to be involuntarily hospitalized, we overrule respondent's first assignment of error.

IV. Second Assignment of Error – Forced Medication

{¶20} In his second assignment of error, respondent contends the probate court's decision to forcibly medicate respondent lacks the support of clear and convincing evidence. Again, respondent challenges the manifest weight of the evidence, and the standard of review is the same as above.

{¶21} In *Steele v. Hamilton Cty. Community Mental Health Bd.*, 90 Ohio St.3d 176, 2000-Ohio-47, the Ohio Supreme Court stated that "a court may issue an order permitting hospital employees to administer antipsychotic drugs against the wishes of an involuntarily committed mentally ill person if it finds, by clear and convincing evidence, that: (1) the patient does not have the capacity to give or withhold informed consent regarding his/her treatment; (2) it is in the patient's best interest to take the medication,

i.e., the benefits of the medication outweigh the side effects; and (3) no less intrusive treatment will be as effective in treating the mental illness." *Id.* at 187-88.

{¶22} During the forced medication hearing, Dr. Singh, the attending psychiatrist at TVBH and respondent's treating physician, testified respondent suffers from a delusional disorder requiring medication management and "there's an imminent and immediate need to medicate [respondent] to reduce his delusions and clear his mental state." (Forced Medication Hearing Tr. 6-7.) Dr. Singh testified respondent, throughout the course of his treatment, repeatedly denied the existence of his mental illness. According to Dr. Singh, respondent's delusions have increased in severity over the past six months to the point that just prior to the hearing respondent became so agitated and out of control that he "posed imminent danger" and required emergency forced medication. (FM Tr. 8.)

{¶23} Dr. Singh opined that, as a result of respondent's condition, respondent "lacks the insight into his illness right now" and he does not have "capacity to make decisions regarding his medication." (FM Tr. 9.) Dr. Singh noted respondent would not participate in a discussion on concerns about the medication and possible side effects, and respondent "fails to understand the main reason for all this behavior is his own mental illness. Therefore, he fails to understand that he is mentally ill and doesn't understand that in the past whenever he took the medication these behaviors subsided." (FM Tr. 17.) Dr. Singh testified respondent's failure to see the connection between his behavior and the medication "indicates that [respondent is] lacking the capacity." (FM Tr. 18.)

{¶24} In addition, Dr. Singh testified the only way respondent may be discharged from a hospital setting is to "control his delusions with medication." (FM Tr. 11.) In

reviewing the list of proposed medications, Dr. Singh explained some medications are available in pill form but, if respondent refuses to take medication by mouth, the list also includes options of medications in an injectable form, providing doctors flexibility in respondent's treatment. Dr. Singh stated respondent's "prognosis is really bleak without medication" and "[t]he benefits outweigh the risks" of the medication. (FM Tr. 11.)

{¶25} Dr. Singh lastly testified no less restrictive treatment alternative for respondent exists at this time. Dr. Singh explained respondent's illness "has its own natural course with flexible ups and downs" where "the delusions temporarily subside." (FM Tr. 12.) This "natural cycle of the illness" produces the undesirable consequence of reinforcing respondent's belief "of not being ill and not needing medication." (FM Tr. 12-13.) According to Dr. Singh, the medication is the only way to effectively treat respondent's delusional disorder. (FM Tr. 16.)

{¶26} Dr. Bates also testified in the forced medication hearing, agreeing with Dr. Singh's reasons for and the nature of the proposed treatment. Dr. Bates agreed respondent lacks the capacity to give or withhold informed consent, in part because respondent does not believe he has a mental illness. As a result, respondent "doesn't accept a number of relevant facts and, therefore, you can't get to a reasonable conclusion" in trying to explain to respondent the need for medication. (FM Tr. 21.) Dr. Bates stated he has "[n]o doubt" that "[t]he benefits far outweigh the risks" of the proposed medications. Further, Dr. Bates stated not only was the proposed medication the least restrictive treatment alternative for respondent at this time but respondent's delusions will not improve without the medication.

{¶27} Taken together, the doctors' testimony addresses the three points in *Steele* and provides clear and convincing evidence as to all three requirements for forced medication, as it demonstrates respondent's denial precludes his being able to give informed consent, he cannot improve or even be released from the hospital without first taking the medication, and no less intrusive treatment is available. Accordingly, the order for forced medication has the support of clear and convincing competent, credible evidence, and we overrule respondent's second assignment of error.

V. Disposition

{¶28} Having determined that neither the continued commitment order nor the forced medication order is against the manifest weight of the evidence, we overrule respondent's two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas, Probate Division.

Judgment affirmed.

SADLER and TYACK, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

MAR 22 PM 1:21
CLERK OF COURTS

In re: T.B.,

(Appellant).

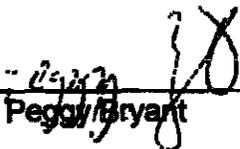
No 11AP-99
(P C No MI-17,218)

(ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 22, 2011, and having overruled respondent's two assignments of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Probate Division, is affirmed. Costs assessed to respondent.

BRYANT, P.J., SADLER & TYACK, JJ

By 
Judge Peggy Bryant