COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-12451

SUFFOLK COUNTY

CYNTHIA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY L. MILLER, ASHLEY GOMES INDIVIDUALLY AND ON BEHALF OF HER MINOR DAUGHTER "M"

PLAINTIFFS-APPELLANTS

V.

STEWARD HEALTH CARE SYSTEM, LLC AND STEWARD CARNEY HOSPITAL, INC.

DEFENDANTS-APPELLEES

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT FOR SUFFOLK COUNTY

BRIEF OF THE DEFENDANTS-APPELLEES

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I. STATEMENT OF THE ISSUE

Whether the lower court properly entered summary judgment, finding that the defendant, Steward Carney Hospital, owed no duty to the plaintiffs where: 1) an individual psychiatrist applied for and obtained a Civil Commitment Order for the commitment of patient "N" for a period of six months or until there was no longer a likelihood of serious harm; 2) the Civil Commitment Order was not directed at the Defendant Hospital; 3) a second treating psychiatrist discharged "N" after she determined that "N" no longer posed a likelihood of serious harm; and 4) the plaintiffs do not allege that the Defendant Hospital is vicariously liable for the conduct of the psychiatrist who discharged "N".

II. STATEMENT OF THE CASE

The plaintiffs brought the underlying action by Complaint dated November 24, 2014, alleging wrongful death and infliction of emotional distress against the defendants, Steward Health Care Systems, L.L.C. (hereinafter "Defendant Steward") and Steward Carney Hospital (hereinafter "Defendant Hospital").[1] The

[1] The defendants included in their Motion for Summary Judgment a section contending that Defendant Steward had a second, independent ground for summary judgment. (App. 236). Specifically, the Defendant Steward asserted that, as a parent corporation, it was

plaintiffs alleged that the Defendant Hospital was negligent when it violated an Order of Civil Commitment pursuant to G.L. c. 123, §§7 and 8, and when it failed to control the patient. "N" went on to kill the plaintiff's decedent, Mary Miller, twenty-two days after discharge. Notably, the plaintiffs' claims rest in general negligence against the Defendant Hospital, and not in medical malpractice or vicarious liability.

The defendants moved for summary judgment on the basis that 1) the defendants owed no duty to the plaintiffs, 2) there is no recognizable cause of action in negligence for an alleged violation of a court order, and 3) no special relationship existed that gave rise to a duty to control a patient in this factual scenario. App. 225-238). The lower court heard oral argument on

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not liable for the acts of a subsidiary. (App. 236-37). At oral argument, the parties agreed to defer that issue, to focus on the legal duty aspect of the case, and to address the appropriateness of the Defendant Steward's involvement in the case as a parent corporation at a later time in the event summary judgment was denied. (App. 257-58). The plaintiffs make no mention of the claims against Defendant Steward in their brief. Clearly, if no duty existed as to the Defendant Hospital, then no duty existed as to its parent corporation, Defendant Steward.

Footnote 4 in the lower court's decision thus is not entirely accurate. (App. 56) The court is correct in stating that the plaintiffs do not allege any theory of vicarious liability against the defendants. (See App. 9-34, App. 262, and App. 272-73; Plaintiffs' brief at 24-25) However, the second sentence of the footnote is incorrect. The parties did not agree to stay any question of vicarious liability; they agreed to stay only the question of whether Defendant Steward, as a parent corporation, could, as a matter of law, be found liable for the conduct of the subsidiary co-defendant.

July 19, 2017, and granted leave for the parties to further brief the issues thereafter. The lower court granted Defendants' Motion for Summary Judgment by Order dated August 24, 2017, finding that "Defendants are entitled to judgment as a matter of law because Plaintiffs have not - and cannot on these facts - show that Defendants owed them a duty of care." (App. 59). This appeal followed.

III. STATEMENT OF THE FACTS

The patient "N" was admitted to the Emergency Room at Steward Carney Hospital on the evening of January 7, 2012, due to complaints from family members that he was threatening his mother with a knife and arguing with his sister. (Supp. App. 1-2; App. 122). On January 8, 2012, "N" underwent psychiatric evaluation by the Boston Area Emergency Service Program (known as BEST). (App. 122; App. 127). Based on that evaluation, admission to an inpatient psychiatric facility was recommended. (App. 133). At that time, there were no beds available at the Defendant Hospital. (App. 134).

On January 9, 2012, when a bed became available, Peggy Johnson, M.D. (hereinafter Dr. Johnson) admitted "N" to the psychiatric ward at Defendant Hospital. (App. 136). On that same day, Dr. Johnson also submitted an

application for an authorization of temporary involuntary hospitalization pursuant to G.L. c. 123, §§ 12(a) and 12(b), which allows for emergency restraint and hospitalization of a person posing serious risk of harm by reason of mental illness and is valid for a three day period. (App. 140). At the expiration of the three day period, on January 12, 2012, the Medical Director of the Defendant Hospital, Michael Henry, M.D. (hereinafter Dr. Henry), filed a Petition for Commitment to commit "N". (App. 143-144). Dr. Henry is a licensed physician in the Commonwealth of Massachusetts with a specialty in psychiatry. (Supp. App. 19).

The petition was heard on January 19, 2012, and an Order of Civil Commitment pursuant to G.L. c. 123, §§7 and 8 was issued by a Justice of the Boston Municipal Court to deliver "N" to the Superintendent or Medical Director of Caritas Carney Hospital. (App. 148). The Order specifically issued to the "Superintendent or Medical Director of Carney Hospital" and provided that "N" "be committed to the Caritas Carney Hospital for a period not to exceed six months or until there is no longer a likelihood of serious harm by reason of mental illness, whichever period is shorter." (App. 148).

Dr. Johnson served as the treating psychiatrist for "N" during all pertinent portions of "N's" admission. (Supp. App. 4-7). As a treating psychiatrist, it was her role to exercise independent decision-making regarding patient admission and care, and the timing and appropriateness of discharge. (Supp. App. 10-11). "N" continued to receive psychiatric treatment from his admission of January 9, 2012 through January 30, 2012, at which time, Dr. Johnson ordered that "N" be discharged from the Defendant Hospital. (App. 123; Supp. App. 3-7). At that time, Dr. Johnson evaluated "N" and made a clinical determination that there was no likelihood of imminent harm by reason of mental illness, based on the factors surrounding the patient's hospitalization and the patient's baseline mental status. (Supp. App. 13-17; App. 123, line 2). On February 21, 2012, twenty-two days after discharge, "N" broke into the apartment of his neighbor, Mary Miller, and killed her. (App. 33). At the time, "M" was also present in the apartment but was not physically injured. (Id.). The plaintiffs in the resulting action are Cynthia Williams as personal representative of the Estate of Mary Miller (claims under the wrongful death statute) and Ashley Gomes individually and on behalf of her minor daughter "M" (a

myriad of negligence claims arising from infliction of emotional distress and loss of consortium).

The central issue in this case is whether or not the Defendant Hospital, owed a duty of care to unidentified third parties.[2] The lower court found that the defendant did not. The defendants respectfully assert that this Honorable Court should sustain the entry of summary judgment.

IV. ARGUMENT

A. Standard of Review

Whether a duty of care exists is a question of law. Jupin v. Kask, 447 Mass. 141, 146 (2006). Accordingly, the matter is an appropriate subject for summary judgment. Summary judgment is proper where there is no genuine issue of material fact and when, viewing the evidence in the light most favorable to the nonmoving

[2] The plaintiffs mischaracterize the central issue of the case at page 5 of their brief, arguing that the central issue is whether there was no longer a likelihood of serious harm by reason of mental illness at the time "N" was discharged on January 30, 2012, and relying exclusively on the affidavit of their proposed expert throughout their brief. While the likelihood of serious harm presented by the patient at discharge would certainly be an issue of fact for a jury at the time of trial, the plaintiffs must first demonstrate that the defendant owed a duty of care, which it did not. See e.g., Afarian v. Massachusetts Elec. Co., 449 Mass. 257, 261 (2007) (recognizing that, although juries are uniquely qualified to determine the scope of the duty at issue, the existence of a duty "is a question of law appropriate for resolution by summary judgment."). Absent a duty of care, the factfinder does not reach the analysis of the reasonableness of Dr. Johnson's discharge. Accordingly, whether or not there existed a likelihood of serious harm is not relevant for purposes of this appeal.

party, the moving party is entitled to judgment as a matter of law. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); Mass.R.Civ.P. 56(c). The standard of review on appeal is de novo, with the court considering the record and the legal principles involved without deference to the judge's reasoning. Clean Harbors, Inc. v. John Hancock Life Ins. Co., 64 Mass.App.Ct. 347, 357 n. 9 (2005).

B. The Plaintiffs Have Waived The Issue Of Whether Or Not The Civil Commitment Order Pursuant To G.L. c. 123, §§ 7 And 8 Creates A Nondelegable Duty; However, If The Court Chooses To Consider The Issue, It Should Find That The Order Was Not Directed At The Defendant, The Order Was Not Violated, And There Is No Private Cause Of Action In Negligence For The Violation Of A Civil Commitment Order.

i. The Plaintiffs Have Waived The Issue Of Whether The Civil Commitment Order Creates A Nondelegable Duty.

The plaintiffs assert in their appellate brief, for the first time, that the Civil Commitment Order pursuant to G.L. c. 123, §§ 7 and 8 creates a nondelegable duty that must be obeyed by the Defendant Hospital. Essentially the plaintiffs attempt to argue that Defendant Hospital is responsible for the actions of its employees, not due to respondeat superior, but because the Civil Commitment Order created a duty that could not

be discharged or delegated to the employees. This argument falls outside the scope of appeal.

The Supreme Judicial Court has held that it "[does] not consider issues, arguments, or claims for relief raised for the first time on appeal." Cariglia v. Bar Counsel, 442 Mass. 372, 378-79 (2004). Indeed, issues and arguments not initially raised before a single justice are "beyond the limited scope" of appeal. See Milton v. City of Boston, 427 Mass. 1016, 1016 (1998); Foley v. Com., 437 Mass. 1016, 1017-18 (2002) (refusing to consider the issues, arguments, or claims for relief that were not raised before the single justice). See also, M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Commission, 386 Mass. 64, 67 (1982) (noting that issues not raised in the trial court on summary judgment cannot be argued for the first time on appeal); Fidelity Management & Research Co. v. Ostrander, 40 Mass.App.Ct. 195 (1996) (refusing to consider legal theories advanced on appeal but not originally introduced at the hearing on the summary judgment motion).

Here, the Court should not consider the plaintiffs' argument that the Civil Commitment Order presented a nondelegable duty. The plaintiffs did not raise this issue in any of the prior pleadings, nor did their

counsel assert such an argument during oral argument. The closest the plaintiffs came to this theory at any point in the proceedings was when, during oral argument, the plaintiffs' counsel stated that "the duty [to determine whether there was a likelihood of harm by reason of mental illness] was delegated to Peggy Johnson, M.D. . . by the hospital." (App. 272, Lines 2-5). The plaintiffs have at no time argued, until now, that the duty was nondelegable or that it was inappropriately delegated to "N's" treating physician. Accordingly, the plaintiffs have waived any such argument and it should not be considered at this time.

ii. Even If The Court Does Not Find That Plaintiffs Waived The Argument That The Duty Was Nondelegable, The Cases Cited Do Not Support Plaintiffs' Position.

The plaintiffs have repeatedly denied that their claims sound in vicarious liability (App. 9-34; App. 262; App. 272-73; Pl. brief at 24-25). They instead have cited to several cases to support their position that the Civil Commitment Order created a nondelegable duty that could not be discharged by anyone other than the party to whom the order was directed. These cases are dissimilar and are not persuasive.

For example, in United Factory Outlet, Inc. v. Jay's Stores, Inc., 361 Mass. 35 (1972), this court addressed the issue of whether a party could be found in civil contempt of a court order absent a showing of willful disobedience. There, the court order in question directed eight corporate defendants "and their respective and several officers, agents, servants, employees, and assigns . . ." to refrain from using the words 'Mammoth Mart' in connection with any store or business enterprise. Id. at 35. When the defendants went on to advertise using the taboo phrase, the plaintiffs filed a petition for contempt of court. Id. The sole issue on appeal was whether a finding of civil contempt requires a show of willful disobedience to the court's decree. Id. at 36. The court ruled that, where a corporation is charged with civil contempt, it is not necessary to show that there was willful disobedience or intention to violate the order, as long as it is established that persons acting for the corporation were responsible for the acts or inaction which constituted a violation. Id. at 37.

The plaintiffs rely on footnote 15 of the concurring opinion of United Factory Outlet, in which the minority opinion cites Singer Mfg. Co. v. Sun Vacuum

Stores, Inc., 192 F.Supp. 738 (1961) for the proposition that a court order creates a nondelegable duty that cannot be discharged by reliance on subordinates. In Singer, the plaintiff brought civil contempt proceedings against a corporate defendant and two corporate officers for violation of a court order which was directed at "Defendant corporation, its officers and directors, and the agents, employees, representatives . . ." and prohibited use of the plaintiff's marks or names in the course of advertising. Id. at 739. In finding that the defendant corporation should be found in contempt for its employees' failure to obey the court order, the United States District Court of New Jersey noted that an employer must stand and fall with those it selects to act for it, not under the theory of vicarious liability, but because a court order issues a nondelegable duty. Id. at 741. Here, no evidence exists that the Defendant Hospital delegated any duty, as individual psychiatrists applied for the order and subsequently ordered the discharge of the patient.

The plaintiffs also cite to McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949), for the proposition that the absence of willfulness does not relieve from civil contempt. Again, there is no issue of willfulness

in the present case and the plaintiffs' discussion of McComb is irrelevant.

The situation presented here is inapposite, so reliance on United Factory Outlet, Singer and McComb provides no assistance to the plaintiffs. Most importantly, this is not an action for civil contempt. The court's rulings regarding civil contempt proceedings are therefore inapplicable here. Further, the facts are distinguishable: the Civil Commitment Order in this case was directed at an individual, not a corporate party and its employees and agents; the individual who ordered the patient's discharge was not an agent, servant or employee of the Defendant Hospital[3]; the plaintiffs have expressly denied that their claims sound in vicarious liability (App. 9-34; App. 262; App. 272-73); and there was no violation of the Civil Commitment Order by the Defendant Hospital. Accordingly, even if this Honorable Court chooses to entertain the plaintiffs' new argument, the cases cited by the plaintiffs are not relevant to the present facts and procedural posture.

iii. The Order Was Not Directed At The Defendant Hospital.

[3] Dr. Johnson has testified that she was an employee of Steward Medical Group at all relevant times, and was not an employee of the Defendant Hospital. (Supp. App. 9).

If the Court chooses to consider whether the Civil Commitment Order created a nondelegable duty, the plaintiffs' claims must nonetheless fail as the Civil Commitment Order was not directed at the Defendant Hospital. In accordance with G.L. c. 123, §§7 and 8, Dr. Henry petitioned the court for "N's" commitment. The Order for Civil Commitment was issued to the "Superintendent or Medical Director of Carney Hospital," an individual. Pursuant to §7(a), only a superintendent of a facility may petition the court for commitment and retention.

In support of their argument, the plaintiffs rely on the deposition testimony of Dr. Henry, the medical director of Defendant Hospital in January 2012 and a licensed physician with a specialty in psychiatry. (Supp. App. 19). Dr. Henry stated that he "understood" the Civil Commitment Order to be directed at the Defendant Hospital. In doing so, the plaintiffs ignore the conflicting testimony of Dr. Johnson, who understood the order to be directed at the psychiatrist who had pursued the commitment. (Supp. App. 12). These interpretations, based entirely on belief and supposition, are irrelevant and not persuasive; a

physician's "understanding" of a Civil Commitment Order cannot be binding upon the parties.

Instead, this Honorable Court should look to the language of the Civil Commitment Order. The petition for the Civil Commitment Order was filed by Dr. Henry, an individual psychiatrist. Further, the Civil Commitment Order clearly dictates the patient is to be delivered "to the Superintendent or Medical Director," an individual. While the patient was necessarily to be confined in a facility such as the Defendant Hospital, the Civil Commitment Order is not directed at the facility and is instead, directed to an individual. As the plaintiffs have not asserted any claims of vicarious liability, the Defendant Hospital cannot be held liable for the actions of the Superintendent or Medical Director in relation to compliance with the Civil Commitment Order.

Further, the Civil Commitment Order stipulated that the patient should be held for six months "or until there is no longer a likelihood of serious harm by reason of mental illness . . ."[4] A corporate entity is not capable

[4] Pursuant to G.L. c. 123, §8(d) a first order of commitment is valid for a period of six months, with all subsequent commitments sought being valid for a period of one year. Id. Accordingly, the initial maximum commitment period of six months was included in the

of reaching a clinical determination as to if and when a patient no longer presents a likelihood of serious harm. Such a finding must logically be left to a licensed psychiatrist, not a brick and mortar institution, as reflected by the language of the Order.

iv. The Defendant Did Not Violate The Civil Commitment Order Because The Patient's Commitment Was Conditional And Legitimately Terminated Upon Satisfaction Of A Condition Of Commitment.

Further, even if the Defendant Hospital was the recipient of the order (which Defendant Hospital denies), the Order was not violated. The Civil Commitment Order provided that "N" was to be committed for a period of six months or until there is no longer a likelihood of serious harm by reason of mental illness. Thus, the patient's commitment was conditional, and release was based upon either an expiration of six months, or a medical determination of the patient's mental fitness.

Here, the Defendant Hospital, as a corporate entity, was not capable of making a clinical determination as to a patient's mental status, and that decision was necessarily left to a mental health

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Civil Commitment Order based on the law, not on the specific situation presented by this individual patient.

professional. "N's" treating physician, Dr. Johnson, ordered that "N" be discharged from the Defendant Hospital on January 30, 2012, based on such a clinical determination, after evaluating the patient and finding that there was no longer a likelihood of serious harm. Once Dr. Johnson concluded there was no longer a likelihood of serious harm by reason of mental illness, the second condition of the Civil Commitment Order was satisfied and release from Defendant Hospital was mandatory. Further detention of the patient at the Defendant Hospital after Dr. Johnson determined there was no longer a likelihood of serious harm would have violated the Civil Commitment Order.

Based on the language of the Civil Commitment Order, even if the Order had been directed at the Defendant Hospital, it was not violated. Instead, upon satisfaction of a condition of commitment, the patient "N" was discharged and his commitment was terminated, as required by the Civil Commitment Order.

v. Even If The Civil Commitment Order Was Directed At The Defendant Hospital And Was Violated, There Is No Recognizable Cause Of Action In Negligence For A Purported Violation Of A Civil Commitment Order Against The Defendant Hospital.

In general, disobedience of a court order or decree may give rise to an action in contempt. See Godard v. Babson-Dow Mfg. Co., 319 Mass. 345 (1946). Civil contempt, as distinguished from criminal contempt, is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). To constitute civil contempt, there must be a clear and undoubted disobedience of a clear and unequivocal command. See United States Time Corp. v. G.E.M. of Boston, Inc., 345 Mass. 279, 283 (1963).

The plaintiffs in this case did not file a contempt action, choosing instead to proceed on a theory of negligence. The law does not provide any similar redress for an alleged violation of a court order that would sound in negligence. The plaintiffs have cited to no legal precedent that would permit them to file an action in negligence for the alleged violation of a court order, and indeed, the Defendant Hospital is aware of no such case law. Accordingly, the plaintiffs cannot maintain their action and summary judgment was appropriate.

C. The Defendant Hospital Did Not Owe A Statutory Duty Of Care To The Plaintiffs.

The Massachusetts legislature has created a limited duty of care, owed by mental health providers to third parties under specific circumstances, not applicable here. Specifically, G.L. c. 123, §36B provides as follows:

> There shall be no duty owed by a licensed mental health professional to take reasonable precautions **to warn or in any other way protect** a potential victim or victims of said professional's patient, and no cause of action imposed against a licensed mental health professional for failure to warn or in any other way protect a potential victim or victims of such professional's patient unless: (a) the patient has communicated to the licensed mental health professional an explicit threat to kill or inflict serious bodily injury upon a reasonably identified victim or victims and the patient has the apparent intent and ability to carry out the threat and the licensed mental health professional fails to take reasonable precautions as the term is defined in section one; or (b) the patient has a history of physical violence which is known to the licensed mental health professional and the licensed mental health professional has a reasonable basis to believe that there is a clear and present danger that the patient will attempt to kill or inflict serious bodily injury against a reasonably identified victim or victims and the licensed mental health professional fails to take reasonable precaution. G.L. c. 123, §36B (emphasis added).

As set forth above, §36B creates a duty of care owed by licensed mental health professionals only in very limited situations, and provides protection in cases such as the one presented here. Essentially, §36B is a statute of protection for licensed mental health professionals, establishing that no duty will arise unless the provider fails to warn or protect an identified or reasonably identifiable victim of a known threat or of a clear and present danger.

The plaintiffs attempt to circumvent that protection by naming only the Defendant Hospital, and not naming the individual mental health professionals. It flies in the face of reason to say that a hospital, a corporate entity with no ability to exercise clinical judgment or discretion, may be held liable for failing to warn or protect a third party, but the treating psychiatrist is immune from liability. To decide otherwise would create a dangerous precedent whereby the plaintiffs could end-run the immunity statute by naming only a facility in a complaint to essentially impose a duty to warn and protect in all circumstances contrary to the intent of the statute. This Honorable Court should recognize that the legislature's intent in limiting the duty owed by mental health professionals to

third parties will be served by extending §36B protection to facilities in this factual scenario, particularly where facilities, like the Defendant Hospital, do not provide direct treatment to patients and rely on the clinical judgments of licensed mental health professionals. Accordingly, the Defendant Hospital is entitled to summary judgment as a matter of law.

i. The Lower Court's Reliance On *Shea v. Caritas Carney Hospital* Provides Appropriate Guidance In This Matter.

The lower court appropriately determined that summary judgment should enter based on the finding that, not only did the Defendant Hospital owe no duty to the plaintiffs as a matter of law, but "there is clear, unambiguous statutory guidance to the contrary." (App. 59). In so finding, the lower court relied upon Shea v. Caritas Carney Hospital, 79 Mass. App. Ct. 530, 540-41 (2011), the only apparent appellate caselaw addressing §36B in connection with a health care facility. In Shea, a psychiatric patient was discharged by an individual psychiatrist and, two days later, went on to stab his mother and stepfather to death. 79 Mass. App. Ct. 530. The court granted summary judgment to the individual mental health professionals and the defendant hospital

based on the language of G.L. c. 123, §36B, concluding there was no failure to warn and that the victims were not reasonably identifiable. In a footnote, the court noted that the defendant hospital, which was named on a theory of vicarious liability, was also entitled to summary judgment. 79 Mass. App. Ct. 530, 531 n. 3 (2011). Therefore, under that factual scenario, the limited duty established by the statute also applied to the corporate entity.

Shea is similar to the case at bar, but the plaintiffs here seek to end-run the fatal effects of §36B, and the precedent set by Shea, by not naming the mental health professionals. Applying the language of G.L. c. 123, §36B to the facts of this case, it is clear that there was no duty here to warn the victims. At no point during "N's" hospitalization did he threaten, discuss, or so much as mention the plaintiff's decedent, Mary Miller. The plaintiffs do not argue otherwise. Accordingly, Mary Miller was not a reasonably identifiable victim and the Defendant Hospital, if it is extended the protection of §36B, did not have a statutory duty to warn or protect the plaintiff's decedent in any other way. The plaintiffs in essence concede this point by not naming the individual mental health providers,

and by acknowledging that mental health professionals are protected from liability by the statute. (App. 9-34; Pl. Brief at 30).

Jurisdictions that have passed statutes similar to G.L. c. 123, §36B or created legal precedent limiting the duty owed by a mental health professional, have done so to protect the mental health professional from too broad a duty after weighing the interests of the public against the private patient. For example, in the leading case, Tarasoff v. Regents of University of California, the Supreme Court of California recognized the need to balance the private interest in protecting the privacy rights of patients and maintaining effective mental health treatment with the public interest in safety from violent assault. 17 Cal.3d 425, 440, 442 (1976).

Since the decision in Tarasoff, many other states have followed suit, enacting statutes limiting the duty of a psychiatrist or interpreting common law to adopt the rationale of the Tarasoff court. See, e.g., Davis v. Lhim, 124 Mich. App. 291, 301 (1983) (*rev'd on other grounds* in Canon v. Thumudo, 430 Mich. 326 (1988)) (recognizing that psychiatry is not an exact science and therefore any imposition of duty must take into consideration the uncertainty of a psychiatric

analysis); Leedy v. Hartnett, 510 F. Supp. 1125 (1981) (discussing other jurisdictions that have adopted the theory of liability of Tarasoff); Swan v. Wedgwood Christian Youth and Family Srvcs. Inc., 230 Mich.App. 190, 198 (1998) (noting that the legislative intent behind an analogous statute was to limit the liability of mental health practitioners to only those readily identifiable individuals). Here, based on the facts of the case, upholding the lower court's finding is in line with the ruling in Shea, and consistent with the legislative intent expressed by states with a similar statutory scheme.

ii. G.L. c. 123, §36B Abrogates Any Common Law Duty That May Otherwise Exist.

The plaintiffs further attempt to avoid the fatal effect of G.L. c. 123, §36B and to distinguish this case from Shea by asserting their claim is not one of failure to warn, but one of failure to control. That distinction does not help the plaintiffs. The plain language of the statute indicates that §36B abrogates any common law duty that would ordinarily arise, including that of a duty to control in these circumstances.[5] Pursuant to

[5] See *infra*, Section D, for a discussion of the common law duty to control.

§36B, "there shall be no duty owed by a licensed mental health professional to take reasonable precautions to warn **or in any other way protect a potential victim** or victims of said professional's patient . . ." (Emphasis added). This result was also recognized by the Appeals Court of Massachusetts in Shea, 79 Mass. App. Ct. at 540 (2011)("G.L. c, 123, section 36B clearly abrogated any common-law duty owed by a mental health professional to a patient."). Should the Court choose to interpret G.L. c. 123, §36B as limiting the duty of care owed by a hospital based mental health facility, then the Defendant Hospital had no duty to the plaintiffs regardless of the legal theory pursued by the plaintiffs. Accordingly, the Defendant Hospital is entitled to summary judgment and the decision of the lower court should be upheld.

D. The Defendant Did Not Owe A Common Law Duty To The Plaintiffs.

Should the Court decline to interpret §36B as limiting the duty of care owed by a mental health facility, it nonetheless should find that the Defendant Hospital did not owe a common law duty to the plaintiff.

"Absent a special relationship with a person posing a risk, there is no duty to control another person's

conduct to prevent that person from causing harm to a third party." Leavitt v. Brockton Hosp., Inc., 414 Mass. 37, 40-41 (2009); see also, Restatement (Second) of Torts §315 (1965). "Consistent with that principle [the Supreme Judicial Court] has recognized a duty to control the conduct of another for the benefit of a third party in narrowly prescribed circumstances." Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 41-42 (2009) (citing to Jean W. v. Commonwealth, 414 Mass. 496, 513-14 (1993)). This court has also recognized a duty may arise, in part, from statutory responsibilities. See e.g., Irwin v. Ware, 392 Mass. 745, 759 (1984) (finding the town may be liable for officers' failure to take protective custody of an intoxicated driver whose vehicle subsequently struck and injured plaintiffs where the proper conduct in such a situation is provided by statute).

A duty to control will arise only during the period of time the patient or individual is legitimately intended to be in the custody of the defendant. Restatement (Second) of Torts §319 provides that one "who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable

care to control the third person to prevent him from doing such harm." To the extent a special relationship existed between the Defendant Hospital and the patient, and to the extent the Defendant Hospital had a duty to control the patient, that relationship and duty terminated once Dr. Johnson ordered that the patient be discharged from the hospital. At that point, the Defendant Hospital no longer had any right to control or detain "N".

Examples provided in the Comments of the Restatement include an infectious disease hospital that owes a duty to third parties when it accidentally releases a patient who is still contagious, a guard who owes a duty to third parties when he allows a delirious and contagious patient to escape, and a private sanitarium for the insane that owes a duty when it negligently permits a patient to escape. Id. Each of these examples contemplate the escape or accidental premature release of a patient, which is not the scenario presented here.

Legal precedent confirms this interpretation of the Restatement. For example, in Jean W. v. Commonwealth, 414 Mass. 496 (1993), the Supreme Judicial Court found that a special relationship existed that would give rise

to a duty to control when a prison negligently released an inmate before he was granted parole and the inmate raped the plaintiff. In that situation, the duty to control arose because it had not yet terminated by way of legitimate release, and the prison could be found to have a duty to control the inmate and prevent his escape.

Similarly in Williams v. U.S., 450 F.Supp. 1040 (1978) a duty to control existed where a patient receiving inpatient psychiatric treatment at the VA was required to be released into police custody, but was accidentally released into the public, then went on to shoot and kill a man. While the court noted "a hospital cannot be charged with the responsibility of insuring the physical safety of the public from all harmful acts committed by the patients who have been discharged," the Williams court found a duty to control existed based on its failure to perform an administrative task it had taken an affirmative duty to perform. Id. at 1044.

Even in Carr v. Howard, which the plaintiffs rely upon at page 29 of their brief, the duty to control arose because the patient was still committed at the defendant hospital when he was permitted to break away from an escort during transport between buildings and jumped to his death from the fifth floor of the hospital parking

garage, landing on the plaintiff. Norfolk Superior Court Civil Action No. 94-47 (1996) (Cowin, J.) (App. 91-106). In Carr, the court denied defendants' summary judgment motion, finding that a jury could reasonably find negligence based on the record. The court rejected application of G.L. c. 123, §36B, recognizing that the case was not a failure to warn case, based on the facts and circumstances. Id. Instead, the court turned to common law, and, in dicta, discussed that a psychiatrist and hospital that have custody over a person may have a duty to control their patients. Id. Thus, the court's application of the Restatement rested upon the status of the third party as being a patient at the time of the alleged injury.

The present case is factually dissimilar from those where a duty to control was found. Here, "N" did not escape and he was not negligently released due to administrative error. Instead, Dr. Johnson evaluated "N" and reached a clinical determination that "N" was mentally fit to be discharged. Once Dr. Johnson made that clinical judgment and entered an order for his discharge (Supp. App. 3-7; Supp. App. 14-15), the Defendant Hospital appropriately effectuated the patient's release. While a duty to control the patient

may have existed at the time he was a committed patient of the facility, once he was discharged by his treating physician, any duty or right to control, and thus any special relationship, terminated.

V. CONCLUSION

Wherefore, the Defendant-Appellees respectfully request that this Honorable Court affirm the entry of summary judgment. The Defendant Hospital owed no duty to unidentified third parties, either to warn or to control "N" because the Civil Commitment Order was not directed at the Defendant Hospital, G.L. c. 123, §36B provides protection to the Defendant Hospital and the Defendant Hospital owed no common law duty to control under these circumstances. Accordingly, the lower court properly granted the Defendant Hospital summary judgment as a matter of law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Massachusetts Rules of Appellate Procedure Rule 16(k) I, Edward F. Mahoney, counsel for Defendants-Appellees, Steward Health Care System, LLC, and Steward Carney Hospital, Inc., hereby certify that this brief complies with the Rules of the Court that pertain to filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision)

Mass. R. A. P. 16(e)(references to the record)

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations)

Mass. R. A. P. 16(h) (length of briefs)

Mass. R. A. P. 18 (appendix to the briefs)

Mass. R. A. P. 20 (form of briefs, appendices and other papers).

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2018, a copy of the foregoing brief has been served upon all counsel of record by first class mail as follows:

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