burden of providing specific reasons for discounting the opinion of an examining source, particularly when ordered by the Appeals Council to solicit the additional opinion. The ALJ did not do this in Ms. Ringgold's case. Although the Social Security Commissioner's brief highlighted several potential flaws in Dr. Crall's opinion that could have served as a basis for discounting her opinion, this reasoning came *post hoc*, after the ALJ's decision was already made. The ALJ himself did not give any specific reason for his disregarding Dr. Crall's opinion. He could have pointed to some of the concerns expressed by the Commissioner, but he did not.

The Tenth Circuit Court of Appeals determined that the ALJ's error was not harmless. The court reasoned that if Dr. Crall's opinion had been given sufficient weight, the ALJ might have found that Ms. Ringgold was incapable of semiskilled jobs, such as cleaning and price marking. For example, since Dr. Crall noted that Ms. Ringgold had marked difficulty interacting with supervisors and the public, it is unlikely that she could perform well in any job. Ms. Ringgold had a long history of conflict with supervisors and leaving jobs, which provided further support for Dr. Crall's findings. The court of appeals reversed the district court's decision and remanded the case with instructions that the Social Security Administration conduct further proceedings giving sufficient weight to Dr. Crall's opinion.

Discussion

This case highlights the importance that courts place on proper consideration of all available medical opinions in Social Security disability determinations. The Tenth Circuit Court of Appeals found the ALJ in error, despite his review of multiple sources of evidence, including Ms. Ringgold's testimony about her work history, daily functioning, and limitations; the testimony of a vocational expert; medical records from her treatment providers; and another consulting psychologist's opinion. The sole error in Ms. Ringgold's six-year-long process of benefits applications, denials, and appeals was the ALJ's failure to state explicitly why he discounted the opinion of one psychologist. This one error was sufficient for the Tenth Circuit Court of Appeals to reverse the lower court's decision.

The same appellate court had considered a similar question in *Best-Willie v. Colvin*, 514 F. App'x 728 (10th Cir. 2013), where it affirmed a Utah district court's decision to deny Social Security disability benefits. In that case, Michelle Best-Willie argued that the ALJ had erred in discounting the opinions of her two treating physicians: a primary care doctor and a psychiatrist. Using an analysis similar to that articulated in *Ringgold*, the court concluded that the ALJ's decision was not in error. In his decision, the ALJ had stated explicitly that the medical providers' opinions supporting Ms. Best-Willie's disability application were not to be given controlling weight because their findings were inconsistent with the totality of the medical records and because they did not provide objective evidence of functional limitations. Since the ALJ clearly articulated his reasoning for discounting the treating physicians' opinions, the appellate court concluded that he had considered all the available evidence and appropriately reached a determination about Ms. Best-Willie's disability application.

The court's insistence upon on clear reasoning in Social Security benefits decisions is relevant for forensic evaluators. Forensic psychiatrists and psychologists who perform consultative evaluations in these cases are also well advised to articulate the basis for their conclusions, thereby setting the stage for later judicial opinions. For example, a forensic consultant evaluating Ms. Ringgold should describe her functional limitations in detail, account for inconsistencies between her statements and other medical records, and state the reasoning for an opinion as to whether the functional deficits are a result of depression or substance abuse. Including this type of analysis may persuade the ALJ to assign more weight to the opinion. Without it, consultants run the risk of having their conclusions discounted during subsequent judicial reviews.

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Expansion of the Duty to Protect Includes Foreseeable Victims in the Zone of Danger

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The Supreme Court of Vermont Holds That Psychiatrists Have a Duty to Warn the Caretakers of a Dangerous Patient About Foreseeable Risk, Despite the Lack of a Specific Threat, and to Inform Them on How to Take Measures to Protect Third Parties

In *Kuligoski v. Brattleboro Retreat & Northeast Kingdom Human Services*, 2016 Vt. 54A (Vt. 2016), the Supreme Court of Vermont considered whether an inpatient psychiatric service was negligent, not only in discharging a patient and failing to warn his parents of his risk to the public, but also in failing to train the patient's parents in how to manage him so as to mitigate the risk he posed to the public. Separate counts were filed against outpatient services including failure to warn the parents. The majority opinion by the Supreme Court of Vermont breaks new legal ground in risk mitigation and liability and establishes a new legal duty for psychiatrists beyond the conventional boundaries iterated in *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976) and its progeny.

Facts of the Case

(Note: The facts outlined in the decision are supplemented here with undisputed facts cited in a different action brought by the Kuligoski family.)

On October 9, 2010, E.R. was voluntarily admitted to the Psychiatric Department of Central Vermont Medical Center (CVMC) for treatment of a "psychotic disorder" after having threatened young children at his home. He was transferred to Vermont State Hospital on October 16, then a week later to the Brattleboro Retreat (BR), a nonprofit psychiatric hospital in Windham County, Vermont. E.R.'s clinical presentation was consistent across these hospitalizations. It included auditory and visual hallucinations, suicidal and homicidal ideation, and poor judgment. He was deemed to represent a danger to himself, his family, and others. He had a consistent diagnosis of schizophreniform disorder and was prescribed antipsychotic and anxiolytic medications.

E.R. was discharged from BR in November 2010. His physician expressed concerns in the medical record that E.R. had recently stopped taking his medication and had experienced an exacerbation of his hallucinations, and that there was a high risk of poor compliance with aftercare plans. At the time of his discharge, E.R.'s parents were told that their son was "going through a phase" and "would recover." E.R.'s mother was told to monitor and administer her son's medication daily. He was referred for outpatient treatment at Northeast Kingdom Human Services (NKHS). In mid-December 2010, after E.R. disclosed to his mother that he had stopped taking his medication, she called and informed a physician on his outpatient treatment team. The physician indicated that this was a cause for concern, but that E.R. had to decide to take care of himself. After his mother's call, no one at the clinic reached out to E.R., and he was not seen there for further assessment and treatment.

On February 26, 2011, E.R. went with his father on a visit to an apartment building owned by his family. Once inside, E.R. proceeded to the basement, and without known provocation, assaulted Michael Kuligoski, who was working on the furnace, "causing serious injuries."

Mr. Kuligoski's family filed a complaint against BR and NKHS before the Windham County Superior Court. The complaint alleged failure to warn E.R.'s parents of his risk to the public, as well as failure to train his parents in how to supervise E.R., monitor and manage his medications, and take appropriate steps to protect potential victims.

In April 2014, the defendants separately filed motions to dismiss, citing the Vermont Rule of Civil Procedure, Vt. Code R. § 12(b)(6) (2014), arguing that the plaintiffs failed to state a claim upon which relief can be granted, since the defendants owed no duty to protect Mr. Kuligoski from E.R., nor were the actions of BR and NKHS the proximate cause of Mr. Kuligoski's injuries. The motion was granted by the superior court, relying upon the definition of a potential victim that establishes a duty to protect, as elucidated in *Peck v. Counseling Service of Addison County, Inc.*, 499 A. 2d 422 (Vt.1985). In *Peck*, the Supreme Court of Vermont held that a mental health agency had a duty to exercise reasonable care to protect an identifiable victim when its patient posed a serious risk of danger, in that case, threatening to burn his family's barn, a threat that he carried out.

The Kuligoski family appealed to the Vermont Supreme Court, arguing that the *Peck* holding should in fact extend beyond identifiable victims, based on current tort laws, as well as public policy which emphasizes the protection of the public from dangerous individuals.

Ruling and Reasoning

Justice Dooley delivered the opinion for the three-to-two majority; Justices Robinson and Morris joined. The Supreme Court of Vermont held that

BR had a duty and failed to discharge it. It is worth noting that the court used the term "duty to warn"; however, it can be reasonably inferred that the majority's opinion was concerned with the duty to protect. The holding was based primarily on the doctrine of the "zone of danger" as described in *Hamman v. County of Maricopa*, 775 P.2d 1122 (Ariz. 1989), a case the court said was very much like the *Kuligoski* case. The *Hamman* court noted the "constant physical proximity" of the parents to their son, placing them at high risk as the "most likely victims" of his violence and rendering them foreseeable victims, despite the absence of a specific threat against them. In *Kuligoski*, the court reasoned that E.R.'s parents fell in the "zone of danger" specifically because they assumed a caretaker role upon his discharge, and he had threatened his caretakers (staff) repeatedly while at BR.

The duty to train the parents presented a legal and ideological challenge to the court. Ultimately, the court found that since E.R.'s parents were not only involved in his discharge and aftercare, but also assigned the responsibility to administer drug treatment and monitor his medication compliance at home, BR essentially transferred custody of a patient with psychosis to caretakers who lacked psychiatric training. It followed that BR owed a duty of care to supply the patient's parents with "sufficient information" so that they could undertake their responsibility as caretakers, assist in their son's treatment, and minimize the risk of any violent behavior in which E.R. could engage. The court expressed this duty to train as a "duty to inform."

Dissenting Opinions

The two dissenting justices contemplated long-term repercussions of the ruling. In Justice Reiber's dissent, the salient argument was that of the slippery-slope aspect of extending the duty to warn beyond identifiable victims. He argued that the majority had expanded the duty of clinicians to control dangerous patients so as to include "the public at large." His dissent poignantly cautioned that "To suggest that a threat against a nurse, therapist, physician, or other mental health care provider somehow represents a threat against an identifiable class of all family members and friends who help with the patient's outpatient care would stretch the 'zone of danger' doctrine beyond recognition" (*Kuligoski*, p 55). Justice Reiber also expressed concerns vis-à-vis the ramifications of the decision on the policy of treating psychiatric patients in the least restrictive environment, given that the fear of this newly dilated circle of liability may drive unwarranted psychiatric commitments.

Justice Skoglund not only joined Justice Reiber in his dissent, but also voiced grave misgivings in his own dissent. He deemed that lowering the threshold for disclosures to include foreseeable victims was so detrimental as to be "potentially fatal" to therapeutic relationships between clinicians and recipients of care. He underscored that generalized threats by patients are commonplace in psychiatric practice.

Discussion

Although the Vermont Supreme Court's majority opinion specified that the duty to inform (formerly duty to train) was to be explored and defined by the trial court within the context of this particular case, this decision raises many questions regarding the application of this duty in clinical practice. The dissent astutely pointed out the lack of existing professional standards or clinical convention around this new duty. What constitutes "sufficient information" to be given to the caretakers so as to satisfy this duty may depend on several variables, including the caretakers' ability to comprehend, their willingness to engage, or their concurrence with the treatment plan. The participation of the mental health profession in the elucidation of this duty can lead to a more workable model that involves caretakers more intimately in aftercare while placing realistic expectations of duty and liability on practicing clinicians.

In *Tarasoff*, the court highlighted the importance of examining the "foreseeability of harm" toward an identifiable victim. At face value, swinging the pendulum of the duty to warn away from the specificity of "identifiable victims" (as in *Tarasoff* and *Peck*) toward the sensitivity of "foreseeable victims" (as in this ruling) is intended to benefit the safety of individuals in the "zone of danger" in proximity to the patient. The case of *Regents of University of California v. Superior Court of L.A. County*, 193 Cal. Rptr. 3d 447 (Cal. Ct. App. 2015), which is currently before the Supreme Court of California, mirrors these competing notions. In that case, the American Psychiatric Association officially joined in an *amicus curiae* brief expressing concerns about the effects of such a duty expansion on expectations of confidentiality, that it may discourage patients from seeking care, and pos-

sibly deter psychiatrists from assuming care for potentially violent and risk-laden patients.

Addendum

The Supreme Court of Vermont withdrew the decision it initially released. The majority's new opinion affirmed and reversed the same count dismissals as the previous opinion. However, the court added caveats that carve out the extent of liability incurred by providers as a result of this holding. Specifically, it identifies three conditions that must be met for the duty to inform caretakers to apply. The caregiver must be "actively engaging" with the provider in relation to the patient's care, the treatment or discharge plans must "substantially rely" on the caretaker's ongoing involvement, and the caregiver must be within the zone of danger, rendering the caregiver susceptible to the patient's "violent propensities." Once established, this duty is fulfilled by providing "reasonable information to notify the caregiver of the risks, and of steps he or she can take to mitigate the risks" (*Kuligoski*, p 41). The court also assigned the burden of defining reasonable disclosure, as well as proving duty, breach and causation to the plaintiffs. Justice Reiber amended his dissent, describing these new "obstacles" to litigation as "cold comfort" to mental health providers, given that the duty to inform, as laid out by the *Kuligoski* majority, remains "amorphous."

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Inmate Raises Extreme Emotional Disturbance Defense

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Can Prison Conditions Ever Be So Abhorrent as to Give Rise to an Extreme Emotional Disturbance Claim?

In *Johnson v. State* 2016 Ark. 156 (Ark. 2016), the Supreme Court of Arkansas held that impending confiscation of personal property was not sufficient provocation to support instructing a jury to consider an extreme emotional disturbance (EED) defense. Furthermore, the court affirmed that the state was not required to disclose information regarding general violence in the East Arkansas Regional Unit, where Mr. Johnson was incarcerated.

Facts of the Case

On January 20, 2012, Latavious D. Johnson was approached by correctional officer Barbara Ester in the East Arkansas Regional Unit, where Mr. Johnson was serving a life sentence for first-degree murder. Officer Ester accused Mr. Johnson of wearing contraband shoes, which Mr. Johnson denied. Mr. Johnson was sent to his cell to remove his shoes. Officer Ester left Mr. Johnson while she sought Lieutenant Steven Lane for assistance with confiscating the alleged contraband shoes. While at his cell, Mr. Johnson retrieved a personal property inventory sheet recorded during his prison intake, which did not label his shoes as contraband, and had been signed by Officer Ester. Mr. Johnson also retrieved a homemade weapon, which he subsequently used to stab Officer Ester upon her return with Lieutenant Lane, resulting in her death.

In the original trial held in Lee County Circuit Court, Mr. Johnson was tried by a jury for capital murder. He provided testimony wherein he admitted to stabbing Officer Ester but denied realizing at the time of the stabbing that his actions could result in Officer Ester's death. Mr. Johnson was convicted of capital murder and sentenced to death. Pursuant to Ark. R. App. P. Crim. Rule 10, in any case involving a conviction where the sentence is death, an automatic appeal is filed with the circuit court clerk and reviewed by the Supreme Court of Arkansas.

In his appeal to the Supreme Court of Arkansas, Mr. Johnson stated he was under extreme emotional distress at the time of the stabbing, and therefore, the trial court jury should have been instructed to consider his mental state at that time, including the EED defense and the accompanying lesser charge of manslaughter. Ark. Code Ann. § 5-10-104 (2012) states that a person commits manslaughter if he "causes the death of another person . . . under the influence of extreme emotional disturbance for which there is a reasonable excuse" and "the reasonableness of the excuse is determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believed them to be." Mr. Johnson asserted that