

ing its determination. When considering what the best interests of the child are, the court should take into account the likelihood that the parent in question would be able to resume parental responsibilities within a reasonable period of time; the child's adjustment to home, school, and community; the interaction of the child with the parents and siblings; and whether the parent has played or continues to play a constructive role in the child's life.

In this case, the court made it clear that, given the false allegations and the fitness of Ms. Cegalis, the decision of the court was a challenging one. The court relied heavily on the testimony of the child's therapists, who opined that the child would endure further trauma if abruptly placed in the care of his mother without having first received trauma-informed care. Although the court's goal was not to reward Mr. Knutsen and his wife for their behavior, the central concern was the child's psychological well-being.

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## Mental Health Staff at Prison Not Liable for Failure to Warn Unidentifiable Victim Upon Release of Inmate

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### Liability and Duty to Warn Clarified for Mental Health-Contracted Employees Who Do Not Hospitalize Inmates at the End of Their Prison Terms

*Holloway v. State*, 875 N.W.2d 435 (Neb. 2016), reviewed the decision of a district court in Nebraska. Shamecka Holloway sued the State of Nebraska, the Department of Corrections, a contracted mental health company, and the contracted physicians after she was shot and injured by Nikko Jenkins after his release from prison. Ms. Holloway stated that the named parties had an obligation to the citizens of Nebraska to treat all inmates in their care and that

they had breached their duty in the release of Mr. Jenkins. The district court granted the defendants' motions to dismiss the case. Ms. Holloway appealed to the Nebraska Supreme Court, arguing that the district court erred in granting the motion to dismiss, in finding that the commitment of Mr. Jenkins at the end of his prison term was discretionary, and in finding that the employees exercised due care.

#### Facts of the Case

Mr. Jenkins was sentenced to 21 years in the Nebraska Department of Corrections. During his incarceration, he "repeatedly exhibited signs of a serious mental health problem" (*Holloway*, p 441) and requested treatment. He was treated by physicians who were contracted by the prison to provide treatment.

Mr. Jenkins was released after serving 10 years of his sentence on July 30, 2013. On August 24, Mr. Jenkins shot Ms. Holloway, resulting in her injury.

Ms. Holloway sued the State of Nebraska, the Department of Corrections (DOC), the behavioral health administrator for the DOC, Correct Care Solutions (CCS, the contract company for mental health services), and two physicians who treated Mr. Jenkins during his incarceration, through a contract with CCS. Ms. Holloway alleged that the named individuals "evidenced a deliberate indifference to the mental health needs" of Mr. Jenkins, because of their knowledge that Mr. Jenkins "presented a substantial risk of serious bodily harm to the citizens of Nebraska" (*Holloway*, p 441) and, specifically, to Ms. Holloway. She alleged that the appellees' acts of omission and commission caused her emotional damage. She alleged that the appellees had a duty to protect all the citizens of Nebraska and that this duty was breached when they released Mr. Jenkins. She claimed that the state knew or should have known that harm to her was foreseeable after Mr. Jenkins was released.

The appellees filed motions to dismiss the case. One motion stated that Ms. Holloway failed to state a claim on which relief could be granted. Another motion was to halt discovery pending the motion to dismiss the case. Ms. Holloway later moved to dismiss the complaint against one of the physicians, which the court then dismissed.

The district court granted the motion to dismiss with prejudice. The district court found that the ap-

pellees had discretion in choosing against commitment of Mr. Jenkins at the end of his prison term. The district court also dismissed the case against CCS, stating that Ms. Holloway failed to state a negligence claim and that Ms. Holloway did not claim that a special relationship existed between CCS and Mr. Jenkins.

Ms. Holloway appealed to the Nebraska Supreme Court.

*Ruling and Reasoning*

The first point that the court addressed was the discretionary nature of the decision for civil commitment of Mr. Jenkins at the end of his prison sentence. The court noted that Ms. Holloway and the appellees used two different statutes regarding civil commitment.

Ms. Holloway referred to the Nebraska Mental Health Commitment Act § 71-920 (Neb. Rev. Stat. § 71-920 (2012)), which states, “A mental health professional who, upon evaluation of a person admitted for emergency protective custody . . . determines that such person is mentally ill and dangerous shall execute a written certificate . . . not later than twenty-four hours after the completion of such an evaluation.” Ms. Holloway stated that the word “shall” means that there was no discretion in the decision to civilly commit Mr. Jenkins.

However, the court found that Ms. Holloway applied the wrong statute, since Mr. Jenkins was not admitted for emergency protective custody in a medical facility. Rather, he was an inmate who was receiving mental health treatment while in the custody of the DOC. At no point was he admitted to a medical facility. Thus, the statute did not apply in his case.

The statute that was applicable uses language that states that the decision for civil commitment is discretionary. Section 71-921(1) (Neb. Rev. Stat. § 71-921 (2006)) states that, “Any person who believes that another person is mentally ill and dangerous may communicate such belief to the county attorney.” The use of the word “may” implies that the decision to civilly commit an individual is a matter of choice.

Furthermore, the court noted that the state did not have control over Mr. Jenkins following his release from prison. Mr. Jenkins had completed his sentence, and the only options were to discharge him or to seek his civil commitment. As the decision for

civil commitment of an individual is discretionary, the court found that the district court properly dismissed Ms. Holloway’s claim against the state, the Department of Corrections, and the named individuals.

The second claim that the court addressed was that against CCS. The district court had found that Ms. Holloway failed to state a claim of negligence against CCS. Her complaint was directed toward the physician’s negligence in failing to treat Mr. Jenkins adequately. However, Ms. Holloway voluntarily dismissed the complaint against that physician, stating that she had adequately performed her duties. Under the doctrine of *respondeat superior*, an employer can be held responsible for the negligent acts committed by an employee in the course of their employment. However, Ms. Holloway stated that the doctor was not negligent. Therefore, the district court was correct in its decision to dismiss the case against CCS as a result of Ms. Holloway’s dismissal of her claims against the physician.

The third claim the court addressed was the liability of CCS for failing to warn Ms. Holloway of the potential danger posed by Mr. Jenkins. Ms. Holloway alleged that CCS was negligent in its decision to not warn others of the threat that Mr. Jenkins posed to the public. The court referenced the state’s Mental Health Practice Act and the Psychology Practice Act to determine what liability a mental health practitioner faced for failing to warn others of the threats of violence of a patient. These acts state that the victim must be “reasonably identifiable” for a practitioner to incur liability. The court found that Ms. Holloway was not a “reasonably identifiable” victim of Mr. Jenkins, because he had never made any threat of violence against her.

Further, Ms. Holloway alleged that all the citizens of Omaha, Nebraska, were potential victims of Mr. Jenkins, as he allegedly told agents of the state that he intended to cause “bodily harm and injury to persons at random” (*Holloway*, p 449). The court did not agree that the entire population of a city could be a “reasonably identifiable victim” and therefore found that CCS was not liable as a mental health provider.

The court also found that there was no legal duty owed to Ms. Holloway by CCS because there was no “special relationship” between Mr. Jenkins and CCS. The court stated that the relationship necessary to create liability was a custodial relationship, and Mr. Jenkins was a prison inmate, under the custody of the

Department of Corrections, not in the custody of CCS. Therefore, CCS was not liable, since there was no custodial relationship.

#### Discussion

The main question in this case was the responsibility of mental health providers to third parties when they encounter a patient with violent propensities. In this case, Ms. Holloway asserted that Mr. Jenkins should have been hospitalized at the end of his prison sentence and that she, as well as the citizens of Omaha, should have been protected from Mr. Jenkins or warned of his potential for violence. The first case that dealt with these claims was *Tarasoff v. Regents of the University of California* (551 P.2d 334 (Cal. 1976)), which established the duty to protect third parties, a duty that could be discharged by warning the potential victim. Following the *Tarasoff* decision, many states in the United States codified the specific circumstances that required a duty to warn.

In 1980, the Nebraska District Court decided *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980). This case substantially expanded the liability of physicians, as the court found that it was not necessary to have a specific foreseeable victim, rather the public at large could be defined as a foreseeable victim. Nebraska later passed a *Tarasoff*-limiting statute that limited the third parties to “reasonably identifiable victims,” as seen in the case of *Holloway v. State*.

In the 40 years since *Tarasoff* was decided, states have dealt with the duty to warn third parties in many different manners. As of 2010, according to a review by Griffin Edwards, 23 states have a duty to warn or protect codified in a statute; 10 states have a duty to warn or protect supported by precedent but not codified by statute; 11 states do not have any formal duty to warn or protect but allow for the breach of confidentiality if a threat is present; and six states offer no guidance on these matters (Edwards GS: Database of State *Tarasoff* laws. Available at the Social Science Research Network, Abstract 1551505, 2010. <http://ssrn.com/abstract=1551505>. Accessed on June 18, 2016). Given the range in approaches to managing liability, psychiatrists should know the current legal standard in their states, to ensure that they practice in a manner consistent with the law.

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## GPS Monitoring for Life

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### Lifelong GPS Monitoring System for Sex Offenders Released from Civil Commitment Does Not Violate Fourth Amendment Rights or the Ex Post Facto Clause of the Constitution

In *Belleau v. Wall*, 811 F.3d 929 (7th Cir 2016), the Seventh Circuit Court of Appeals addressed whether a Wisconsin law requiring that persons released from civil commitment for sexual offenses wear a GPS monitoring device 24 hours a day for the rest of their lives violates those individuals' Fourth Amendment rights and the *Ex Post Facto* Clause of Article I of the Constitution. The court reversed a lower court decision and determined that the Wisconsin law was not a violation of Fourth Amendment rights nor an *ex post facto* law, as GPS monitoring in this case is considered to be a reasonable search with the purpose of prevention, not punishment.

#### Facts of the Case

Michael Belleau was convicted in 1992 in a Wisconsin state court of having sexually assaulted a boy repeatedly for 5 years, beginning when the boy was 8 years old. He was sentenced to one year in jail and probation. Before his period of probation ended, however, he was convicted of having sexually assaulted a 9-year-old girl in 1988 and was consequently sentenced to 10 years in prison. He was initially paroled after 6 years, but his parole was revoked a year later after he admitted to having sexual fantasies about two other prepubescent girls. He acknowledged that he would have molested these girls had he had an opportunity to do so.

Mr. Belleau was scheduled to be released from prison in 2005, but instead was civilly committed to the Sand Ridge Secure Treatment Center after a civil trial in 2004, where he was classified as a “sexually violent person” (*Belleau*, p 931). In 2010, he was released from the treatment center after a psychologist opined that Mr. Belleau was “no longer more likely than not to commit further sexual assaults”