

The majority opinion acknowledged that aspects of the interaction between Dr. Patterson and Mr. Johnson made “this question close.” They explained that “every *Miranda* inquiry is highly fact specific” (*Johnson*, p 693), and their ruling was only “for this unique record.” The court ruled that there was no Fifth Amendment violation in admitting the evidence.

Dissent

The dissent stated the trial court erred in admitting Mr. Johnson’s statements to Dr. Patterson, and further, that the error was prejudicial to Mr. Johnson’s conviction of first-degree murder. Citing *Leyra v. Denno*, 347 U.S. 556 (1954), the dissent noted that sending in a medical professional is a tactic used by law enforcement. The dissent also pointed out that the practice of evaluating suspects prior to consultation with their legal counsel “has been condemned as unethical by professional psychiatric organizations (Janofksy, *Lies and Coercion: Why Psychiatrists Should Not Participate in Police and Intelligence Interrogations* (2006) 34 J. Am. Acad. Psychiatry & L. 472, 475–476” (*Johnson*, p 640). The dissent further pointed out the multiple *Miranda* and *Edwards* violations and Dr. Patterson’s “lingering presence” under the guise of a “mutual, rather than adversarial” relationship.

The dissent recognized an insufficient break in the stream of events to insulate Mr. Johnson’s statement from the effects of prior violations. Citing *Smith v. Illinois*, 469 U.S. 91 (1984), the dissent asserted that *Edwards*’ “bright-line rule” that all questioning must cease after an accused requests counsel could not be squared with the majority opinion.

The dissenting opinion considered ramifications of the majority ruling, stating that “today’s decision tells law enforcement officials that there is ‘nothing to lose, and a useable confession to gain, if they simply disregard the suspect’s requests for counsel’ and continue to interrogate the suspect with shifting and ever subtler tactics” (*Johnson*, p 729).

Discussion

This case addressed whether the trial court erred when it denied the motion to suppress testimony from a prosecution-retained psychiatrist who evaluated Mr. Johnson after he had previously invoked his *Miranda* and *Edwards* rights.

The majority and dissenting opinions differed in their appraisal of the context surrounding the psychiatric evaluation. The majority opinion’s review of relevant case law found that the exchange between Mr. Johnson and Dr. Patterson was analogous to *Edwards* exceptions and concluded that the testimony was admissible.

The dissenting opinion viewed the psychiatric evaluation as a “ploy” in which the psychiatrist acted as the “good cop” to elicit self-incriminating testimony after detectives failed. This case examines the problems that may occur when, despite being warned about the role of the evaluator, defendants may still respond as if a treatment relationship exists. The dissent noted that both the American Psychiatric Association and the American Academy of Psychiatry and the Law have adopted ethics principles related to this concern.

Duty to Warn and Actual Communication

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A Duty to Warn Arises When a Threat is Actually Communicated to the Psychiatrist

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In *Rodriguez v. Lasting Hope Recovery Center*, 955 N. W.2d 707 (Neb. 2021), the Supreme Court of Nebraska ruled that summary judgment was properly granted to defendants in a wrongful death action brought against them for failure to warn and protect a woman from her ex-boyfriend, who allegedly killed her

shortly after being discharged from Lasting Hope. The court ruled that, under state law, psychiatrists owe no legal duty to warn and protect where the patient does not actually communicate to the psychiatrist a threat of harm to the victim.

Facts of the Case

Mikael Loyd visited the Omaha Police Department on August 8, 2013, and indicated that he blamed his mother for his father's 1995 murder and wanted law enforcement officials' help in having his mother killed in retaliation. Officers contacted Mr. Loyd's grandmother who confirmed that he had a history of mental illness and was threatening to kill his mother. Police called Mr. Loyd's mother in North Carolina to warn her of his threats. Law enforcement officials discovered Mr. Loyd had an outstanding arrest warrant for misdemeanor assault and battery of his girlfriend, Melissa Rodriguez. Concerned about his mental health needs and potential dangerousness, officers placed Mr. Loyd under emergency protective custody and transported him to Lasting Hope Recovery Center.

At Lasting Hope, Mr. Loyd was assigned to a treating psychiatrist, Dr. Jeana Benton, who was employed by the University of Nebraska Medical Center Physicians (UNMC Physicians). During Mr. Loyd's initial evaluation on August 9, 2013, Dr. Benton determined he was "very paranoid, homicidal and delusional and [a] risk for harm to others were he to be outside the hospital environment at this time" (*Rodriguez*, p 713). He was admitted to Lasting Hope from August 8 to 14, 2013. During his course of hospitalization, Mr. Loyd communicated with his mother and Ms. Rodriguez on the telephone and Ms. Rodriguez visited him twice at the facility. During her second visit, Ms. Rodriguez terminated her relationship with Mr. Loyd. Based on Mr. Loyd's statements regarding his expressed desire to kill his mother, Lasting Hope staff contacted his mother and warned her of his threats. Mr. Loyd never expressed similar threats against Ms. Rodriguez, and no warning was provided to her.

On August 14, 2013, Dr. Benton determined Mr. Loyd was appropriate for discharge, as he had been medication compliant for six days and no longer expressed an intent to harm his mother. After Mr. Loyd was discharged, he placed several calls to Ms. Rodriguez, informed her of his release, and she agreed to meet him at a park that evening. On August 15, 2013, Ms. Rodriguez's body was found,

and investigators identified Mr. Loyd as the suspect in her death.

The present civil action was initiated by the Special Administrators for Ms. Rodriguez's estate, her parents, who claimed that UNMC Physicians and Lasting Hope had negligently caused their daughter's wrongful death. After a hearing, the district court held that the Special Administrators failed to demonstrate sufficient facts to show that the defendants owed Ms. Rodriguez any duty and the complaint was dismissed. After reviewing the Special Administrators' first appeal (*Rodriguez v. Catholic Health Initiatives*, 899 N.W.2d 227 (Neb. 2017)), the Supreme Court of Nebraska reversed and remanded. To survive defendants' motion for summary judgment, the court found that the plaintiffs sufficiently alleged that Mr. Loyd was in the custody of Lasting Hope and had communicated to Dr. Benton an intention to kill Ms. Rodriguez.

After remand and some discovery, the defendants again moved for summary judgment. Upon review, the district court granted the defendants' motion and concluded that none of the defendants owed any duty to Ms. Rodriguez. Specifically, the district court found that the UNMC Physicians owed no duty to warn Ms. Rodriguez because Mr. Loyd never actually communicated threats to harm her. Lasting Hope owed no duty to protect Ms. Rodriguez because, at the time of the murder, Mr. Loyd had already been discharged.

The Special Administrators filed another appeal, alleging that the district court erred in granting summary judgment to the defendants on the basis that they did not have any duty to warn and protect Ms. Rodriguez from Mr. Loyd. They also appealed on the basis that the court had excluded six affidavits in opposition to the defendants' motion for summary judgment, which is not addressed further here.

Ruling and Reasoning

The Supreme Court of Nebraska affirmed the district court's order granting summary judgment for the defendants, thus denying relief to the Special Administrators.

The court recognized that the Special Administrators had experienced a terrible loss but clarified that tort law requires the existence of a legal duty to impose liability on the defendants. The court reviewed the historical precedent of the duty to warn and protect in Nebraska.

Regarding UNMC Physicians, the plaintiffs conceded that the facts do not support their contention

that Mr. Loyd actually communicated to Dr. Benton his intention to harm Ms. Rodriguez. The plaintiffs argued, however, that actual communication is not necessary. Relying on a prior case of *Munstermann v. Alegent Health*, 716 N.W.2d 73 (Neb. 2006), the court stated that it had previously considered the extent of a psychiatrist's duty to warn and protect third-party victims. In *Munstermann*, the court had reviewed Nebraska's legislative response following the California case of *Tarasoff v. Regents of University of California*, 551 P.2d 334 (1976), which imposed on mental health professionals a duty to protect. In *Munstermann*, the court ruled that a psychiatrist is liable for failing to warn and protect "when the patient has communicated to the psychiatrist a serious threat of physical violence against himself, herself, or a reasonably identifiable victim or victims" (*Rodriguez*, p 239, citing *Munstermann*, p 82). Because the legislature has not further amended the *Munstermann* rule, the court viewed the rule as having received "legislative acquiescence." According to the court, to negate the requirement that an actual threat be communicated to clinicians, it would undermine the state's statutes that underly the *Munstermann* rule. Here, the only reasonably identified victim of threats communicated by Mr. Loyd was his mother.

For *Lasting Hope*, the court addressed whether it had a duty to protect based on any custodial special relationship to Mr. Loyd. The district court had found undisputed facts that Mr. Loyd had been discharged from *Lasting Hope* pursuant to Dr. Benton's discharge plan. The Special Administrators alleged that the district court viewed the relevant time period too narrowly and pointed to an expert opinion that the discharge was premature. Finding that Dr. Benton was the person responsible for Mr. Loyd's treatment and discharge, the court said that the duty to protect claim is solely based on the alleged duty and breach by the psychiatrist. Here, even assuming Mr. Loyd was in custody while he was a patient at *Lasting Hope*, Ms. Rodriguez's death cannot be attributed to a breach of duty because no threat was communicated about intention to harm her. "We reach this decision not based on a lack of custody but instead because Loyd did not communicate to the defendants that he intended to physically injure Melissa" (*Rodriguez*, p 722).

Concurring Opinion

Justice Papik concurred in the judgment but wrote separately to express reservations regarding the court's

original analysis in *Munstermann*. In *Munstermann*, the court reviewed existing state statutes that did not specifically name psychiatrists and found that, for policy reasons, the duties and limitations imposed on licensed mental health practitioners and psychologists also applied to psychiatrists. Despite reservations about the applicability of prior law to psychiatrists, Justice Papik concurred in the judgment.

Discussion

In *Rodriguez v. Lasting Hope*, the Nebraska Supreme Court considered a psychiatrist's duty to warn and protect under the state's *Munstermann* rule, which was based on the state's legislative response following *Tarasoff*. The *Rodriguez* case makes clear that, in order for such a duty to arise in Nebraska, the patient must "actually communicate" information to the psychiatrist about harming a third party (*Rodriguez*, p 719). The court noted that the Special Administrators did not dispute the fact that Mr. Loyd had not actually communicated a threat of violence against Ms. Rodriguez, rather the Special Administrators invited the court to "reconsider" whether such actual communication was necessary. What information or manner of disclosure is needed to sufficiently communicate a threat was not decided in this case. A future case could address what constitutes an "actual communication."

State laws on mental health providers' duties to warn or protect vary around the country. Nebraska is not alone in having some limiting language in their laws about the parameters that trigger the duty, such as the requirement of an actual communication to harm an identifiable victim. Recognizing that duties to protect third parties may conflict with clinicians' legal and ethical duties to protect patient confidentiality, limiting the duty to protect to circumstances in which an actual threat of harm is communicated about a reasonably identifiable victim is one way to balance these responsibilities.

Transfer on Death Agreement and Mental Incapacity

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