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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.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR -2 PM 3:58

BRIEF OF APPELLANT

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorney for Appellant Overlake Hospital
Medical Center

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

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I. SUMMARY OF THE CASE

Complaining of delusions and suicidal thoughts, Shirley Poletti sought help at the emergency room at Swedish Hospital in Ballard, agreed to inpatient care, and was moved to Overlake Hospital Medical Center's psychiatric unit, where she was voluntarily admitted. Eighteen hours later, she asked to be discharged, insisting she felt better and was not suicidal. Because Ms. Poletti's admission had been voluntary, Overlake was obligated by RCW 71.05.050 to discharge her "immediately upon [her] request" unless its staff "regard[ed her] . . . as presenting, as a result of a mental disorder, an imminent likelihood of serious harm, or [as] gravely disabled" Overlake's charge nurse urged Ms. Poletti to stay, but concluded that Ms. Poletti did not meet the RCW 71.05.050 criteria for "detainability" and, after consulting the on-call psychiatrist, discharged her. Ms. Poletti took a taxi home to Ballard. She died several hours later when the car she was driving left the road near Olympia and rolled over, ejecting her. Plaintiff contends Ms. Poletti fell asleep at the wheel, not that she committed suicide, and that Overlake is liable for her death because it negligently failed to detain Ms. Poletti against her will.

On cross-motions for summary judgment, the trial court held that no provision of RCW chapter 71.05 was "implicated" by Nurse Short's decision to discharge rather than detain Ms. Poletti, that RCW

7.70.040(1)'s health care malpractice standard rather than RCW 71.05.120(1)'s gross negligence standard applies to decisions whether to discharge or detain a psychiatric patient, and that Nurse Short was negligent as a matter of law because she did not comply with a hospital policy requiring referral to the county mental health professional (and by implication, temporary detention), of any psychiatric patient who is in need of, but who does not consent to, further inpatient treatment.

This Court should reverse. The decision Nurse Short made on Overlake's behalf in consultation with the on-call psychiatrist was a decision "whether to . . . discharge . . . or detain a person [Ms. Poletti] for evaluation and treatment . . .," and is subject to RCW 71.05.120(1), which precludes imposition of civil liability if the decision was made "in good faith and without gross negligence." The trial court's refusal to apply that standard is contrary to the plain language of RCW 71.05.120(1) and, incongruously, exposes a hospital to civil liability more readily for allowing a voluntarily admitted psychiatric patient to discontinue care and go home than for allowing an involuntarily admitted patient to do so.

This Court should also reverse the trial court's negligence-as-a-matter-of-law ruling because, while a nurse's failure to comply with a hospital administrative policy may be some evidence of negligence, it is not negligence as a matter of law.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its September 23, 2011 Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment.

2. The trial court erred in ruling that Overlake's liability is subject to the ordinary medical negligence standard of RCW 7.70.040(1), and not to the bad faith/gross negligence standard of RCW 71.05.120(1).

3. The trial court erred in ruling that Overlake was negligent as a matter of law in discharging Ms. Poletti because its charge nurse allegedly did not follow Overlake's "own policy requiring Ms. Poletti to be referred" to the county designated mental health professional and instead honored Ms. Poletti's request to be discharged.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a hospital's psychiatric unit charge nurse complies with a voluntarily admitted psychiatric patient's request to be discharged, does the nurse make, for the hospital, a "decision of whether to . . . discharge . . . or detain a person for evaluation and treatment," within the meaning of RCW 71.05.120(1), such that the hospital is immune from civil liability for such a decision as long as the decision was made "in good faith and without gross negligence"?

2. Even if RCW 7.70.040(1)'s ordinary medical negligence liability standard rather than RCW 71.05.120(1)'s gross negligence standard applies, does the nurse's failure to follow an applicable internal hospital policy on psychiatric patient discharge merely provide some evidence of negligence rather than establish negligence as a matter of law?

IV. STATEMENT OF THE CASE

A. Events of December 30-31, 2006.

On the evening of December 30, 2006, 58-year-old Sherri Poletti sought help at Swedish Hospital in Ballard, complaining of paranoid delusions and suicidal thoughts. CP 8 (¶ 3.1), 14 (¶ 5), 574. She told Swedish-Ballard staff that she was bipolar, had been off her prescribed medications for at least two weeks, and had been driving around since December 25, and reported "not sleeping for [the] past several nights."¹ CP 574. According to plaintiff, Ms. Poletti said she could not be trusted to give accurate information because, at one point Ms. Poletti told a nurse that "you know when you are bipolar you don't want to go off your meds and you don't want to tell any one when you are having bad thoughts." CP 517 (lines 21-22), 577.

Swedish-Ballard recommended to Ms. Poletti that she get inpatient treatment and Ms. Poletti agreed to be admitted to the psychiatric unit at

¹ No evidence of record supports or refutes Ms. Poletti's statements about what she had been doing during the preceding day(s).

Overlake Hospital Medical Center in Bellevue. CP 575. She was transported to Overlake and was voluntarily admitted there at 1:05 a.m. on December 31. CP 518, 592. Ms. Poletti told Overlake staff, among other things, that she had been getting 2-4 hours of sleep a night. CP 518, 596.

Early in the afternoon of December 31, a psychiatrist, Dr. Kelan Koenig, evaluated Ms. Poletti. CP 519, 599. In his handwritten chart entry, Dr. Koenig noted, among other things, that Ms. Poletti “denies delusions” and had a “new psych appt [appointment]” for “1/12”. CP 599, lines 3 and 6. In his dictated report, CP 620-25, he noted that Ms. Poletti “is felt currently to meet MHP criteria due to psychosis and suicidal ideation with a recent suicide attempt and a lack of compliance with voluntary care.”² CP 623. Dr. Koenig did not seek to have Ms. Poletti involuntarily committed; instead, in his Treatment Recommendations, CP 624 (Item 3), he stated:

If patient continues to decline medications on 01/01/2007, the treatment team will consider referring the patient to the mental health professionals for an involuntary assessment versus administratively discharging the patient.

He also noted that Ms. Poletti was “directable” and “not exhibiting any intentional self-harm behavior at this time.” CP 624 (Item 7).

² It is undisputed that Dr. Koenig’s reference to “MHP” was to the county’s designated mental health professional and that his reference to “MHP criteria” indicates that he felt Ms. Poletti presented, at the time he saw her at mid-day on December 31, an imminent likelihood of serious harm to herself within the meaning of RCW 71.05.050.

Early on the evening of December 31, a while after Dr. Koenig left the hospital, Ms. Poletti asked to be discharged. CP 520, 600, 631. Elaine Short, the unit charge nurse who had 30 years of psychiatric care experience, was told of the request, interviewed Ms. Poletti, and tried, unsuccessfully, to persuade her to remain hospitalized. CP 282-83, 286-87, 520, 600, 631-32. Nurse Short did not regard Ms. Poletti as imminently likely to commit suicide or as gravely disabled, and thus did not believe that Ms. Poletti was “detainable” under the criteria of RCW 71.05.050. CP 289-90, 293-94, 600, 636. Nonetheless, after speaking by phone with the hospital’s on-call psychiatrist, Nurse Short called the county MHP, who listened to Nurse Short’s description of how Ms. Poletti was then presenting,³ reviewed his record of an earlier consultation about Ms. Poletti that had occurred about two weeks before, and told Nurse Short that, based on how Ms. Poletti was described as then presenting, she was not detainable. CP 284-85, 297-304, 438-41, 450-59, 600. After informing the on-call psychiatrist of her conversation with the MHP, Nurse Short discharged Ms. Poletti “AMA” (*i.e.*, against medical advice).

³ Nurse Short had Dr. Koenig’s handwritten chart entry, CP 599, 801 (Dep. 15-16), but not his dictated report from early that afternoon, CP 620-28, 631. Nurse Short informed the MHP that Ms. Poletti had been admitted to Overlake late the previous evening after presenting to the emergency room at Swedish “endorsing S/I [suicidal ideation] and evidencing P/I [paranoid ideation] and A/H [auditory hallucinations],” but was now denying being suicidal, showed no overt signs or symptoms [“sxs”] of paranoid ideation, other delusions, or hallucinations,” was organized and able to form and express plans for getting herself home from the hospital. CP 459.

CP 523, 600, 610. Ms. Poletti took a taxi home to Ballard, but then got in her car. CP 9 (¶ 3.6), 523, 600. She died early the next morning when her car went off a highway near Olympia. CP 9 (¶ 3.6), 523, 716-18. Plaintiff contends Ms. Poletti fell asleep at the wheel, CP 523, 718 (last sentence), not that she committed suicide.

B. This Lawsuit.

Ms. Poletti's personal representative filed a wrongful death lawsuit against Overlake and King County, CP 1-12, contending that Overlake negligently failed to insist that, and to detain Ms. Poletti until, an in-person evaluation by the MHP took place, CP 9 (¶ 4.1), and that King County's MHP negligently failed to go to Overlake to evaluate Ms. Poletti, CP 9-10 (¶¶ 4.2-4.3). Overlake denied any negligence, CP 14-16, and asserted immunity under RCW 71.05, CP 17 (¶ 6).

In 2009, on defendants' motions for summary judgment, Judge Barbara Mack ruled that plaintiff lacked sufficient admissible evidence to create a genuine issue of material fact as to standards of psychiatric nursing care and proximate causation, and dismissed the complaint. CP 21-26. Plaintiff appealed, and the Court of Appeals reversed in an unpublished decision. *Poletti v. Overlake Hosp. Med. Ctr.*, Nos. 63568-9-I and 62818-6-I, 2010 Wash. App. LEXIS 1097 (May 24, 2010).⁴

⁴ In that decision, the Court of Appeals recognized that, in light of RCW 71.05.050 and

On remand, the case was reassigned to Judge Suzanne Barnett, CP 27, and plaintiff settled with King County, CP 391. On June 3, 2011, with trial approaching, and the parties planning to brief the applicable standard of liability, Judge Barnett entered an Order Staying Trial, CP 399-400, pending a ruling on “the standard by which Overlake Hospital Medical Center’s care of decedent should be judged.” CP 399 (¶ 2).

The parties filed cross-motions for summary judgment. CP 401-15, 514-537. On September 23, 2011, Judge Barnett issued an order denying defendants’ motion and granting plaintiff’s motion, CP 909-10, making two legal rulings in plaintiff’s favor. First, Judge Barnett agreed with plaintiff, *see* CP 515, 526-34, 687-95, 845-48, that RCW ch. 71.05 (the Involuntary Treatment Act) had not been implicated because Nurse Short did not “detain” Ms. Poletti, and that the issue of Overlake’s liability therefore must be tried under the “ordinary” medical negligence standard of RCW 7.70.040(1)⁵ rather than the bad faith/gross negligence standard of RCW 71.05.120(1). CP 910 (¶¶ 1-2). In so doing, Judge Barnett implicitly rejected Overlake’s arguments that RCW 71.05.050 and .120(1)

RCW 71.05.120(1), Overlake’s negligence would have to be gross for it to be liable, 2010 Wn. App. LEXIS 1097 at *1, *13-15, but held that at least one of plaintiff’s experts was sufficiently qualified as an expert to opine that aspects of Nurse Short’s care of Ms. Poletti were grossly negligent, *id.* at *22-24.

⁵ Under RCW 7.70.040(1), fault is established if “[t]he health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances.”

specify the standard of liability when the decision at issue is either a “decision of whether to . . . detain a person,” or a decision to comply with a *voluntarily* admitted psychiatric patient’s request for “discharge,” or both. CP 408-11, 772-76, 838-42.

Second, Judge Barnett agreed with plaintiff, *see* CP 535-36, that Overlake was negligent as a matter of law in discharging Ms. Poletti at her request because Nurse Short did not follow Overlake’s “own policy requiring Ms. Poletti to be referred to the [MHP].”⁶ CP 910 (¶ 3). In so ruling, Judge Barnett implicitly rejected Overlake’s position that, even if RCW 7.70.040(1)’s standard *does* apply, failure to follow a hospital policy at most may be *evidence* of negligence but is not negligence *per se*. CP 776-77.

Judge Barnett certified under RAP 2.3(b)(4) that her September 23 Order involves “controlling issues of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” CP 910 (¶ 4). Overlake’s timely Motion for Discretionary Review was granted.

⁶ It appears that Judge Barnett was referring to Hospital Policy 12548 ¶ C, CP 627-28, which provides, in what plaintiff contended below is its pertinent part, *see* CP 520 (lines 13-19) and CP 535 (lines 15-21), that “[p]atients in need of further psychiatric (inpatient) treatment, but who . . . do not consent to treatment, will be referred to the [MHP] for immediate evaluation.”

V. STANDARD OF REVIEW

Appellate courts review issues of statutory interpretation *de novo*. *Cerrillo v. Esparza*, 158 Wn.2d 194, 199, 142 P.3d 155 (2006). Appellate courts also review orders granting summary judgment *de novo*, engaging in the same inquiry as the trial court. *Id.*; *In re Det. of Danforth*, 173 Wn.2d 59, 68, 264 P.3d 783 (2011). Summary judgment is properly granted only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

VI. ARGUMENT

- A. Because Ms. Poletti's Admission to Overlake for Psychiatric Treatment Was Voluntary, RCW 71.05.050 Applies and Required Overlake to Release Ms. Poletti upon Request Unless Its Professional Staff Regarded Her as Presenting an Imminent Likelihood of Serious Harm or as Gravely Disabled.

There is no dispute that Ms. Poletti's admission to Overlake for mental health treatment was voluntary. Because it was voluntary, Ms. Poletti's hospitalization was subject to RCW 71.05.050, a section of the Involuntary Treatment Act which provides in pertinent part that:

... Any person voluntarily admitted for inpatient treatment to any public or private agency⁷ shall be released immediately upon his or her request... PROVIDED HOWEVER, That if the professional staff of any... hospital regards a person voluntarily admitted who requests discharge as presenting, as a result of a mental disorder, an

⁷ RCW 71.05.020(30) defines "private agency" to include hospitals that have departments or wards to treat persons who are mentally ill.

imminent⁸ likelihood of serious harm,⁹ or is gravely disabled,¹⁰ they may detain such person for sufficient time to notify the county designated mental health professional of such person's condition to enable the county designated mental health professional to authorize such person being further held in custody or transported to an evaluation and treatment center pursuant to the provisions of this chapter, which shall in ordinary circumstances be no later than the next judicial day . . . [Footnotes added.]

Plaintiff never argued below that RCW 71.05.050 did not apply to Ms. Poletti and to Nurse Short's response to her request for immediate discharge. In her arguments below, plaintiff ignored that statute and contended that the gross negligence standard of liability of RCW 71.05.120(1) applies only to decisions concerning patients who have been committed or "detained" involuntarily, and thus did not apply to the decision to discharge Ms. Poletti, who had not be committed or

⁸ RCW 71.05.020(20) defines "imminent" to mean "the state or condition of being likely to occur at any moment or near at hand, rather than distant or remote."

⁹ Under RCW 71.05.020(25), "Likelihood of serious harm" means: (a) A substantial risk that: (i) Physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself; (ii) physical harm will be inflicted by a person upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm; or (iii) physical harm will be inflicted by a person upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; or (b) The person has threatened the physical safety of another and has a history of one or more violent acts." There is no evidence, and plaintiff has never contended, that Ms. Poletti presented any risk of harm to others or to property. The only risk of harm she presented was to herself.

¹⁰ RCW 71.05.020(17) defines "gravely disabled" to mean:

. . . a condition in which a person, as a result of a mental disorder: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.

involuntarily detained. CP 527-34, 845-46. The trial court accepted that argument, ruling that, “because Overlake did not detain” Ms. Poletti, “the Involuntary Treatment Act was not implicated at any time.” CP 910 (¶ 1).

That ruling was error. Not only is that ruling not supported by the text of the statute, but also it would incongruously mean that a hospital has greater protection against civil liability when it releases an involuntarily committed patient than it has when it refuses to detain a voluntarily admitted psychiatric patient against her will, even when it cannot say that the patient meets RCW 71.05.050’s “detainability” criteria.

B. Because Nurse Short, in Response to Ms. Poletti’s Request for Immediate Discharge, Made a Decision Whether to Discharge Ms. Poletti or Detain Her for Evaluation and Treatment, RCW 71.05.120(1)’s Bad Faith/Gross Negligence Standard of Liability Applies in This Case.

Under RCW 71.05.120(1), Overlake is entitled to immunity from civil liability for a decision whether to discharge Ms. Poletti or to instead detain her for evaluation and treatment, so long as the decision was made in good faith and without gross negligence. RCW 71.05.120(1) provides:

No officer of a . . . private agency, nor . . . his or her professional designee, or attending staff of any such agency, . . . or an evaluation and treatment facility shall be civilly . . . liable for performing duties pursuant to this chapter with regard to the decision of *whether to* admit, *discharge*, release, administer antipsychotic medications, *or detain a person for evaluation and treatment*: PROVIDED, That such duties were performed in good faith and without gross negligence. [Emphases added.]

The text of RCW 71.05.120(1) does not limit its application to decisions by hospital staff to *detain* a person against her will (and thus involuntarily). The statute confers immunity for a decision “*whether to . . . discharge . . . or detain a person.*” That includes a decision to discharge **or not** to discharge, or a decision to detain **or not** to detain. Thus, gross negligence or lack of good faith is the standard of liability that applies to Nurse Short’s decision whether to discharge or detain Ms. Poletti, regardless of whether one characterizes her decision as one to detain, or not to detain, or to discharge, or not to discharge.

The trial court’s ruling that conditional immunity under RCW 71.05.120(1) applies only to decisions concerning involuntarily committed or “detained” patients incorrectly reads into RCW 71.05.120(1) limiting terms that simply are not there, and ignores language to the contrary that is there. Courts must not add words to a statute where the legislature has chosen not to do so, *Internet Cmty. & Entm’t Corp. v. State Gambling Comm’n*, 169 Wn.2d 687, 695, 238 P.3d 1163 (2010), nor may they simply ignore terms in a statute, *In re Parentage of J.M.K.*, 155 Wn.2d 374, 393, 119 P.3d 840 (2005).¹¹ RCW 71.05.120(1) by its terms applies to decisions of the kind Nurse Short made in Ms. Poletti’s case – whether

¹¹ “In construing a statute, it is safer always not to add to, or subtract from, the language of the statute unless imperatively required to make it a rational statute.” *Harold Meyer Drug v. Hurd*, 23 Wn. App. 683, 686, 598 P.2d 404 (1979) (quoting *McKay v. Dept. of Labor & Indus.*, 180 Wash. 191, 194, 39 P.2d 997 (1934)).

to discharge or detain a patient – without specifying that the patient must have been hospitalized under an involuntary commitment or must have been “detained” because she was regarded as presenting an imminent likelihood of serious harm or as gravely disabled.

It is true that RCW 71.050.120(1) can apply to decisions whether to release an involuntarily committed patient. It applies to decisions whether to “release” a patient, and “release” is defined by RCW 71.05.020(37) to mean “legal termination of the commitment under the provisions of this chapter,” and RCW 71.05.020(4) defines “commitment” to mean “the determination *by a court* that a person should be detained for a period of either evaluation or treatment, or both” Thus “*release*” refers to termination of a court-ordered, involuntary, commitment.

But, a decision whether to “*release*” a patient is not the only decision to which RCW 71.05.120(1)’s gross negligence standard of civil liability applies. RCW 71.05.120(1) by its terms also applies its gross negligence standard of civil liability to a “decision whether to admit, discharge, . . . or detain a person for evaluation and treatment.” Under RCW 71.05.020(15), “*discharge*” means simply “the termination of hospital medical authority,” and the definition of “discharge”, unlike the definition of “release,” is not linked to any court action or notion of compulsion or involuntariness. Thus, a *discharge* ends a hospitalization

that need not have been involuntary and includes Ms. Poletti's hospitalization, which was voluntary. Therefore, the decision plaintiff seeks to hold Overlake liable for – to discharge, rather than detain, a voluntarily admitted psychiatric patient – *does* “implicate” the Involuntary Treatment Act. The trial court, CP 910(¶ 1), erred in ruling to the contrary.

Furthermore, RCW 71.05.050 – the section that requires immediate discharge of a voluntarily admitted patient (as Ms. Poletti was) once that patient requests discharge (as Ms. Poletti did) unless the hospital's professional staff regards the person as meeting certain exacting “detainability” criteria – is part of the Involuntary Treatment Act, uses the same terminology as RCW 71.05.120(1) does (*i.e.*, discharge and detain), and requires *immediate* discharge unless the hospital regards the patient as meeting the exacting criteria for “detainability.” Because they are parts of the same act, RCW 71.05.120(1) and RCW 71.05.050 must be harmonized. *State v. Lilyblad*, 163 Wn.2d 1, 12, 177 P.3d 686 (2008). Construed harmoniously, those two sections of the Involuntary Treatment Act immunize any decision “whether to discharge . . . or detain” a psychiatric patient. Contrary to what the trial court held, RCW 71.05.120(1) does not make either involuntary commitment or involuntary detention a

necessary prerequisite to applicability of its gross negligence/bad faith standard of liability.

Because Ms. Poletti's admission to Overlake's psychiatric unit had been *voluntary*, once Ms. Poletti decided she wanted to go home, Overlake was duty-bound under RCW 71.05.050¹² to respect that decision and discharge Ms. Poletti immediately – not eventually, based on its view as to whether she would benefit from more inpatient treatment – unless Nurse Short regarded her as “detainable,” which she did not. It is legally immaterial that Ms. Poletti was mentally ill, needed treatment, and would have been better off staying in the hospital overnight or longer. Although plaintiff is entitled to second-guess Nurse Short's perception of Ms. Poletti's condition on the evening of December 30, a jury must evaluate that perception under the bad faith/gross negligence standard of RCW 71.05.120(1), not the “ordinary” medical negligence standard of RCW 7.70.040(1). The trial court erred in ruling otherwise.

¹² Overlake was so duty-bound on pain of potential liability for depriving Ms. Poletti of her constitutional right to physical liberty. See *Jensen v. Lane County*, 312 F.3d 1145, 1147 (9th Cir. 2002) (“In general, due process precludes the involuntary hospitalization of a person who is not both mentally ill and a danger to one's self or to others”) (citing *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975)); *In re Labelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986) (involuntary commitment has been characterized as “a massive curtailment of liberty”) (citing *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)).

C. Even if RCW 7.70.040, Instead of RCW 71.05.120(1), Supplies the Applicable Standard of Liability, Nurse Short's Alleged Violation of a Hospital Policy Was Not Negligence as a Matter of Law.

Plaintiff contended below, CP 520, 535, and the trial court ruled, CP 910 (¶ 3), that Nurse Short was negligent as a matter of law because she did not follow an Overlake policy stating that “patients in need of further psychiatric (inpatient) treatment, but who . . . do not consent to treatment, will be referred to the [MHP] for immediate evaluation.” There is no dispute that Ms. Poletti, by requesting discharge, was refusing consent to further treatment of which she was in need. But Policy 12548 neither purports to supersede, nor could lawfully supersede, the *near-absolute* right that RCW 71.05.050 gives a voluntarily admitted psychiatric patient to be discharged immediately upon request. RCW 71.05.050 is part of Washington’s statutory civil commitment scheme, which our Supreme Court has held must be construed strictly. *In re Swanson*, 115 Wn.2d 21, 25-28, 793 P.2d 962 (1990). Construing the Involuntary Treatment Act strictly means construing it against, rather than in favor of, involuntary commitment or detention.¹³ Thus Policy 12548 cannot have imposed on Nurse Short and Overlake a legal obligation to detain Ms.

¹³ 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*]”).

Poletti on grounds less exacting than those permitted by RCW 71.05.050, and it was error for the trial court to hold Overlake negligent *per se* because Nurse Short did not do so.¹⁴

The trial court's negligence-as-a-matter-of-law ruling is error for the additional reason that a violation of an Overlake policy by Nurse Short would at most be *evidence* of negligence, not negligence *per se*, because:

Standards adopted by private parties or trade associations are admissible on the issue of negligence where shown to be reliable and relevant, but do not have the legal force of a statute, ordinance, or statutorily authorized administrative regulation. [Citations omitted.] That being so, it follows that a violation of such a hospital regulation does not amount to negligence *per se*.

Andrews v. Burke, 55 Wn. App. 622, 626, 779 P.2d 740, *rev. denied*, 113 Wn.2d 1024 (1989).¹⁵

¹⁴ In ruling on *plaintiff's* motion for summary judgment, the trial court had to view all evidence and inferences therefrom in the light most favorable to Overlake. *E.g.*, *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). The evidence before the trial court included deposition testimony of defense psychiatric standard of care expert Dr. John Chiles, CP 756-57, that Ms. Poletti did not meet the criteria for detention, CP 771 (Dep., p. 72). If Ms. Poletti was not legally detainable, then a reasonable jury could find that it was not unreasonable for Nurse Short to discharge her. Thus, viewing the evidence in the light most favorable to Overlake, the trial court would have had to deny plaintiff's motion for summary judgment on the issue of negligence, had it not erroneously ruled in plaintiff's favor based on Policy 12458.

¹⁵ That is consistent with WPI (Civ.) 60.03, which provides that "[t]he violation, if any, of a statute, ordinance, administrative rule, or internal governmental policy is not necessarily negligence, but may be considered by [the finder of fact] as evidence in determining negligence."

VII. CONCLUSION

It is a significant deprivation of liberty to confine someone because she has a mental disorder¹⁶ and statutes allowing such deprivation are construed strictly,¹⁷ in favor of the individual's right *not* to be confined, not liberally, in favor of the authority of the state or health care providers to confine. When a mentally disturbed person is hospitalized voluntarily for psychiatric care and decides she wants to leave, she has, under the law, the civil right to be discharged *immediately* if the hospital staff cannot say she presents an *imminent likelihood of serious* harm or is *gravely disabled*, even if the hospital staff thinks her decision to leave is terribly misguided. RCW 71.05.050. Whether one agrees or disagrees that mentally ill persons should have that civil right, lip service would be paid to the right if hospitals lack protection against civil liability for respecting it. RCW 71.05.120(1) confers on hospitals the protection they and their staff need for respecting the right, which is what Nurse Short and Overlake did.

This Court should reverse the trial court's summary judgment rulings and hold that the standard of liability to be applied in this case is the bad faith/gross negligence standard of liability set forth in RCW 71.05.120(1). Even if the court holds that the standard of liability is the

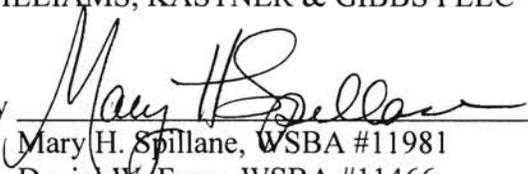
¹⁶ *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *Detention of C.W.*, 147 Wn.2d 359, 277, 53 P.3d 979 (2002); *In re Harris*, 98 Wn.2d 276, 279, 654 P.2d 109 (1982).

¹⁷ *In re Detention of Swanson*, 115 Wn.2d at 27-28.

ordinary health care provider negligence standard of RCW 7.70.040(1), it should reverse and vacate the trial court's ruling that Nurse Short's alleged violation of a hospital policy was negligence as a matter of law.

RESPECTFULLY SUBMITTED this 2nd day of April, 2012.

WILLIAMS, KASTNER & GIBBS PLLC

By 
Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466

Attorneys for Appellant Overlake Hospital
Medical Center

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 April, 2012, I caused a true and correct copy of the foregoing document, "Brief of Appellant," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Respondent:

Michael A. Goldfarb, WSBA #13492
Kit W. Roth, WSBA #33059
Christopher M. Huck, WSBA #34104
KELLY DONION GILL HUCK &
GOLDFARB, PLLC
701 Fifth Ave., Suite 6800
Seattle, WA 98104
Ph: (206) 452-0260
Fx: (206) 397-3062
E-mail: goldfarb@kdg-law.com
E-mail: roth@kdg-law.com
E-mail: huck@kdg-law.com

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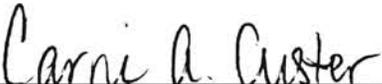
Co-counsel for Petitioners:

Christopher H. Anderson, WSBA #19811
FAIN ANDERSON & VANDERHOEF, PLLC
701 Fifth Ave., Suite 4650
Seattle, WA 98104
Ph: (206) 749-2379
Fx: (206) 749-0194
E-mail: chris@favfirm.com

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Carrie A. Custer, Legal Assistant