

No. A14-0413

STATE OF MINNESOTA
IN SUPREME COURT

Jerry Expose, Jr.,
Respondent,

vs.

Thad Wilderson & Associates, P.A.,
Appellant,
and

Nina Mattson,
Appellant.

**BRIEF OF AMICUS CURIAE
MINNESOTA BOARD OF PSYCHOLOGY
IN SUPPORT OF APPELLANT NINA MATTSON**

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LEGAL ISSUE

I. SHOULD THE TERM “LICENSEE” IN MINN. STAT. § 148.975 APPLY TO AN INDIVIDUAL PRACTICING PURSUANT TO SUPERVISION BY A LICENSEE?

The Minnesota Court of Appeals held in the negative.

Apposite Authority:

Minn. Stat. § 148.907

Minn. Stat. § 149.925

Minn. Stat. § 148.975

STATEMENT OF AMICUS CURIAE¹

The Minnesota Board of Psychology (“Board”) submits this brief in support of Appellant Nina Mattson, pursuant to Minn. R. Civ. App. P. 129 and this Court’s Order of February 5, 2016, granting leave to file a brief as *amicus curiae*.

The Board has an interest in this case because it presents an opportunity for the Court to interpret Minn. Stat. § 148.975, which is a part of the Board’s Practice Act (“Practice Act”), the set of statutes that governs the practice of psychology in Minnesota. *See generally* Minn. Stat. §§ 148.88 – 148.98.

Section 148.975 obligates a psychologist whose client articulates certain threats against a third party to warn potential victims and law enforcement of the threat. The statute provides immunity from liability to those who fulfill this duty to warn. Minn. Stat. § 148.975, subds. 4, 8. The Court of Appeals’ opinion held that section 148.975 applies only to licensees, but does not extend to individuals practicing under the supervision of a licensee.

In order to become a licensed psychologist, an applicant for board licensure must practice under close supervision of a licensee. This includes both supervised and unsupervised client counseling. The Board believes that exempting the applicants from the duty and immunity provisions of section 148.975 would have a chilling effect on

¹ Pursuant to Minn. R. Civ. App. P. 129.03, the Minnesota Board of Psychology affirmatively states that counsel for *amicus curiae* authored this brief in whole. No person or entity, other than the *amicus curiae* and its representatives, authored any part of or made monetary contribution to the preparation or submission of this brief.

reporting, such that supervisees, supervisors, and clinics could be prevented or delayed in reporting the sort of specific, serious threats that are meant to be reported under section 148.975, putting the public at risk of violence that section 148.975 is designed to prevent.

Further, Respondent seeks to hold both the Clinic, as well as the supervisee, liable for the report. Such a result may be deter licensed psychologists from accepting potential supervisees and allowing those supervisees to practice under supervision, as intended and required by the Practice Act.

STATEMENT OF FACTS

Respondent Jerry Expose, Jr. received therapy services from Appellant Thad Wilderson & Associates, P.A. (“Clinic”) in 2012. (*See* Addendum of Appellant Nina Mattson “NMA” at 2). The Clinic assigned Appellant Nina Mattson (“Mattson”) to provide therapy to Respondent Jerry Expose, Jr. (“Expose”) *Id.* At the time, Mattson was working towards her license to practice marriage and family therapy, and was thus required to conduct therapy under the supervision of a licensee of the Board of Marriage and Family Therapy. *Id.* at 61.

During a therapy session with Mattson on October 10, 2012, Expose made statements to Mattson regarding a Ramsey County child-protection caseworker, whom Expose believed was making it more difficult to reunite with his children. *Id.* at 3. The statements caused Mattson to believe that Expose might physically harm the caseworker. *Id.* Mattson believed that she had a duty to warn based on Expose’s statements. *Id.* at 61-

63. Immediately after the session, Mattson consulted with her supervisor, a licensee of the Board of Marriage and Family Therapy, who advised her to contact law enforcement. *Id.* at 4. Mattson reported the threat to the potential victim and law enforcement. *Id.* Expose was later charged with making a terroristic threat. *Id.* Mattson was subpoenaed and testified at Expose's trial. *Id.*

Expose then brought a civil action against Mattson and the Clinic, claiming that Mattson breached her confidentiality obligations. NMA at 5. Mattson and the Clinic raised several defenses to Expose's civil claims, arguing in part that section 148.975, subdivisions 4 and 8, guaranteed Mattson immunity for fulfilling her duty to warn a victim of a specific, serious threat of violence. *Id.* at 17-22. The district court held that Expose's claims were barred by Mattson's statutory immunity, pursuant to her proper execution of her duty to warn. *Id.* The Court of Appeals held that section 148.975 did not provide a valid defense in this case, holding that that statute applies to licensees, and that because Mattson is not a licensee, as defined by statute, section 148.975 does not apply in her situation. *Id.* at 40-43.

ARGUMENT

I. STATUTORY INTERPRETATION

Statutory interpretation presents a question of law subject to de novo review. *E.g.*, *Day Masonry v. Independent Sch. Dist.* 347, 781 N.W.2d 321, 325 (Minn. 2010). "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. The first step in statutory

interpretation is to “determine whether the statute’s language, on its face, is ambiguous.” *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001) (citing *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)). When the words of law “in their application to an existing situation” are not “clear and free from all ambiguity,” the language is ambiguous. Minn. Stat. § 645.16.

In cases where a statute’s language is ambiguous, a court may “consider the factors set forth in Minn. Stat. 645.16(1)-(8) (2008).” *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009). These factors include the occasion and necessity for the law, as well as the mischief to be remedied and object to be obtained. *Id.* Furthermore, the legislature does not intend an absurd result. Minn. Stat. § 645.17, subd. 1.

II. THE TERM “LICENSEE” IN MINN. STAT. § 148.975 APPLIES TO AN INDIVIDUAL PRACTICING UNDER A LICENSEE’S SUPERVISION.

Under section 148.975, a licensee has a duty to warn when a client communicates a “specific, serious threat of physical violence against a specific, clearly identified or identifiable potential victim.” Minn. Stat. § 148.975, subd. 2.² Section 148.975 also provides immunity from liability for those who act on a duty to warn. Minn. Stat. § 148.975, subs. 4, 8. In short, section 148.975 sets up a structure by which those who are bound by confidentiality requirements are permitted to break that confidentiality to disclose certain threats. For the statute to have its full effect, it must be applied to all

² Section 148.975 is part of the Board of Psychology Practice Act, and applies to the Board of Marriage and Family Therapy by reference. *See* Minn. Stat. § 148B.1751.

providers of mental health services who are in the position to receive and act on the threats described in section 148.975.

Section 148.975's application in the existing situation is ambiguous. *See* Minn. Stat. § 645.16. While Mattson was not personally a licensee of a health licensing board at the time of the events in question, it is undisputed that she was acting on behalf of the licensee when she both learned of and disclosed Expose's threats. This supervised practice is a requirement to becoming licensed, Minn. R. 7200.2000, and a supervisor is responsible for ensuring the quality of the services provided. *See* Minn. R. 7200.4600. *See also* Minn. Stat. § 148.925, subds 1, 6.

Furthermore, Mattson was acting at the behest of her licensee-supervisor, both during the consultation with the client and in making the subsequent report. After hearing the threat, Mattson consulted with her supervisor, who advised her of the need to report the threat. As such, Mattson was an agent of her supervisor. *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981) ("Agency is the fiduciary relationship that results from manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.").

Section 148.975 is ambiguous as to how it applies to a supervisee acting on behalf of a licensee. However, applying section 148.975 to supervisees is consistent with the legislative intent and purpose behind the law.

A. Applicants For Licensure Are Required to Practice Under Licensee Supervision.

The Practice Act permits unlicensed supervisees to practice psychology in one-on-one therapy sessions without a supervisor present. Minn. Stat § 148.925, subd. 5 (requiring two hours of supervision a week). Thus, unlicensed supervisees are permitted to perform the functions of a psychologist, including assessment, psychotherapy, and psycho-educational services and treatment, outside of such supervision hours. Minn. Stat § 148.925, subd. 6; Minn. Stat. § 148.89, subd. 5. Supervisors are not required to “sit in” on any therapy sessions conducted by their supervisees. Minn. Stat § 148.925, subd. 5.

The law requires Board applicants to complete a minimum of 1800 hours of supervised practice in order to qualify for licensure, in a period lasting between twelve and thirty months from the date of first employment. Minn. Stat. § 148.907, subd. 2(7); Minn. R. 7200.2000, subp. 1. The supervision provided during this period is subject to several specific requirements. Minn. R. 7200.2000, subp. 2 (referencing Minn. Stat. § 148.907, subs. 1 to 3, 5, and 6).

A supervisee who is practicing in such an arrangement is, in effect, practicing pursuant to the license held by her supervisor and acting exactly as a licensee would. *See* Minn. Stat. § 148.907, subd. 1 (permitting practice by an unlicensed individual only pursuant to statutory supervision requirements). As the sole provider to a client, the supervisee will receive information directly from clients, with no one else present. In such a setting, a supervisee is practicing as a licensee, and should receive the protections and responsibilities of section 148.975. *See* Minn. R. 7200.4500, subp. 1 (applying the

Board's rules of conduct to all providers); *see also* Minn. Stat. 148.89, subd. 4a (defining provider to include applicants).

B. The Board Applies Confidentiality Exceptions To Supervisees.

The Board's position is borne out in its own rules. The Board has adopted rules of conduct, as required by section 148.98. *See generally* Minn. R. 7200.4500 – 7200.5750. The Board's Rules of Conduct apply to "the conduct of all providers, including conduct during the period of education, training, and employment that is required for licensure." Minn. R. 7200.4500. The fact that the Board's Rules of Conduct apply to supervisees demonstrates that the Board expects supervisees to practice as licensees, and holds them accountable to the same Rules of Conduct as licensees.

In addition, Rule 7200.4700 provides for limited disclosure of private client information in the event of a threat. That provision reads as follows:

Limited disclosure to others without consent. Private information may be disclosed without the consent of the client when disclosure is necessary to protect against a clear and substantial risk of imminent serious harm being inflicted by the client on the client or another individual, including the provider. In such case the private information is to be disclosed only to law enforcement agencies, the potential victim, the family of the client, or appropriate third parties in a position to prevent or avert the harm.

Minn. R. 7200.4700, subp. 2. The current language of the above rule was adopted on June 18, 2012, following the required public comment period. This rule is evidence that the Board's position, at least since adoption of the above rule, has been that disclosure of otherwise protected information is appropriate when there is a risk of harm coming to a member of the public. As in the case of section 148.975, the above exception

is narrow, and worded in such a way as to balance the important interest of client-therapist confidentiality while ensuring public protection. Applying section 148.975 to unlicensed supervisees will be consistent with Board rules and the intent to protect providers who are bound on one side by confidentiality and by a duty to protect the public on the other.

C. The Board Is Concerned that Affirming The Court Of Appeals' Interpretation Of Section 148.975 Will Put Supervisees And The Public At Risk.

The Board believes that affirming the Court of Appeals' interpretation of 148.975 would create uncertainty and risk in a situation where a threat is made in a therapy session that is conducted by a supervisee who is practicing properly under Board statutes and rules. Under the statute, a duty to warn arises when a "client or other person has communicated to the licensee a specific, serious threat of physical violence against a specific, clearly identifiable potential victim." Minn. Stat. § 148.975, subd. 2. The structure of the statute evinces the legislature's intent to apply the duty to warn and relate immunity to the individuals who receive confidential but threatening communications.

If Mattson is the sole provider in a session with her client, the Court of Appeals would hold that Mattson is not a licensee for whom the duty to warn arises, and therefore not immune from civil liability pursuant to section 148.975 subdivisions 4 and 8. Such an interpretation would treat the same threat differently, depending on whether it is heard by a licensee or by an unlicensed supervisee practicing under the supervision of a licensee and performing the same duties as a licensee.

Mattson could have communicated the threat to her licensed supervisor and asked him to report the threat. Minn. Stat. § 148.975. Even if Mattson wished to warn the victim this way, there is no guarantee that her supervisor would be immediately available. Further, such a report would be second-hand, increasing the chances of an error, and creating unnecessary delay.³ The language of section 148.975, creating a duty to warn and protections for those who do so, demonstrates on its face that the legislature intended for specific, serious threats of violence to be reported, to prevent such violence from occurring.

D. The Board Believes That Affirming The Court Of Appeals' Interpretation Of Section 148.975 Will Impede The Supervision-Based Training Regimen And Could Reduce The Availability And Quality Of Psychological Care In Minnesota.

If this Court affirms the Court of Appeals' interpretation of section 148.975, the Board believes that such a decision will likely have an effect on the practice of psychology and other mental health disciplines in Minnesota. As noted above, Board statutes and rules do not require that supervisees practice with their supervisors present, and it is common for individuals who are practicing psychology as supervisees under the Practice Act to provide psychological services to clients in a one-on-one setting. *See* Minn. R. 7200.2000.

³ Even if a supervisee were to report a threat to a supervisor, the Court of Appeals' opinion would create uncertainty regarding whether the *supervisor* would have a duty to warn, because the client did not communicate the threat *to the licensed supervisor*. Minn. Stat. § 148.975, subd. 2.

If this Court upholds the Court of Appeals' interpretation, the Board is concerned that clinics and individual supervisors may become more reluctant to accept unlicensed individuals who will be practicing under supervision, due to uncertainty and potential liability regarding the Duty to Warn. For example, supervisors may feel that in order to avoid interpretational confusion, supervisors must sit in on every session by every supervisee, so that if a threat is communicated by a client, the licensed supervisor will be present to hear that threat and take appropriate steps. Such changes would put further strain on limited practitioner resources, and would ultimately result in less availability of qualified providers available to provide psychological care to Minnesotans.

Clarifying that section 148.975 applies to licensees and supervisees practicing under the supervision of a licensee will ensure that providers of psychological services are able to continue providing high-quality care to patients, pursuant to applicable laws and rules. Such an interpretation would free supervisors and clinics from weighing the risk to the public and risk to the clinic, and restore a common sense balance by which providers who are witness to threats in the course of supervised practice may protect the public by communicating those threats directly and efficiently.

CONCLUSION

The Board's interest is in ensuring that psychology is practiced safely in Minnesota by seeing that the Practice Act and Board rules are enforced properly. See Minn. Stat. § 148.905, subd. 1(1), (8). The correct interpretation of Minn. Stat. § 148.975 is to apply the statute to supervisees who are practicing under the supervision of a licensee pursuant

to Board statutes and rules. This interpretation is consistent with the intent of section 148.975, as evidenced by the language of that statute: to provide a narrow exception to confidentiality requirements so that those who receive specific, serious threats can take steps to prevent potential violence. This interpretation is also consistent with the Board's stringent requirements on supervisors and supervisees and will encourage strong and responsible supervision and supervised practice. Such an interpretation preserves the value of client-therapist confidentiality while ensuring that the public is protected from preventable violence.

Dated: February 25, 2016.

Respectfully submitted,

BOARD OF PSYCHOLOGY
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