

The goal for courts and legislatures is to maintain reasonable treatment standards while not overburdening physicians or encouraging overzealous hospitalization. The *Mulhern* case highlights the difficulty of predicting suicide and the limits of a physician's control over a patient's behavior, especially when the patient does not meet the criteria for commitment. While the *Mulhern* decision supports the idea that patients should have some responsibility for their care, these responsibilities should be more clearly defined. Further, other cases and literature suggest that malpractice evaluations should be individualized both to account better for a spectrum of circumstances (e.g., avoiding dichotomies between in- and outpatients) and to widen the focus from suicide itself to the neglected responsibilities leading up to it.

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Lay Witness Testimony Is Substantial and Competent for Determination of Elder Abuse

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Expert Testimony Not Required in Missouri Department of Health and Senior Services Determination That a Health Care Worker Knowingly Abused a Resident

In a Missouri nursing home, a licensed practical nurse (LPN) used physical force when attempting to medicate an elderly woman with cognitive deficits. In *Stone v. Missouri Department of Health & Senior Services*, 350 S.W.3d 14 (Mo. 2011), the Missouri Supreme Court was tasked to decide whether lay testimony was adequate to find that the resident had experienced harm and whether statutory requirements for placement on the Employee Disqualification List were established.

Facts of the Case

On November 3, 2007, Catherine Ann Stone, LPN, was observed by other staff force-feeding med-

ication to a female resident, K.S., who had diagnoses of dementia and mental retardation. Ms. Stone's behavior was reported to the Department of Health and Senior Services (DHSS) central registry hotline on November 7, 2007 by one of her coworkers; on November 8, 2007, she was terminated from the position. On February 19, 2008, after an investigation by Mary Jane Garbin, a department facility investigator, and pursuant to Mo. Rev. Stat. § 198.070(13) (2006), Ms. Stone was found to have "knowingly or recklessly abused or neglected a resident," and she was informed of the department's intention to place her on the Employee Disqualification List (EDL) for 18 months. The department also concluded that although there were no physical sequelae from the incident, Ms. Stone "abused" K.S. by inflicting "emotional injury or harm" (Mo. Rev. Stat. § 198.006(1) (2006)).

Following the department's notification, Ms. Stone requested an administrative hearing, which occurred on August 28, 2008. At the hearing, there were several contested facts. Ms. Stone and her sole witness, an LPN, asserted that she was acting in a defensive manner, and not an aggressive one. Ms. Stone also reported that she was struck on the left arm by K.S. and that she therefore "could not have used it to forcefully hold back K.S.'s forehead" (*Stone*, p 18). Ms. Stone denied knowledge of any specific care plan for K.S. that directed staff behavior in the event of medication refusal.

The department, relying on the investigation by Ms. Garbin and her witness interviews, reported that on November 3, 2007, Ms. Stone was attempting to medicate K.S. During the attempt, K.S. struck Ms. Stone on the arm. Ms. Stone instructed a nursing assistant to restrain K.S.'s arm while Ms. Stone held her head back and forced medication into her mouth with a small wooden spoon. The department's witnesses also testified that the care plan was posted at the nursing station and that Ms. Stone had training on resident abuse and residents' rights. A dietary aid at the facility testified that she saw Ms. Stone forcefully restraining and medicating K.S. and that K.S. was "screaming differently than usual" (*Stone*, p 17). At the conclusion of the hearing, the hearing officer found that the department's decision was justified, and on October 28, 2008, affirmed Ms. Stone's placement on the EDL.

After the hearing, Ms. Stone filed for a judicial review in the Cole County Circuit Court, which re-

versed the decision. The department appealed, and after a unanimous decision by the court of appeals affirming the circuit court's decision, the case was transferred to the Supreme Court of Missouri for further review.

Ms. Stone argued that there was insufficient evidence to support the hearing officer's decision, because there was no expert witness to substantiate the claim that Ms. Stone knowingly abused K.S. She challenged the hearing officer's conclusion that a lay witness report can be relied on as substantial and competent evidence.

Ruling and Reasoning

The Missouri Supreme Court cited Article V, § 18, of the Missouri Constitution, which authorizes the court's authority in reviewing department decisions and stipulates that the decision from the hearing be supported by "competent and substantial evidence upon the whole record." The court goes on to parse its role by stating, "This Court will not substitute its judgment for that of the administrative law judge on factual matters" (*Stone*, p 20).

The court referred to *Klein v. Missouri Department of Health & Senior Services*, 226 S.W.3d 162 (Mo. 2007), when making the case that expert testimony is not required for a finding of abuse. In *Klein*, the Missouri Supreme Court stated that there is a low threshold for establishment of physical injury or harm and that this low threshold applies equally to emotional injury or harm.

The court noted, "It is within the adjudicator's discretion to determine the necessity of the expert testimony," (*Stone*, p 21). citing Mo. Rev. Stat. § 490.065 (2006), which specifies that in civil cases, if additional scientific, technical, or other specialized knowledge is needed to assist the trier of fact, an expert witness may be called to testify. In cases where the court determines no additional need for expertise, it "may draw conclusions about a person's mental or emotional condition based on evidence of the person's actions or behaviors," and such evidence may come from a layperson's testimony (*White v. Moore*, 58 S.W.3d 73 (Mo. Ct. App. 2001), p 77).

The Missouri statute specifies that, "a person acts 'knowingly' with respect to the person's conduct when a reasonable person should be aware of the result caused by his or her conduct" (§ 198.070 (13)). The administrative hearing officer determined that Ms. Stone abused K.S., because any reasonable person would have known that force feeding medi-

cation is likely to cause harm. Furthermore, the court found that K.S.'s yelling, spitting, and fighting were clear indications that she was experiencing harm.

Ms. Stone cited *Oakes v. Mo. Dept. of Mental Health*, 254 S.W.3d 153 (Mo. Ct. App. 2008), as case precedent in her defense. In that case, a resident had walked from a supervised living facility into the middle of a city street. A staff member (Ms. Oakes) tried to coax the resident out of the traffic and was attacked and spat on by the combative resident; the staff member spat back at the resident. The staff member successfully defended her behavior by claiming that it was instinctive and reflexive and that there was no clear definition of the standard of care. The Missouri Supreme Court in *Stone* refuted this comparison, noting that K.S.'s care plan clearly outlined what Ms. Stone was to do if K.S. refused medication; thus, the standard of care was clearly defined and breached, and the "situation presented no urgency" (*Stone*, p 26). The court further distinguished Ms. Stone's behavior by stating, "Unlike Ms. Oakes's actions, Ms. Stone's actions were not merely reflexive. Her actions were aggressive" (*Stone*, p 26).

Discussion

Stone illuminates themes about the necessity of expert testimony and the determination of an individual's state of mind that are of interest to forensic psychiatry. First, the Missouri Constitution outlines the need for substantial and competent evidence in administrative proceedings, but it leaves it to the trier of fact to determine if that threshold is met. A forensic psychiatrist is often brought in to aid in the interpretation of fact or to draw conclusions regarding an individual's mental state.

Ms. Stone argued that the department assumed the burden of proof and failed to establish definitively that K.S. had been harmed. The court reasoned that harm, although not defined by statute, is inferred in cases where abuse is determined. The court did not find that proof of enduring emotional or physical injury is needed to conclude that an individual has been harmed, nor did it find that K.S.'s impaired mental functioning had any bearing on what constitutes abuse. Therefore, the court deemed the determination of harm to be within its purview.

Ms. Stone further asserted that her mental state could not be determined by lay witness testimony and that the department had the burden to prove that she was either knowing or negligent in her ac-

tions. When addressing her appeal, the Supreme Court of Missouri relied on the statutory definition of abuse, neglect, and knowing action. Using the definition of what it means to act knowingly, the court must answer whether a reasonable person would expect abuse to be the outcome of Ms. Stone's actions and also must determine whether Ms. Stone was "a reasonable person" at the time of the incident and should have expected that outcome herself. The court held that both of these determinations are within the skill set of nonpsychiatrists.

Second, in citing *Oakes*, Ms. Stone was seemingly attempting to draw a connection between her behavior and the conduct of Ms. Oakes. The court refuted this comparison citing, in part, that Ms. Stone acted aggressively, whereas Ms. Oakes acted reflexively. One can make the case that these two concepts need not be mutually exclusive. Rather than drawing a distinction between reflex and aggression, the court seems, in this comparison, to contrast controllable and uncontrollable behavior. The difference between controllable behavior and uncontrollable behavior is not always so clear, and in cases where this distinction becomes germane, a forensic psychiatrist could be called in to offer an expert opinion.

The challenges that patients like K.S. face in the health care system are far from unique. It is necessary to appreciate the difficult task faced by a system of care that is being strained by a growing number of individuals who lack the capacity to make medical decisions and who may have a tendency to act out aggressively. Appropriate staffing and institutional training programs focused around recognition and intervention with challenging patients will become increasingly necessary.

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Not Competent and Not Restorable: Now What?

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Connecticut Supreme Court Rules That a Defendant Found Not Competent and Not Restorable Remains Under the Jurisdiction of the Trial Court Until the Statute of Limitations Elapses

In *State v. Johnson*, 26 A.3d 59 (Conn. 2011), the Supreme Court of Connecticut held that defendants found not competent and not restorable under Conn. Gen. Stat. § 54-56d(m)(5) (2007) remain under the jurisdiction of the trial court, regardless of the seriousness of their charges, until the statute of limitations for their offense expires. In addition, the court clarified that the statute of limitations period for bringing criminal charges begins on the date the crime is allegedly committed.

Facts of the Case

In January 2007, Keir Johnson was arrested and charged with operating a motor vehicle while his license was suspended and with improper illumination of a license plate. He pleaded not guilty to these charges in March 2007. In September 2007, he was arrested and charged with breach of the peace in the second degree, which the state later changed to assault in the third degree. Mr. Johnson was also charged with violation of probation related to an offense in 2006. The trial court subsequently issued a protective order against Mr. Johnson related to the events of September 2007. In October 2007, Mr. Johnson pleaded not guilty to the assault charge and denied having violated probation. In February 2008, the trial court ordered a competency-to-stand-trial evaluation. Mr. Johnson was found not competent but restorable, and was referred to the Department of Disability Services (DDS) for 90 days of outpatient restoration. In May 2008, Mr. Johnson was arrested for violating the protective order from the September 2007 incident (a felony), and he pleaded not guilty in June 2008. In a second competency hearing in November 2008, the court concluded that he was not competent and not restorable under Conn. Gen. Stat. § 54-56d(m) (hereafter referred to as sub(m)) and placed him in the custody of the DDS.

In June 2009, Mr. Johnson motioned to dismiss all the charges against him. The trial court concluded that it did not have personal jurisdiction over him, given that he was found sub(m) in the prior proceedings, and consequently dismissed all charges without prejudice. In addition, the court did not feel that maintaining jurisdiction over Mr. Johnson after his sub(m) finding was appropriate, because his actions