provided to the defense and county attorneys. The court emphasized that this protocol does not automatically mean that the victim's mental health records are admissible at trial; that is a separate determination.

The court allowed Mr. Cashen to use specific parts of the record in his defense and agreed with the district court's ruling that Ms. Schulmeister's testimony at the deposition fulfilled the requirement of "reasonable probability." It was determined that the victim's records contained evidence in favor of the defense. The case was remanded to the district court, and all parties were directed to adhere to the newly established protocol.

*Dissent*

Justice Cady reasoned that the protocol gives too much power to the defendant to protect the right to a fair trial while compromising the victim's treatment. This balancing test, he said, may prevent victims of domestic violence from reporting abuse or seeking help, as their records may be used against them in court.

*Discussion*

This decision considers both the defendant's and the victim's needs and rights in determining the admissibility of the victim's mental health records. While providing this additional "privilege" for the defendant, the victim's confidential information is exposed, and this exposure can have a negative impact on both victims and mental health professionals. As explained in the dissent, victims may be less likely to come forward and seek help, because their confidential information can, in effect, be used against them. The procedure outlined may deter victims of domestic abuse from seeking necessary help or disclosing their problems fully, making it difficult for them to feel secure within the safe haven of mental health care. This loss of confidence may ultimately lead to a backlash from mental health professionals attempting to regain the trust of their clients. One solution to this dilemma is for mental health professionals to refrain from taking notes or to be selective in what they write. Although this is not the standard, those who choose to work with victims of domestic violence may find that this is one way to help their clients and still maintain confidentiality. Perhaps with time a better balanced compromise will be enacted.

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# Do Verbal Statements Constitute Dangerousness?

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### The Supreme Court of Texas Reversed the Court of Appeals and Remanded for Determination of Factual Sufficiency of Specific Verbal Threats for a Civil Commitment Adjudication

In the case *State v. K.E.W*, 315 S.W.3d 16 (Tex. 2010), the statutory sufficiency of a verbal threat as the basis for the imminent-threat arm of a civil commitment code was deliberated to different ends by a trial court and a court of appeals. On review, the Supreme Court of Texas held that the appellate court's interpretation of "overt act" in a Texas code authorizing civil commitment was impermissibly narrow. The Supreme Court of Texas held that a verbal threat could satisfy the statutory requirement of a "recent overt act" sufficient to authorize involuntary hospitalization of a mentally ill client.

*Facts of the Case*

On April 17, 2008, K.E.W., a patient known to the Gulf Coast Mental Health and Mental Retardation Center (hereafter, Center), presented for a scheduled appointment with Dr. Pugh (a Center psychiatrist). K.E.W., who had been diagnosed with schizophrenia, related that he had been "assigned to impregnate multiple women" (*K.E.W.*, p 18). He then alarmed the Center staff by making multiple requests to see a particular female Center employee. Fearing for the safety of others, Dr. Pugh called the police. K.E.W. refused to cooperate with the police, and was taken to the emergency room at the University of Texas Medical Branch at Galveston.

K.E.W. was cared for at a psychiatric hospital by Drs. Ortiz and Stone. He informed the staff of his plan to impregnate a group of women to create a "better race of humans" (*K.E.W.*, p 18). This "group" included his adult stepdaughter. He intermittently became angry because he believed that certain of the women he had been assigned to impregnate were being kept from him and that hospital staff

members were withholding information regarding the whereabouts of these women. He believed that some of his "intended" women might have left the hospital grounds via "time travel" (*K.E.W.*, p 18). He carried papers that detailed his plans and included a list of the women he believed he had to impregnate. Eventually, he explained that he had to leave the hospital to "accomplish his mission" (*K.E.W.*, p 18).

The state sought a civil commitment order authorizing it to hospitalize K.E.W. at Austin State Hospital for a period not to exceed 90 days. The state proffered medical records, testimony from two Center employees, and testimony from Drs. Ortiz and Stone. K.E.W. presented no evidence. Dr. Ortiz testified that K.E.W. had not made threats to impregnate women at the hospital, nor had he made threats to impregnate women against their will. Nevertheless, Dr. Ortiz was still concerned. She related that, given his "state of mind," she was not sure that K.E.W. would understand that "no means no" (*K.E.W.*, p 25). The trial court granted the civil commitment order and, in a second hearing, an order authorizing the hospital to administer psychoactive medications to the defendant.

K.E.W. appealed. The court of appeals reversed the trial court, holding that there was no evidence of an overt act indicating that he was likely to cause serious harm to others. This finding also invalidated the trial court's order authorizing administration of psychoactive medications.

### *Ruling and Reasoning*

The Supreme Court of Texas reversed the appellate court. It remanded the case to the appellate court to review *K.E.W.*'s "factual sufficiency issues and for further proceedings" (*K.E.W.*, p 27). Much of the court's argument in reversing the appellate court is concerned with proper construal of the language in the Texas Legislature's civil commitment code (Tex. Health & Safety Code Ann. § 573.034[d] (2005)). After citing dictionary definitions of "overt" and "act" (*K.E.W.*, p 21), the court took issue with the appellate court over their sufficiency of evidence argument in a previous Texas appellate case, *Moss v. State*, 539 S.W.2d 936 (Tex. Civ. App. 1976). In *Moss*, the appellate court reversed the trial court because the physicians requesting civil commitment had testified that the patient was dangerous, but would not reveal the factual basis of their opinion. (The patient had apparently made statements during the evaluations that prompted the physicians to pursue civil commitment.) The appellate court in *Moss* asserted that there must be substantial threat of future harm founded on actual, dangerous behavior. The Supreme Court of Texas, in rejecting the *Moss* analysis, pointed out the changes in the Texas code that had occurred since *Moss*. The court related that:

> . . .the statute applicable to this case does not require evidence of a recent overt act that by itself proves the likelihood a proposed patient will cause serious harm to others. It requires only that the overt act "tends to confirm" the likelihood of serious harm. "Tends" means "to have leaning," "to contribute to," or "have a more or less direct bearing or effect" (*K.E.W.*, p 23).

The Supreme Court of Texas also detailed testimony given by the psychiatrists in the civil commitment hearing that indicated that K.E.W. posed a threat to the women he believed were "promised" to him. Dr. Ortiz testified that during the sessions, K.E.W. became "agitated, [and] was intrusive," and "invaded [her] space" (*K.E.W.*, p 24). Dr. Stone testified that K.E.W. posed a "danger to women in general because [he] might mistake any woman for one of the women he believed was promised to him" (*K.E.W.*, p 25). He testified that he had instructed female medical staff to be very careful to "keep the door open" when they spoke with K.E.W. and that he would be concerned if K.E.W. were released, since he might encounter a woman and believe that she is "promised to him" and that she "want[s] to be impregnated" (*K.E.W.*, p 25).

Finally, the court rejected the state's assertion that slightly more than a "scintilla of evidence" of threat was all that was necessary to authorize a civil commitment. The court reiterated the clear-and-convincing-evidence threshold set by the Supreme Court in *Addington v. Texas*, 441 U.S. 418 (1979). Nonetheless, the court held that, in certain cases, a verbal communication alone, even one that is not explicitly threatening, constitutes "legally sufficient evidence" by which a "a reasonable trier of fact" could have "formed a firm belief" as to the need for civil commitment (*K.E.W.*, p 27).

### *Discussion*

K.E.W. did not challenge the finding that he was mentally ill. He urged affirmation of the court of appeals' decision as to the standard of review for legal insufficiency of the evidence. Criminal law statues usually require that for a verbal threat to

qualify as an assault, it must be coupled with an apparent, present ability to cause the harm (such as a raised fist). However, the Supreme Court of Texas cited a case in which the Montana Supreme Court held that an "overt act" could be either physical or verbal (*In re Mental Health of E.M.,* 875 P.2d 355 (Mont. 1994)). The threshold for what is adjudged threatening conduct in those with severe, persistent mental illness has traditionally been lower than that required in criminal statutes. Although a few states have, at least for brief periods, required that "danger to others" in civil commitment cases be proved "beyond reasonable doubt," most states now adhere to the constitutional minimum established in *Addington.* Since both criminal convictions and civil commitments result in at least temporary deprivation of liberty, the lower threshold required in civil commitments suggests that a less stringent evidentiary process is satisfactory.

There is a potential problem here. If verbal statements, even ones as freighted with sexually threatening overtones as those of K.E.W., can satisfy the danger-to-others arm of a civil commitment statute, then states might turn civil commitment actions into civility codes. In setting the threshold in *Addington*, the Court sought to prevent ". . .commit(ing) an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior" (*Addington*, p 427).

In a concurrence in *K.E.W.*, one of the justices related his concern about allowing a verbal statement, which is not overtly threatening, to satisfy the danger-to-others arm. He noted that, considered in the abstract, K.E.W.'s statements "may not rise to the level of a threat" (*K.E.W.*, p 27). Indeed, there is no indication that K.E.W. ever verbalized intent to force females into sexual acts. The justice recommended that the threat arm in this case be grounded in K.E.W.'s nonverbal acts, such as, keeping a "list of women's names as well as detailed plans to impregnate them (among other things)" or his carrying of these documents on his person and his holding them out to those providing his medical treatment (*K.E.W.*, p 28).

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# Can Municipalities Bear *Respondeat Superior* Liability for Failure to Adequately Train Police Officers in Crisis Intervention Techniques?

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### The Fifth Circuit Court of Appeals Upheld the Appellate Court's Grant of Summary Judgment for the City of Houston in a Case Alleging the City's Failure to Adequately Train Their Police Officers in Crisis Intervention Techniques

The United States Court of Appeals for the Fifth Circuit affirmed the lower court's summary judgment dismissal of claims against the city of Houston by the family of the deceased, Omar Esparza, for violations of Mr. Esparza's Fourth and Fourteenth Amendment Rights (*Valle v. City of Houston*, 613 F.3d 536 (5th Cir. 2010)).

#### *Facts of the Case*

Omar Esparza locked himself in the family home and refused to let his parents, the Valles, enter. He had had depression and anxiety for months, and his parents had attempted to get him admitted to a hospital for psychiatric care. After Mr. Esparza refused to come out or let his parents into the house for about an hour, the parents called 911 to get medical assistance for their son. The police were dispatched instead. Mr. Esparza refused their requests that he come out or let them in. The officers contacted their supervisor, a sergeant, who arrived on the scene and assumed control. After failing to convince Mr. Esparza to unlock the door, he contacted the SWAT captain who directed the on-scene supervisor to get a crisis intervention team (CIT) special officer to negotiate with Mr. Esparza. After 30 to 40 minutes of negotiation without success, the sergeant, without consulting or notifying the CIT officer, contacted the SWAT captain who authorized forceful entry into the house.