

No. *F032740*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

STANLEY FORD,
by and through MICHAEL P. FORD, his Guardian *ad litem*,
Appellant,

vs.

ROBERT NORTON, an individual;
HARVEY BIALA, an individual,

Respondents.

**BRIEF OF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF RESPONDENTS ROBERT NORTON AND HARVEY BIALA**

ON APPEAL FROM FINAL JUDGMENT
ENTERED IN FRESNO SUPERIOR COURT, NO. 583043-5,
THE HONORABLE DWAYNE KEYES, JUDGE

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INTEREST OF AMICUS CURIAE

Amicus curiae the American Psychological Association (“APA”), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 155,000 members, including approximately 10,000 members in California. Thus, APA is vitally interested in the outcome in this case. APA has a fundamental concern with the law governing its members in this state, as well as in the precedent that may potentially affect thousands more APA members and countless mental health patients - nationwide.

Through *amicus curiae* participation, APA seeks to provide an experienced and knowledgeable perspective on the impact of judicial decisions on mental health problems and psychological care. In this case, APA is familiar with the questions before the Court and with the nature of the arguments made thus far. APA believes that its participation as *amicus curiae* will significantly aid the Court's resolution of this case. Specifically, APA, having participated as *amicus curiae* in *C.A.P.P. v. Rank* (1990) 51 Cal.3d 1, can offer a unique and informed perspective on the importance of that decision for this case. Most importantly, APA is especially well-suited to comment on psychologists' education, training, and competence for treatment decisions, including discharge. Thus, APA respectfully submits this brief to assist the Court in evaluating the trial court's decision and the arguments presented by the parties and other amici.

STATEMENT OF THE CASE

This case concerns a psychologist's treatment and discharge of Stanley Ford, formerly a patient in a Fresno mental health hospital. While in the hospital, Mr. Ford was determined to be disabled and potentially dangerous. Therefore, he was involuntarily committed to a locked facility within the hospital, for 72-hour treatment and evaluation, pursuant to Section 5150 of the Lanterman-Petris-Short ("LPS") Act, Welfare & Institutions Code § 5000 *et seq.*

While in lock-down, Mr. Ford was examined by Dr. Robert Norton, the psychologist responsible for his care. Dr. Norton concluded that the involuntary hold was unnecessary, and that Mr. Ford should be released from the hospital. After Dr. Norton conferred with Dr. Harvey Biala, a psychiatrist, Mr. Ford was discharged from the hospital before the end of the 72-hour lock-down.

That evening, Mr. Ford stabbed and injured his roommate. He was later charged with criminal assault and, after trial, committed to state hospitals.

Mr. Ford sued Drs. Norton and Biala for negligent treatment and discharge, claiming as damages the loss of income he allegedly would have earned if he had not been committed to state hospitals. The trial court granted Drs. Norton and Biala's motions for nonsuit. Relying on the Supreme Court's decision in *CA.P.P. v. Rank* (1990) 51 Cal.3d 1, the trial

court concluded that Drs. Norton and Biala were immune from liability under LPS Section 5154, Welfare & Institutions Code § 5154. Mr. Ford appeals the trial court's decision, arguing, *inter alia*, that Section 5154 does not apply to psychologists such as Dr. Norton.

SUMMARY OF ARGUMENT

The trial court correctly concluded, in light of *CA.P.P. v. Rank*, that Dr. Norton was entitled to immunity under Section 5154. Although Section 5154 explicitly immunizes only the "psychiatrist" responsible for the 72-hour treatment, "psychiatrist" must be read as being interchangeable with "psychologist." Section 5154 was enacted at a time when only psychiatrists, and not psychologists, could admit and discharge patients in acute mental health facilities. As the Court noted in *Rank*, the Legislature later adopted Health and Safety Code § 1316.5 so as to put psychologists and psychiatrists "on an equal footing." A fundamental canon of statutory interpretation is that later statutory enactments trump prior, inconsistent provisions. The LPS Act cannot be read to grant discharge authority and immunity to psychiatrists alone, without relegating psychologists to the inferior, dependent status that the *Rank* Court recognized was changed by Section 1316.5.

Like the Court in *Rank*, this Court should refrain from second-guessing the Legislature's endorsement, in Section 1316.5, of psychologists' qualifications and crucial role in hospital settings. And, like

the Court in *Rank*, this Court can rest assured that there is a sound basis for the Legislature's determination that psychologists are competent to make treatment and discharge decisions, for the following reasons:

- Before psychologists in this State can be licensed to practice, they must undergo a rigorous education leading to a doctoral degree. Their training consists of didactic coursework (including the biological bases of behavior), clinical practica, and one year of full-time, closely supervised internships in hospitals, medical centers, or clinics. This training is followed by at least one postdoctoral year of supervised experience and demonstration of academic knowledge and clinical skills on both written and oral examinations. Only then is a psychologist in California permitted to engage in the diagnosis, prevention, treatment, and amelioration of mental disorders. In addition, the ethical and professional standards of psychologists and hospital accrediting agencies, as well as California law, protect patients, and ensure that psychologists will deliver quality mental health care.
- Psychologists are also trained in the use of objective and valid tests, which uncover the presence, site, and extent of injuries that often elude standard medical and psychiatric procedures. Because of their special skills, psychologists have long

functioned independently of physicians and have treated mental disorders irrespective of cause. A vast array of federal and state statutes recognize psychologists' importance in treating mental disorders and rendering discharge decisions.

Accordingly, this Court should take care not to set precedent that will discriminate against psychologists, disserve the public interest, conflict with current and accepted practice, and effectively undermine the holding of *C.A.P.P. v. Rank*. Instead, the Court should affirm psychologists' central role in hospital settings, as the Legislature and Supreme Court have already.

ARGUMENT

I. The Supreme Court's Decision in *C.A.P.P. v. Rank* Demonstrates That Psychologists and Psychiatrists Have the Same Legal Authority and Immunity for Discharge Decisions.

The trial court correctly concluded that Dr. Norton was entitled to immunity under Section 5154, in light of the Supreme Court's decision in *C.A.P.P. v. Rank* (1990) 51 Cal.3d 1. Section 5154 grants certain persons immunity from liability for actions by a person released before the end of a 72-hour treatment and evaluation. In pertinent part, Section 5154 immunizes "the psychiatrist directly responsible for the person's treatment" if "the provisions of Section 5152 have been met." Section 5152 allows release before the end of 72 hours if authorized by "the psychiatrist directly responsible for the person's treatment."

In Sections 5152 and 5154, the word "psychiatrist" must be read to be interchangeable with "psychologist," so that psychologists will be in the same position as psychiatrists vis-a-vis treatment and discharge. That interpretation is dictated by the Supreme Court's decision in *Rank*. In *Rank*, the Court recognized that, in enacting Health and Safety Code § 1316.5, the Legislature intended to put psychiatrists and psychologists on an equal footing" vis-à-vis the diagnosis and treatment of mental disorders. (*Rank*, 51 Cal.3d at 13.) Clearly, psychiatrists and psychologists will not be "on an equal footing" if only the former, and not the latter, can make LPS early discharge decisions and enjoy immunity regarding them. Indeed, the Supreme Court itself said in *Rank* that the LPS Act and Section 1316.5 must be read consistently. (Id. at 22 n. 14.)

Before the enactment of Section 1316.5, only psychiatrists, and not psychologists, could admit and discharge patients in acute mental health facilities. (*Rank*, 51 Cal.3d at 6) With the adoption of Section 1316.5, however, the Legislature freed psychologists from "physician supervision and ... discriminatory restrictions." (*id* at 14; *see also id* at 6.)

Section 1316.5 states that clinical psychologists on a hospital's staff may, subject to the hospital's rules, "carry professional responsibilities consistent with the scope of their licensure" (*Rank*, 51 Cal.3d at 12

(quoting § 13165).) That licensure "includes 'diagnosis, prevention, treatment and amelioration'" of mental disorders. (*id.* at 12 (quoting Bus. & Prof. Code § 2903)). "The only statutory limitation is that psychologists cannot prescribe drugs, perform surgery, or administer electroconvulsive therapy." (*id.* (citing Bus. & Prof. Code § 2904).) Section 1316.5 further provides that, if a hospital offers services that both physicians and psychologists may perform, "such services may be performed by either, *without discrimination.*" (*id.* at 13 (quoting § 1316.5) (emphasis added).)

In reviewing this legislative command in *Rank*, the California Supreme Court held that the "without discrimination" clause signifies that in performing such services the two professions, each authorized by law, *stand on an equal footing; neither is subject to constraints from which the other is free.*" (*Rank*, 51 Cal.3d at 13 (emphasis added)). *See also id.* at 16 ("The legislative direction that 'psychology is an independent health care profession,' and its recognition of the psychologist 'as primary provider of mental health care' seem designed to put the two professions - psychology and medicine - on as equal a level as possible within the scope of their respective licensures.".) The Court further "conclude[d] that under California law a hospital that admits clinical psychologists to its staff may permit ... psychologists to take primary responsibility for the admission, diagnosis, treatment, and *discharge* of their patients." (*Id.* at 21 (emphasis added).)

The licensure and "without discrimination" provisions cited in *Rank* were enacted in 1978 and 1980, respectively. (Id. at 6.) The Legislature adopted this language more than a decade after Sections 5152 and 5154 were approved in 1967.

When expressions of policy, embodied in prior and subsequent statutes, are in conflict, the policy embodied in the subsequent statute controls. (*E.g.*, *Candlestick Properties, Inc. v. Son Francisco Bay Conservation & Dev. Comm'n* (1970) 11 Cal.App.3d 557, 565 (First Appellate District).) Courts follow this rule and consider the history of legislative enactments, even if no ambiguity appears in the language of a statute when read in isolation from an inconsistent, prior or subsequent act. (*E.g.*, *id.* at 565.)

Thus, as the trial court correctly recognized, Sections 5152 and 5154 must be interpreted in a manner consistent with the Legislature's subsequent action in passing Section 1316.5 of the Health and Safety Code. The interpretation urged by appellant, however, would make it extraordinarily risky for psychologists to perform - or for their hospital employers to allow them to perform - the "discharge" functions that are plainly authorized by California law, and that the California Supreme Court has explicitly recognized to be within the province of psychologists. By placing psychologists that perform such functions in a highly disadvantageous legal position - and thus strongly incenting their hospitalemployers to use

psychiatrists, rather than psychologists - appellant's interpretation is squarely at odds with the Legislature's command that psychologists may provide these services "without discrimination." It is also fundamentally inconsistent with the California Supreme Court's holding that psychologists "stand on an equal footing" with psychiatrists in providing such services and are not "subject to constraints from which the other [psychiatrists] are free." Instead, appellant would have this Court relegate psychologists to a secondary status in connection with discharge decisions - a status that cannot be reconciled with the Legislature's actions or the Supreme Court's decision in *Rank*.

II. Psychologists Are Qualified to Function Independently from Physicians and Make Autonomous Decisions Regarding Patients' Treatment and Discharge.

Amicus curiae the California Psychiatric Association ("CPA") contends that only psychiatrists, and not psychologists, are competent to make discharge decisions. That argument, however, was rejected by the enactment of Section 1316.5 and by the California Supreme Court in *CA.P.P. v. Rank*. As the Court explained, in adopting Section 1316.5, "the Legislature ... necessarily determined that psychologists are generally competent to practice within the scope of their licensure," which, as noted above, includes authority for "discharge" decisions. (*Rank*, 51 Cal.3d at 21).

The California Psychiatric Association's claim that psychiatrists are uniquely qualified to make discharge decisions is simply an attempt to

resurrect policy arguments that the California Supreme Court declined to adopt in *Rank*. In that case, psychiatrists argued that hospitalized patients would be endangered by giving "responsibility for diagnosis and treatment to a professional who has received less training." (Id. at 21). The *Rank* Court held that "the competence of the professions must be decided by the Legislature, not the courts" and declined the psychiatrists' invitation to nullify" the Legislature's judgment reflected in Section 1316.5. (Id..)

Like the Court in *Rank*, this Court should refrain from second-guessing the Legislature's endorsement, in Section 1316.5, of psychologists' competency. Not only is the California Psychiatric Association's position at odds with Section 1316.5, it also has no sound basis in research or public policy. The California Psychiatric Association's argument simply reinforces discarded "stereotypes from the 1950s" when "psychiatrists 'treated' the patients; [and] psychologists [merely] administered tests to them."¹ The California Psychiatric Association overlooks the many guarantees of psychologists' competency: (a) their doctoral training; (b) their licensure and certification; and (c) the ethical, professional, and hospital-based constraints under which they work. In addition, psychologists have important skills that are not within the expertise of psychiatrists. Further, for many years, psychologists have worked independently of physicians, caring for

¹ Blum & Redlich, *Mental Health Practitioners: Old Stereotypes and New Realities*, 37 Arch. Gen. Psychiatry 1247, 1247 (1980).

hospitalized patients with severe mental disorders. Because of these many factors, psychologists are generally recognized, under state and federal law, as independent professionals on a coequal footing with psychiatrists.

A. The Doctoral Degree

The entry level degree for psychologists is the doctorate. Generally, a doctoral level program in clinical psychology requires four to five years of rigorous and extensive didactic and field placement experience, with approximately three years devoted to coursework and practica; one year to a full-time, supervised internship at a hospital, clinic, or other training center; and one year of research.²

All clinical psychology programs combine the teaching of basic science and methods of psychology with the theory and techniques of clinical practice. In addition to developing competence in such skills as diagnosis and treatment, students gain a sound graduate education in the cognitive and affective bases of behavior (*e.al*, learning, memory, motivation, and emotion), social bases of behavior (*e.g.*, group processes and organizational theory), and individual behavior (*e.g.*, personality theory, human development, and abnormal psychology). Most relevant, clinical psychology programs provide for education in the biological bases

² See generally Edelstein & Brasted, *Clinical Training in The Clinical Psychology Handbook* 35 (M. Hersen, A. Kazdin, & A. Bellack eds. 1983).

of behavior, including, for example, physiological psychology, neuropsychology, and psychopharmacology.³

Internship training, an essential component of doctoral training in clinical psychology, provides students with the opportunity to take substantial responsibility for carrying out major professional functions in the context of close and careful supervision. Of 455 internships accredited by APA in 1998, 234 (51.4%) were in hospital settings.⁴

The combination of these intensive educative and training experiences ensure that clinical psychologists are fully prepared to render independent psychological services. As a result of their solid grounding in the scientific method and the scientific foundations of mental disorders, as well as their acquisition of skills in the diagnosis, assessment, and treatment of all mental disorders, psychologists clearly possess the competence to diagnose and treat mental disorders and, when appropriate, discharge patients from psychological care.

B. Licensure and Certification

At present, and since 1977, all 50 states and the District of Columbia have enacted laws regulating the practice of psychology.⁵ Most state

³ See *APA Accreditation Guidelines & Principles*.

⁴ See Committee on Accreditation, *APA Accredited Predoctoral Internships for Doctoral Training in Psychology: 1998*.

⁵ Stigall, *Licensing and Certification in The Professional Psychologist's Handbook* 285 (B. Sales ed. 1983). These laws, which permit psychologists to practice independently in all settings, provide for certification or

licensure laws, like California's, establish as the minimum requirements for independent practice, the doctoral degree in psychology (or its equivalent) plus two years of supervised experience (with at least one of those at the predoctoral level).⁶

State examining boards administering laws regulating the practice of psychology also require that applicants pass an examination, either written, or oral, or both. California's test covers all major substantive areas in psychology, including physiological and biological aspects of behavior. In addition, like other states, California requires applicants to undergo an oral examination in which they must exhibit competency in recognizing disorders, and demonstrate a full understanding of their duty to refer patients to physicians for medical care.

C. Ethical Codes and Professional Standards

To further ensure a high quality of professional practice, states have adopted ethical codes identical or quite similar to the APA's *Ethical Principles of Psychologists and Code of Conduct*.⁷ Among other requirements, the *Principles* mandate that "psychologists recognize the

licensure. Certification laws limit the use of the title C4 psychologist." Licensure laws, like California's, both regulate use of the title and define the scope of those activities for which a license to practice is required.

⁶ See Cal. Health & Safety Code § 1316.5, subd. (C).

boundaries of their particular competencies and the limitations of their expertise. They provide only those services and use only those techniques for which they are qualified by education, training, or experience."⁸ Psychologists are also ethically required to "maintain knowledge of relevant scientific and professional information related to the services they render" and to "recognize the need for ongoing education." They are required to "make appropriate use of scientific, professional, technical, and administrative resources." Id.

Psychologists who violate the ethical standards of their profession are subject to disciplinary action by the APA, including expulsion from the Association. And, because these ethical principles are reflected in state licensure laws, psychologists also risk revocation of their license, which would preclude them from practicing their profession.⁹

⁷ APA, *Ethical Principles of Psychologists*, 47 Amer. Psychologist 1597 (1992). California reflects these principles in its licensure law and regulations. See Cal. Bus. & Prof Code § 2960.

⁸ APA, *Ethical Principles of Psychologists & Code of Conduct*, Principle A.

⁹ APA has also adopted general guidelines psychologists are expected to observe to promote the best interests and welfare of clients. The *General Guidelines for Providers of Psychological Services*, 42 Amer. Psychologist 1 (1987), were "established by organized psychology as a means of self-regulation in the public interest," and cover any psychological service "at any time and in any setting." Id. The *General Guidelines*, although acknowledging that "psychologists pursue their activities as members of the independent, autonomous profession of psychology," id. at 8 (Guideline 3.2), also remind psychologists to "limit their practice ... to their demonstrated areas of professional competence, id. at 4 (Guideline 1.6), and "in the best interest of users, . . . to consult and collaborate with

These ethical standards appropriately regulate and monitor the work of clinical psychologists in hospitals and elsewhere. The drastic sanctions psychologists can suffer for violating the profession's code of ethics and the licensure laws provide significant protections to patients and other consumers of psychological services.

D. Psychologists' Special Skills and Autonomy from Physicians

For decades, psychologists have functioned independently of physicians, providing care for patients hospitalized for severe mental disorders such as schizophrenia and manic-depressive psychoses. With widespread approval, psychologists serve as autonomous professionals in a variety of settings, including the nation's medical schools, public general hospitals, public psychiatric hospitals, private psychiatric hospitals and Veterans Administration hospitals across the country.

Psychologists, because of their unique training and experience, are the only mental health professionals competent to perform reliable and valid assessments, through comprehensive testing of patients.¹⁰ Further,

professional colleagues in the planning and delivery of services Id. at 5 (Guidelines 2.2.6).

¹⁰ See, e.g., Lovitt, *Current Practice of Psychological Assessment*, 19 Prof. Psychology 516 (1988); Wade & Baker, *Opinions and Use of Psychological Tests: A Survey of Clinical Psychologists*, 32 Amer. Psychologist 874 (1977); Blum & Redlich, *Mental Health Practitioners: Old Stereotypes and New Realities*, 37 Arch. Gen. Psychiatry 1247 (1980).

clinical psychologists' knowledge of assessment and research methodology permit them to delineate the factors that powerfully influence the success or failure of treatment plans¹¹ - a role for which psychiatrists have not been trained.¹²

Most importantly, not allowing psychologists to treat and, when appropriate, discharge mental health patients can lead to unnecessary institutionalization and overmedication, with the serious risks of powerful and debilitating side-effects that antipsychotic drugs can produce. A number of effective interventions create substantial benefits for patients either in conjunction with, or as an alternative to, medication.

E. Recognition of Psychology as an Independent Profession

Given their intensive training, rigorous licensure laws and ethical standards, and unique skills, psychologists are, not surprisingly, recognized as independent professionals providing diagnosis and treatment on a coequal footing with psychiatry. This recognition is expressed not only in public attitudes but also in federal and state law (both statutory and

¹¹ See, e.g., *Clinical Psychologists as Health Professionals* in *Health Psychology - A Handbook* (G. Stone, F. Cohen & H. Adler eds. 1979); Schraa & Jones, *A Model Psychometrically Based Medical Psychology Program*, 14 Prof. Psychology 78 (1983).

¹² See Kingsbury, *Cognitive Differences Between Clinical Psychologists and Psychiatrists*, 42 Amer. Psychologist 152 (1987) (author is a physician and clinical psychologist); Pasnau, *The Remedicalization of Psychiatry*, 38 Hosp. & Comm. Psychiatry 145, 150 (1987) (complaining of "the relative dearth of physician investigators in psychiatry, which in any case has not had a long research tradition").

regulatory) and in private sector practices. As the California Supreme Court explained in *Rank*, "[t]he role of the psychologist as primary provider of mental health care has been repeatedly recognized at both the state and federal levels of government." 51 Cal.3d at 15 (quoting Legislative findings).

Almost all relevant federal statutes require direct recognition of clinical psychologists as independent providers, qualified to deliver health care services without supervision by a physician. These statutes include, for example, the Federal Employees Compensation Act, 5 U.S.C. §8101(2); Offenders with Mental Disease or Defect Act, 18 U.S.C. §§ 4241-4244; the Vocational Rehabilitation Act, 29 U.S.C. § 723(a)(1), and the Health Maintenance Organization Act, 42 U.S.C. § 300e-1.

The most notable examples of federal statutes recognizing clinical psychologists as independent providers of mental health services are the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8902(k), (1), and the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"), 10 U.S.C. § 1071 *et seq.* FEHBA establishes conditions and funding of group health plans for federal employees and their beneficiaries. CHAMPUS covers both inpatient and outpatient services.¹³

¹³ For a fuller description of these two programs as well as the other federal statutes listed, *supra*, see Dorken, Health Insurance and Third-Party

State law just as explicitly recognizes psychologists as independent providers of mental health services. California has enacted legislation that expressly requires recognition of and reimbursement for psychological services.¹⁴ These statutes amend state insurance and related codes to require third party payors to cover the independent provision of services by licensed psychologists if those same services are also provided by physicians. These "freedom of choice" laws broaden the range of providers who can render the covered service, permitting patients direct access to qualified psychologists if that is the patient's choice.

In addition to freedom of choice legislation, California confers independent status for psychologists in several and diverse areas: *E.g.*, Cal. Lab. Code § 3209.3; Cal. Penal Code § 1369; Cal. Penal Code § 1027; Cal. Penal Code § 1203h; Cal. Penal Code § 2962; Cal. Civ. Proc. Code § 2032; Cal. Welf. Inst. Code § 5361; Cal. Fain. Code § 232.

This is but a partial listing of federal and California laws that evidence legislative recognition of the qualifications of psychologists to provide independently, and regardless of setting, a broad diversity of mental health services to all kinds of patients, including those with severe

Reimbursement in *The Professional Psychologist's Handbook* 249 (B. Sales ed. 1983); DeLeon, VandenBos, & Kraut, *Federal Legislation Recognizing Psychology*, 39 *Amer. Psychologist* 933 (1984).

¹⁴ See Cal. Ins. Code § 10176.

mental disorders. The plain import of these provisions is that psychologists are permitted to perform all diagnostic services so long as they do not use drugs, surgery, or electro-convulsive devices.¹⁵

In sum, psychologists are qualified - by virtue of their doctoral training, licensure and certification, and ethical codes and professional standards - to treat and, when appropriate, discharge hospitalized patients. Psychologists have long functioned independently of physicians and have successfully treated patients with severe mental disorders. The status of psychology as an independent, integral profession is well recognized both in California state law and federal law.

Although psychologists can make mistakes in treatment and discharge, they are no more prone to error than psychiatrists and should be subject to the same legal standards. Accordingly, this Court should affirm the importance, independence, and equal standing of psychology, as have the Legislature and Supreme Court already.

¹⁵ See Cal. Bus. & Prof. Code § 2904.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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