

Because Dr. Rhoden settled the action against him out of court, it is still an open question to what extent and under what circumstances the prescribing psychiatrist is liable when a patient develops tardive dyskinesia. Psychiatrists should be aware that, via the learned intermediary doctrine, the duty to warn patients about the risks, benefits, and side effects of medications still falls to the prescribing physician in obtaining informed consent. Psychiatrists should be mindful of how they explain the risks and benefits of a medication to a patient and attempt to avoid a general approach when explaining the risks and benefits of antipsychotics. The prescribing psychiatrist remains in the position to give warnings and provide an informed opinion as to whether a specific drug is appropriate.

Disclosures of financial or other potential conflicts of interest: None.

Community Supervision of Probationer

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Department of Corrections' Supervision of a Probationer Who Committed Murder After Prison Release Did Not Constitute Gross Negligence

DOI:10.29158/JAAPL.003900-19

In *Harper v. State*, 429 P.3d 1071 (Wash. 2018), the Washington Supreme Court considered whether the Washington Department of Corrections' (DOC) supervision of probationer Scottye Miller constituted gross negligence and whether the DOC was liable in failing to prevent Mr. Miller from murdering his girlfriend, Tricia Patricelli. Specifically, the court explored if the appeals court had erred in focusing too narrowly on what the DOC had neglected to do without considering what the DOC had done to prevent Mr. Miller and Ms. Patricelli from reestablishing contact while Mr. Miller was on supervised probation.

Facts of the Case

On October 30, 2012, Mr. Miller murdered his girlfriend, Ms. Patricelli, 15 days after being released from prison. During that time, Mr. Miller was being actively supervised by the DOC. Prior to his release, it was also known by Ms. Patricelli, her family, her friends, and the DOC that Ms. Patricelli was physically abused by Mr. Miller in the past and that he would "likely do so again if they resumed their relationship" (*Harper*, p 1071). Nonetheless, after his release from prison, Mr. Miller and Ms. Patricelli resumed their previous relationship.

Ms. Patricelli had lied to the DOC, telling them that she was not in a relationship with Mr. Miller and that she would be moving to a new location unknown to him. Mr. Miller's mother was aware that her son and Ms. Patricelli were in contact, and she signed documents stating Mr. Miller was sleeping at her home, when in fact he was living with Ms. Patricelli. Ms. Patricelli also did not tell her mother, Cathy Harper, that Mr. Miller was living with her. At the time of the murder, the DOC was monitoring Mr. Miller for a 2010 misdemeanor probation and a 2012 misdemeanor probation for assault of Ms. Patricelli that included an order of no contact with her among his other probation conditions.

A DOC victim services advocate communicated with Ms. Patricelli to notify her of Mr. Miller's impending release and to develop a safety plan. A day after his release on October 16, Mr. Miller reported to his DOC supervisor that he was living with relatives rather than at his release address at the Sober Solutions Program. Mr. Miller was not disciplined by the DOC for not seeking approval before changing addresses. The DOC verified that Mr. Miller had begun the process of seeking domestic violence treatment, including scheduling a psychological evaluation. On October 23, Mr. Miller tested negative for drugs and alcohol for a second time and submitted a shelter log stating he stayed with his mother each night. On October 29, the day before Mr. Miller was to report to his DOC supervisor for the third time, the DOC supervisor called Mr. Miller's mother to verify his living arrangements. The next morning, Mr. Miller stabbed Ms. Patricelli at her home over accusations of infidelity.

Ms. Harper sued the DOC in the Superior Court for King County, alleging gross negligence in its supervision of Mr. Miller. She alleged that the DOC should have monitored Mr. Miller using GPS (global positioning monitoring system), conducted home visits, moni-

tored his social media, required a polygraph, and arrested Mr. Miller for changing addresses without notifying the DOC, and should not have authorized him to live in a sober housing program in the city where Ms. Patricelli was also living (although the DOC may not have known this information).

The trial court dismissed the suit on summary judgment. The appeals court reversed, stating that the DOC's "failure to take additional steps to verify Ms. Patricelli's statements or Mr. Miller's housing arrangements could qualify as gross negligence" and that the determination of simple or gross negligence is "basically a question for the jury, not the court" (*Harper*, p 1071). The DOC appealed that decision to the Washington Supreme Court.

Ruling and Reasoning

The Washington Supreme Court unanimously reversed the appeals court decision and affirmed the trial court's order granting summary judgment for the DOC. The court held that Ms. Harper did not produce sufficient evidence that the DOC's supervision of Mr. Miller constituted gross negligence. Specifically, Ms. Harper did not "provide substantial evidence demonstrating that the DOC exercised substantially or appreciably less than that degree of care that a reasonably prudent department would have exercised in the same or similar circumstances" (*Harper*, p 1077).

The court described the standard of gross negligence. It noted that, to prove a case of gross negligence, "Harper must show that DOC 'substantially' breached its duty by failing to act with even slight care" (*Harper*, p 1076, citing *Nist v. Tudor*, 407 P.2d 798 (Wash. 1965)). The court also agreed with the trial court that "reasonable minds" could not differ about the fact that DOC exercised slight care. In a case of simple negligence, one would have to show only "the existence of a duty. . . , breach of the duty, and injury to plaintiff proximately caused by the breach" (*Harper*, p 1076, citing *Degel v. Majestic Mobile Manor, Inc.*, 914 P.2d 728 (Wash. 1996)).

According to *Nist*, gross negligence occurs when a person exercises "substantially or appreciably" less than that degree of care which a reasonably prudent person would exercise in the same or similar circumstances" (*Harper*, p 1077). The court disagreed with the appeals court's assertion that plaintiffs can survive a summary judgment in gross negligence cases by "providing any evidence of negligence—not just

'substantial evidence or seriously negligent acts'" (*Harper*, p 1078).

The court, citing *Nist*, noted that, to analyze a claim of gross negligence on a summary judgment motion, one must first identify the "relevant failure" that is alleged by the plaintiff. The relevant failure is the action that should have been taken, allegedly causing the plaintiff's injury. Next, the court must consider whether the plaintiff presented substantial evidence that the defendant failed to exercise slight care, considering both the relevant failure and any relevant actions that the defendant did take. If the evidence suggests that reasonable minds could differ on whether the defendant may have failed to exercise slight care, then the court must deny the motion for summary judgment. But if the evidence reveals that the defendant exercised slight care, and reasonable minds could not differ on this point, then the court must grant the motion.

The relevant failure alleged by Ms. Harper was that the DOC failed to prevent Mr. Miller from contacting Ms. Patricelli despite a 2012 no contact order and probation conditions to not commit any criminal offenses. The appeals court held that the DOC could potentially be found grossly negligent in a trial with regard to its failure to supervise the no contact order. The court pointed to assertions that the DOC supervisor failed to call both of Ms. Patricelli's numbers; failed to get a verbal confirmation from Mr. Miller's mother that he was residing with her; and failed to assume that Mr. Miller was lying when he reported living with his mother.

The Washington Supreme Court found that the lower court erred in not considering what the DOC did do to prevent Mr. Miller from contacting Ms. Patricelli. These steps included the victim advocate contacting Ms. Patricelli about his release; confirming that Ms. Patricelli relocated to a new unknown address; Ms. Patricelli's assertions she had not seen Mr. Miller; Mr. Miller's requirement to maintain a shelter log with his mother's signature verifying he stayed with her nightly; the DOC supervisor calling Ms. Miller to verify Mr. Miller's living arrangements (although the supervisor did not specifically confirm he was staying with his mother); and the victim services advocate and DOC supervisor discussing any known concerns about the address of Mr. Miller's mother. Additionally, the court noted that Mr. Miller, his mother, and Ms. Patricelli "lied to the

DOC throughout the 15 days that Miller was out on probation” (*Harper*, p 1079).

Regarding the notion that juries should essentially decide simple or gross negligence, the court clarified its ruling in *LaPlante v. State*, 531 P.2d 299 (Wash. 1975) regarding questions of negligence and proximate cause, stating that “courts are not precluded from rendering such judgments” and that the “issues of negligence and proximate cause must be accorded the same treatment as any other following a motion for summary judgment” (*Harper*, p 1079, quoting *LaPlante*, p 302).

Discussion

The Washington State Supreme Court found that the DOC exercised an acceptable level of care in monitoring Mr. Miller after release and in attempting to ensure no contact between Mr. Miller and Ms. Patricelli. The court also pointed out that the appeals court failed to take into account what the DOC did to assure no contact between the two parties and that the DOC actions did not rise to the level of gross negligence. Although the murder of Ms. Patricelli was tragic, the DOC was ultimately not held liable for failing to enforce a no contact order between two parties who voluntarily and covertly began living together. The case is instructive because it discussed the responsibility of the DOC after an inmate is released from prison and how the court analyzed the gross negligence standard.

Disclosures of financial or other potential conflicts of interest: None.

Accommodation for Patients with Mental Illness Under the Americans with Disabilities Act and the Rehabilitation Act

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Seclusion and Withholding Communication Devices Can Act as Intentional Discrimination or Failure of Reasonable Accommodation

DOI:10.29158/JAAPL.3900LI-19

In *Reed v. Columbia St. Mary’s Hospital*, 915 F.3d 473 (7th Cir. 2019), the Seventh Circuit Court of Appeals reversed and remanded the U.S. District Court for the Eastern District of Wisconsin’s grant of summary judgment dismissing Linda Reed’s claims of intentional discrimination and failure to accommodate under the Americans with Disabilities Act (ADA) and the Rehabilitation Act during her psychiatric hospitalization at Columbia St. Mary’s Hospital. The court of appeals held that the hospital forfeited its affirmative defense of religious exemption from the ADA due to failure to plead such a defense until after discovery. The appeals court also stated there were factual disputes regarding Ms. Reed’s Rehabilitation Act claims and therefore dismissal via summary judgment was not appropriate.

Facts of the Case

Ms. Reed was hospitalized voluntarily for suicidal ideation at Columbia St. Mary’s Hospital from March 8 to March 12, 2012. Her psychiatric history included bipolar disorder and posttraumatic stress disorder (PTSD). She also experienced tardive dyskinesia (TD) that interfered with her speech and required a prescription electronic device (called a Dynavox) to assist with communication.

Numerous offenses were alleged by Ms. Reed during her hospitalization. First, she reported her Dynavox was withheld. A nursing supervisor from the hospital testified that the Dynavox was secured outside of her room at night and that she had access to it during the day if she maintained “appropriate” behavior. Ms. Reed also alleged that she was denied access to a telephone, chaplain, and medical records; experienced a near-exposure to allergenic medications; and was escorted off hospital property at discharge by security.

On March 11, 2012, Ms. Reed’s Dynavox was withheld and she was placed in seclusion for approximately two hours. Ms. Reed and the hospital disputed the circumstances precipitating seclusion. Ms. Reed reported she asked for her Dynavox and hospital staff refused access. She noted that her TD and associated movements caused her to spill coffee and fall. She reported then being placed in the seclusion room by a patient-care assistant. Staff from Colum-