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NO.63568-9

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

NICHOLE POLETTI,

Appellant,

v.

OVERLAKE HOSPITAL MEDICAL CENTER
and KING COUNTY

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA A. MACK

BRIEF OF RESPONDENT KING COUNTY

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I. COUNTERSTATEMENT OF THE CASE

Sherri Poletti, plaintiff/decedent herein, died in a one car accident occurring on December 31, 2006 in Thurston County. (CP 185, 186). No one knows what caused Ms. Poletti to drift off of the shoulder of the roadway while driving through a curve, overcorrect, and then sharply cross the roadway crashing her car off road beyond the opposite shoulder. (CP 185, 186). Beginning about 20 hours before the accident, Ms. Poletti had been a patient at Overlake Hospital having voluntarily admitted herself because of mental health issues. (CP 188, 216-224). At her request, Ms. Poletti was discharged from the hospital against medical advice by Overlake Hospital Nurse Elaine Short on the evening of December 31, 2006. (CP 188). This discharge occurred about six hours after Ms. Poletti was examined by Overlake Hospital physician Kelan R. Koenig. (CP 188, 218-225).

In the course of Ms. Poletti's discharge, Nurse Short had a phone conversation with King County Designated Mental Health Professional Joseph Militello. (CP 188, 192, 193). At that time, both Nurse Short and CDMHP Militello charted the character of their conversation as a "consultation" rather than a "referral." (CP 188, 192, 193). "Referral" is a term of art under RCW 71.05 in which a CDMHP is actually called to the hospital by hospital staff to investigate whether the legal standard for

emergency involuntary detention is met for patients whom the hospital reports as demonstrating an imminent danger to self or others and/or a grave disability. In the Matter of the Detention of C.W., 147 Wash.2d 259, 272, 53 P.2d 979 (2002); RCW 71.05.050.

Based upon the Short/Militello phone conversation, Ms. Poletti's daughter, Nichole Poletti, on behalf of her mother's estate, is suing King County alleging gross negligence on the part of CDMHP Militello. In support of this theory, plaintiff claims in her brief that CDMHP Militello "talked Nurse Short out of" referring Ms. Poletti for evaluation for involuntary detention. (App. Brief, page 32). Plaintiff also argues that Militello and Short "colluded" in bad faith to deny Ms. Poletti her involuntary detention investigation. (App. Brief, page 34).

However, not only King County but even defendant Overlake Hospital takes the position that based upon her independent professional judgment, Nurse Short did not consider Ms. Poletti detainable under the required legal criteria of RCW 71.05 when the discharge occurred. As Overlake Hospital advised the trial court in its summary judgment brief:

Nurse Short has over thirty years experience as a psychiatric nurse, with duties including crisis intervention and assessing patients. She went and introduced herself to Ms. Poletti, told her that she understood Ms. Poletti had requested discharge, and then began asking mental status questions. The conversation was designed to allow Nurse

Short to assess Ms. Poletti's current status as to any paranoid delusions or hallucinations she might be having, to assess her potential for self-harm, and to determine whether she was capable of, and had a plan to, care for herself upon discharge. . .

Ms. Poletti advised that she was not responding to auditory hallucinations, that she would not injure herself.

She also advised of her plan once she left the hospital, which included taking a cab to get home safely and obtaining follow up psychiatric care. Nurse Short asked the questions in a manner designed to elicit accurate responses. Ms. Poletti gave clear answers to the questions and did not demonstrate that she was responding to any auditory or visual hallucinations. She did not exhibit nonverbal behavior that suggested that she was disorganized in her thought process or psychotic.

In Nurse Short's experienced professional judgment, based upon Ms. Poletti's current condition at the time she was seeking discharge, Ms. Poletti did not meet criteria for involuntary commitment for forced psychiatric care. . .

(CP 95, 96).

Moreover, in her deposition Nurse Short testified that in her opinion, Ms. Poletti did not meet involuntary detention criteria. As she said:

Q: So you were relying on the mental health professional's experience with her at previous times; is that correct?

A: Plus my assessment that quite honestly she did not meet criteria.

Q: That was your opinion?

A: That was my opinion also. She did not meet criteria at the time that I called [the CDMHP].

(CP 195, 196).

Despite this testimony, plaintiff claims that CDMHP Militello should have investigated Ms. Poletti's case because he "knew" that Nurse Short was not "qualified" to involuntarily detain Ms. Poletti. (App. Brief, pages 12, 13, 32). This position significantly misrepresents Mr. Militello's testimony as well as the specific statutory scheme under RCW 71.05.050 where, as here, the patient had voluntarily admitted herself into the hospital.

Indeed, while it is true that only a County Designated Mental Health Professional has the legal authority to take away a patient's liberty pending further commitment through hearing and order of the court, under RCW 71.05.050 only professional staff of a private agency or hospital has the legal authority to detain a voluntarily admitted patient like Ms. Poletti pending investigation through the hospital's referral to a CDMHP. In the Matter of the Detention of C.W., 147 Wash.2d 259, 53 P.2d 979 (2002);

RCW 71.05.050. This is what CDMHP Militello tried to explain to plaintiff's counsel when he testified in his deposition as follows:¹

Q: Okay, and in fact, Nurse Short probably didn't even know that. Nurse Short isn't capable of doing a psychiatric evaluation, is she?

MR. ANDERSON: Object, lacks foundation.

A: Nurse Short is not capable of doing a psychiatric evaluation?

Q: Is she qualified professionally to do a psychiatric evaluation?

A: What kind of an evaluation?

Q: An evaluation of someone's threat to themselves or others.

A: I think part of -- I'm not sure what you're asking. Is she a substitute for the evaluation that I would do as a mental health professional?

Q: No --

A: Or is she capable--she's a psych RN. She assesses and evaluates patients on a routine basis. That's part of her job.

Q: On a legal basis, is she qualified to do an evaluation as to whether or not an individual presents a danger to themselves or others?

A: No. The State of Washington county designated mental health professionals are the

¹ This is the same section of testimony that plaintiff relies upon to accuse CDMHP Militello of being grossly negligent for not conducting an investigation of Sherri Poletti knowing that Nurse Short was "unqualified." (App. Brief pages 12, 13, 32).

ones that make that determination as far as commitments is concerned.

Q: And Nurse Short wasn't a county designated mental health professional, was she?

A: Correct.

Q: So she wouldn't have been qualified to make that decision, would she?

A: She ---

MR. PARKER: Decision as to commitments?

Q: Decision as to whether someone is dangerous to themselves or others.

MR. PARKER: He said as to commitments.

MS. YOUNG: Sure.

MR. PARKER: That was his qualification. You're asking a different question.

MS. YOUNG: Your objection will be noted for the record. I'm not worried about it.

MR. PARKER: Okay.

(CP 239).

In fact under the law, Ms. Poletti's status as a patient who presented herself for voluntary admission gave her the statutorily guaranteed right to be "released immediately" from the hospital upon her request. RCW 71.05.050. The only legal mechanism provided in the

statute to override this guaranteed right is where hospital staff regards its patient "as presenting, as a result of a mental disorder, an imminent likelihood of serious harm" or grave disability. RCW 71.05.050. Nurse Short specifically testified that she did not so regard Ms. Poletti when Ms. Poletti asked to leave the hospital. (CP 195, 196). Accordingly, in granting King County's Motion for Summary Judgment, the trial court ruled in part as follows:

The first question, then is whether Mr. Militello had a duty to Ms. Poletti. It is undisputed that Ms. Poletti voluntarily admitted herself to Overlake, and had an absolute right to leave under RCW 71.05.050. Civil commitment statutes involve deprivation of liberty, and must be strictly construed. In Re: Detention of Swanson, 115 Wn.2d 21, 27-28 (1990). The grounds for detention under these circumstances require that if the **hospital** regards a patient requesting discharge, as presenting, "as a result of a mental disorder, an imminent likelihood of serious harm, or is gravely disabled, they may detain" that person for sufficient time to get an evaluation from a CDMHP. The psychiatric nurse found that Ms. Poletti did not meet the criteria for involuntary detention. She called Mr. Militello to consult, and told him how Ms. Poletti was presenting. Mr. Militello confirmed the conclusion that she had already reached. She did not refer Ms. Poletti for an evaluation. Nothing in any of the documents before the court supports any other conclusion.

Dr. Koenig's psychiatric notes from earlier that day (dictated within 48 hours, so apparently not available at the time) discussed her history, but

indicated that Ms. Poletti denied homicidal ideation, that her thought processes were organized and goal directed, that her insight and judgment was fair, that cognitively she was fully oriented. Dr. Koenig's treatment recommendations say that "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. . . The last entry also says that she is directable and is not exhibiting any intentional self-harm behavior at this time." In another area part of his notes he also said she would be referred the next day to a CDMHP if she refused to take medications.

Because Ms. Poletti did not meet the threshold criteria for involuntary detention, the hospital did not refer her for an evaluation, and Mr. Militello had no duty to her. A consulting phone call is not an evaluation, and he could not do an evaluation without a referral. . . [Emphasis the court's].

(CP 248, 249).

The trial court also addressed the issue of proximate cause ruling that there was no evidence that CDMHP Militello's conduct proximately caused Ms. Poletti's death in the automobile accident. (CP 249). As the court stated:

"The police report indicates [Ms. Poletti] overcorrected on a curve in the road, something that could have been caused by any multitude of circumstances: falling asleep, reaching for something, swerving to avoid hitting an animal, or hallucinations. There are no facts whatsoever

indicating that Mr. Militello's actions were a proximate cause of her death."

(CP 249).

Plaintiff is critical of the court for including proximate cause as a part of its ruling contending that King County did not raise proximate cause in its motion. (App. Brief, page 19). In fact, the proximate cause issue was first raised by the plaintiff in her response brief to King County's Motion for Summary Judgment. (CP 206, 207). It was also first raised by plaintiff's counsel at oral argument to which the court requested an oral response from the defense. Accordingly, the court was entirely correct in rendering a summary judgment ruling on proximate cause because it had been raised and argued by the plaintiff.

Plaintiff now appeals the trial court's rulings claiming that the court erred in granting King County's motion. King County responds as follows:

II. ARGUMENT

A. CDMHP Militello breached no duty owed to Ms. Poletti.

Ms. Poletti had voluntarily admitted herself into the hospital. That is factually not disputed in this lawsuit. With a voluntary admission, Ms. Poletti had the statutorily guaranteed right to leave the hospital whenever

she saw fit. As the "Voluntary Application for Mental Health Services" statute, RCW 71.05.050 states:

Any person voluntarily admitted for inpatient treatment to any public or private agency shall be released immediately upon his or her request. . .

The only exception in this case to Ms. Poletti's right to be "released immediately upon her request" is contained in the first proviso to RCW

71.05.050. That proviso states in relevant part as follows:

PROVIDED HOWEVER, that if the professional staff of any public or private agency or hospital regards a person voluntarily admitted who requests discharge as presenting, as a result of a mental disorder, an imminent likelihood of serious harm, or is gravely disabled, 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. . .
[Emphasis added].

In the case of In the Matter of the Detention of C.W., 147 Wash.2d 259, 53 P.2d 979 (2002), the Supreme Court examined the hospital staff/CDMHP interplay of RCW 71.05.050 relative to the issue of when the six hour time limit of a hospital's power to involuntarily detain its patient begins to run. (See second proviso of RCW 71.05.050). The court indicated that the six hours of "arrest power" granted the hospital is designed to provide a CDMHP time to investigate the hospital's referral

after it is made. In the Matter of the Detention of C.W., supra. In this context, the Supreme Court held that:

RCW 71.05.050 permits a hospital to detain an alleged mentally ill person for six hours from the time the hospital professional staff determines that it is necessary to contact a CDMHP.

In the Matter of the Detention of C.W., supra at 263.

In support of its approach, the Supreme Court stated that several events must occur before the hospital staff may legally detain and refer a person to the CDMHP for investigation and evaluation. In the Matter of the Detention of C.W., supra, at 272. One of those events is that:

Professional staff must "regard" the person as "presenting as result of a mental disorder an imminent likelihood of serious harm, or as presenting an imminent danger because of grave disability." RCW 71.05.050.

In the Matter of the Detention of C.W., supra, at 272.

That did not occur in this case. Nurse Short testified in her deposition that when Ms. Poletti was under her care during the discharge process, Ms. Poletti did not meet the criteria for involuntary detention. As Nurse Short stated:

Q: So you were relying on the mental health professional's experience with her at previous times; is that correct?

A: Plus my assessment that quite honestly she did not meet criteria.

Q: That was your opinion?

A: That was my opinion also. She did not meet criteria at the time that I called [the CDMHP].

Overlake Hospital took the exact same position on behalf of Nurse Short in its Motion for Summary Judgment to the trial court.

Accordingly, because Nurse Short had concluded that Ms. Poletti did not meet "criteria" for involuntary detention at the time she contacted the CDMHP, the nurse had no legal grounds upon which to hold Ms. Poletti pending investigation by the CDMHP for involuntary detention.²

In the Matter of the Detention of C.W., supra; RCW 71.05.050.

Therefore, plaintiff's lawsuit was properly dismissed because CDMHP Militello did not owe nor did he breach any duty owed to Ms. Poletti. In the Matter of Detention of C.W., supra; RCW 71.05.050. The trial court's order granting King County's Motion for Summary Judgment should accordingly, be affirmed. Id.

² At page 18 of her brief plaintiff claims that King County argued "that it had no duty because Ms. Short reported facts to Mr. Militello that did not provide the legal grounds to trigger a mental health evaluation." This characterization is patently unfair. The real argument to the trial court was as it is here, namely, that no duty was owed because the undisputed evidence was that in Nurse Short's independent professional opinion, Ms. Poletti did not meet the statutory criteria to cause and/or give Nurse Short the legal authority to detain and make a referral. (CP 157-161).

B. Even Plaintiff's Expert Witnesses Cannot Disagree with this Conclusion.

Plaintiff's expert witnesses during the summary judgment process were Christian Harris, M.D. and Bruce Olson, Ph.D. Dr. Harris submitted one declaration while Mr. Olson submitted two. (CP 104, 114, 264-269). Neither of these witnesses made any attempt to directly challenge Nurse Short's clinical determination made at the time Ms. Poletti requested discharge. Instead, each witness chose to rely upon chart notes authored by Dr. Koenig concerning his examination of Ms. Poletti conducted about 6 hours before. (CP 218, 227).

However, even Dr. Koenig's notes do not support the conclusion that Nurse Short was wrong in her clinical assessment. Indeed, at one point, based upon his 1 p.m. examination, Dr. Koenig writes that: "The patient is felt currently to meet MHP criteria. . ." (CP 223). On the page immediately following that note Dr. Koenig writes at "Treatment Recommendations," paragraph 3, as follows:

If patient continues to decline medications on 01/01/07, the treatment team will **consider** referring the patient to the mental health professionals for involuntary assessment versus administratively discharging the patient.
[Emphasis added].

(CP 224).

Given these conflicting chart entries and the timing of their origin relative to Ms. Poletti's discharge, the expert witnesses' dependence upon Dr. Koenig's notes in their attempts to call into question Nurse Short's clinical judgments are factually misplaced.

Indeed, even Bruce Olson testified, as did Nurse Short, that the key commitment question is how Ms. Poletti was presenting on the evening of December 31st when she asked to be discharged. Directing the inquiry to Ms. Poletti's presenting condition relative to the timing of her request relates specifically to the statutory requirement of "imminent."³ (CP 268, ¶5). As Mr. Olson states:

In addition, the standard of care for a reasonably prudent designated mental health professional does not allow Mr. Militello to rely on written evaluations of Sherri Poletti done by other designated mental health professionals two weeks earlier, i.e. December 16 and 17, 2006, to determine Sherri Poletti was not detainable. If he did so, Mr. Militello was grossly negligent. **While such reports provide information as to the history of the patient they do not reflect on the patient's condition on the evening of December 31, 2006.** [Emphasis added].

(CP 268).

³ RCW 71.05.020(20) defines "imminent" for the purpose of involuntary commitment to mean "the state or condition of being likely to occur at any moment or neat at hand, rather than distant or remote."

On that fundamental legal issue, i.e. Ms. Poletti's presenting condition at the time she requested discharge on December 31, 2006, Mr. Olson as well as Dr. Harris decline to challenge Nurse Short's judgment relying instead on self-conflicting chart notes authored hours before. Because the required legal standard in RCW 71.05.050 is "imminent," absent evidence to show that Nurse Short was actually wrong at the time she made her clinical judgments, plaintiff's attempts to build a case for failure to detain and refer Ms. Poletti for investigation for involuntary commitment by the CDMHP cannot be legally sustained. In the Matter of Detention of C.W., supra; RCW 71.05.050. Therefore, the trial court's order of summary judgment in favor of King County was proper. Id.

III. CONCLUSION

No one will ever know what caused Ms. Poletti to drive off of the shoulder of the road, overcorrect and cross to the other side of the road where she crashed her car off of the opposite shoulder. Likewise, no one will ever know whether an "arrest" and detention referral by Nurse Short to CDMHP Militello would have somehow interfered with Ms. Poletti's discharge from the hospital sufficient to have prevented this single car accident from occurring hours later in Thurston County. In these contexts,

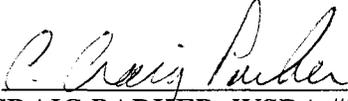
plaintiff cannot establish proximate cause in this lawsuit as the trial court properly found.

Moreover, in this state, hospital staff are the front line personnel specifically designated by law to make initial deprivation of liberty judgments on behalf of their voluntarily admitted patients. On that issue, Nurse Short specifically stated in sworn testimony, as well as in Overlake Hospital's Motion for Summary Judgment, that in her professional judgment, at the time Ms. Poletti was requesting discharge, the nurse did not believe that Ms. Poletti met the required statutory criteria for detention. On that material issue of fact, Nurse Short has never waived. And, without having made that in person clinical determination, Nurse Short was precluded by law from forcibly detaining Ms. Poletti as well as required by law to immediately release her. RCW 71.05.050. Therefore, there was no referral for a CDMHP to respond to.

Accordingly, the trial court's order dismissing plaintiff's case against King County for allegedly causing the death of Sherri Poletti due to "gross negligence" failures by CDMHP Militello on the evening of December 31, 2006 must be affirmed. In the Matter of the Detention of C.W., supra; RCW 71.05.050.

DATED this 6th day of October, 2009.

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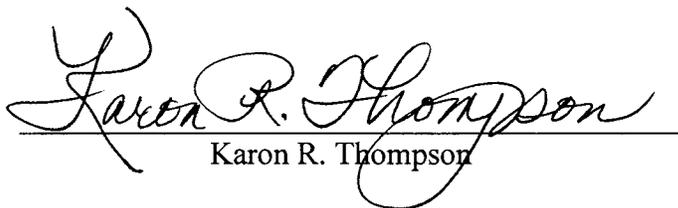
CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2009, I sent, by ABC Messenger Service, with instructions to be delivered no later than 4:30 p.m. on the afternoon of Oct. 7, 2009, a copy of **Respondent King County's Brief** to the following:

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