

No. 67821-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NICHOLE POLETTI,
as the Executor of the Estate of Sherri Poletti, Deceased,

Respondent,

v.

OVERLAKE HOSPITAL MEDICAL CENTER,

Appellant,

and KING COUNTY,

Defendant.

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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. SUMMARY OF REPLY ARGUMENTS 1

II. ARGUMENT IN REPLY 2

 A. Overlake Did Not Fail to Carry a Burden of Demonstrating that RCW 71.05.120(1) Applies..... 2

 B. RCW 71.05.120(1) Is Not Subject to “Strict” Construction 3

 C. *Detention of C.W.* Does Not Support Plaintiff’s Argument(s) 4

 D. Contrary to Plaintiff’s Protestations, Release of a Voluntarily Admitted Psychiatric Patient Is Subject to the ITA 6

 E. “Psychiatric Medicine” Will Not Be Immunized from Civil Liability By A Reversal of the Trial Court’s Ruling..... 7

 F. There Is No Merit to Plaintiff’s Legislative Intent and Public Policy Arguments 10

 G. Plaintiff’s Arguments that Overlake Can Be Held Liable for Ordinary Negligence for Decisions Other than “Whether to . . . Discharge, Release . . . or Detain” Ms. Poletti Are Not Germane to the Trial Court Order Being Reviewed, and Are Wrong..... 14

 H. The California Decision and the *Harris, Taggart* and *Webb* Decisions Plaintiff Cites Are Inapposite..... 16

 I. The WAC Regulations Plaintiff Cites Do Not and Could Not Override Pertinent Statutes, Such as RCW 71.05.050 and .120(1) 18

 J. Plaintiff’s “Informed Consent” Arguments Are Not Germane to the Trial Court’s Ruling and Misconceive How “Informed Consent” Law Would Apply 19

K.	There Is No Basis for This Court to Find Overlake Grossly Negligent as a Matter of Law	21
L.	Plaintiff’s Arguments About Overlake’s Policies Erroneously Assume that RCW 71.05.120(1) Does Not Apply, and Failure to Adhere to a Hospital Policy Is Not Negligence as a Matter of Law	23
M.	Overlake Submitted Sufficient Evidence to Raise an Issue of Fact Even if “Ordinary” Negligence Is the Applicable Standard	24
III.	CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Andrews v. Burke</i> , 55 Wn. App. 622, 779 P.2d 740, rev. denied, 113 Wn.2d 1024 (1989)	22, 24
<i>Backlund v. Univ. of Washington</i> , 137 Wn.2d 651, 975 P.2d 950 (1999)	20
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006)	11
<i>Detention of C.W.</i> , 147 Wn.2d 259, 53 P.3d 979 (2002)	4-6
<i>Dep't of Ecology v. Campbell & Gwynn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002)	11
<i>Dep't of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998)	19
<i>Estate of Bunch v. McGraw Residential Center</i> , ___ Wn.2d ___, 275 P.3d 1119 (2012)	4
<i>Gonzalez v. Paradise Valley Hosp.</i> , 3 Cal. Rptr. 3d 903 (2003)	16-17
<i>Hallauer v. Spectrum Props.</i> , 143 Wn.2d 126, 18 P.3d 540 (2001)	21
<i>HomeStreet, Inc. v. Dep't of Revenue</i> , 166 Wn.2d 444, 210 P.3d 297 (2009)	9
<i>In re Harris</i> , 98 Wn.2d 276, 654 P.2d 109 (1982)	16, 17

<i>In re Knapp</i> , 102 Wn.2d 466, 687 P.2d 1145 (1984).....	9
<i>In re Labelle</i> , 107 Wn.2d 196, 728 P.2d 138 (1986).....	8
<i>In re Swanson</i> , 115 Wn.2d 21, 793 P.2d 962 (1990).....	4, 8
<i>Matthews v. Elk Pioneer Days</i> , 64 Wn. App. 433, 824 P.2d 541 (1992).....	3-4
<i>Mohr v. Grantham</i> , 172 Wn.2d 844, 262 P. 3d 490 (2011).....	24
<i>Rideau v. Cort Furniture Rental</i> , 110 Wn. App. 301, 39 P.3d 1006 (2002).....	2
<i>Schmidt v. Cornerstone Inv., Inc.</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990).....	13-14
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992).....	16, 17-18
<i>Webb v. Neuroeducation, Inc. P.C.</i> , 121 Wn. App. 336, 88 P.3d 417 (2004).....	16, 17-18

FEDERAL CASES

<i>Jensen v. Lane County</i> , 312 F.3d 1145 (9 th Cir. 2002)	8
---	---

FEDERAL STATUTES

42 U.S.C. § 1983.....	5-6
-----------------------	-----

STATE STATUTES

California Welfare & Institutions Code ¶ 527816, 17

Laws of 1974 ex. s., ch. 145, § 611

Laws of 1997, ch. 112, § 5.....11

Laws of 2000, ch. 94, § § 1, 3 and 413

RCW 7.70.03019, 20

RCW 7.70.030(3).....19, 20, 21

RCW 7.70.04023

RCW 7.70.040(1).....14, 15, 25

RCW 7.70.05019, 20, 21, 25

RCW 7.70.050(2).....20

RCW ch. 10.77.....10

RCW 70.05.120(4).....1

RCW 70.24.0701

RCW 70.28.031-.0371

RCW ch. 71.05.....10, 11, 12

RCW 71.05.03010

RCW 71.05.050 passim

RCW 71.05.120(1)..... passim

RCW 71.05.15010

RCW 71.05.15310

RCW 71.05.153(1).....6

RCW 71.05.510	6
RCW ch. 71.06.....	10
RCW ch. 71.34.....	10

RULES

RAP 10.3(a)(6).....	13
---------------------	----

OTHER AUTHORITIES

Senate Bill Report, HB 2520 (Feb. 23, 2000).....	12, 13
WPI (Civ.) 105.04.....	20

I. SUMMARY OF REPLY ARGUMENTS

Plaintiff may wish the law were different, but the right of a law-abiding mentally ill adult to decline or terminate treatment and go home, or wander the streets, or drive a car, trumps, in almost every instance, anyone else's belief that the person would have been better off confined and receiving psychiatric treatment. Appellate court decisions and Involuntary Treatment Act (ITA) provisions that make it difficult to confine a mentally ill person express society's concern that the power to confine and impose treatment on individuals is too susceptible of abuse.¹

Contrary to plaintiff's assertions, statutes that enable a mentally ill person to decline treatment are not construed strictly. It is statutes that *permit* a mentally ill person to be detained or confined that are construed strictly. The law that applied when Sherri Poletti requested discharge from Overlake early on the evening of December 31, 2006 was clear. Even though Nurse Short believed Ms. Poletti² would benefit from further inpatient treatment, and told Ms. Poletti so, the law required Overlake to let Ms. Poletti leave immediately, unless Nurse Short regarded her as

¹ In general, *health care* is not something a law-abiding adult can be forced to have. Exceptions are few: an adult may be quarantined and/or forcibly treated for *communicable* diseases, *see* RCW 70.28.031-.037 (tuberculosis), RCW 70.24.070 (sexually transmitted diseases), RCW 70.05.120(4) (contagious diseases generally), or may be committed or detained for mental health treatment, but only as permitted by, and subject to the due-process protections provided for in, the ITA, *see fn. 7 infra*.

² "Ms. Poletti" is used to refer to Sherri Poletti, the decedent. "Plaintiff" is used to refer to Nichole Poletti, the Executor of Sherri Poletti's estate.

presenting an imminent likelihood of serious harm. RCW 71.05.050 (second sentence). To detain Ms. Poletti, Nurse Short had to regard her as someone who would imminently attempt suicide if allowed to leave.³ Nurse Short did not regard Ms. Poletti as an imminent suicide risk.⁴ Overlake’s “decision of whether to [and by implication whether *not* to] . . . discharge, release, . . . or detain” Ms. Poletti must be evaluated under a gross negligence standard of fault. RCW 71.05.120(1). Under the facts of this case, RCW 71.05.050 and .120(1) trump all of the administrative regulations, hospital policies, and “informed consent” statutes plaintiff cites, which in most instances would not apply anyway.

II. ARGUMENT IN REPLY

A. Overlake Did Not Fail to Carry a Burden of Demonstrating that RCW 71.05.120(1) Applies.

Citing *Rideau v. Cort Furniture Rental*, 110 Wn. App. 301, 304, 39 P.3d 1006 (2002), plaintiff argues, *Resp. Br. at 22-23*, that Overlake had, and failed to carry, a burden of demonstrating that RCW 71.05.120(1) applies. *Rideau* does not support such an argument. It is inapposite.

Rideau involved an issue of immunity under the Industrial Insurance Act, the applicability of which depended on the parties’ relationship, which was disputed. The *Rideau* court held that summary

³ Plaintiff has not contended that Ms. Poletti met the statutory definition of “gravely disabled” or presented an imminent likelihood of serious harm to anyone but herself.

⁴ Nor was she. Indeed, as plaintiff insists, Ms. Poletti died accidentally; not by suicide.

judgment in favor of the defendant on statutory immunity grounds was improper because the defendant had failed to establish as a matter of law that it had been the plaintiff's employer under the loaned servant doctrine.

Here, Ms. Poletti's relationship with Overlake is not in dispute; she was its voluntarily admitted psychiatric patient. The relationship being undisputed, whether RCW 71.05.120(1) applies depends upon the act or omission on which plaintiff bases her claim that Overlake has liability for Ms. Poletti's death. That act or omission is the decision to discharge, rather than to detain, Ms. Poletti. Because Ms. Poletti was a voluntarily admitted patient, Overlake had a legal duty under RCW 71.05.050 to discharge her immediately upon request unless it regarded her as presenting an imminent likelihood of serious harm. In responding to her discharge request, Overlake was performing a "dut[y] . . . with regard to the decision of whether to . . . discharge, release, . . . or detain a person for evaluation and treatment," and therefore has immunity from civil liability under RCW 71.05.120(1), unless it acted with gross negligence.

B. RCW 71.05.120(1) Is Not Subject to "Strict" Construction.

Citing *Mathews v. Elk Pioneer Days*, 64 Wn. App. 433, 437, 824 P.2d 541 (1992), plaintiff argues, *Resp. Br. at 23*, that RCW 71.05.120(1) must be "narrowly construed" because it provides immunity "in derogation of common law." Plaintiff is incorrect. *Mathews* did not concern the

ITA or mental health issues. But, *In re Swanson*, 115 Wn.2d 21, 793 P.2d 962 (1990), did. Referring to ITA sections that permit involuntary detention for evaluation and treatment, *Swanson* made clear that “statutes involving a *deprivation* of liberty are to be construed strictly.” *Swanson*, 115 Wn.2d at 27 (italics added; citation omitted). Thus, it is statutes permitting detention of mentally ill persons, not statutes enabling mentally ill persons to decline treatment, that are subject to strict construction.⁵

C. *Detention of C.W. Does Not Support Plaintiff’s Argument(s).*

The trial court ruled that RCW 71.05.120(1) – indeed, the entire ITA – does not apply because Overlake did not detain Ms. Poletti. CP 910. Trying to justify that ruling, plaintiff argues that *Detention of C.W.*, 147 Wn.2d 259, 53 P.3d 979 (2002), “confirmed that, even when a hospital has confined a patient, the procedures set out in the ITA do not begin until the moment when its staff regards the patient as detainable,” *Resp. Br. at 24*, and that Overlake thus does not have RCW 71.05.120(1) immunity because it did not detain Ms. Poletti and obtain an MHP

⁵ Moreover, as the Washington Supreme Court recently noted in *Estate of Bunch v. McGraw Residential Center*, ___ Wn.2d ___, ___, 275 P.3d 1119, 1123 (2012):

The distinction between “liberal construction” and “strict construction” is easily overstated. Neither a liberal construction nor a strict construction may be employed to defeat the intent of the legislature, as discerned through traditional processes of statutory interpretation. . . . Strict construction is simply a requirement that, where two interpretations are equally consistent with legislative intent, the court opts for the narrower interpretation of the statute. . . . [Citations omitted.]

evaluation. *C.W.* neither holds nor suggests any such thing.

This case concerns RCW 71.05.050's second sentence: "Any person voluntarily admitted for inpatient treatment to any public or private agency shall be released immediately upon his or her request." *C.W.* concerned RCW 71.05.050's *last* sentence, which provides:

[I]f a person is brought to the emergency room of a . . . hospital for observation or treatment, the person refuses voluntary admission, and the professional staff of the . . . hospital regard such person as presenting as a result of a mental disorder an imminent likelihood of serious harm, or as presenting an imminent danger because of grave disability, they may detain such person for sufficient time to notify the [MHP] of such person's condition to enable the [MHP] to authorize such person being further held in custody or transported to an evaluation treatment center pursuant to the conditions in this chapter, but *which time shall be no more than six hours from the time the professional staff determine that an evaluation by the [MHP] is necessary.* [Emphasis added.]

RCW 71.05.050's last sentence concerns a scenario different from that addressed by RCW 71.05.050's second sentence. The petitioners in *C.W.* were six different children who, because of complaints of strange and/or violent behavior, had been taken to hospital emergency departments (EDs), observed, evaluated by the MHP at the request of ED staff, and involuntarily detained by the MHP for 72 hours. The legal issue common to the five cases was when the statutory six-hour period begins to run (such that exceeding it can expose a hospital to civil liability under 42

U.S.C. § 1983 and/or RCW 71.05.510 for excessive detention⁶).

The trial court in *C.W.* held that the period begins to run the minute a person is admitted to an ED, such that detention becomes unlawful (and actionable) unless, within six hours, ED staff decides to call and calls the MHP, and the MHP completes an evaluation and makes a decision pursuant to RCW 71.05.153(1) to detain involuntarily for up to 72 more hours. The Supreme Court rejected that conclusion, holding that RCW 71.05.050's six-hour clock does not begin to run until ED staff makes the determination that the statutory criteria for calling in the MHP are met.

The six-hour period at issue in *C.W.* has nothing to do with this case because Ms. Poletti was not brought to an ED for observation and treatment; she sought treatment on her own. The *C.W.* case had nothing to do with the second sentence of RCW 71.05.050 (requiring release of a voluntarily admitted patient immediately upon request), or with the application of RCW 71.05.0120(1), which are at issue in this case. Thus, *C.W.* is neither on point nor instructive.

D. Contrary to Plaintiff's Protestations, Release of a Voluntarily Admitted Psychiatric Patient Is Subject to the ITA.

Plaintiff asserts, *Resp. Br. at 25 (Header 2)*, that "release of a voluntary patient is not an ITA duty." Nonsense. The second sentence of

⁶ Under RCW 71.05.510, "[a]ny individual who knowingly, willfully or through gross negligence violates the provisions of this chapter by detaining a person for more than the allowable number of days shall be liable to the person detained in civil damages."

RCW 71.05.050 (“Any person voluntarily admitted for inpatient treatment to any public or private agency shall be released immediately upon his or her request”) is *part of* the ITA. It is an ITA duty.

E. “Psychiatric Medicine” Will Not Be Immunized from Civil Liability By A Reversal of the Trial Court’s Ruling.

Offering “dire consequences,” plaintiff asserts, *Resp. Br. at 25*, that, according to Overlake, “the release of a voluntary psychiatric patient is always an ITA act that gives rise to [RCW 71.05.120(1)] immunity,” and that acceptance of Overlake’s arguments will “lead to the unwarranted outcome of immunizing virtually all of psychiatric medicine . . .”

The first assertion is true. Release of a voluntary psychiatric patient is subject to RCW 71.05.120(1)’s gross negligence standard – not because Overlake argues that it is, but because the statute says it is. The second assertion is nonsense. A psychiatrist whose patient is injured or dies due to a misprescription of antidepressant or other medication, or a psychiatric unit nurse who leaves open a tenth-floor window through which a suicidal patient jumps, won’t be “immunized” from liability if RCW 71.05.050 and RCW 71.05.120(1) apply to this case. RCW 71.05.050 and RCW 71.05.120(1) are not implicated by those or myriad other possible errors in psychiatric care. But, those statutes do apply to this case and immunize Overlake from liability, absent gross negligence,

for its decision whether to discharge, release, or detain Ms. Poletti.

Ms. Poletti was a voluntarily admitted patient who decided she wanted to go home. The second sentence of RCW 71.05.050 therefore applied, and Overlake had duty to release her unless it regarded her as detainable. In making the decision “*whether to . . . discharge, release, . . . or detain*” her, Overlake made a decision subject to RCW 71.05.120(1). Try as plaintiff might to evade those statutes, there is no way around them.

Plaintiff asserts, *Resp. Br. at 26*, that Overlake “acknowledges [that] the obligation to release a patient stems not from the ITA, but from the fundamental principle that people normally cannot be held against their will [because of due process/false imprisonment concerns].” That is not Overlake’s argument, but it wouldn’t matter if it were. What matters is that the Legislature, consistent with decisions such as *Jensen v. Lane County*, 312 F.3d 1145 (9th Cir. 2002), *In re Swanson*, 115 Wn.2d 21, 793 P.2d 962 (1990), and *In re Labelle*, 107 Wn.2d 196, 728 P.2d 138 (1986), has accepted that involuntary civil commitment for mental illness is a “massive curtailment of liberty,” constitutionally suspect, potentially actionable, and something that must be tightly controlled with meaningful due-process protections. Therefore, the ITA makes it *difficult*, not easy, to involuntarily detain or commit, and makes it *difficult*, not easy, to second-guess in civil lawsuits decisions “whether to . . . discharge, release, . . . or

detain a person for evaluation and treatment” when the person, wisely or not, won’t willingly submit to a curtailment of her liberty.⁷

RCW 71.05.050 implicitly recognizes that a voluntarily admitted psychiatric patient who requests discharge may well need treatment – even need it desperately – and that, by requesting discharge, the patient is not consenting to, and thus is refusing, treatment she may need. But the statute *nonetheless requires immediate discharge unless – and only unless* – the staff regards the patient as presenting an imminent likelihood of serious harm or as gravely disabled.⁸ The three words *imminent*, *likelihood*, and *serious* matter. See, e.g., *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (“[E]ach word of a statute is to be accorded meaning;” statutes are to be construed, when possible, so that “no clause, sentence or word shall be superfluous, void, or insignificant;” and courts must “assume the Legislature meant exactly what it said and apply the statute as written”) (citations omitted). “Imminent harm” or “likelihood of harm” or “serious harm” alone is not enough to detain.⁹ RCW 71.05.050 requires convergence of all three

⁷ See *In re Knapp*, 102 Wn.2d 466, 475, 687 P.2d 1145 (1984) (contrasting the situation faced by persons confined to state hospital pursuant to criminal convictions, who could not be allowed to leave upon request, with the effect of RCW 71.05.050, under which “any person *voluntarily* admitted for inpatient treatment shall be released immediately upon his request [italics by the court]”).

⁸ Plaintiff has never claimed that Ms. Poletti was gravely disabled.

⁹ The law strictly limits the circumstances under which a person may be involuntarily

terms: “an imminent likelihood of serious harm.”¹⁰

F. There Is No Merit to Plaintiff’s Legislative Intent and Public Policy Arguments.

Plaintiff asserts, *Resp. Br. at 27*, that “within the [ITA], the term ‘discharge’ was never meant to refer to the discharge of a voluntary patient who was never detained...”. Given the use of the word “discharge” in RCW 71.05.050, that statement is incorrect on its face.

Citing 1987 and 2000 legislative bill reports, plaintiff then asserts, *Resp. Br. at 27-28*, that RCW 71.05.120(1) applies only to decisions to discharge *involuntarily* committed patients, and that “[n]owhere in the amendments, nor [sic] the legislative history, did the Legislature indicate that it intended to radically broaden the scope of the ITA to include

civily committed. To get a court order to confine or continue the confinement of someone with a mental disorder who is not already involuntarily committed requires compliance with RCW 71.05.030, which provides:

Persons suffering from a mental disorder may not be involuntarily committed for treatment of such disorder except pursuant to provisions of this chapter, chapter 10.77 RCW, chapter 71.06 RCW, chapter 71.34 RCW, transfer pursuant to RCW 72.68.031 through 72.68.037, or pursuant to court ordered evaluation and treatment not to exceed ninety days pending a criminal trial or sentencing. [Emphasis added.]

RCW ch. 10.77 applies to criminally insane persons, which Ms. Poletti was not. RCW ch. 71.06 applies to sexual psychopaths, which Ms. Poletti was not. RCW ch. 71.34 applies to minors, which Ms. Poletti was not. Transfer statutes did not apply to Ms. Poletti and Overlake, and she was not facing criminal trial or sentencing. That means specific sections of the ITA – RCW 71.05.050, .150, .153 – provided the *only* legal authority under which Overlake (or anyone else) could lawfully have done anything other than release Ms. Poletti immediately when she asked to be discharged.

¹⁰ Thus, if the trial court believed Overlake Hospital Policy 12548 imposed on Nurse Short and Overlake a legal obligation to detain Ms. Poletti on grounds less exacting than those required by RCW 71.05.050, it erred. It compounded its error by holding Overlake negligent *per se* because Nurse Short did not detain Ms. Poletti pursuant to the policy.

immunity for the discharge of voluntary psychiatric patients who had never been involuntarily detained.” Neither the bill reports plaintiff cites, nor the rest of the legislative history of the ITA, supports those assertions. But, there is no need to resort to legislative history in the first place. RCW 71.05.050 and RCW 71.05.120(1) are not ambiguous and plaintiff has never claimed they are. Courts do not consult legislative history to ascertain the meaning of statutes that are not ambiguous. *Cerrillo v. Esparza*, 158 Wn.2d 194, 202, 142 P.3d 155 (2006); *Dep’t of Ecology v. Campbell & Gwynn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

Despite the lack of ambiguity, were this Court to track the amendments made to RCW ch. 71.05 since its original enactment in 1973, it would find that plaintiff’s conclusions as to legislative intent are not supportable. The second sentence of RCW 71.05.050 has remained unchanged since 1973 except for the insertion of “or her” after “his.” *See* Laws of 1997, ch. 112, § 5. That sentence has always served the purpose of emphasizing, along with the sentences that precede and follow it, that *voluntarily* admitted mental health patients are free – *absolutely* free – to stop having treatment whenever they wish. Since the addition in 1974 of the first proviso, *see* Laws of 1974 ex. s., ch. 145, § 6, voluntary mental health patients are absolutely free to leave a hospital whenever they decide to, unless – and only unless – the staff regards them as meeting

detainability criteria. The 2000 amendments were made to address reimbursement issues, not to make substantive changes to any ITA provision. Senate Bill Report, HB 2520 (Feb. 23, 2000). Thus, those amendments did not change the law. A person may not be held against her will for mental health treatment unless ITA procedures are complied with. Overlake was legally obligated in 2008, just as it would have been before the 2000 amendments, to let Ms. Poletti leave, and could have no liability at all, under any standard, for letting her leave *but for* the fact that it made a decision “of whether to . . . discharge, release, . . . or detain” her, a decision for which RCW 71.05.120(1) provides immunity from liability absent gross negligence.

In support of her assertion that RCW 71.05.120(1) provides immunity only with respect to discharge of patients held involuntarily, plaintiff claims, *Resp. Br. at 27*, that “[p]rior to 2000, the immunity provision only included legal terms such as ‘release’ (*i.e.*, termination of a commitment order [footnote omitted]), and not medical terms such as ‘discharge.’” That claim ignores the fact that, prior to 2000, “release” was an undefined term in RCW ch. 71.05, not a term of art, and not limited to “termination of a commitment order.” Indeed, prior to 2000, “release” was the term used in RCW 71.05.050 concerning the right voluntarily admitted patients have to immediate “release” (now “discharge”) upon

request. When the legislature in 2000 gave definition to the terms “release” and “discharge,” substituted the word “discharge” for the term “release” in four places in RCW 71.05.050, and added the word “discharge” to RCW 71.05.120(1), *see* Laws of 2000, ch. 94, § § 1, 3, and 4, it intended no substantive change in the law. Senate Bill Report, HB 2520 (Feb. 23, 2000). As used in 1973, and until the 2000 amendments, “release” plainly was not limited to “termination of a commitment order, but rather meant “allowed to leave.”

Plaintiff’s argument that RCW 71.05.120(1)’s immunity provision applies only to decisions whether to discharge, release or detain involuntarily committed patients makes no sense. It is wildly improbable that the Legislature, in enacting RCW 71.05.050 in the ITA, and requiring the *immediate* release of a voluntarily admitted psychiatric patient upon request, intended for a hospital that complies with that requirement to have greater exposure to potential civil liability than a hospital that decides to discharge, release, or detain an involuntarily committed patient.

Plaintiff follows her legislative intent arguments with assertions as to what she thinks would make good public policy and should be the law. *Resp. Br. at 28-30*. This Court may and should ignore such arguments because they are unaccompanied by citation to any legal authority. RAP 10.3(a)(6); *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 160, 795

P.2d 1143 (1990). In any event, this Court could not “create incentives in favor of involving MHPs in questionable cases,” or “[a]n immunity scheme that favors [involuntary] evaluation [over discharge] in questionable cases,” *Resp. Br. at 29*, without ignoring the Constitution and the ITA. Presumptive detention in “questionable” cases is the main thing the ITA exists to prevent, not incentivize.

G. Plaintiff’s Arguments that Overlake Can Be Held Liable for Ordinary Negligence for Decisions Other than “Whether to . . . Discharge, Release . . . or Detain” Ms. Poletti Are Not Germane to the Trial Court Order Being Reviewed, and Are Wrong.

Plaintiff asserts, *Resp. Br. at 30-33*, without citing any authority, that even if Overlake has RCW 71.05.120(1) “immunity” for its decision whether to discharge, release or detain Ms. Poletti, it can still be held liable under an ordinary negligence standard of fault for other aspects of the care Ms. Poletti received while hospitalized. That, however, is not what the trial court ruled in the interlocutory order that is the subject of review. The trial court ruled that RCW 7.70.040(1)’s liability standard applies, and RCW 71.05.120(1)’s standard doesn’t, because Overlake did not detain Sherri Poletti. CP 910. It did not rule that Overlake can be held at fault and liable under one standard of fault for certain decisions and under another standard of fault for other decisions.

Plaintiff may be trying to argue that, even if a gross negligence

standard applies to the ultimate “decision of *whether to* . . . discharge, release, . . . or detain” Ms. Poletti, Overlake is subject to an “ordinary” (RCW 7.70.040(1)) standard of liability for not having done things, such as observe Ms. Poletti regularly during the afternoon to determine if she had caught up on her sleep, that might have led Nurse Short to “regard” her as meeting the detainability criteria when she requested discharge at about 6 p.m. If so, that is simply a way to try to get around an obstacle the ITA intentionally places in the way of civil liability, absent gross negligence, for decisions “whether to . . . discharge, release, . . . or detain.”

Any decision “of whether to . . . discharge, release, . . . or detain” is subject to RCW 71.05.120(1)’s gross negligence standard and, because of RCW 71.05.050, had to be made based on how Overlake staff “regarded” Ms. Poletti early in the evening of December 31, 2006, when she requested discharge. The trial court cannot enter judgment based on a jury finding that Overlake was not grossly negligent in deciding “whether to . . . discharge, release, . . . or detain” Ms. Poletti, but was negligent in some other respect having nothing to do with the discharge decision. A finding that the discharge decision was a but-for cause and legal cause of death is a *sine qua non* for plaintiff’s liability case.¹¹

¹¹ Whether Nurse Short arguably could be found to have acted with “ordinary” professional negligence in failing to adhere strictly to the letter of a given hospital policy or policies may or may not be relevant and admissible at a trial on the issue of whether

H. The California Decision and the *Harris, Taggart and Webb* Decisions Plaintiff Cites Are Inapposite.

Plaintiff, *Resp. Br. at 32-33, 37-38*, cites *Gonzalez v. Paradise Valley Hosp.*, 3 Cal. Rptr. 3d 903 (2003), for the proposition that immunity conferred by statutes such as RCW 71.05.120(1) does not extend to liability for negligent evaluation and treatment. *Gonzalez* did not involve a health care professional's decision whether to discharge, release, or detain a person under RCW 71.05.120(1). The patient in that case was not a bipolar voluntary admit to whose discharge request RCW 71.05.050 would apply under Washington law. The patient in *Gonzalez* was psychotic, had been committed involuntarily, escaped, stabbed himself, and induced police to shoot him, with fatal effect. His parents sued the hospital for inadequately treating his psychosis and supervising him (making his escape possible). *Gonzalez*, 3 Cal. Rptr. at 908.

The *Gonzalez* court held that California Welfare & Institutions Code ¶ 5278 did not apply to immunize the hospital from tort liability under those circumstances. That statute is not like RCW 71.05.120(1). It confers complete immunity from civil liability on someone who makes a

Overlake was grossly negligent. This interlocutory review, however, is of an order that does not involve rulings as to what evidence will be admissible *if* the standard of fault is gross negligence. The issue is *whether* the standard of fault *is* gross negligence. This Court should not make advisory evidentiary rulings, much less do so in the absence of trial court evidentiary rulings and a proper record.

decision to detain.¹² RCW 71.05.120(1) confers limited immunity, by mandating a higher (gross negligence) standard of fault, on those who make decisions “*whether to . . . discharge, release, . . . or detain.*”

Because the facts and the statutes at issue in this case are unlike those in *Gonzalez, Gonzalez* has no persuasive value in deciding whether the trial court in this case erred in ruling that, because Overlake did not detain Ms. Poletti, RCW 71.05.120(1) does not apply to Overlake’s decision of whether to comply with Ms. Poletti’s request for discharge.

Plaintiff’s reliance on *In re Harris*, 98 Wn.2d 276, 654 P.2d 109 (1982), is also misplaced. Overlake did not need to act “quasi-judicially” in making the decision of “whether to . . . discharge, release, . . . or detain” Ms. Poletti in order for the question of its fault to be determinable under RCW 71.05.120(1). Plaintiff may not like it, but RCW 71.05.120(1) makes any decision whether to discharge or release someone from a psychiatric hospitalization, or to detain someone for evaluation and treatment, subject to a gross negligence standard of fault.

Plaintiff’s reliance on *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), *Resp. Br. at 34*, and *Webb v. Neuroeducation, Inc. P.C.*, 121 Wn. App. 336, 88 P.3d 417 (2004), *Resp Br. at 35-37*, is misplaced as

¹² Section 5278 provides in pertinent part that “Individuals authorized under this part to detain a person for 72-hour treatment and evaluation pursuant to Article 1 (commencing with Section 5150) or Article 2 (commencing with Section 5200), . . . shall not be held either criminally or civilly liable for exercising this authority in accordance with the law.”

well. *Taggart* arose out of parole officers' supervision of a parolee, not out of psychiatric staff making a "whether to . . . discharge, release, . . . or detain" decision under RCW 71.05.050. *Webb* involved mental health care but did not involve a type of decision to which RCW 71.05.120(1) applies, or any question of what standard of fault applied.¹³

Plaintiff is entitled to argue that Nurse Short erred in failing to regard Ms. Poletti as meeting the statutory "detainability" criteria – none of which have to do with drowsiness – when Ms. Poletti asked to be discharged from her voluntary hospitalization. RCW 71.05.050 and .120(1), however, require the trial court to frame the jury's consideration of that alleged failure in terms of gross negligence.

I. The WAC Regulations Plaintiff Cites Do Not and Could Not Override Pertinent Statutes, Such as RCW 71.05.050 and .120(1).

Plaintiff quotes several WAC regulations. *Resp. Br. at 38-39*. None of them speak to a hospital's duty to a voluntarily admitted psychiatric patient who requests discharge. RCW 71.05.050 speaks to that subject. None of the regulations plaintiff cites speak to standards of fault to be applied to decisions whether to discharge, release, or detain a person

¹³ Insofar as plaintiff cites *Webb* in support of an argument that Overlake can be found negligent for acts or omissions leading up to, but not including, the discharge decision, she is wrong for the reasons explained at pages 14-15, *supra*. Insofar as she cites *Webb* in support of yet more assertions about legislative intent, she is wrong for the reasons stated at pages 10-14, *supra*. It is plaintiff, not Overlake, who is asking this Court to rewrite the ITA, and to find a legislative intent that is contrary to the words and sentences the legislature used.

for mental health evaluation and treatment. RCW 71.05.120(1) speaks to that subject. Regulations do not supersede statutes, *e.g.*, *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 P.2d 1241 (1998) (“Administrative rules or regulations cannot amend or change legislative enactments”), particularly when the statute, not the regulation, is on point.

J. Plaintiff’s “Informed Consent” Arguments Are Not Germane to the Trial Court’s Ruling and Misconceive How “Informed Consent” Law Would Apply.

Plaintiff argues, *Resp. Br. at 39-40*, that Nurse Short owed Ms. Poletti a duty under “informed consent” law to explain the risks of discharge. The order that is the subject of review contains no “informed consent” ruling. Even if the Court chooses to consider the argument, plaintiff is wrong about what “informed consent” law requires.

Even ignoring the ITA, under the “informed consent” statutes, RCW 7.70.030 and RCW 7.70.050, Overlake had no duty to inform Ms. Poletti of the risks of *discharge*. Under RCW 7.70.030(3), “damages for injury occurring as the result of health care” can be recovered by proving “[t]hat injury resulted from health care to which the patient or his or her representative did not consent.” Under RCW 7.70.050, a health care provider “has a duty to inform a patient of all material facts, including risks and alternatives, that a reasonably prudent patient would need in order to make an informed decision on whether to consent to or reject a

proposed course of treatment.” WPI (Civ.) 105.04.

By leaving Overlake and getting into the taxi, Ms. Poletti did not undergo “a proposed course of treatment” as to which her consent is in dispute. She just went home, and *ceased* undergoing treatment. Discharge was not a “proposed course of treatment” as to which Overlake had a duty to inform of risks and alternatives under RCW 7.70.030 and .050.¹⁴ Moreover, a “material” fact for purposes of informed consent” law is determined objectively, from the standpoint of what a reasonable patient would want to know, not from the standpoint of a specific patient. RCW 7.70.050(2).¹⁵ The average adult hardly needs a psychiatric care professional to advise her that if she drives a car alone late at night there is a risk she could fall asleep while doing so and be hurt or killed.

Even if RCW 7.70.030(3) and .050 *would*, in the absence of RCW 71.05.050, impose on a psychiatric care professional a duty to ensure that a voluntarily admitted patient seeking discharge against medical advice is

¹⁴ “Washington’s informed consent statute is generally based on the policy judgment that patients have the right to make decisions about their own medical treatment.” *Backlund v. Univ. of Washington*, 137 Wn.2d 651, 663, 975 P.2d 950 (1999). As RCW 71.05.050 makes clear, Ms. Poletti had the right to decide whether to have mental health treatment at all. Plaintiff seeks to use “informed consent” law instead to empower Ms. Poletti’s providers at Overlake to overrule her decision about whether to have health care.

¹⁵ See, e.g., *Backlund*, 137 Wn.2d at 667 n.3 (“[t]he doctrine [of informed consent] does not place upon the physician a duty to explain all possible risks, but only those of a serious nature. The guide for disclosure is the test of materiality, which is an *objective* one, but incorporates the underlying concept of ‘*patient sovereignty*.’ That is, if the *reasonable* person in the patient’s position would attach significance to a risk in deciding treatment, the risk is material”).

fully informed of the risks of *discharge*, the fact remains that RCW 71.05.050 does exist and is the more specifically pertinent statute.¹⁶ If statutes irreconcilably conflict, the more specific statute prevails unless the legislature intended for the more general one to control. *Hallauer v. Spectrum Props.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001).

Finally, plaintiff's "informed consent" arguments lack legal merit because, even if RCW 71.05.050 did not trump RCW 7.70.030(3) and .050, RCW 71.05.120(1) still sets the applicable standard of *fault*, because the act or omission upon which plaintiff's claim that Overlake has liability for Ms. Poletti's death is premise is Nurse Short's decision "whether to . . . discharge, release, . . . or detain" Ms. Poletti.

K. There Is No Basis for This Court to Find Overlake Grossly Negligent as a Matter of Law.

Plaintiff argues, *Resp. Br. at 42-43*, that this Court may affirm the trial court's ruling that Overlake was negligent under an "ordinary" negligence standard by making its own ruling that Overlake was *grossly* negligent even if the trial court erred by holding RCW 71.05.120(1) inapplicable. As explained at pages 17-18 of Overlake's opening brief,

¹⁶ Under RCW 71.05.050's second sentence, "[a]ny person voluntarily admitted for inpatient treatment . . . shall be released immediately upon his or her request" and such person cannot be detained unless the professional staff regard the patient as meeting specific detainability criteria. Those detainability criteria nowhere include detention until the patient has been fully informed of the risks of discontinuing inpatient treatment and discharge, including the risk that she could fall asleep at the wheel and be hurt and killed, if she decides to go for a drive in her car after being taken home by taxi.

the evidence did not permit a finding that Overlake was negligent *as a matter of law* even under an “ordinary” professional negligence standard. That is, even if an Overlake internal policy was not strictly adhered to, that could at most constitute *evidence* of fault, but it would not establish fault *per se*. *Andrews v. Burke*, 55 Wn. App. 622, 626, 779 P.2d 740, *rev. denied*, 113 Wn.2d 1024 (1989).¹⁷ The decisions plaintiff cites, *Resp. Br. at 42*, do not stand for the proposition that an appellate court may *sua sponte* declare a defendant grossly negligent as a matter of law.

Moreover, to find Overlake grossly negligent as a matter of law in failing to regard Ms. Poletti as “present[ing] an imminent likelihood of serious harm” when she requested discharge, there would have to be irrefutable or at least overwhelming evidence that Ms. Poletti *did* meet the “detainability” criteria. The record includes no such evidence. That Ms. Poletti died accidentally several hours after she went home by taxi hardly proves or even implies that she intended suicide when she requested discharge; rather, it tends to confirm that she was *not* suicidal, and that Nurse Short correctly so regarded her.

Plaintiff’s assertions, *Resp. Br. at 43*, that Overlake has “counter-balanced” and sought to “average out” Nurse Short’s actions and decisions

¹⁷ Holding a defendant at fault under a more exacting standard should logically be more difficult and rarer than holding a defendant liable as a matter of law, without a trial, under an ordinary negligence standard.

to keep her conduct short of gross negligence are bizarre. Overlake was not called upon below to offer any argument as to whether it or Nurse Short or anyone else was or was not grossly negligent in fact, or as a matter of law. Plaintiff's motion – the one the trial court granted and that this Court is reviewing – was for a ruling that the gross negligence standard *did not apply*. Any determination as to whether Nurse Short was grossly negligent is for the jury if there is a trial.¹⁸

L. Plaintiff's Arguments About Overlake's Policies Erroneously Assume that RCW 71.05.120(1) Does Not Apply, and Failure to Adhere to a Hospital Policy Is Not Negligence as a Matter of Law.

Plaintiff's argument that Overlake was negligent because Nurse Short did not follow the letter of Policy 12458 and/or other policies, *Resp. Br. at 44-50*, incorrectly presupposes that the standard of fault is "ordinary" RCW 7.70.040 professional negligence. Even assuming that the hospital's policies and whether Nurse Short followed them might be relevant and admissible at trial with respect to liability (under either a gross negligence or "ordinary" professional negligence standard), the policies themselves have no bearing on the key fact issues of (a) whether Ms. Poletti actually did, in fact, meet "detainability" criteria and, (b) if she

¹⁸ Whether plaintiff can create a triable issue of fact as to causation is not an issue the trial court was asked to rule, or has ruled, upon. Plaintiff will have to prove, among other things, that Ms. Poletti met the "detainability" criteria when she requested discharge from Overlake and that the MHP would have so concluded had the MHP evaluated her in person, and that Nurse Short's "failure" to "regard" Ms. Poletti as suicidal is a proximate cause of Ms. Poletti's accidental death after she went home by taxi.

did, whether Nurse Short should have “regarded” her as meeting those criteria. In other words, even if a jury might find Nurse Short at fault for not following a hospital policy, Overlake cannot be held liable for discharging Ms. Poletti if Nurse Short did not regard her as meeting the detainability criteria and if plaintiff fails to persuade the jury with admissible expert testimony that Ms. Poletti actually did meet, and Nurse Short was grossly negligent in failing to regard her as meeting those criteria. It would be error for the trial court to instruct the jury – as it surely will if its order stands – that Nurse Short was at fault as a matter of law (under either fault standard), for not following a hospital policy and not insisting that the MHP evaluate Ms. Poletti even though Nurse Short did not regard Ms. Poletti as meeting the statutory detainability criteria.¹⁹

M. Overlake Submitted Sufficient Evidence to Raise an Issue of Fact Even if “Ordinary” Negligence Is the Applicable Standard.

On plaintiff’s summary judgment motion, all evidence and inferences must be viewed in the light most favorable to Overlake. *E.g., Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P. 3d 490 (2011). Defense expert, Dr. John Chiles, testified that Ms. Poletti did not meet the criteria for detention, CP 771 (Dep. p. 72). That evidence was more than sufficient to raise a genuine issue of material fact to preclude entry of summary

¹⁹ Moreover, violation of a hospital policy is at most evidence of negligence, not negligence as a matter of law. *Andrews v. Burke*, 55 Wn. App. 622, 626, 779 P.2d 740, *rev. denied*, 113 Wn.2d 1024 (1989).

judgment on the issue of fault, even if the “ordinary” RCW 7.70.050 professional negligence standard were to apply to plaintiff’s claim.

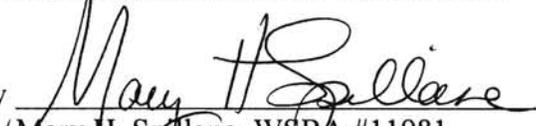
III. CONCLUSION

This Court should reverse the trial court’s summary judgment rulings and hold that that the “gross negligence” standard of liability set forth in RCW 71.05.120(1) applies, and that, even if the RCW 7.70.040(1) ordinary health care provider standard of care applies, genuine issues of material fact preclude summary judgment in favor of plaintiff.

RESPECTFULLY SUBMITTED this 2nd day of July, 2012.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 2nd day of July, 2012, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellant," to be delivered in the manner indicated below to the following counsel of record:

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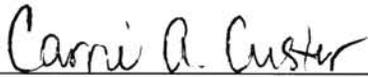
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DATED this 2nd day of July, 2012, at Seattle, Washington.



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