

Malpractice Liability for Post-discharge Suicides, Assaults, and Murders

April 21, 2017

M. Jansen Voss, J.D.; M.B.A



SCOTT • SULLIVAN
STREETMAN • FOX

2450 Valldale Road, Birmingham, AL 35244
Phone: (205) 967-9675 | Fax: (205) 967-9673

Email: voss@sssnanf.com

Disclosures

- I defend physicians, nurses and other health care professionals throughout the State of Alabama and Mississippi in medical malpractice actions.
- I have represented a number of psychiatrists, psychologists, therapists, community mental health centers, and in-patient facilities.
- Over the last ten years, I have handled medical malpractice and mental health cases throughout Alabama and Mississippi.
- I have also been retained to review mental health policies and procedures.



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valldale Rd, Birmingham, AL 35244
205-967-9675; voss@sssnanf.com



Page 2 of 23

Disclosures

- I have spoken to a number of groups throughout the state on medical malpractice and mental health issues, including:
 - Medical records and malpractice;
 - The Psychotherapist-Patient Privilege;
 - The Counselor-Client Privilege;
 - Child Abuse Reporting and Immunity;
 - Post-discharge suicides, assaults and murders;
 - Patient on patient assaults; and,
 - Staff on patient assaults.



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valldale Rd, Birmingham, AL 35244
205-967-9675; voss@sssnanf.com



Page 3 of 23

Introduction

- Mental health malpractice lawsuits are an omnipresent threat to mental health professionals in Alabama.
- Purchasing liability insurance and staying up-to-date on clinical research is not an adequate practice plan.
- Mental health professionals should proactively address malpractice risks. Managing the risk of malpractice lawsuits should be an integral part of all mental health professionals' practice plans.
- This presentation addresses malpractice liability for post-discharge suicides, assaults, and murders. We will talk through common factual scenarios giving rise to such malpractice claims.
- This presentation is not clinical instruction.



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 4 of 23

The American Legal System

- ***Anyone can sue anyone for anything.*** The real question is whether the person will be successful in obtaining a monetary award or some other legal relief from the alleged wrongdoer.
- All civilized societies have developed laws outlining acceptable and unacceptable human behaviors, and a formal and civilized system through which those laws are administered.
- The right to a trial by a jury of ones peers is another fundamental tenant of the United States judicial system. A person must meet only very minimum requirements in order to present his case to a jury of his peers.
- Judges generally prefer a jury decide a case.



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 5 of 23

The American Legal System

- A side effect of open access to the system, and the preference for jury trials, is some people will take advantage of the system by filing and pursuing unmeritorious or frivolous lawsuits with the hope of obtaining monetary and/or other legal relief.
- The United States judicial system has developed laws, judicial decisions and procedures for weeding out unmeritorious or frivolous lawsuits. The system has established elements a person must prove in order to obtain monetary awards and/or other legal relief from an alleged wrongdoer.



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 6 of 23

Medical Malpractice

- **The Alabama Medical Liability Act:** governs claims against health care providers for alleged medical injuries in the context of the provision of health care to the patient. Ala.Code 1975, § 6-5-540; Ala.Code 1975§ 6-5-548; Ala.Code 1975, § 6-5-549.1
- **Redress of a Medical Injury:** A medical malpractice lawsuit is one for the redress of an injury suffered by a patient during the provision of healthcare. *Taylor v. Smith*, 892 So.2d 887, 893 (Ala.2004) citing Ala.Code 1975, § 6-5-540.
- **Elements of a medical malpractice claim:** A plaintiff must prove: 1) the appropriate standard of care; 2) the doctor's deviation from that standard; and 3) a proximate causal connection between the doctor's act or omission constituting the breach and the injury sustained by the plaintiff (the doctor's acts/omissions probably caused the injury). *Bradley v. Miller*, 878 So. 2d 262 (Ala 2003).



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 7 of 23

General Negligence

- **Negligence** is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, with reference to the situation and knowledge of the parties under all of the attendant circumstances. *Shanklin v. New Pilgrim Towers*, 58 So. 3d. 1251, 1256 (Ala. Civ. App. 2010) (citing *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233(n.2) (5th Cir.1974)).
- **Wantonness** is "conduct which is carried on with a reckless or conscious disregard of the rights or safety of others." Wantonness requires consciousness on the part of the defendant, from knowing the existing conditions that injury is likely to result from an act or omission. See also *Gardner v. State Farm Mut. Auto. Ins. Co.*, 842 So.2d 1 (Ala. Civ. App. 2002); Se. *Entvl. Infrastructures, L.L.C. v. Rivers*, 12 So. 3d 32, 45 (Ala. 2008); Ala. Code § 6-11-20(b)(3).



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 8 of 23

Post-discharge Assaults and Murders

- Absent special relationships or circumstances, **a person has no duty to protect another from criminal acts of a third party.** *Alabama Dept. of Corrections v. Thompson*, 855 So.2d 1016, 1021-22 (Ala. 2003); *Moye v. A.G. Gaston Motels, Inc.*, 499 So.2d 1368, 1370 (Ala.1986).
- **Special Relationship Exception:** Where a relationship between the defendant and the criminal actor, or a relationship between the defendant and the victim, imposes a duty upon the defendant to protect the victim. See *Alabama Dept. of Corrections v. Thompson*, 855 So.2d 1016, 1022 (Ala. 2003); *Finley v. Patterson*, 705 So.2d 826, 828 (Ala.1997).
- **Special Circumstance Exception:** When the defendant "know[s] or [has] reason to know that acts are occurring or [are] about to occur on the premises that pose imminent probability of harm to an invitee." *Finley v. Patterson*, 705 So.2d 826, 829 (Ala.1997) (quoting *Nail v. Jefferson County Truck Growers Ass'n, Inc.*, 542 So.2d 1208, 1211 (Ala.1988)).



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 9 of 23

Post-discharge Assaults and Murders

- Alabama courts also use the *Tarasoff* line of cases when analyzing a mental health professional's liability for a patient's criminal acts.
- In *Tarasoff*, the patient told his therapist he intended to kill a readily identifiable, although unnamed, girl. The therapist informed law enforcement, but not the girl or her parents. The California Supreme Court held that when a therapist determines or should determine that a patient presents a serious threat of danger to another he has an obligation to use reasonable care to protect the intended victim against such danger. 551 P.2d 334 (Cal. 1976).
- Later, in *Thompson v. Alameda County*, a juvenile offender made general threats during his confinement in a county institution regarding his intention to kill someone. Although the juvenile was known to be dangerous, his threats were not directed to any specific, identifiable person. Following his release from the institution, he killed a young boy in his neighborhood. The California Supreme Court stated that even in a case where a person had a history of violence, no duty existed when the aggressor makes only general threats of violence directed at non-identifiable victims. 614 P.2d 728 (Cal. 1980)



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 10 of 23

Post-discharge Assaults and Murders

- In order to establish the liability of a psycho-therapist for the criminal acts of a patient, a plaintiff must "prove that the [therapist] knew or should have known that the [patient] might be a danger to a specific individual". *Donahoo v. State*, 479 So. 2d 1188,1191 (Ala. 1985) (following *Tarasoff v. Regents of University of California*, 551 P. 2d 334, 340 (Cal. 1976) and *Thompson v. Alameda County*, 614 P. 2d 728,735-38 (Cal. 1980)); see also *Morton v. Prescott*, 564 So. 2d 913 (Ala. 1990) (applying the Court's rationale in *Donahoo* to a civil lawsuit).
- "Unless a patient makes specific threats, the possibility that he may inflict injury on another is vague, speculative, and a matter of conjecture" *Morton v. Prescott*, 564 So. 2d 913, 916 (Ala. 1990) citing *Brady v. Hopper*, 570 F. Supp. 1333, 1338 (D. Colo. 1983). Once these specific threats are verbalized, then the possibility of harm to third persons becomes foreseeable and the psychiatrist's duty arises. *Id.*



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 11 of 23

Post-discharge Assaults and Murders

- The following case is outside the scope of the present topic but it is nevertheless instructive.
- In *Taylor v. Smith*, a methadone patient, under the influence of methadone after leaving a treatment center, lost control of her vehicle and collided with another motorist. 892 So.2d 887, 891 (Ala. 2004)
- The injured motorist filed a lawsuit against the physician who administered methadone. The trial court dismissed the case. On appeal, the Alabama Supreme Court considered "whether the director of a methadone-treatment center owes a duty of due care to a nonpatient motorist who is injured in an automobile accident with the director's patient, when it is reasonably foreseeable that such an accident may result from the director's failure to exercise due care in administering methadone to the patient." *Id.* at 892. The Court determined the physician owed a duty of care to the non-patient motorist. *Id.* at 897.



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 12 of 23

Case Studies: Post-discharge Assaults and Murders

- Chris had been diagnosed with schizophrenia. Over the years his condition stabilized with medication. Periodically, he stopped taking the medication and would decompensate requiring in-patient stabilization. This process repeated itself several times over the years.
- Chris was committed to an in-patient psychiatric unit for evaluation and stabilization after he reported hearing voices telling him to have sex with his grandmother. He informed out-patient mental health professionals that he would kill his grandmother before having sex with her.
- Attending psychiatrist Dr. Voss monitored Chris for five days. According to in-patient records, Chris was aggressive with staff and was uncooperative during his stay. However, Chris reported no suicidal or homicidal ideations. Dr. Voss discharged Chris after a five day in-patient stay.
- Following discharge, Chris treated with out-patient mental health professionals on two occasions.
- Eight days following discharge, Chris showed up, unannounced, to the local community mental health center requesting food and a ride to his grandmother's house. The mental health center provided him food and a ride home.
- At approximately 8:00pm, later that same day, Chris presented to a local emergency room with abdominal pain. He was combative, spat in the floor, and verbally abused staff. Chris was evaluated by an ER physician who believed Chris was exhibiting drug seeking behaviors. He expressed no intent to kill himself or others. The ER physician discharged Chris, and security personnel assisted with the process.
- One hour after discharge from the ER, Chris stole a rifle from a neighbor's home, and shot and killed his grandmother.



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 13 of 23

Case Studies: Post-discharge Assaults and Murders

- Jane had a long history of alcohol abuse. She suddenly stopped drinking. In the following days, she began expressing a concern that her husband could hear her thoughts and had implanted a listening device in her brain.
- She was scheduled for an elective cosmetic surgery but became agitated and fearful in the pre-operative preparation area. Jane believed the surgeons would be implanting a device in her uterus to monitor her body functions. The cosmetic procedure was canceled.
- The next day, she presented for a voluntary admission to an in-patient facility. Jane was initially guarded and quiet. However, she continued to voice paranoid and delusional thoughts about her husband.
- At the end of day four of her in-patient hospitalization, she informed Dr. Voss that she wanted to leave the hospital. Jane's husband also wanted her out of the hospital. But, Dr. Voss believed further in-patient treatment was indicated. Dr. Voss counseled Jane and her husband concerning the risks of leaving (including injury or death). Dr. Voss discharged Jane Against Medical Advice. Both Jane and her husband signed AMA discharge documents. Jane was not voicing suicidal or homicidal ideations at the time of discharge.
- Later that afternoon, Jane stabbed her husband to death. Jane's six year old grandson witnessed the incident.



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 14 of 23

Case Studies: Post-discharge Assaults and Murders

- James had a history of mental illness beginning with his time in the US military. He had several in-patient psychiatric admissions while in the military. After leaving the military, he enrolled in a day treatment program. He was involved in an altercation with another patient in the program, and was voluntarily admitted to a psychiatric hospital under Dr. Voss' care.
- Dr. Voss diagnosed James with schizophrenia, paranoid type. After four days, Dr. Voss recommended James be transferred to a long-term care facility. He was provisionally accepted for hospitalization at a VA facility but the VA denied admission.
- James was re-admitted (on a voluntary basis) to the psychiatric hospital under Dr. Voss' care. However, Dr. Voss recommended that James' family begin involuntary commitment proceedings. James' family declined to do so.
- Dr. Voss had James on various medication regimens but James had not been on any medication long enough to control James' condition. In an effort to control James' inappropriate behavior, he was placed in seclusion for twenty-four hours. He was released with medications shortly after coming out of seclusion.
- Dr. Voss thought the local community mental health center would follow up with James.
- One day after discharge, James stabbed a pregnant woman. The woman survived, but remained in the hospital for observation through delivery.



M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9676; voss@ssandf.com



Page 15 of 23

Practice Pointers

The following practice pointers are not a substitute for your medical training, experience and judgment. If the following suggestions are inconsistent with the standard of care, you should always defer to the standard of care, your training, experience, and judgment:

- Document what you do and do what you document.
- If a patient makes a credible threat of harm to an identifiable person or readily identifiable person, you should: 1) move forward with commitment proceedings, 2) notify law enforcement and 3) take reasonable efforts to notify the subject of the threat.
- If a patient makes a credible threat to harm himself, you should 1) move forward with commitment proceedings and 2) implement suicide precautions.

 M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9876; voss@ssandf.com 

Page 22 of 23

QUESTIONS?

 M. Jansen Voss
Scott, Sullivan, Streetman & Fox
2450 Valleydale Rd, Birmingham, AL 35244
205-967-9876; voss@ssandf.com 

Page 23 of 23
