

majority opinion. The dissent remarked that the right to interstate travel is not explicitly mentioned in the constitution. In addition, as noted in the dissent, presuming that Jane has a right to travel, the state may have a right to interfere if it has a rational basis for doing so. The testimony regarding the high cost of accepting and caring for individuals like Jane by the state was viewed by some as rationally related to government interests and thus supportive of the state's mandate for a residency requirement in guardianships. Should laws regarding residency requirement in guardianship be found constitutional, it may have the practical effect of boxing in destitute wards due to these requirements. Wards financially dependent on state support may become a group that cannot be transferred. Transfer of guardianship would be more hospitable for individuals who do not seek state support, thus creating two classes of wards: those who would be a financial encumbrance on a state system and those who would not. The guidelines for transfer of interstate guardianship might only be applied to those who could afford it. If this were to occur, further litigation related to this issue would be likely.

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Malpractice

A Subjective or Capacity-Based Test Should Be Applied When Assessing the Contributory Negligence of Mentally Ill Individuals Who Have Committed Suicide

In *Dodson v. Dep't of Human Servs.*, 703 N.W.2d 353 (2005), the South Dakota Supreme Court (SDSC) considered whether the trial court erred in the jury instructions on contributory negligence in a medical malpractice case involving a patient's suicide. In this case, the burden was on the plaintiff to

show that the instructions were both erroneous and prejudicial. The trial court used the standard of a reasonable person to measure the patient's conduct in committing suicide. The supreme court agreed with the plaintiff, that the jury should have been instructed to consider the decedent's mental incapacity in judging her contributory negligence. The case was reversed and remanded for a new trial.

Facts of the Case

Kristi M. Dodson graduated from high school in 1998 and married in 2000. During her high school years, she was involved in numerous activities and had several friends. Shortly after getting married, she developed various health problems and began to display "erratic behavior." In 2001, while hospitalized at Avera McKennan Hospital, she presented as very depressed, and on April 1, about 10 days after admission, she attempted to commit suicide. She was found unconscious but was successfully resuscitated. A diagnosis of bipolar disorder was made during this hospitalization. Three days after her serious suicide attempt, Mrs. Dodson was transferred to the South Dakota Human Services Center (HSC) for long-term treatment. After approximately a week in this facility, she was discharged home. She committed suicide the following day.

Mr. Dodson, individually and as special administrator of the estate of his wife, brought a medical malpractice action against the physicians and hospitals involved in his wife's psychiatric care on the days and weeks preceding the incident. The jury for this trial was given specific instructions to apply the affirmative defenses of contributory negligence and assumption of the risk. For the defense of contributory negligence, the jury was told to apply an objective reasonable-person standard to Mrs. Dodson's conduct, and there was an instruction on the assumption of risk. The instruction for contributory negligence included language stating, "A plaintiff who is contributorily negligent may still recover damages if that contributory negligence is slight or less than slight when compared with the negligence of the defendants" (*Dodson*, 703 N.W.2d, p 355).

The jury found that the Avera McKennan Hospital and the physician there were not negligent, but HSC or the physician who provided her care in that facility breached the applicable standard of care for Mrs. Dodson and that this breach was the legal cause of her injuries. However, they also found that Mrs.

Dodson's contributory negligence was more than slight, thus barring recovery against the appellees and causing the jury not to address the issue of assumption of risk. Mr. Dodson appealed this decision to the Supreme Court of South Dakota alleging that the trial court erred in the instructions given to the jury with respect to contributory negligence and assumption of the risk. The physician at Avera McKennan Hospital and his employer were not part of the appeal because the trial court did not find them negligent.

Ruling and Reasoning

The South Dakota Supreme Court established that the defense of contributory negligence is applicable to medical malpractice actions. Citing *Mid-Western Elec., Inc. v. DeWild Grant Reckert & Assocs., Co.*, 500 N.W.2d 250, 254 (S.D. 1993), the court stated that the general rule is that in judging the contributory negligence of a plaintiff with mental illness, the proper standard to be used holds that "such a person should be held only to the exercise of such care as he or she was capable of exercising, that is the standard of care of a person of like mental capacity under similar circumstances" rather than the objective reasonable-person standard (*Dodson*, 703 N.W.2d, p 357).

In reviewing Mr. Dodson's allegations that contributory negligence instructions should not be given in suicide cases, the court first cited cases supporting that position. For instance, in *Cole v. Multnomah County*, 592 P.2d 221, 223 (Oreg. Ct. App. 1979), it was determined that "a defendant's liability may not be reduced by comparing his negligent conduct with the decedent's intentional suicide since the suicide was the foreseeable risk created by the defendant's negligence." More recently, in the case of *Hoeffner v. The Citadel*, 429 S.E.2d 190, 193 (S.C. 1993), it was held that "where the duty exists to prevent a patient from committing suicide, the very suicide which the defendant has the duty to prevent cannot constitute assumption of the risk or contributory negligence."

Mr. Dodson contended that it was proper to instruct the jury on contributory negligence relying on a 1925 decision by the South Dakota Supreme Court involving a situation similar to his wife's. In *Fetzer v. Aberdeen Clinic*, 204 N.W. 364 (S.D. 1925), a post-surgical delirious patient, jumped or fell from a third-story window. In this case, the court ruled that there can be no requirement to guard against an event that

a reasonable person would not anticipate as likely to happen. However, the opinion points out that the *Fetzer* court also indicated that a defendant may be liable if he has "notice or knowledge of conduct or a condition of mind on the part of the plaintiff which indicates that he intended self-injury or self-destruction" (*Dodson*, 703 N.W.2d, p 357). The court indicated in *Fetzer* that "a subjective standard should be applied in such a case, not an objective standard," as used in the current case (*Dodson*, 703 N.W.2d, 357-8). The South Dakota Supreme Court stated that this 1925 decision is in accord with the majority view in other cases, that a mentally ill person should be required only to exercise such care as he or she is capable of exercising. The court noted that is the standard of care of a person of like mental capacity under similar circumstances that would require a jury to apply a subjective or capacity-based test to a mentally ill plaintiff's conduct, as opposed to the objective reasonable-person standard that was used by the trial court.

The supreme court concluded that the evidence in the instant case was sufficient to show mental incapacity on the part of Mrs. Dodson and to show that her physician and staff at HSC had notice of that incapacity. The suicide attempt on April 1 should have given them notice of this condition and reason to anticipate that Mrs. Dodson could harm herself. The *Dodson* court found that the jury should have been instructed to evaluate the effect of that mental incapacity in judging Mrs. Dodson's contributory negligence, and that, in not doing so, the instructions were erroneous. They also found the instructions to be prejudicial in that, had the faulty instructions not been given to the jury, they probably would have come to a different verdict.

With respect to the instructions of assumption of risk, the South Dakota Supreme Court noted that they were confusing. One of the instructions stated the conditions under which such defense would apply, but it was followed by another instruction that indicated that the assumption of risk did not apply to patients with mental illness. Because the jury found that Mrs. Dodson was contributorily negligent, they made no finding on the issue of assumption of risk. The court held that the trial court should have instructed the jury that this defense of assumption of risk could be used only if, after considering her age, intelligence, experience, and mental condition, Mrs.

Dodson was found to be able to comprehend fully and appreciate the danger of injury.

Discussion

This case affirms a standard to be used in suicide cases when considering the contributory negligence and assumption of risk doctrines. In considering contributory negligence, one argument made by the defense in suicide cases has been that, independent of the errors the clinician makes in the course of treatment, it is the patient's self-imposed conduct that caused the harm. The issue before the court becomes whether mentally ill patients, who are receiving psychiatric treatment for life-threatening behavior that is an expected risk of their illness should be considered contributorily negligent when they die from the very behavior for which they sought treatment and against which defendants had a duty to protect.

Courts nationwide have often addressed this question by looking at the capacity of the individual who commits a high-risk act such as suicide at the time the action is undertaken. The general conclusion has been, as it was in the opinion of the South Dakota Supreme Court, that a plaintiff with mental illness should be expected to be responsible for his self-destructive actions only to the extent that his diminished capacity permits. The rationale behind this position seems to be that as the capacity of a mentally ill individual who attempts or commits suicide decreases, the clinician's responsibility may increase. The diminished capacity of patients impairs their ability to appreciate the risks and dangers involved in their self-destructive acts, arguing against the use of an assumption of risk defense. In sum, the defenses of contributory negligence and assumption of risk have been viewed by many, including the courts, as an often unjustifiable excuse for mental health professionals who failed in their duty to provide reasonable care to individuals with foreseeable life-threatening behavior.

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Competence Requirements for Sexually Violent Predator Hearings

Texas Sex Offender Law Hearings Held to Be Civil; Competence to Stand Trial Not Required for Adjudication as a Sexually Violent Predator

In Re Fisher, 164 S.W.3d 637 (Tex. 2005), is a case concerning the necessity of competence in a civil proceeding adjudicating a person as a sexually violent predator. Questions were raised about whether the proceeding was indeed a civil proceeding, as criminal charges could be filed if the petitioner violated the terms of his outpatient commitment.

Facts of the Case

In January 1987, Michael James Fisher pled guilty to second-degree sexual assault and received a two-year sentence to a facility in the Texas Department of Corrections. Over the course of the next 12 years, Mr. Fisher was found to have violated the terms of his parole on three occasions for such things as a conviction for first-degree aggravated assault (August 1987), an indictment for assault (June 1996), and an indictment for unspecified violations of the terms of his release (May 1999). Mr. Fisher was reportedly hospitalized on numerous occasions between 1991 and 1996 for psychiatric problems. The state of Texas petitioned on October 25, 2000, to have Mr. Fisher adjudicated a sexually violent predator according to the Texas Sexually Violent Predator Act (TSVPA). Mr. Fisher filed a "general denial" and requested a trial by jury for this proceeding.

A trial was convened to determine whether Mr. Fisher was a sexually dangerous predator according to Texas statutes. An evidentiary hearing was conducted, without the presence of a jury, regarding Mr. Fisher's competence to stand trial. Two experts testified that Mr. Fisher was incompetent, as he lacked factual or rational knowledge of the proceedings and could not assist in his defense. Even in the absence of evidence to contradict these experts' testimony, the trial court denied Mr. Fisher's motion for a jury trial regarding competency.

At the trial that was held to determine Mr. Fisher's status as a sexually dangerous person three psychologists and a psychiatrist testified as to his diagnosis and risk for future dangerousness. The experts generally agreed that Mr. Fisher merited diagnoses of Schizo-