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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000846-MR
&
NO. 2001-CA-000922-MR

LOIS DEVASIER, ADMINISTRATRIX
OF THE ESTATE OF
KENNEITHA CRADY — APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 96-CI-003734

WILLIAM JAMES, M.D. — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON[1] AND TAYLOR, JUDGES; BUCKINGHAM,[2] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: On July 20, 1995, Rene Cissell killed his girlfriend, Kenneitha Crady, by stabbing her more than 40 times. This tragic event led Lois DeVasier, administratrix of

[1] Judge Rick A. Johnson dissented in this opinion and filed a separate opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Crady's estate, to file a civil complaint in the Jefferson Circuit Court against various mental health care providers, including Dr. William James. After all defendants except Dr. James were either dismissed as parties by the court or were dismissed after settlement with Crady's estate, the case was tried before a jury. The jury rendered a verdict in favor of Dr. James, and this appeal by Crady's estate followed. Further, Dr. James filed a protective cross-appeal. Because we believe Dr. James's cross-appeal has merit, we affirm.

Cissell and Crady had been involved in a romantic relationship and had cohabitated for an extended period of time. Their relationship was troubled, and their problems frequently resulted in domestic violence. By 1995, Crady was seeing another man, and Cissell was concerned that she was going to end the relationship.

In mid-July, Cissell apparently rammed his car into a parked car in which Crady was sitting with her new boyfriend, causing Crady minor injuries. On July 18, 1995, Cissell and Crady went to Inpsych Kentucky, Inc., an outpatient psychiatric facility, because of Cissell's emotional problems. Cissell was evaluated by a licensed clinical social worker, and Cissell expressed his relationship difficulties and his fear that Crady was going to leave him. Cissell also admitted to having a substance abuse problem. Further, he admitted that earlier in

the day he had held a knife to Crady's throat and had caused a superficial laceration. He was given an appointment with a psychologist for the next day.

The next day, Cissell presented himself to the emergency room at the University of Louisville Hospital, accompanied by his sister and Crady. He was placed on an involuntary hold by the emergency room staff because he expressed homicidal thoughts about Crady. Cissell claimed that he could not wait for his appointment that afternoon at Inpsych.

A licensed clinical social worker took his history and gave it to Dr. James. The social worker's report included references to the incident with the car and the incident with the knife. The report noted that Cissell had threatened Crady's life and felt he could not control himself. However, Cissell also told the social worker that he loved Crady and did not want to hurt her, but that he needed help in coping with the situation. Cissell asked to be hospitalized to address his problems regarding his relationship issues with Crady.

Dr. James examined Cissell in Crady's presence and concluded that Cissell did not need inpatient treatment. He also noted that Crady was not afraid of Cissell. Cissell did not communicate any specific threat against Crady in Dr. James's presence. Dr. James determined that Cissell needed outpatient treatment, and he advised Cissell to keep his scheduled

appointment with Inpsych. Dr. James also cancelled the involuntary hold on Cissell and allowed him to leave.

That same afternoon Cissell attended his session with a psychologist at Inpsych. Later that evening, Cissell again fought with Crady, this time placing his hands around her throat. The police arrived, but Cissell was not arrested. That incident was not reported to Dr. James.

On June 20, 1995, Cissell and Crady were involved in yet another violent altercation, in which Cissell stabbed Crady over 40 times, killing her. Cissell later pled guilty to manslaughter and was sentenced to a term of 13 years in prison.

Crady's estate filed a civil action in the Jefferson Circuit Court against Dr. James and other mental health care providers. The court dismissed the case on the ground the complaint did not allege that an actual threat had been communicated to any of the defendants, which is required under KRS[3] 202A.400. The estate appealed to this court, and we reversed the circuit court's dismissal on the ground that there had been no opportunity for discovery in connection with statements Cissell may have made to the mental health care providers. See DeVasier v. Galen of Virginia, 96-CA-3354-MR, rendered June 12, 1998 (not to be published).

[3] Kentucky Revised Statutes.

After the case was remanded to the circuit court and the estate had the opportunity to complete discovery, Dr. James moved the court to award summary judgment in his favor. The court denied the motion, reasoning that an issue of fact existed as to whether or not Cissell had communicated an actual threat of violence to Dr. James.

The case was tried before a jury in early 2001. After testimony was presented, Dr. James moved the court to grant a directed verdict in his favor. The court denied the motion, and the case was submitted to the jury for its decision.

Instruction No. 2 to the jury read as follows:

> Do you believe from the evidence that Rene Cissell communicated to Dr. William James an actual threat of physical violence against Kenneitha Crady?

The jury unanimously answered "YES" to that question. At the bottom of the instruction page, the jury was directed to proceed to Instruction No. 3.

Instruction No. 3 to the jury read as follows:

> It was the duty of Dr. William James in treating Rene Cissell, to exercise that degree of care and skill expected of a reasonably competent psychiatrist acting under same or similar circumstance.
>
> Do you believe from the evidence that Dr. William James failed to comply with the duty, and that such failure was a substantial factor in causing Kenneitha Crady's death?

The jury unanimously answered "NO" to that question. At the bottom of the instruction page, the jury was directed that if it had answered "NO", then it was to enter a verdict in Dr. James's favor. The jury then proceeded to Verdict Form B and unanimously entered a verdict in favor of Dr. James. Following the court's entry of a final judgment in Dr. James's favor, the estate's appeal and Dr. James's cross-appeal followed.

In Evans v. Morehead Clinic, 749 S.W.2d 696 (Ky.App. 1988), this court recognized that other jurisdictions have imposed a duty on a psychiatrist or psychologist to warn another concerning a dangerous patient. Id. at 698. The landmark case is Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976). In creating a duty owed to a potential victim, the Tarasoff court applied *Restatement (2d) of Torts* § 315 which provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which owes to the other a right of protection.

Based on Tarasoff and other cases, this court in the Evans case stated:

> These authorities lead us to conclude that the appellant has a cause of action. The relationship of a psychiatrist or

> therapist and a patient under § 315 of the *Restatement* is a special relation resulting in duties to third persons. Thus, if the psychiatrist or therapist determined or under the applicable standards of his profession reasonably should have determined that his patient poses a serious risk of violence, the psychiatrist or therapist has a duty of ordinary care to protect a reasonably foreseeable victim of that danger. This foreseeability encompasses victims specifically identified and those readily identifiable. As stated in Tarasoff, supra, the manner in which this duty shall be discharged will vary with the facts of each case. The question will be whether the psychiatrist or therapist has exercised reasonable care under the circumstances.

Id. at 699.

Several states have enacted statutes that limit the duty of a psychiatrist or psychologist to warn a potential victim. See 56 U.Cin. L.Rev. 269 (1987). KRS 202A.400 is one such statute.

KRS 202A.400 provides in relevant part as follows:

> (1) No monetary liability and no cause of action shall arise against any qualified mental health professional for failing to predict, warn of or take precautions to provide protection from a patient's violent behavior, unless the patient has communicated to the qualified mental health professional an actual threat of physical violence against a clearly identified or reasonably identifiable victim, or unless the patient has communicated to the qualified mental health professional an actual threat of some specific violent act.

> (2) The duty to warn of or to take reasonable precautions to provide protection from violent behavior arises only under the limited circumstances specified in subsection (1) of this section. The duty to warn a clearly or reasonably identifiable victim shall be discharged by the qualified mental health professional if reasonable efforts are made to communicate the threat to the victim, and to notify the police department closest to the patient's and the victim's residence of the threat of violence. When the patient has communicated to the qualified mental health professional an actual threat of some specific violent act and no particular victim is identifiable, the duty to warn has been discharged if reasonable efforts are made to communicate the threat to law enforcement authorities. The duty to take reasonable precaution to provide protection from violent behavior shall be satisfied if reasonable efforts are made to seek civil commitment of the patient under this chapter.

On cross-appeal, Dr. James argues that the circuit court erred in not granting him a directed verdict. First, he argues that KRS 202A.400(1) requires that the threat be communicated by the patient directly to the mental health care provider and may not be indirectly communicated in medical reports forwarded by social workers or others to the provider for purposes of treatment. The trial court had ruled otherwise. Second, he argues that the evidence was insufficient to support a finding that an actual threat had been communicated to anyone.

Regarding Dr. James's first argument, that the statute requires the threat be communicated by the patient directly to the mental health care provider rather than indirectly through medical reports forwarded by social workers or others, we note that the statute has not been interpreted by the appellate courts of this state as of this time. Thus, the issue is a matter of first impression. "In construing a statute, the courts are 'guided by the two paramount rules of statutory construction, that is, that words must be afforded their plain, commonly accepted meanings and that statutes must be construed in such a way as to carry out the intent of the legislature[.]'" McLain v. Dana Corp., 16 S.W.3d 320, 326 (Ky.App. 1999).

The language of KRS 202A.400(1) limits the liability of a qualified mental health professional to situations where actual threats have been communicated by the patient to the qualified mental health professional. Dr. James argues that had the legislature intended that there be liability where the communication was not made directly to the professional but was made indirectly through other persons or qualified mental health professionals, then the statute would have read "unless there is communicated to the qualified mental health professional" rather than "unless the patient has communicated to the qualified mental health professional." The plain language of the statute so states.

We conclude that the statute limits liability to situations where the patient has directly communicated an actual threat to the qualified mental health professional. There was no evidence that Cissell communicated any threat directly to Dr. James. Thus, the court should have directed a verdict in favor of Dr. James.

The judgment of the Jefferson Circuit Court is affirmed.[4]

TAYLOR, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent. I conclude that the Majority Opinion has erred by not only accepting Dr. James's argument on cross-appeal that KRS 202A.400 "limits liability to situations where the patient has directly communicated an actual threat to the qualified mental health professional;" but additionally, Crady's estate is entitled to a new trial because the trial court committed reversible error by failing to instruct the jury as to Dr. James's specific duties under the statute.

While the Majority claims to be affording the words of the statute their plain, commonly accepted meanings, in actuality the Majority has re-written the statute by inserting

[4] Because we have concluded that the court should have directed a verdict in favor of Dr. James, the estate's argument that the jury instructions were erroneous is moot.

the word “directly.” When the language “unless the patient has communicated to the qualified mental health professional an actual threat of physical violence against a clearly identified or reasonably identifiable victim” is given its plain and commonly accepted meaning, that meaning would include any type of communication, direct or indirect. Thus, an indirect communication of an actual threat by the staff to a qualified mental health professional would meet the requirements of the statute.

The critical information communicated by Cissell to members of Dr. James’s staff included his patient history given to Intake Nurse, Gregory Howell, and Licensed Clinical Social Worker, Hiro Tanamachi. Howell testified that Cissell appeared as a man in crisis, that he was non-responsive to questions about homicidal and suicidal ideation, and that he was beating his legs with his fist and had clenched teeth. Howell stated that he concluded Cissell was the highest-level priority patient, and he recorded on the intake form that Cissell was a Level 3 priority, indicating the most serious. Tanamachi testified that Cissell communicated to him that he had run Crady off the road in a car the previous week, that he had cut Crady’s throat with a knife the previous day, that he felt he “could not help himself,” and he asked to be admitted to the hospital to get help. Cissell’s patient history, as communicated to Dr.

James's staff by Cissell, as a part of the regular and customary treatment of a patient, was then communicated to Dr. James by the staff.

Medical professionals regularly rely upon this type of communication concerning a patient's history in the treatment of patients. The proper inferences to be drawn from this evidence and the ultimate factual finding of whether an actual threat was communicated to the qualified mental health professional should be for the jury.

I also conclude that the trial court erred by failing to instruct the jury on the specific duties established by KRS 202A.400 (2). The relevant part of the statute states that "[t]he duty to warn a clearly or reasonably identifiable victim shall be discharged by the qualified mental health professional if reasonable efforts are made to communicate the threat to the victim, and to notify the police department closest to the patient's and the victim's residence of the threat of violence." Crady's estate proposed the following instruction, which in my opinion meets the requirements of the statute:

> Dr. James had a duty to warn Kenneitha Crady of Cissell's threat and to notify the police department closest to Crady's residence; or to take precautions for the safety of Crady, such as seek hospitalization of Cissell.

> Do you believe from the evidence that Dr. James failed to warn Crady and to notify the police or to hospitalize Cissell?

Dr. James argues on the one hand that the Legislature enacted KRS 202A.400 to give some liability protection to qualified mental health professionals; but on the other hand, he argues against instructing the jury as to the specific duties the Legislature created. It is axiomatic that in a negligence action, the jury instructions are "to set forth the statutory duties imposed upon [the parties.]"[5] As this Court noted in Humana of Kentucky, Inc. v. McKee,[6] this rule also applies to medical negligence actions. "[H]ospitals are required to comply with many statutory duties in addition to that of exercising ordinary care." If a claim is based upon "a hospital's negligent failure to comply with a statutory duty, the court obviously is required to instruct the jury regarding that duty because the violation of such a duty, standing alone, may be sufficient to support a claim of negligence."[7]

[5] Henderson v. Watson, 262 S.W.2d 811, 815 (Ky. 1953). See also, Newman v. Lee, 471S.W.2d 293, 296 (Ky. 1971); and City of Louisville v. Maresz, 835 S.W.2d 889, 894 (Ky.App., 1992).

[6] 834 S.W.2d 711, 722 (Ky.App. 1992).

[7] Id. (citing Rietze v. Williams, 458 S.W.2d 613 (1970)).

Thus, when there is a specific statutory duty imposed upon a party, the jury instructions must include that duty.[8] I would reverse the trial court and remand for a new trial.

BRIEF FOR APPELLANT/CROSS-APPELLEE, Lois DeVasier, Administratrix of the Estate of Crady:

Maury D. Kommor
Christopher A. Bates
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BRIEF FOR APPELLEE/CROSS-APPELLANT, William James, M.D.:

W. Gregory King
J. Gregory Cornett
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[8] Cf. Hamby v,. University of Kentucky Medical Center, 844 S.W.2d 431, 433 (Ky.App., 1992) (stating in note 1. that "[b]ecause the statute was so specific [in McKee, supra], the expert testimony supported the duty, and failure to perform the required test was a clear substantial factor in causing McKee's problems, [but here] . . . [w]e do not have such a specific statute").