

**Case No. S-00-0022**

IN THE  
SUPREME COURT FOR THE STATE OF NEBRASKA

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**JOANN BRANDON**, Personal Representative of the Estate of **TEENA BRANDON**, deceased,

*Plaintiff-Appellant,*

vs.

**THE COUNTY OF RICHARDSON, NEBRASKA**, and **CHARLES B. LAUX**,  
Richardson County Sheriff,

*Defendants-Appellees and Cross-Appellants.*

Appeal from the District Court of Richardson County, Nebraska  
The Honorable Orville L. Coady, District Judge

**BRIEF OF THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA  
ASSOCIATION  
AS *AMICUS CURIAE*  
SUPPORTING PLAINTIFF-APPELLANT**

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## **INTEREST OF *AMICUS CURIAE***

*Amicus curiae* is the Harry Benjamin International Gender Dysphoria Association (HBIGDA). HBIGDA is a professional organization devoted to the understanding and treatment of gender dysphoria, a condition that is characterized by severe and sometimes debilitating dissatisfaction or unhappiness with one's assigned gender. HBIGDA is responsible for establishing Standards of Care for the diagnosis and treatment of gender dysphoria. These standards are internationally accepted guidelines that promote the health and welfare of individuals with gender dysphoria. HBIGDA includes approximately 350 members from around the world who are experts in the fields of psychiatry, endocrinology, surgery, psychology, law, sociology and counseling.

Because of Brandon's documented attempt to live as a man and to seek medical advice and treatment for gender dysphoria, and because the violence and discrimination that ended Brandon's life are typical of the struggles faced by persons who are similarly situated, *amicus* submits this brief to provide the Court with accurate and relevant information regarding transgender people.

## **INTRODUCTION**

This case is about how to apportion civil liability for the death of Teena Renee Brandon. The trial court correctly found that Sheriff Laux breached his duty to protect Brandon and that Richardson County was therefore liable for negligence, wrongful death, and funeral expenses. However, among the other errors adequately addressed for the Court in other briefs, the trial court also erred in summarily concluding that the damages should be reduced by one percent for the contributory negligence of Brandon. (69-71). As explained in detail in Plaintiff's opening brief, the facts uniformly show that Brandon exercised due care in cooperating with the authorities and in attempting to conceal his whereabouts from Lotter and Nissen following the

rape. Given the absence of supporting evidence indicating any negligent conduct by Brandon, it appears that the trial court's finding of contributory negligence may be based on the disturbing misconception that Brandon was somehow at fault simply for existing and interacting with others as a transgender person — *i.e.*, for presenting himself as male rather than female.

*Amicus* respectfully asks this Court to reverse the reduction in damages based on Brandon's contributory negligence and to rule that no person may be held responsible for his or her own rape or murder simply by virtue of belonging to a stigmatized or disadvantaged group, or simply because others discover that he or she is a member of that group. "In civilized society men must be able to assume that others will do them no intended injury - that others will commit no intentioned aggressions upon them." Roscoe Pound, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 169 (1925). The trial court's contributory negligence ruling wrongly suggests that Brandon's very existence as a transgender person was a legitimate provocation to rape and/or murder. Like other citizens, transgender people are entitled to live in the world and to act on a day-to-day basis on the assumption that others will not rape and/or murder them, regardless of whether their transgender status is known.

## ARGUMENT

Gender identity refers to a person's internal, deeply-felt sense of being either male or female. Suzanne J. Kessler & Wendy McKenna, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* 8-11 (1978); John Money, *Gender Role, Gender Identity, Core Gender Identity: Usage and Definition of Terms*, 1 *JOURNAL OF THE AMERICAN ACADEMY OF PSYCHOANALYSIS* 397-403 (1973). Everyone has a gender identity. Most people experience their gender identity as consistent with their physical sex. That is, most people born with female bodies also have a female gender identity, and most people born with male bodies have a male gender identity. For a transgender person, however, there is a conflict between one's physical sex and one's gender identity. C.M. Cole, L.E. Emory, T. Huang, & W.J. Meyer, *Treatment of Gender Dysphoria*, 90 *TEXAS MEDICINE* 68-72 (1994). Female-to-male transgender people are born with female bodies, but have a masculine gender identity. Male-to-female transgender people are born with male bodies, but have a feminine gender identity. *Id.*

In medical terminology, the disparity or incongruence between anatomical sex and psychological gender is termed gender dysphoria. Gianna E. Israel & Donald E. Tarver, *TRANSGENDER CARE: RECOMMENDED GUIDELINES, PRACTICAL INFORMATION & PERSONAL ACCOUNTS* 7-8 (1997). Gender dysphoria causes intense feelings of conflict and emotional pain. To alleviate this incongruity and discomfort, some transgender people undergo medical treatment, including hormone therapy and sex reassignment surgeries, to change their physical sex. *Id.* at 14. Others, like Brandon, live as a member of the opposite sex without undergoing any hormonal or surgical treatment, *id.* at 15, sometimes in medically prescribed preparation for

such treatment. *Id.* at 10-12 (describing the “real-life test,” which requires transgender persons to live as a member of the opposite sex before obtaining sex reassignment surgery). In either case, being transgender is not a lifestyle choice; it is a condition or syndrome in which one's identification and desire to live as a member of the other sex is deep-seated, unavoidable, and overwhelming.

Current medical standards seek to respect the dignity and autonomy of transgender people by requiring health care professionals to acknowledge a transgender person's self-designated gender identification. *See, e.g.,* Israel & Tarver, *supra*, at 7 (“one should refer to transgender individuals on the basis of their current presentation or their specified pronoun preference.”); B.R. Beemer, *Gender Dysphoria Update*, 34 JOURNAL OF PSYCHOSOCIAL NURSING AND MENTAL HEALTH SERVICES 12 (1996) (“caregivers have a responsibility to acknowledge the self-chosen identity of their clients.”). Because Brandon used a male name and male pronouns, and presented himself socially as a man, *amicus* uses male pronouns when referring to him herein, consistent with the practice followed by most courts. *See, e.g.,* *Schwenk v. Hartford*, 204 F.3d 1187, 1192 n.1 (9<sup>th</sup> Cir. 2000); *Murray v. United States Bureau of Prisons*, 106 F.3d 401, 410 n.1 (6<sup>th</sup> Cir. 1997); *Merriweather v. Faulkner*, 821 F.2d 408, 408 n.1 (7<sup>th</sup> Cir. 1987); *Smith v. Rasmussen*, 57 F. Supp. 2d 736, 740 n.2 (N.D. Iowa 1999).

Although the precise cause of cross-gender identity is not currently known, the weight of current scientific evidence suggests a biologically-based, multifactorial etiology, including genetic, hormonal and environmental influences. P.T. Cohen-Kettenis & L. J. Gooren, *Transsexualism: A Review of Etiology, Diagnosis and Treatment*, 46 JOURNAL OF PSYCHOSOMATIC RESEARCH 315-33 (1999). Research on individuals with some types of intersex

conditions (conditions in which a person is born with a combination of male and female biological characteristics) indicates that chromosomes may have a significant influence on gender identity. Louis Gooren, *Gender Transpositions: The Brain Has Not Followed Other Markers of Sexual Differentiation?*, 4 *International Journal of Transgenderism* (2000). At the present time, however, science has not yet been able to isolate a specific gene that controls gender identity. Although the details of genetic influence are enormously complex and still require much study, researchers are increasingly inclined to classify transgenderism as an intersex condition. *Id.*

Prenatal hormones also influence gender-related behavior. Numerous animal studies have shown the impact of prenatal sex hormones on the developing structure of the brain and the development of masculine or feminine behavior. *See, e.g.*, Heino Meyer-Bahlburg, *Hormones and Psychosexual Differentiation: Implication for the Management of Intersexuality, Homosexuality, and Transsexuality*, 11 *CLINICS IN ENDOCRINOLOGY AND METABOLISM* 681-701 (1982); G. Dorner, *HORMONES AND BRAIN DIFFERENTIATION* (1976). Recent studies indicate that gender identity in humans may be related to the structure of the human brain as well. A 1995 study from the Netherlands looked at a region of the hypothalamus which is smaller in women than in men. Remarkably, the region was also smaller in the brains of the six male-to-female transsexual women examined. J.-N. Zhou, M.A. Hoffman, L.J. Gooren & D.F. Swaab, *A Sex Difference in the Human Brain and its Relation to Transsexuality*, *NATURE* 378 (1995) (concluding that “gender identity alterations may develop as a result of an altered interaction between the development of the brain and sex hormones [in utero]”).

Finally, environmental factors, such as early developmental experiences and family and cultural dynamics are also believed to play some causal role, although not in any uniform or easily quantifiable manner. Walter O. Bockting & Eli Coleman, *A Comprehensive Approach to the Treatment of Gender Dysphoria*, in *GENDER DYSPHORIA: INTERDISCIPLINARY APPROACHES IN CLINICAL MANAGEMENT* 131, 132-33 (W.O. Bockting & E. Coleman eds., 1992).

Transgender people have diverse backgrounds in terms of family dynamics and psychosexual development. *Id.* at 133. Like Brandon, a significant number of transgender people report childhood abuse. *Id.* at 140-141. Some of these abusive experiences may relate directly or indirectly to gender (such as sexual abuse), and some are unrelated to gender but may affect the person's ability to cope with gender incongruity or cross-gender identification. *Id.* Even in the former situation, however, there is no simple causal relationship between childhood abuse and the development of a transgender identity. *Id.*

In sum, gender identity is the result of a complex interaction between three factors: (1) genetic disposition; (2) physiological factors; and (3) the socialization process. As Professor John Money has stated:

causality with respect to gender identity disorder is sub-divisible into genetic, prenatal hormonal, postnatal social, and post-pubertal hormonal determinants....there is no one cause of a gender role...Nature is not responsible, nor is nurture, alone...They work together, hand in glove.

John Money, *The Concept of Gender Identity Disorder in Childhood and Adolescence after 39 Years*, 20 *JOURNAL OF SEX AND MARITAL THERAPY* 163-77 (1994).

Whatever its precise causation, gender identity is a fundamental and effectively immutable aspect of human identity. A person's psychological identification as male or female is established at an early age and is highly resistant to change. *See, e.g.*, Robert J. Stoller, *The Sense of Maleness*, 34 *PSYCHOANALYTIC QUARTERLY* 207-218 (1965). In the past, some practitioners tried to "cure" transgender people through aversion therapies and other techniques intended to alter cross-gender identification. *See, e.g.*, M.G. Gelder & I.M. Marks, *Aversion Treatment in Transvestism and Transsexualism*, in *TRANSSEXUALISM AND SEX REASSIGNMENT* (Richard Green & John Money eds., 1969). Those efforts were not only unsuccessful, but caused severe psychological and in some cases even physical damage. Gerald Mallon, *Practice with Transgendered Children*, in *SOCIAL SERVICES WITH TRANSGENDERED YOUTH* 49, 55-58 (Gerald Mallon ed. 1999). Today, efforts to alter a person's core gender identity are viewed as both futile and unethical. *Id.* Accordingly, the treatment paradigm has shifted from attempting to "cure" the transgender person "to facilitating acceptance and management of a gender role transition." Bockting & Coleman, *supra*, at 131-32.

Yet despite enormous gains in the scientific and medical understanding of transgender people over the past fifty years, the general public is still largely misinformed about and hostile to persons whose appearance, identity or behavior threatens conventional expectations and assumptions about gender. Although no comprehensive data on the topic exist, medical practitioners who specialize in transgender care have long been aware that transgender people are victimized at high rates. The victimization ranges from "subtle forms of harassment and discrimination to blatant verbal, physical, and sexual assault....[and] may include violent beatings, rape, and even death." Israel & Tarver, *supra*, at 37. Because "law enforcement

agencies and personnel can be hostile toward transgender persons and are often the chief perpetrators of the same victimization and abuse they are designated by society to prevent,” most incidents of anti-transgender violence are unreported. *Id.*

A recent survey analyzing reported instances of bias-motivated violence against gay and transgender people from 1995 through 1998 found that although anti-transgender violence accounted for only a relatively small percentage of all reported cases, those incidents accounted for 20% of all reported murders, and approximately 40% of all police-initiated violence. *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998*, A Report of the National Coalition of Anti-Violence Programs (1999). As these figures indicate, the violence directed at transgender persons tends to be particularly brutal and lethal.

## CONCLUSION

In this case, Brandon's behavior when he reported his brutal rape to the police and when he attempted to avoid his attackers could only be considered the behavior of a reasonable person under the circumstances. Therefore, the trial court's ruling that Brandon was contributorily negligent appears to be based on an assumption that Brandon acted negligently by living in his self-identified gender role. The finding that Brandon was partially responsible for his own death reinforces the already widespread belief that our society condones the harassment, assault, rape and murder of transgender people. The trial court's decision on this point suggests that transgender people may be considered legitimate, even deserving, objects of hatred and violence. By making the victim of a brutal, premeditated homicide partially responsible for the violence visited upon him, the trial court inadvertently suggests that those who intentionally injure people

whose gender identity does not correspond with their anatomical sex have social approbation to do so. *Amicus* respectfully asks this Court to reverse the trial court's dangerous and unsupported holding on this point.

Dated: October 10, 2000

Respectfully submitted,

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