

NO. 6 7 3 6 - I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FRANCES M. HAWKINS, and LOUISE MARKERT
as Guardian ad litem for MICHAEL J. HAWKINS,

APPELLANTS,

vs.

KING COUNTY; COMMUNITY PSYCHIATRIC CLINIC,
INC., SEATTLE; ALEXANDER (LEX) MCGRAW and
"JANE DOE" MCGRAW, husband and wife, and
the marital community composed thereof;
and RICHARD SANDERS and "JANE DOE" SANDERS,
husband and wife, and the marital community
composed thereof,

RESPONDENTS.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE NORMAN QUINN, JUDGE *A*

FILED
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BRIEF OF APPELLANTS

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THE HONORABLE NORMAN QUINN, JUDGE

BRIEF OF APPELLANTS

I.

ASSIGNMENT OF ERROR

The trial court erred in granting summary judgment
dismissing Defendants Sanders as a matter of law.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Is Richard Sanders immune from suit because of his "court appointment" status when he represented Michael Hawkins?
- B. Do either the physician-patient privilege or attorney-client privilege have any application to the facts in the instant case?
- C. Was a psychiatrist's opinion that Michael Hawkins was "a danger to himself and other people" an irrelevant consideration for a bail hearing?
- D. Did Richard Sanders breach that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in Washington State by failing to advise either the bail hearing judge or the King County Prosecuting Attorney of the contents of the Elwood L. Jones, M.D. letter dated July 8, 1975, prior to having Michael Hawkins released from confinement on personal recognizance?
- E. May an attorney control the affairs of a mentally disabled person without obtaining for him a guardian ad litem?
- F. Is there a genuine issue as to any material fact which preclude entry of summary judgment in favor of Richard Sanders as a matter of law?

II.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

On July 1, 1975, Michael Hawkins was arrested after assaulting a young girl on the University of Washington campus, under the belief that she was an old girl friend of his named "Thelma." He chased and grabbed the girl, refusing to let her go despite her denial that she was "Thelma". The police arrived and arrested Michael. After his arrest it was discovered that he was in possession of a quantity of marijuana. Although assault charges were not filed, Michael was held on the drug charge. On July 3, 1975, Richard Sanders was appointed to represent Michael Hawkins.

On July 3, 1975, Mr. Sanders had a lengthy telephone conference with Palmer Smith, an attorney hired by Frances Hawkins, Michael's mother, to assist in getting Michael either into a hospital or civilly committed after he had threatened her and his sister and forced them to move out of the family home. (See Dep. of Richard Sanders, taken April 15, 1977, at page 27, lines 16-25; page 28, lines 1-22; and page 31, lines 20-25; page 32, lines 1-20). Mr. Smith advised Mr. Sanders that Michael was seriously mentally ill and dangerous, that he was in need of psychiatric care and treatment, and that he should not be released because of the danger he presented to himself and others. Mr. Smith advised Mr. Sanders that Dr. Elwood Jones, a psychiatrist who knew the Hawkins family and had been treating Mrs. Hawkins in regard to her problems with Michael,

concluded in this opinion.

On July 4, 1975, Mr. Smith hand-delivered a letter to Mr. Sanders restating the substance of the telephone conversation of the previous day, and stating that both he and Dr. Jones would like to meet with him to discuss these matters as soon as possible. (See Dep. of Richard Sanders, page 28, lines 23-25, page 29, lines 1-15). On July 8, 1975, Mr. Smith sent another letter to Mr. Sanders, advising him that a psychiatric examination of Michael could be made under Mrs. Hawkins' medical insurance plan before Michael's release to make an independent determination as to his mental condition and the risk of injury should he be released other than to a hospital. Mr. Smith's letter also stated that if, despite his dangerousness, Michael was released, Mr. Sanders give Mr. Smith and Mrs. Hawkins notice so that they could be forewarned.

On July 8, 1975, Mr. Sanders received a telephone call from Dr. Jones regarding Michael Hawkins' mental condition. Dr. Jones stated that he felt Michael was seriously mentally ill and a danger to himself and others, and that he should not be released. (See Dep. of Richard Sanders, page 39, lines 16-17, page 40, lines 1-25, and page 41, lines 1-13). On that same day Dr. Jones sent a letter to Mr. Sanders again setting forth his medical opinion that Michael ". . . is seriously emotionally ill, of danger to himself and others and should be detained in a controlled setting, be it the jail at this time or a hospital". (See Dep. of Richard Sanders, page 39, lines 6-11).

In the telephone conversation, Dr. Jones advised that he had a 22-page account of Michael's disturbed behavior dating back to 1966 prepared by Michael's sister, Mardia, and that it was available to him if he wished to review it. Mr. Sanders refused to read or review this document stating, "I don't believe Michael would want me to read this." Dr. Jones also stated in his letter that he was available to render any assistance necessary, and that Mr. Sanders was free to contact him at any time.

On July 8, 1975, Mr. Sanders also had a telephone conference with Mr. Smith, Dr. Jones and Mrs. Hawkins regarding Michael's mental condition. (See Dep. of Richard Sanders, page 32, lines 21-25, page 33, lines 1-9). At no time was action taken for the appointment of a guardian or guardian ad litem for Hawkins.

On July 9, 1975, Mr. Sanders appeared at a bail hearing for Michael Hawkins. None of the information related to him was brought to the attention of either the court or prosecutor. Sanders withheld all information that Michael Hawkins might be seriously mentally ill and dangerous. (See Dep. of Richard Sanders, page 26, lines 23-24). Mr. Sanders obtained a release of Hawkins on the latter's personal recognizance.

On July 17, 1975, less than eight days after his release from jail, while in a demented and psychotic state, Hawkins attacked his mother, Frances Hawkins, with a knife, inflicting multiple and severe stab wounds, and left her bleeding and unconscious. Following the attack on his mother, Hawkins

inflicted multiple knife wounds to himself and jumped off the 45th Street Bridge, sustaining numerous and serious injuries, and resulting in the amputation of both legs.

At all times after being assigned as counsel to Hawkins, Richard Sanders was fully aware that Hawkins was severely mentally ill and dangerous. In spite of his knowledge of these facts, he had Michael Hawkins released on his personal recognizance without informing the court of Michael's mental condition, or attempting to refute or disprove the opinions of Dr. Jones, Mr. Smith, Mrs. Hawkins or Mardia Hawkins, or seeking to have a guardian appointed to represent Michael's interest. Richard Sanders' sole concern at all times was to see that Michael Hawkins was released from jail, without regard to Hawkins' best interests or whether he presented a significant danger to himself or others.

Mr. Sanders was aware of Hawkins' incompetence and of the danger of having Michael released, as he states in his deposition taken on April 15, 1977, on pages 31, lines 20-25, and page 32, lines 1-6:

Page 31:

Q. You don't? But you were aware that Palmer Smith and Dr. Jones, the psychiatrist, on July 4th of 1975, were seriously concerned about the wisdom of turning this gentleman loose into society?

A. Well--

Q. Were you or were you not?

Page 32:

A. Well, if I received the letter, I read the letter.

Q. All right, sir. So then you were aware of a serious question as to whether or not he should be released into society?

A. Well, if you want to characterize what is said in the letter the way you did, yes.

And Mr. Sanders admits in his deposition at page 32, lines 21-25 and page 33, line 1, that he made no attempt to determine whether or not Michael Hawkins was mentally ill and/or dangerous, as was believed by Dr. Jones, Mr. Smith, Mrs. Hawkins and Michael's sister, Mardia:

Page 32:

Q. Well, what did you do to determine whether or not Palmer Smith and Dr. Jones and the mother and the sister were correct or incorrect in their opinion that he was dangerous to himself and he represented a danger to them, if anything?

Page 33:

A. I wasn't called upon to make that kind of decision.

Furthermore, he admits in his deposition at page 33, lines 10-17, page 34, lines 13-25, and page 35, lines 1-13, that he made no attempt to inform the court of Michael Hawkins' mental condition, nor to see that, as an incompetent person, Michael's interests in the litigation and in obtaining psychiatric care and treatment were protected by the appointment of a guardian, but was concerned solely with having Michael released from jail:

Page 33:

Q. You did tell His Honor, the judge, that there was a psychiatrist who felt that this man was not safe to be at large?

A. I doubt it.

Q. Did you tell the prosecuting attorney that this man was felt not to be safe at large by another lawyer, by his mother, by his sister, and his psychiatrist?

A. I doubt it.

Page 34:

Q. And you felt it inappropriate to advise the office of the prosecuting attorney and inappropriate to advise His Honor, the judge, before he signed the papers that the man was considered by his psychiatrist to be dangerous to society?

A. I don't think it is inappropriate. I don't think it came up.

Q. And you didn't make any effort to see to it that it did come up?

A. I don't recall that I did.

Q. Would that be consistent with your philosophy of how the practice of law should be conducted in representing a man in a criminal case that you would not bring the

Page 34:

attention of the court or the prosecutor that there were indications that would speak against the release of the prisoner into society?

A. If a client advises me that he wants to get out of jail for the purpose of committing a crime, you know, I think that I might have a responsibility to either bring that to the court's attention or to withdraw. I don't think it is my responsibility to try to psychoanalyze my clients or to disclose information that other people have supplied to me in that regard.

Q. You think your first and final responsibility is to--if he wants to get out of jail, is to get him out?

A. Yes.

And he states at page 23, lines 11-16, that he would in any case wherein he was representing a criminal defendant, obtain a

release regardless of his knowledge that such defendant was a danger to himself and/or others:

Page 23:

Q. All right. Would you answer the question? Would you, as a lawyer, in representing a defendant, feel free to use your legal skills to get a defendant released into society when you have information from a psychiatrist that the man is dangerous to himself and others?

A. Yes.

In the opinion of an attorney practicing in criminal law, Sander's actions constituted a breach of the standard of practice of law of Washington lawyers.

B. STATEMENT OF THE PROCEDURE BELOW.

On May 9, 1978, a motion was filed on Richard Sanders' behalf entitled "Motion to Dismiss for Failure to State a Claim." The court's order of June 16, 1978, states "...plaintiffs' claims against defendant Richard Sanders are hereby dismissed with prejudice". An amending order dated June 29, 1978, amplifies as follows:

ORDERED that the "Order" entered on the 16th day of June, 1978, is amended to read that the "Order" is a summary judgment order entered pursuant to CR 56 which contemplates that final judgment is herewith entered against plaintiffs and in favor of defendant Sanders and there is no just reason to delay the review of the judgment.

Richard Sanders' motion was based on the following:

1. As an appointed public defender Richard Sanders was immune from suit.
2. The physician-patient and attorney-client privileges

would not permit Richard Sanders to divulge the information given to him by Dr. Jones to either the court or prosecutor's office.

3. Information provided by Dr. Jones to Richard Sanders would have been irrelevant at a bail hearing.
4. Richard Sanders owed no legal duty to Frances Hawkins.

No other arguments were advanced by Richard Sanders' counsel in support of the motion to dismiss. The court granted summary judgment holding that there were no issues of material fact.

III.

SUMMARY OF ARGUMENT

As the appointed attorney to represent Michael Hawkins, Richard Sanders owed to Hawkins the same duties and obligations as would other members of the legal profession. Sanders' duty to an indigent client is the same as that owed to any client, and he is not, therefore, immune from suit.

The attorney-client privilege does not apply to the facts in this case because it protects only communications made by the client in the course of the professional relationship. Sanders' disclosure of Hawkins' mental condition was necessary to protect Hawkins and those who might be harmed by him. Similarly, the physician-patient privilege has no application in this case, as the information given to Sanders by Dr. Jones was non-confidential in nature, and Dr. Jones was not treating the accused-patient, Michael Hawkins. Even if this court should find that the information was confidential,

Dr. Jones had a legal duty to disclose this information in order to protect Michael and his mother and sisters.

The information that Richard Sanders held concerning Hawkins' mental condition and dangerousness was highly relevant in his bail hearing. Such information was necessary for the court to make an effective, informed decision as to whether Hawkins should be released.

Sanders breached his legal duty to Hawkins by concealing and failing to disclose Hawkins' mental condition to the court. This information was also necessary for the court to determine whether a guardian ad litem should have been appointed to represent Hawkins' rights and interests. Sanders' failure to disclose, where he had a duty to speak, renders him liable to Hawkins for malpractice. The medical information raised a genuine issue of fact whether Hawkins had such mental disability as to require a guardian ad litem to exercise discretion for the conduct of the litigation.

Because of Sanders' failure to disclose the information to the court, Hawkins was released. Because he was unrestrained, Hawkins suffered severe and permanent injuries to himself and inflicted the same upon his mother. Richard Sanders should be held liable in damages to Frances and Michael Hawkins for their injuries, which were the direct and proximate result of Sanders' negligent acts.

IV.

A. ATTORNEY RICHARD SANDERS IS NOT IMMUNE FROM
SUIT BECAUSE OF HIS COURT APPOINTMENT STATUS.

An attorney appointed to represent a criminal defendant

is under the same duties and obligations, and is equally liable for negligence or breach of legal duty, as other members of the legal profession; and an attorney's actions must conform to the standards of the profession regardless of the capacity in which he may be acting. In Re Cornelius, 520 P.2d 76, rehearing 521 P.2d 497 (Alaska 1974); Tasby v. Peek, 396 F. Supp. 952 (W.D. Ark. 1975); Bowler v. Warden, Maryland Penitentiary, 236 F. Supp. 400 (D. Md. 1964); Vance v. Robinson, 292 F. Supp. 786 (W.D. N.C. 1968). Thus an appointed counsel's duty to an indigent client is basically the same as that owed to any client. In Re Phelps, 204 Kan. 16, 459 P.2d 172 (1969); Vance v. Robinson, supra; In Re Cornelius, supra.

Respondent Sanders cannot rely on immunity from suit under 42 U.S.C. §§ 1983, The Civil Rights Act, because section 1983 is a federal remedy, protecting only federal constitutional rights. Somers v. Strader, 435 F. Supp. 1184 (M.D. N.C. 1977). Rose Chalet Functions Corp. v. Evans, 264 F. Supp. 790 (D. Mass. 1967). The statute only embraces claims arising out of the deprivation of constitutional rights by state action. Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972); Rose Chalet Functions Corp. v. Evans, supra. It is not a jurisdictional statute, and is significant only to the extent that it creates a federal cause of action. Tyler v. Russel, 410 F.2d 490 (10th Cir. 1969); U.S. ex rel. Ingram v. Montgomery County Prison Board, 369 F. Supp. 873 (E.D. Penn. 1974). 42 U.S.C. Section 1983 was not intended to reach all tortious interferences with the rights of others, Doyle v. Unicare Health Services, Inc.,

399 F. Supp. 69 (N.D. Ill. 1975) affirmed 541 F.2d 283 (7th Cir. 1976) and does not have any application to common law torts. Curtis v. Rosso and Mastracco, Inc., 413 F. Supp. 804 (E.D. Va. 1976); Taylor v. Nichols, 409 F. Supp. 927 (D. Kan. 1976), affirmed 558 F. 2d 561 (10th Cir. 1977); Knipp v. Weikle, 405 F. Supp. 782 (N.D. Ohio 1975); Bolden v. Mandel, 385 F. Supp. 761 (D. Md. 1974). The immunity afforded certain judicial officers also applies only to actions arising under the Civil Rights Act, 42 U.S.C. Section 1983. Furthermore, a clear majority of the federal courts have taken the position that the Civil Rights Act, or Section 1983 of that Act, has no application to private attorneys, including court appointed attorneys being sued by criminal defendants, since they are not officers of the state, or "acting under color of state law," within the meaning of the Act. Morrow v. Ingleburger, 67 F.R.D. 675 (1974), and cases cited therein, at page 685.

Therefore attorney Richard Sanders, appointed to represent Michael Hawkins, is not immune from suit. Sanders owed to the defendant the duties of diligence and faithful representation as required by the canons of professional ethics and by the ordinary duties of due care in the practice of his profession, and can be held liable for negligence or breach of legal duty as though he were employed by the client. Tasby v. Peek, supra; Vance v. Robinson, supra; see also Young v. U.S., 346 F.2d 793 (D.C. Cir. 1965).

B. NEITHER THE PHYSICIAN-PATIENT PRIVILEGE NOR THE ATTORNEY-CLIENT PRIVILEGE HAVE ANY APPLICATION TO THE FACTS IN THIS CASE.

1. The information given to attorney Sanders was not from his client, nor was it within the scope of the privilege.

The assertion of the attorney client privilege as justification for Sanders' failure to disclose the information he had received regarding Hawkins' mental condition, or the fact of his potential dangerousness, is contrary to established law, because this information was not within the scope of that privilege. To be protected as privileged communication, information acquired by an attorney must have been communicated or delivered to him by the client, and not merely obtained by the attorney while acting in that capacity for the client. State ex rel Sowers v. Olwell, 64 Wn.2d 828, 394 P.2d 681 (1964). The attorney-client privilege, RCW 5.60.060(2), protects only communications made by the client in the course of the professional relationship. State v. Wilder, 12 Wn.App. 296, 529 P.2d 1109 (1974). Thus, if a third person communicates the information to an attorney, or is present when such information is given to the attorney by the client, the information is not confidential and therefore not privileged. State v. Wilder, supra; State ex rel Sowers v. Olwell, supra.

Even if the information received by Sanders regarding Hawkins' mental condition and dangerousness could be viewed as confidential communications, the attorney-client privilege

would not apply. The case of State ex rel Haugland v. Smythe, 25 Wn.2d 161, 169 P.2d 706 (1946) sets forth the elements necessary to find that a communication is privileged:

The mere fact that a communication was made in confidence, express or implied, does not of itself create a privilege. As stated in 8 Wigmore on Evidence (3d ed.) 531, §2285, there are four fundamental conditions necessary to the establishment of a privilege against disclosure of communications between persons standing in a given relation: (1) The communication must originate in the confidence that it will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.
Id. at 168, 169 P.2d at 710.

In the present case, not one of the above mentioned factors was present. Hawkins' mental condition, and his dangerousness, were well known to those persons closest to him. Confidentiality was not necessary to the satisfactory maintenance of Mr. Sanders' relationship with his client, and no harm would result to Hawkins' interests in defense of the criminal charges against him by disclosure of this information. It was, in fact, in Hawkins' best interest that such information be disclosed, since he was incompetent and a danger to himself

and others. There was no relation which would have been fostered by withholding the information. The disclosure was necessary to protect Hawkins and those who might be harmed by him, and was needed to protect society in general from mentally ill and dangerous individuals. The benefits to be gained by disclosure far outweighed the disadvantages, if any, which might have inured to Michael Hawkins' interest.

Even where the attorney-client privilege has been found to exist, it is not absolute, but is limited to the accomplishment of its intended purpose; that is, to promote a useful attorney-client relationship by permitting full disclosure without harming the client's interests, or otherwise prejudicing his rights unnecessarily. Dike v. Dike, 75 Wn.2d 1, 448 P.2d 490 (1968). Even where potential harm or prejudice may result, exceptions to the privilege have resulted from a balancing of the benefits of the privilege against the interest in a full revelation of all the facts:

As the privilege may result in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; but rather, must be strictly limited to the purpose for which it exists.

Id. 75 Wn.2d at 11. See also Fite v. Lee, 11 Wn. App. 21, 521 P.2d 964 (1974); State ex. rel Sowers v. Olwell, supra.

An exception also arises under the disciplinary rules, DR 4-101(C), which specifically provides that an attorney may reveal "(2) confidences or secrets of a client when permitted under Disciplinary Rules or required by law or court order." E.C. 4-2 of Canon 4 provides: "The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or required by law." The facts of this case raise a material question that disclosure was necessary in order for Sanders to perform his professional duty.

For the above reasons, Sanders may not assert the attorney-client privilege as a defense to his failure to disclose the information he held concerning Hawkins' mental condition and dangerousness.

2. The physician-patient privilege does not apply to the statements made by Dr. Jones.

RCW 5.60.060(4) provides for a physician-patient privilege in civil actions for information obtained in the course of treating a patient. RCW 10.58.010 extends this privilege to criminal actions. However, the ban of the statute applies only where a physician-patient relationship exists between the party and the physician whose testimony he is seeking to exclude, and only to the end that the patient be encouraged to disclose his ailments to a physician so that they may be properly treated. State v. McCoy, 70 Wn.2d 964, 425 P.2d 874

(1967). The physician-patient privilege provided by RCW 5.60.060 and RCW 10.58.010 cannot be claimed by one other than the patient. State v. Clevenger, 69 Wn.2d 136, 417 P.2d 626 (1966); State v. Fackrell, 44 Wn.2d 874, 271 P.2d 679 (1954).

For the information to be viewed as privileged, it must have been necessary to enable the physician to treat the patient, and it must be information necessary or for the purpose of treatment, received after the patient has sought treatment by the physician. State v. Gibson, 3 Wn.App. 596, 476 P.2d 727 (1970). The exclusion extends only to disclosures made while the professional relationship of physician-patient existed. Dubcich v. Grand Lodge, A.O.U.W., 33 Wash. 651, 74 Pac. 832 (1903). These requirements are specifically set forth in RCW 5.60.060(4), which states:

(4) A regular physician or surgeon shall not without consent of his patient, be examined (in a civil action) as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient. (Emphasis supplied).

Thus, the privilege is clearly limited to information obtained by means of treatment of the accused-patient.

In the present case, the information disclosed to Mr. Sanders by Dr. Jones was not solely obtained from the treatment of Michael Hawkins, or for the purpose of treating him. Dr. Jones was Frances Hawkins' physician and was familiar with the Hawkins family. He had come to know of Michael's

mental condition during the course of treating Mrs. Hawkins, and from his contacts with the Hawkins family, and not solely from his contacts with Michael. There was not a physician-patient relationship between Michael Hawkins and Dr. Jones when he obtained this information. There was no basis upon which Hawkins could have objected, had he been competent to object, to the disclosure of the information supplied by Dr. Jones. Dr. Jones did not provide the information to Sanders in confidence, but with the intent that it be acted upon, and transmitted as necessary in order to have restraints placed on Hawkins.

Assuming that this information had been obtained in the course of treatment or for the purpose of treatment, a physician-patient privilege does not apply since the privilege is limited to subject matters confidential in nature. State v. Broussard, 12 Wn.App. 355, 529 P.2d 1128 (1974). The fact of Michael's mental illness, and his dangerousness, was not confidential and disclosure did not breach any professional confidence. As in State v. Broussard, Id., where the court held that the physician could testify as to the presence of a bullet in the defendant-patient's body, Hawkins' illness, and his potential dangerousness, was well known to the persons closest to Hawkins, and was not a matter related to Dr. Jones in confidence by Hawkins, or based upon any confidential information received by him from Hawkins, or which Hawkins did not expect to be disclosed.

Even if such information were to be viewed as confidential, Dr. Jones had a duty to disclose this information in order to protect Hawkins from the serious danger he posed to both

himself and others, particularly his mother and sisters.

Tarasoff v. Regents of Univ. of California, 17 Cal.3d 425, 551 P.2d 334, 131 Cal.Rptr. 14 (1976).

The facts of Tarasoff, Id., are as follows: Prosenjit Poddar killed Tatiana Tarasoff. Plaintiffs (Tatiana's parents) brought suit for wrongful death against a psychologist employed by the Cowell Memorial Hospital at the University of California. Poddar previously had confided his intention to kill Tatiana to the psychologist. Poddar had been briefly detained by the campus police, but was released when he appeared rational. The psychologist and his superior directed that no further action be taken to detain Poddar. The defendants asserted that they owed no duty of reasonable care to Tatiana or to her parents and were immune from suit.

The court held that the psychologist had a duty to warn, in that the confidential character of patient-psychotherapist must yield to the extent to which disclosure is essential to avert danger to others. The court stated that the therapist need not disclose unless the strong interest in confidentiality is counter-balanced by an even stronger public interest, namely, safety from violent assault. Tarasoff, Id. at 440-42, 551 P.2d at 346-47.

Once Dr. Jones determined that Hawkins posed a serious danger to himself and others, he was under a duty to protect those who foreseeably could be harmed by Michael. Tarasoff, Id. Had he not informed Mr. Sanders of the serious danger that Hawkins posed, Dr. Jones would have been liable for breach of his duty to

protect those persons who foreseeably would be, and were, injured by Michael's violent acts, in this case, Michael and his mother, Frances Hawkins.

The physician-patient privilege does not apply in a criminal action where there is no benefits to the patient by allowing the privilege to stand, and where sufficient reasons of public interest or otherwise are absent. State v. Boehme, 71 Wn.2d 621, 430 P.2d 527 (1967). RCW 10.58.010 specifically attaches a condition of practicality to the claim of privilege in criminal prosecutions. State v. Boehme, supra. There, the court held that the physician-patient privilege did not apply to exclude the testimony of the victim's physician, even though the victim sought to invoke the privilege in order to protect the defendant (her husband), since there was no benefit to the patient, and allowing it to stand would only result in obstructing justice rather than furthering any public policy or interest intended to be safeguarded by the rule. In the present case, there was no benefit to Michael Hawkins by Mr. Sanders' failure to disclose information related to him by Dr. Jones, had he been entitled to invoke the privilege on behalf of Michael. On the contrary, the full disclosure of these facts would have been of benefit to Michael and was the best means of protecting his interests.

The privilege only applies in a criminal action where it would prejudice the rights of the defendant, and does not apply in a pretrial hearing prior to the selection of a jury. State v. Wheeler, 74 Wn.2d 289, 444 P.2d 687 (1968). Hawkins' right to defend a criminal action would not have been prejudiced by the

disclosure to the court of Dr. Jones' statements.

It was a pretrial hearing conducted to determine whether or not Hawkins should be released on his personal recognizance, and two of the relevant factors to this determination were his mental condition, and his dangerousness and/or need for protective custody. See CrR 3.2 (b)(c), and JCrR 2.09. Accordingly, this information was not privileged, but was in fact necessary for the court to make an informed and effective decision regarding Hawkins' release on his personal recognizance.

C. THE INFORMATION OF MICHAEL HAWKINS' MENTAL CON-
DITION AND DANGEROUSNESS WAS HIGHLY RELEVANT IN
HIS BAIL HEARING.

Evidence as to Michael Hawkins' mental condition was highly relevant and material to the issue of whether Michael should have been released on his personal recognizance pursuant to CrR 3.2, or whether certain conditions listed in CrR 3.2(a) should be imposed upon his release. Other factors listed in CrR 3.2(b) which were relevant to such a determination under CrR 3.2(a) were his employment status and history, his financial condition, his family ties and relationships, and whether responsible members of the community would vouch for his reliability. Additionally, Michael's potential dangerousness to himself and others was relevant and material to such determination under CrR 3.2(c).

The failure to disclose violated the standard of legal practice, expressed in the following opinion:

"It is my opinion that on July 9, 1975, the standard of practice for lawyers in the State

of Washington mandated that before Michael Hawkins was released from confinement on his personal recognizance, Richard B. Sanders should have advised the King County Prosecuting Attorney and the judge assigned to determine whether Michael Hawkins should remain in pretrial confinement of the content of Elwood L. Jones, M.D.'s letter dated July 8, 1975. I believe that Richard B. Sanders, in failing to make this information known to the King County Prosecuting Attorney and judge, breached that degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable careful and prudent lawyer in the practice of law in Washington State." (Affidavit of George Dixon).

In this case, Hawkins was unemployed and had no financial means to support himself. He was living by himself in the family home after threatening his mother and sister and forcing them to move out. His only means of obtaining food at that time was by having his mother bring it to the house and leave it for him on the porch, since she would not enter the house out of fear for her own safety. Two responsible members of the community--a qualified psychiatrist, Dr. Elwood Jones, who was well acquainted with the Hawkins family and had seen them on numerous occasions, and an attorney, Palmer Smith, who had become involved with the family as a result of Mrs. Hawkins' attempt to have her son civilly committed due to his mental condition and her fear for her own and her daughter's safety--were willing to testify as to Michael's mental condition, and the substantial danger he posed to himself and others. As a result of Sanders' failure to relate this information to the court, which he had obtained in the course of representing Michael Hawkins and through

numerous contacts with Dr. Jones, Mr. Smith and Mrs. Hawkins, the court could not make an effective, informed decision as to whether Hawkins should have been released from jail, or if he were released, what conditions should have been imposed upon that release. Both CrR 3.2(a) and CrR 3.2(c) provide for denial of release if the court deems it necessary either to assure the defendant's appearance at trial, or to protect the defendant and/or others who might be harmed as a result of his dangerousness. These sections also provide, if the court decides to release, that it could place any or all of the following conditions upon such release:

1. Place the defendant in protective custody or supervision;
2. Place restrictions on his travel, association, or place of abode;
3. Require the defendant to return to custody (jail) during specified hours, or report regularly to the court, or remain under the supervision of the court or other person or agency; and/or
4. Impose any condition other than detention deemed reasonably necessary.

Had Mr. Sanders related to the court the information he had in his possession, Hawkins' attack on himself and his mother would probably have been prevented, and Hawkins would probably have obtained the type of protection, care and treatment he so desperately needed. At the time of the hearing to determine

the advisability of Hawkins' release, these matters were highly relevant and material, Dike v. Dike, supra, and were required by law to be disclosed, CrR 3.2. See DR 4-101(C); DR7-102(A)(3) and (5); EC7-19, 7-20 and 7-27.

- D. BY FAILING TO ADVISE EITHER THE BAIL HEARING JUDGE OR THE KING COUNTY PROSECUTING ATTORNEY OF THE CONTENTS OF DR. JONES' LETTER, RICHARD SANDERS BREACHED THAT DEGREE OF CARE, SKILL, DILIGENCE AND KNOWLEDGE POSSESSED AND EXERCISED BY A REASONABLE AND PRUDENT LAWYER IN WASHINGTON STATE.
1. Respondent Sanders breached his legal duty to Michael Hawkins in failing to disclose to the court Michael's mental condition, or the fact that a qualified psychiatrist deemed Michael to be a danger to himself and others and should not be released.

Respondent Sanders breached his legal duty to Michael Hawkins by:

(a) Failing to disclose Michael Hawkins' mental condition and dangerousness as required under CrR 3.2, DR 7-102(A)(3), 7-102(A)(5), and EC 7-19, 7-20, and 7-27, in derogation of his duty to inform the court of all relevant and material facts under CrR 3.2, DR 7-102(A)(3), 7-102(A)(5), and EC 7-19, 7-20 and 7-27;

(b) Failing to insure that the court was aware of the fact that there was a serious question as to Michael Hawkins' competency so that the court could determine whether a guardian ad litem should have been

appointed to represent Michael Hawkins' rights and interests, as required under DR 7-102 (A)(3), 7-102(A)(5), and EC 7-9, 7-11 and 7-12; and

(c) By allowing his own personal interests and beliefs with regard to the treatment of mentally ill and dangerous persons to influence his actions and the course of his representation of Michael Hawkins' interests, in derogation of his duty under DR 5-101(A), 5-105(A); and EC 5-1 and 5-2. (Sanders' dep. 11-13).

(d) Under DR 7-102(A), an attorney shall not "(3) conceal or knowingly fail to disclose that which he is required by law to reveal." As stated in EC 7-27: "Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce." An attorney's duty is two-fold: he has a duty to act both as an advocate of his client and as an officer of the court, and neither of these duties and obligations can be viewed independently of the other. Dike v. Dike, supra. An attorney is not permitted to do misconduct himself in pursuit of what he believes to be a client's interest, In Re Cohen, 370 F. Supp. 1166 (S.D. N.Y. 1973), but must conduct his representation of his client within the bounds of the law. State v. Darnell, 14 Wn.App. 346, 542 P.2d 117 (1975). The duty of assigned counsel, as of other counsel, is to act in an ethical manner, as required under the ethical standards of his profession.

Bowler v. Warden, supra. Counsel who are retained to defend criminal matters must give consideration to their client's desires, but they are nonetheless governed by the law, and as officers of the court must observe established guidelines and rules, whether their client approves or not. In Re Wetzel, 150 Mon. 487, 437 P.2d 7 (1978).

Just as an attorney must not act to obtain an acquittal of a client by subornation of perjury, Bowler v. Warden, supra, he must not conceal from the court facts which he is required by law and the ethical rules to disclose, and which are necessary to aid the court in arriving at an effective and informed decision. Dike v. Dike, supra; EC 7-19, 7-20, 7-27.

The lawyer's duty is of a double character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court--a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions. Id. at 6, 448 P.2d at 493. (Emphasis added).

Courts must be able to rely not only on what lawyers say, but also on what they do not say; and where success requires a withholding of facts which an attorney is required by law to disclose, or which, if known to the court, would mislead the court or prejudice the administration of justice, or would affect the decision of the court, or the validity of its action, the

attorney is guilty of misrepresentation the same as if he had made a false statement of fact. In Re Healy, 43 Wn.2d 266, 261 P.2d 89 (1953); Sullins v. State Bar of Cal., 15 Cal. 3d 609, 542 P.2d 631, 125 Cal. Rptr. 471 (1975); State v. Martindale, 215 Kan. 667, 527 P.2d 703 (1974); In Re King, 7 Utah 2d 258, 322 P.2d 1095 (1958). Therefore, a violation of DR 7-102(5), which states that: "A lawyer shall not . . . (5) knowingly make a false statement of law or fact", also includes misrepresentation by silence or omission where there is a duty to speak. See also EC 7-19, 7-20, 7-27.

In the present case, Sanders not only concealed the fact of Michael Hawkins' mental condition and dangerousness from the court, but he also made a false statement of fact, by failing to disclose this information where he had a duty to speak, and leading the court to believe that Michael was of sound mental state and presented no danger to himself or others. Under CrR 3.2(b), one of the relevant factors for determining whether a defendant should be released, or, if released, what conditions placed upon that release pursuant to CrR 3.2(a), is mental condition. Other relevant factors under CrR 3.2(b) are a defendant's employment status and history and financial condition, his family ties and relationships, and whether responsible members of the community would vouch for the defendant's reliability. CrR 3.2(b) requires the court to make its determination of release "on the available information." The critical

information was available, with Mr. Sanders, and was withheld.

Under CrR 3.2(c) the court may either condition the release, or detain the defendant, if he is dangerous or if his physical condition is such as to jeopardize his own safety or that of others. In order for the court to have made an effective and informed decision, counsel was required to disclose any fact which he had in his possession regarding any of the factors necessary to the court's consideration and decision pursuant to CrR 3.2. In order to aid the court in its decision-making process, and assure the due and proper administration of justice, CrR 3.2 required the disclosure of this information. Sanders' failure to disclose this information resulted in an improper, uninformed and ineffective decision by the court, which allowed Michael Hawkins to be released despite the fact that he was mentally ill and dangerous.

Even if CrR 3.2 were not viewed as mandating the disclosure of this information, Sanders nevertheless was under a duty to disclose. An attorney is required to reveal all relevant and material facts to the court, which will aid in its determination of the issue before it for consideration. Fite v. Lee, supra; Dike v. Dike, supra; EC 7-19, 7-20, 7-27. Even if a lawyer has no duty to disclose the whole truth, he does have a duty not to deceive the court, and an obligation not to hide the real facts from the court. Daniel v. Penrod Drilling company, 393 F. Supp. 1056 (D. La. 1975).

Even if the court finds that the attorney-client privilege does exist, it must be weighed against the interest or need in a full revelation of all the facts:

As the privilege may result in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; but rather, must be strictly limited to the purpose for which it exists. Dike v. Dike, 75 Wn.2d at 11.

Dike v. Dike, 75 Wn.2d 1, 448 P.2d 490 (1968) is a case in point. The Washington Supreme Court rejected the attorney's contentions that disclosure of the address of his client was privileged information, holding that an attorney could (and should) be required to disclose this information where the facts relating to the action rendered the disclosure necessary in the interests of justice, and to protect the rights of a party to the action, or an innocent third party:

The necessity for unhindered communication between attorney and client is outweighed, not so much by society's interest in having the truth disclosed as to crimes already completed, but rather by society's interest in protecting the present and future victims of the client. Id. at 14, 448 P.2d at 498. (Emphasis added.)

In the case at bar, the disclosure of Michael Hawkins' mental condition was necessary to protect not only Mrs. Hawkins or other persons who were likely to be harmed by Michael, but also to

protect Hawkins from himself.

2. Hawkins Was Not Competent to Authorize
His Attorney's Action.

The law required Sanders to disclose to the court the fact of Hawkins' mental condition (and dangerousness), so that the court could have appointed a guardian ad litem to represent his interests, since he was incompetent to represent his own interests.

Where an attorney has reason to know that a person is incompetent, or possesses or has knowledge of facts which would support a finding of incompetency, he must inform the court so that the court can make a determination as to whether the party is competent, or must be represented by a guardian ad litem, pursuant to RCW 4.08.060. Shelley v. Elfstrom, 13 Wn. App. 887, 538 P.2d 149 (1975); Dill v. Superior Court, 60 Wn.2d 148, 372 P.2d 541 (1962); Flaherty v. Flaherty, 50 Wn.2d 393, 312 P.2d 205 (1957); In Re Miller, 26 Wn.2d 202, 173 P.2d 538 (1946). And a guardian ad litem will be appointed regardless of whether the person has already been adjudged as, or found to be, insane. In Re Miller, supra. See also Flaherty v. Flaherty, supra; Shelley v. Elfstrom, supra.

The statutory mandate of RCW 4.08.060 is not satisfied when the person under legal disability is represented by an attorney, because it is incumbent upon the attorney to apprise the court of such incapacity. Dill v. Superior Court, supra, citing Flaherty v. Flaherty, supra. This rule is broader than

counsel's professional duty to his client not to disclose this information, since he is under a duty to disclose the information to the court in order that the incompetent party's interests and rights are protected. Flaherty v. Flaherty, supra.

In addition, Sanders was required to act in the best interests of his client. DR 7-101, and EC 7-9. Where serious and substantial doubt exists as to a client's competency, his responsibilities to protect the rights and interests of his client are much greater. See EC 7-11 and 7-12. As the cases above hold, he must seek a court determination as to competency or the need for the appointment of a guardian ad litem to assure that these interests are protected. Since a lawyer cannot perform or make any decision which the law requires the client to make (EC 7-12), he must take steps to assure that a competent person is appointed to make those decisions and to represent the client. In this case, Hawkins was not competent to determine if release was in his best interests, and although he expressed a desire to obtain release from jail, Sanders had a duty to uphold the law (In Re Wetzel, supra), and to see that Hawkins' best interests were protected by the appointment of a guardian ad litem.

The public policy was expressed by the 1975 legislature with regard to a person in Hawkins' situation: That he must be legally protected without the necessity for determination of total incompetency.

RCW 11.88.005. Legislative Intent and Purpose. It is the intent and purpose of the legislature to recognize that mentally retarded, developmentally disabled, and other allegedly mentally incompetent persons have special and unique abilities and competencies with varying degrees of disability.

Such persons must be legally protected without the necessity for determination of total incompetency and without the attendant deprivation of civil and legal rights that such a determination requires. [1975 1st Ex Sess ch 95 § 1] (Emphasis added.)

It was public knowledge that Hawkins was allegedly mentally incompetent. This fact raised an affirmative duty in Sanders to assure that he be legally protected. The minimum requirement in the discharge of this duty would have been to call the Court's attention to these publicly known facts.

3. Sanders' Personal Interest Interfered
With Professional Judgment.

DR 5-101(A) of CPR 5 requires that an attorney refuse representation of a client where his professional judgment on behalf of his client may be affected by his own personal interests.

DR5-105(A) requires that an attorney decline proffered employment when the exercise of his professional judgment will be or is likely to be adversely affected by the acceptance of such employment. In the present case, Sanders' personal beliefs and interest unquestionably clouded his professional judgment, such that he could not act objectively and fairly in his professional capacity in representing the interests of his client. Mr. Sanders permitted his personal views and

beliefs to affect his conduct and manner of representation of Michael Hawkins. He advocated that society did not have the right to make a determination of mental illness or judge the danger to society, and society did not have a right to detain an individual in custody who had not committed a crime as a result of his mental condition or danger (Dep. of Richard Sanders, at page 5, lines 8-25, page 6, lines 1-15; page 7, line 20-25, page 8, lines 1-18; page 11, line 6-25, page 12, page 13, lines 1-3). As a result of his failure to exercise an unbiased and independent professional judgment, either by advising the court of Michael's mental condition and dangerousness, or having a guardian appointed to represent Michael's interests, he breached his legal duty to Michael Hawkins, which resulted in severe and permanent personal injury to Michael Hawkins.

4. Sanders is Liable for Damages.

Respondent Sanders' breach of his legal duties and obligations renders him liable to Michael Hawkins for malpractice. An action for legal malpractice can be framed either as a tort or a breach of contract. Peters v. Simmons, 87 Wn.2d 400, 552 P.2d 1053 (1976). The failure to exercise the requisite skill, care and diligence necessary to the proper rendition of legal services constitutes a tort. Peters v. Simmons, supra. The standard to which attorneys are held in the performance of their professional services is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable careful and prudent lawyer, and failure to meet this standard is malpractice. Cook, Flanagan & Berst v. Clausing, 73 Wn.2d 393, 438 P.2d 865 (1968).

The standards established under the Code of Professional Responsibility are more than just an ethical goal. They have been adopted and declared to be the standard of practice for attorneys in Washington State, (See RCW 2.48.230), and have been declared to have the same effect as any other law by the Washington Supreme Court. Hansen v. Wightman, 14 Wn. App. 78, 538 P.2d 1238 (1975); In Re Chantry, 67 Wn.2d 190, 407 P.2d 160 (1965).

Therefore, a violation of these standards not only subjects an attorney to disciplinary action, but also subjects him to liability for malpractice, since he has breached established standards of the legal profession, which are the guidelines by which an attorney's conduct are to be judged. In Re Steinberg, 44 Wn.2d 707, 269 P.2d 970 (1954); Hansen v. Wightman, supra; Cook, Flanagan & Berst v. Clausing, supra. Particularly where the attorney's conduct is in violation of the disciplinary rules, which are the minimum standards established to govern the conduct of members of the legal profession, a violation of these standards constitutes malpractice, since the attorney has not met the standards of conduct required to be exercised by members of the legal profession. In Re Steinberg, supra; Cook, Flanagan & Berst v. Clausing, supra; Peters v. Simmons, supra.

An attorney is liable if he is negligent in failing to meet the standards of conduct within the legal profession, regardless of his assertion of error or judgment or good faith,

or that his actions were based on an honest belief that they were in the best interests of his client, and regardless of whether his breach was intentional. In Re Fraser, 83 Wn.2d 884, 523 P.2d 921 (1974); Cook, Flanagan & Bert v. Clausing, supra.

Richard Sanders is liable for failure to meet the standards required and must be held answerable in damages to appellant Michael Hawkins.

5. Frances Hawkins' injuries were the direct and proximate result of Respondent Sanders' negligent acts.

Sanders' liability, and scope of duty owed, is measured by the foreseeability of the risk. McCleod v. Grant Co. School Dist., 42 Wn.2d 316, 255 P.2d 360 (1963); Hosea v. Seattle, 64 Wn.2d 678, 393 P.2d 967 (1964); Berg v. General Motors Corporation, 87 Wn.2d 584, 555 P.2d 818 (1976). Public policy requires that an attorney exercise his position of trust and superior knowledge responsibly so as not to adversely affect persons whose rights and interests are certain and foreseeable. Dike v. Dike, 75 Wn.2d 1, 448 P.2d 490 (1968); Heyer v. Flaig, 70 Cal.2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969). As in Dike, the primary purpose of Sanders' duty of disclosure, which required him to reveal to and advise the court of plaintiff Michael Hawkins' mental condition and dangerousness, was not only for the protection of Michael Hawkins, but also for the protection of those who foreseeably could be harmed by Michael. As stated in Dike v. Dike, at 75 Wn.2d 14, the need for disclosure is based

on "society's interest in protecting the present and future victims of the client."

The rules governing the professional conduct of lawyers are designed to establish ethical standards and to protect the public as well. Fite v. Lee, supra; Dike v. Dike, supra; Ames v. State Bar, 8 Cal.3d 910, 506 P.2d 625, 106 Cal. Rptr. 489 (1973). Thus an attorney who fails to carry out the duties imposed upon him as a member of the legal profession, and under the code of professional responsibility is liable, under general negligence theories, to those who foreseeably were injured as a result of his breach.

An action for malpractice is no longer limited to breach of contract, but is also actionable as a tort. Peters v. Simmons, supra. Privity of contract, or allegation of absence of legal duty, is no longer a bar to an action wherein defendant's failure to meet duties imposed upon him results in injury to a third person. Hansen v. Wightman, supra; Peters v. Simmons, supra; Fite v. Lee, supra. An attorney should be held liable as other professional persons or organizations are where violation of a standard of care required to be practiced by members of the legal profession causes injury to another, and where the purpose of the duty was to protect such person. Adams v. State, 71 Wn.2d 414, 429 P.2d 109 (1967); Tarasoff v. Regents of U. of C., supra.

In Tarasoff, supra, the California Supreme Court looked at the importance of the defendant's status, particularly his ability to prevent the injury, as a factor in determining tort liability.

In rejecting the defendants' assertion that they owed no duty of reasonable care, the court invoked the duty of every person to use ordinary care. The court quoted the salient language of Rowland v. Christian, 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1978), which was adopted from an early English case:

Whenever one person is by circumstances placed in such a position with regard to another...that if he did not use ordinary care and skill in his own conduct...he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Id. at 434, 551 P.2d at 342, 131 Cal.Rptr. at 22.

Attorneys may be found liable for their negligence, where third persons, whose rights and interests were reasonably foreseeable, are injured as a result of an attorney's negligent acts. In Re Fraser, 83 Wn.2d 884, 523 P.2d 921 (1974); Hansen v. Wightman, supra; Heyer v. Flaig, supra, 45 ALR 3d 1181 (1972), Attorney's Liability to Third Parties. In the present case, where Sanders knew that Michael Hawkins was seriously mentally ill and dangerous, he had a duty to reveal this information to the court in order to protect Mrs. Hawkins or others who foreseeably could

be injured as a result of Michael Hawkins' violent acts. Tarasoff v. Regents of U. of C., supra. Therefore, Richard Sanders should be held liable in damages to Frances Hawkins, who suffered severe and permanent injury as a direct and proximate result of Sanders' negligent acts.

CONCLUSION

There are genuine issues of material fact which preclude entry of summary judgment in this cause. Attorney Sanders was employed to represent an allegedly incompetent and dangerous person who was without guardian. He elected to represent him by withholding information which was necessary for a court to make an informed decision regarding the client's release upon his own recognizance. This action violated the standard of reasonable care of a lawyer in the practice of law in this state. Sanders breached a duty to his client and to those who were foreseeably injured as a result of his breach of professional duty. The Washington Supreme Court has stated that an attorney may be liable not only to his client, but to third persons who may be injured as a result of the attorney's negligence. The trial court's order dismissing attorney Sanders by summary judgment should be reversed, and the action should be tried.

Respectfully submitted,

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