

1990

Kathy Lynn Higgins, Shaundra Higgins v. Salt Lake County, Salt Lake County Mental Health, Dr. William Kuentzel, Sheryl Steadman, The University of Utah, The University of Utah Medical Center :
Reply Brief

Utah Supreme Court

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BRIEF

90255

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHY LYNN HIGGINS, individually
and as guardian ad litem for
SHAUNDRA HIGGINS, her daughter,

Plaintiff-Appellant,

v.

SALT LAKE COUNTY, by and through
SALT LAKE COUNTY MENTAL HEALTH,
DR. WILLIAM KUENTZEL, SHERYL
STEADMAN, THE UNIVERSITY OF UTAH,
and THE UNIVERSITY OF UTAH
MEDICAL CENTER,

Defendants-Appellees.

Case No. 90255

Priority 16

REPLY OF APPELLANT TO APPELLEE SALT LAKE COUNTY

On Appeal from the Judgments of the Third District Court
In and For Salt Lake County
Honorable James S. Sawaya, Judge

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DECLASSIFICATION

APR 3 1991

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and as guardian ad litem for	:	
SHAUNDRA HIGGINS, her daughter,	:	
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MEDICAL CENTER,	:	
	:	
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Appellant submits this Reply to the brief of the Salt Lake County Mental Health Appellees (hereinafter "SLCMH").

I.

STATEMENT OF ISSUES

SLCMH's "issues" punctuate its contradictory approach to this case. SLCMH casts the "issues" as legal questions but spends its brief resolving the "issues" by construing the "facts" in its favor. While this approach acknowledges the issues are fact-dependent, it is inappropriate to review a summary judgment that Appellant opposed.

The statement of the "duty" issue by SLCMH highlights the incongruous approach. SLCMH asserts the issue is whether the lower court erred in finding "no duty." By comparison, the cases and commentators that have examined the "duty" arising from the relationship between psychotherapists and patients explicitly rely upon the facts in evidence to determine if a duty arises for the benefit of another. Naidu v. Laird, 539 A.2d 1064, 1070 (Del. Supr. 1988) (citing W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on Torts, § 37 at 236 (5th Ed. 1984)).

The material facts, when considered in the light most favorable to the Appellant, support an affirmative duty owed to Shaundra Higgins because the facts establish a "special relationship" between SLCMH and Trujillo as well as its "control" of Trujillo. In addition, SLCMH's broad based obligation as a mental health provider is sufficient to impose a duty for the

benefit of Shaundra Higgins, Appellant's daughter. Naidu v. Laird, 539 A.2d at 1073.

In recognition that there is a duty, SLCMH proposes three additional "issues" to avoid liability to Kathy Higgins: (1) whether Kathy Higgins' individual claim for emotional distress is barred by the Governmental Immunity Act, Utah Code Ann. § 63-30-1, et seq. (1953, as amended); (2) whether Kathy Higgins' individual claim is barred by not sending a notice of claim under the Governmental Immunity Act, Utah Code Ann. § 63-30-11 (1953, as amended); or, (3) whether Kathy Higgins' individual claim is barred by her purported failure to state a claim for infliction of emotional distress. This Reply will address these "issues" even though the trial court did not rule on them.

II.

STATEMENT OF FACTS

SLCMH's ninety-three paragraph Statement of Facts ignores the well-accepted principle that disputed material facts render summary judgment inappropriate. Utah R. Civ. P. 56(c). Critical "facts" set forth by SLCMH in the court below were disputed. [R at 1931-1983.] Those facts are still disputed, are not "material facts," or represent legal conclusions.¹

¹ The following fact paragraphs "realleged" by SLCMH in its brief were specifically disputed below: 16, 17, 19, 22, 34, 37, 45-47, 50, 52, 54, 55, 64, 70, 72, 81-83. Other fact paragraphs "realleged" in the brief were admitted in the trial court only with the addition of necessary material facts to make the "fact" statements accurate: 28-33, 39, 43, 44, 53, 58-61, 63, 68, 69, 71, 75. The following fact paragraphs are now raised in the brief of SLCMH for the first time and could not be responded to below: 25-27, 73, 76-78, 88, 90 and 91. Similarly, the following fact

The following facts, in addition to those set forth in Appellant's opening brief, must be considered in the light most favorable to Appellant. Owens v. Garfield, 784 P.2d 1187, 1188 (Utah 1989). The facts require a reversal of the lower court's decision because they establish, inter alia, a "special relationship" and SLCMH's "control" of Trujillo.

1. Trujillo, before and at the time she stabbed Shaundra, had an extensive and well-documented psychological history, characterized by a major mental illness, schizophrenia, as well as organic brain dysfunction and marginal intelligence. [Appellant's Brief, pages 7-13; Appellee's Brief, fact paragraphs 21, 22, 61 and 77.]

2. Trujillo, before and at the time she stabbed Shaundra, had an extensive, well-documented history of crime and violence, including a very similar prior stabbing. [Appellant's Brief, pages 13-16; Appellee's Brief, fact paragraphs 25-38.]

3. Trujillo, at the time she stabbed Shaundra, had been a patient of SLCMH, on either a voluntary or involuntary basis, for almost nine years. One involuntary placement occurred in February 1982 and ran through February of 1983 and resulted from court-ordered sentences that placed Trujillo into SLCMH's care. [Appellant's Brief, pages 9-11, 13-24; Appellee's Brief, fact paragraphs 24, 36, 39, 40, 43, 44, and 63.]

paragraphs in the SLCMH brief were not alleged below or call for legal conclusions and are not facts at all: 1-8, 10-15, 26.

4. SLCMH was consulted about the sentences, and specifically agreed with probation authorities to provide mental health treatments three days a week to Trujillo, to provide for a weekly visit with her primary therapist "Sheryl Steadman," and to provide medications to Trujillo. [Appellant's Brief, page 15; Steadman Depo. at 90-91; R. at 2371.]

5. SLCMH did not provide the other court-ordered conditions and erroneously advised probation authorities at the end of a one-year period that Trujillo was "taking her medications and attending her treatment sessions" and that it would "continue to monitor her medication and urge her to attend therapy." Probation officials repeated these erroneous representations to the sentencing courts and recommended Trujillo's probation be terminated. [Appellant's Brief, page 15; R. at 1733.]

6. The courts terminated the probation [R. at 1735] and Trujillo decompensated, causing her family and Trujillo to seek treatment and care from SLCMH to control her psychosis and violence. [Appellant's Brief, pages 16-17; Affids. of Trujillo's family; R. at 1701-1713.] Appellant's experts indicate that at this time, and through the date of the stabbing, Trujillo presented an unacceptably high level of risk that she would act violently toward herself and others. [R. at 1759-1767, 2123-2126.]

7. On February 25, 1984, Trujillo's family specifically requested SLCMH hospitalize Trujillo at its inpatient unit, the University Medical Center, because she was psychotic, had wounds to her wrists, and the family could not handle her. SLCMH referred

Trujillo for an "evaluation" to the Medical Center but told the family that "no County beds were available." [R. at 1893.] The record demonstrates there was not a limit on the number of county beds. [Erickson Depo. at 109; R. at 1703-1704, 1713, 1893 and 2380.]

8. Trujillo and her mother, in reliance upon and at the direction of SLCMH, went to the Medical Center and again requested to be hospitalized at the SLCMH inpatient unit. [R. at 1701-1706.] Even though Trujillo was openly psychotic, suffering from dangerous hallucinations and complaining of self-inflicted wounds, the Medical Center repeated the County line that Trujillo could not be admitted due to bed shortages. [R. at 1125.] The Medical Center then sent Trujillo to a SLCMH "group home" known as the Adult Residential Treatment Unit ("ARTU"). Appellant's experts indicate the failure to admit Trujillo and the referral to ARTU fell below appropriate standards of care for Trujillo, who needed an extended hospitalization. [R. at 1668, 1761-1766.]

9. ARTU was a minimally therapeutic setting without adequately qualified or sufficiently available staff. It was not an appropriate substitute for the in-patient hospitalization Trujillo required. [R. at 1665-1671.] Trujillo was sent to this facility, however, for the explicit reason she would be seen by Sheryl Steadman, her SLCMH "primary therapist." [R. at 1125.] Sheryl Steadman never saw Trujillo while she was at ARTU and candidly admitted in her deposition that she did not see or evaluate Trujillo and did not know "whether hospitalization was

appropriate." [Steadman Depo. at 138-139; R. at 1668, 1761-1766, 2371.]

10. Even though Trujillo's family did not believe the group home would help her, they abided by the explicit instructions of SLCMH and took Trujillo to ARTU because they could not afford a private hospital. Upon their arrival at ARTU, the family told ARTU that Trujillo was just there pending a bed at the inpatient unit and Trujillo herself requested hospitalization after having been at ARTU. [Romero Depo. at 82; Steadman Depo. at 138; R. at 1701-1712; 2371.]

11. Trujillo was never seen by her "responsible physician," Dr. William Kuentzel, while at ARTU. Instead, she was assigned to Larry Romero, who was not qualified but formulated Trujillo's treatment plan. The "plan" did not evaluate or diffuse Trujillo's propensities for violence [R. at 1761-1766] and the only licensed doctor to see Trujillo, Dr. Joy Ely, a part-time psychiatrist with a restricted role of prescribing medications, found Trujillo during this time to be "erratic," "non-adaptive," "labile," and displaying a complete "lack of insight." [Ely Depo. at 22; R. at 2371.] Dr. Ely recommended a substantial increase in dosages of medication to control Trujillo but the increased dosages were never administered. [Stevens Depo. at 36; R. at 2382.]

12. ARTU returned Trujillo back to Trujillo's family and the environment of the earlier stabbing. Trujillo's family took her back because she "had no other place to go." [R. at 1710.]

13. Trujillo was placed as a patient in the "evening-weekend" program operated by SLCMH upon her release. Larry Romero was assigned as Trujillo's therapist for the program but did not see Trujillo after she left ARTU. Trujillo missed many of the "evening-weekend" sessions, including every session for the week Shaundra was stabbed. In fact, Shaundra was stabbed at the very time Trujillo was to be in a treatment session. [R. at 1757.]

14. The hallucinations that afflicted Trujillo continued from the time Trujillo left ARTU until the stabbing. [R. at 1708-1711, 2235.] Trujillo presented an unacceptably high level of risk during this time that she would act violently toward others and SLCMH should have known, by a proper evaluation and diagnosis of Trujillo, of the unacceptably high level of risk. [R. at 1761-1767; 2123-2126.]

15. SLCMH failed to properly assess and treat the risk, in violation of the appropriate standard of care, because, among other things, it did not review medical records; it did not involve experienced and qualified personnel to evaluate and diagnose Trujillo; it failed to provide meaningful psychiatric intervention; it allowed medication to be prescribed by non-psychiatrists which medication was far less than that recommended by SLCMH's own doctors to control Trujillo; it failed to evaluate or diffuse Trujillo's propensities for violence; and, it failed to voluntarily or involuntarily hospitalize Trujillo for extended periods. [R. at 1761-1767; 2123-2126.]

16. As a result of these failures, Trujillo's psychosis and violence continued. On April 10, 1984, after having had her request and her family's plea for hospitalization rejected, Trujillo violently stabbed Shaundra Higgins, a neighbor. In an in-depth interview by psychologists at the Utah State Hospital, Trujillo indicated she stabbed Shaundra at the direction of an inner voice, after thinking of an imagined incident between Trujillo's daughter and Shaundra, about which Trujillo had been brooding for six months. [R. at 2067-2068.]

17. Kathy Higgins was standing in the family kitchen, which was close to the location of the stabbing, when she heard a "blood-curdling scream." She ran into her back yard and saw her daughter fall, get up, and fall again. Shaundra then "collapsed in her arms" and Shaundra's eyes "rolled back in her head." Kathy Higgins "realized she had been stabbed" and now suffers from nightmares and anxiety from the emotional distress of having her only child so brutally assaulted. [Depo. of Kathy Higgins at 30-35; 48-50; 72-90; R. at 2372.]

III.

ARGUMENT

A. DISPUTES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT.

SLCMH's assertion that there were no disputed material facts belies the extensive memoranda SLCMH filed, and the nearly fifty pages of "disputed facts" set forth by the Appellant in the trial court. Many of the disputed facts are central to the issue of whether a "special relationship" existed between the SLCMH and

Trujillo and whether SLCMH controlled or had the "right or ability" to control Trujillo. The existence of these factual disputes precluded summary judgment. Doe v. Arguelles, 716 P.2d 279, 280-281 (Utah 1985).

The Court need only examine the SLCMH brief to see there are key facts in dispute. Appellant, in her opening Brief, identified the portions of the record containing the fact disputes and set forth the facts, when construed in her favor, that establish "duty." SLCMH, ignoring this principle, asserts 93 fact paragraphs, many of which are not material or are disputed.

The relevance of fact disputes in this case becomes clear when considering the "duty" issue. For instance, as part of its argument on duty, SLCMH writes at page 30 of its brief:

The undisputed facts show that Caroline Trujillo was always treatment resistant and had little history of violence prior to her assault on Shaundra Higgins.

This argument contradicts the extensive criminal and psychological history of Trujillo and the recorded demands by Trujillo and her family for hospitalization.² The "duty" issue cannot be examined without facts, and when the facts are construed in Appellant's favor, it is undeniable that "duty" exists.

² SLCMH even contradicts the opinions of the County Attorney who prosecuted Trujillo, as set forth in a post-sentence report authored by Jack D. Bowers, an AP&P investigator, in which it is written that the County Attorney stated "he did not believe [Trujillo] would ever be well enough to be paroled," that the "attack on Shaundra Higgins was the second unprovoked attack she made on people with a knife," and that "Trujillo was a very dangerous person." [R. at 2031.]

B. A SPECIAL RELATIONSHIP EXISTED THAT IMPOSED A DUTY TO PROPERLY TREAT AND EVALUATE TRUJILLO AND TAKE PRECAUTIONS TO PROTECT OTHERS.

SLCMH erroneously contends at page 28 of its brief that there was not a duty created by a "special relationship" between SLCMH and Trujillo. SLCMH does not and cannot cite an analogous case for this contention. Instead, SLCMH claims that there was not a "special relationship" because Trujillo was a "voluntary" outpatient on the day Shaundra Higgins was stabbed. The falacy of the argument is apparent. If the test is "voluntary" status, a psychotherapist would never owe a duty to meet recognized standards of care in treating a "voluntary" patient and protecting her victims, no matter how violent and dangerous the patient, and no matter how many people the psychotherapist knew she might stab. Nor would the psychotherapist owe duty even though the reason the patient was a dangerous "voluntary outpatient" was due to the breach of the standard of care in failing to admit the patient who is seeking hospitalization.

Neither the preeminent authorities on tort, nor the general principles affording recovery for negligence in treating a violent mental patient, support the SLCMH argument. Prosser & Keeton, The Law of Torts, § 56, p. 384 (5th Ed. 1984), provides that hospitals and psychotherapists may be liable for the acts of dangerous mental patients. The leading case to which the treatise refers is Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976), which imposed a duty to take reasonable precautions to control a "voluntary" patient. 551 P.2d at 340. See, also, Naidu

v. Laird, 539 A.2d 1064, 1073 (1988); Bradley Center, Inc. v. Wessner, 296 S.E.2d 693 (Ga. 1982) (private mental health hospital owed duty to control voluntary patient); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980) (V.A. hospital responsible for voluntary out-patient previously in day care treatment); McIntosh v. Milano, 403 A.2d 500 (N.J. 1979) (psychotherapist responsible for acts of voluntary out-patient).

Prosser's treatise was recently cited with approval by the Utah Supreme Court in Beech v. University of Utah, 726 P.2d 413 (Utah 1986), where the Court acknowledged certain relationships are "special" as an "expression of policy." 726 P.2d 413, 418 (1986). The majority of cases squarely hold the psychotherapist/patient relationship is such a "special" relationship as a result of public policy, and do not distinguish when the patient is "voluntary."

The first "policy" the courts advocate is that a psychotherapist, as a specialist in medicine, should be compelled to meet the accepted standards of care established by other practitioners in the profession. Schuster v. Altenberg, 424 N.W.2d 159, 162 (Wis. 1988); Durflinger v. Artiles, 673 P.2d 86, 98 (Kan. 1983); McIntosh v. Milano, 403 A.2d 500, 514 (N.J. 1979); Tarasoff v. Regents of the University of California, 551 P.2d 334, 344-345 (Cal. 1976). This "policy" is particularly important in cases like this where the Appellant's experts indicate the negligent diagnosis and treatment, including the failure to hospitalize and properly medicate Trujillo, constituted a cause-in-fact of harm to a third party. Schuster v. Altenberg, 424 N.W.2d at 162.

The second "policy" is that the judgment the therapist makes in diagnosing emotional and psychological disorders and in predicting whether a patient presents a serious threat of danger of violence is comparable to judgments which doctors regularly render under accepted rules of responsibility. But the courts do not require the therapist to be a soothsayer. Rather, the courts merely require the therapist to exercise the degree of skill, knowledge and care established by members of the profession. Naidu v. Laird, 539 A.2d at 1674; Schuster v. Altenberg, 424 N.W.2d at 167-168; McIntosh v. Milano, 403 A.2d at 514; Lipari v. Sears, Roebuck & Co., 497 F. Supp. at 192. The Appellant's experts establish SLCMH did not exercise the degree of skill, knowledge and care established by members of the profession in this case.

The third "policy" the courts consider is the possible breach of confidentiality of doctor-patient communications when a doctor reports a violent patient to authorities. While acknowledging a need to protect confidential doctor-patient communications, the courts recognize that confidentiality must yield where the interests and safety of another is threatened. See, e.g., Schuster v. Altenberg, 424 N.W.2d at 170; Tarasoff v. Regents of the University of California, 551 P.2d at 347. Of course, the "confidentiality" problem does not arise in a case like this where the patient seeks hospitalization.

The fourth "policy" is the principle of providing care for a mental patient in the least restrictive environment. Courts uniformly reject the claim that imposition of "duty" will lead to

overcommitment and will discourage psychotherapists from treating patients. Empirical data indicates that therapists have not been discouraged from treating dangerous patients, nor have they increasingly used involuntary commitment proceedings. See Schuster v. Altenberg, 424 N.W.2d at 175; Givelber, Bowers and Blicht, Tarasoff, Myth and Reality: An Empirical Study of Private Law In Action, 1984 Wis. L. Rev. 443, 473-76, 486; and Mills, Sullivan and Eth, Protecting Third Parties: A Decade After Tarasoff, 144 Am. J. Psych. 68, 69-70 (Jan. 1987). Indeed, the imposition of duty to protect third persons from the violent propensities of a patient is consistent with ethical obligations perceived by psychotherapists to govern their behavior notwithstanding any legal obligation. See, e.g., Schuster v. Altenberg, 424 N.W.2d at 174; Lipari v. Sears, Roebuck & Co., 497 F. Supp. at 192-93.

SLCMH does not address articulated public policy but relies on dicta from Hokansen v. United States, 868 F.2d 372 (10th Cir. 1989) to claim that courts decline to impose "duty" upon mental hospitals where "voluntary patients" are concerned. Importantly, the plaintiffs in Hokansen expressly avoided basing their claims on the special relationship theory this case presents. Id. at 378. Moreover, Hokansen focused upon whether Kansas law imposed an affirmative duty to seek an involuntary commitment. The involuntary commitment analysis is not necessary in this case since Trujillo sought hospitalization.

Additionally, the "dicta" in Hokansen that "most" courts have declined to extend duty to the "voluntary" patient circumstance is

superficial. Hokansen cites Hasenei v. United States, 541 F. Supp. 999 (D. Md. 1982) for this proposition. Hasenei acknowledged the psychotherapist-patient relationship is a "special relationship" and imposes duty when there is a right or ability to control the patient's conduct. 541 F. Supp. at 1009-1010. The court in Hasenei then looked at duty under the facts after a full trial in which the plaintiff's expert testified there was no basis to involuntarily commit the assailant and the assailant expressed "severe" hostility toward hospitalization. 541 F. Supp. at 1010. By comparison, Trujillo sought and the standard of care required hospitalization. Hasenei recognized that in this circumstance there is a duty to hospitalize and "establish" control. 541 F. Supp. at 1012, fn. 23.³

Finally, the cases do not require, as SLCMH claims, that there be "legal custody" over the patient. Those cases requiring "control" indicate it is not the product of forced custody, but a characteristic of the relationship between the mental health provider and even a voluntary patient. This is carefully addressed in the opinion of Bradley Center, Inc. v. Wessner, 287 S.E.2d 716, aff'd, 296 S.E.2d 693 (Ga. 1982), which held the "patient-physician relationship" can allow the psychotherapist to "control" the

³ Hokansen also cites Hinkleman v. Borgess Medical Center, 403 N.W.2d 547 (Mich. App. 1987) to claim there is no "duty" to control a voluntary patient. Hinkleman indicates that the psychotherapist-patient relationship is "special," but chooses to not impose duty as a result of facts that sharply contrast to this case. In Hinkleman, the patient had only two brief prior encounters with the hospital and had purposely left the hospital prior to the assault on a third person.

voluntary patient by exercising various degrees of authority over the patient. 287 S.E.2d at 721 (citing McIntosh v. Milano, 168 N.J. Super. 406, 403 A.2d 500 (1979); Rum River Lumber Co. v. State of Maine, 282 N.W.2d 882 (Minn. Supr. 1979); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980)).

The facts show that SLCMH had the ability and did "control" Trujillo in 1984. First, SLCMH refused to hospitalize Trujillo and sent her to ARTU. SLCMH then directed Trujillo into the Higgins neighborhood just before the stabbing. SLCMH did this as a provider of mental health services for the State Division of Mental Health which had the responsibility to supervise the mentally ill. Utah Code Ann. §§ 26-17-5, 64-7-7 (1953, as amended). Second, when Trujillo was on probation from 1982 until 1983, the medical treatments provided by SLCMH, including a residential stay, were "involuntary."

In addition, the Utah Mental Health statutes gave SLCMH the legal right to control Trujillo. A mental health facility can exercise control over a voluntary patient to restrict her release. Utah Code Ann. § 64-7-31 et seq. (1953, as amended). Also, Utah Code Ann. § 64-7-36 (1953, et seq.) provided for the involuntary hospitalization of a patient, if necessary. Because Caroline Trujillo was psychotic and had a well-documented history of violence, SLCMH owed a duty to exercise due care in its control but failed by, among other ways, not admitting Trujillo to its inpatient unit for full and complete evaluation and treatment. Naidu v. Laird, 539 A.2d 1064, 1070 (Del. Supr. 1988).

This Court's opinion in Owens v. Garfield, 784 P.2d 1187 (Utah 1989) supports this conclusion. In Owens, the Court recognized that certain relationships are "special" and cited the Restatement (Second) of Torts, § 315 (1964) upon which the majority of cases rely to impose duty. The Court also cited Petersen v. State, 671 P.2d 230 (Wash. 1983), where the Washington Supreme Court, citing the Restatement (Second) of Torts, § 315 and the majority of cases that support Appellant, held state psychotherapists have a duty to protect victims of a patient where the therapist could or should reasonably foresee that the risk engendered by the mental patient's condition would endanger others. Petersen at 237 (citing Semler v. Psychiatric Institute of Washington, D. C., 538 F.2d 121, 124 (4th Cir. 1976); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 194 (D. Neb. 1980); Williams v. United States, 450 F. Supp. 1040, 1046 (S.D. 1978)).

C. THE DUTY WAS OWED TO KATHY AND SHAUNDRA HIGGINS AND THE PUBLIC DUTY RULE DOES NOT APPLY.

SLCMH also asserts it owed no duty because "there was no duty owed to the public." [Appellant's Brief at 33.] SLCMH cites two Utah cases, Obray v. Malmberg, 484 P.2d 160, (Utah 1971) (failure of a sheriff to investigate a burglary held not actionable) and Christensen v. Hayward, 694 P.2d 612 (Utah 1984) (deputies owed no duty to arrest an intoxicated motorcyclist prior to fatal accident), to claim "duties owed to the public are not owed to individuals." [Appellee's Brief at 34.]

These cases are not psychotherapist cases and do not apply. The so-called "public duty" rule arises in the corrections or law

enforcement area where a government official breaches an obligation owed to the general public at large. See, e.g., Ferree v. State, 784 P.2d 149, 151 (Utah 1989) (corrections officials owe no duty with respect to releasing inmates "absent special circumstances").

The cases imposing duty upon psychotherapists are different. They are founded upon the relationship between the psychotherapist and the patient or upon the obligation of the psychotherapist, as a medical professional and not a governmental official performing discretionary functions, to perform his or her responsibilities in accordance with applicable standards of care. See, e.g., Woodrome v. Benton County, 783 P.2d 1102, 1105 (Wash. App. 1989) (citing Petersen v. State, 671 P.2d 230 (Wash. 1983)). As a result, government hospitals and psychiatrists are responsible for the violent acts of patients on third parties. See, e.g., Perreira v. State, 768 P.2d 1198 (Colo. 1989) (state-operated community health center); Naidu v. Laird, 539 A.2d 1064 (Del. Supr. 1988) (state hospital and physician); Jablonski v. United States, 712 F.2d 391 (9th Cir. 1983) (V.A. Hospital); Petersen v. State, 671 P.2d 230 (Wash. 1983) (state mental hospital and its physician).

SLCMH's prolix recitation of cases to factually distinguish this one does not help it. The cases cited by SLCMH do not apply the "public duty" rule and cannot be meaningfully distinguished. For instance, SLCMH claims this case can be distinguished from Clark v. State, 472 N.Y.S.2d 170 (1980), Petersen v. State, 671 P.2d 230 (Wash. 1983), and Greenberg v. Barbour, 322 F. Supp. 745 (E.D. Pa. 1971), because no one told it Trujillo's condition was

deteriorating or that Trujillo was dangerous or had engaged in assaultive behavior prior to her discharge from ARTU. [Appellee's Brief at 34-36.] The record clearly shows Trujillo had been a patient of SLCMH for years, SLCMH was aware of her violent past, and SLCMH knew she was decompensating.

SLCMH's attempt to distinguish this case from the "duty to warn" cases also does not help it. Contrary to the SLCMH's assertions, there is a fact question as to whether or not Shaundra Higgins was identifiable. Trujillo had been brooding about Shaundra, her neighbor, for six months. SLCMH did not interview Trujillo about this or do anything to diffuse her violence. Trujillo may well have revealed her preoccupation with Shaundra and protective steps, including appropriate warnings, could have been taken.

Therefore, the duty SLCMH breached was to take the actions and necessary precautions in accordance with the standards of the profession, to properly treat and evaluate Trujillo, and to protect Shaundra Higgins. See Perreira v. State, 768 P.2d 1198 (Colo. 1989); Naidu v. Laird, 539 A.2d 1064, 1073 (Del. Supr. 1988); Schuster v. Altenberg, 424 N.W.2d 159, 172-73 (Wis. 1988); Petersen v. State, 671 P.2d 230, 237 (Wash. 1983).

Not one of the foregoing cases nor one Utah case limits duty to "identified victims." This Court has permitted claims for injuries suffered by the public. Doe v. Arguelles, 716 P.2d 279 (Utah 1985). In Owens v. Garfield, 784 P.2d 1187 (Utah 1989), the Court referred to cases against municipalities for injuries to the

public resulting from a police officer's failure to detain intoxicated drivers. With regard to the holding in cases providing that non-identified victims are owed a duty, the Court indicated that "the element of control over the intoxicated drivers" created the duty to protect potential victims. 784 P.2d at 1192.

It is not, therefore, the identity of the victim that creates the duty, but the ability, either practically or as a matter of statute, to control the dangerous person that defines the duty. SLCMH in this case had the right and ability to control their dangerous patient, Caroline Trujillo.

D. THE TWO COURT SENTENCES IMPOSED DUTY ON SLCMH.

Finally, SLCMH owed duty because of its "acceptance" of Caroline Trujillo as a patient in accordance with the two court sentences. The conditions of the two court sentences required Trujillo to receive mental health care, and SLCMH was made aware of these conditions and agreed that they would be followed before the conditions were imposed. [Steadman Depo. at 91; R. at 1725.] The conditions were obviously imposed to insure that Trujillo received the necessary care and treatment required for her benefit and those she could attack. See Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121, 123-24 (4th Cir. 1976) (holding a psychiatric institute liable for failing to provide the care necessary for a mental health patient under a sentence requiring care to be provided); Payton v. United States, 679 F.2d 475 (5th Cir. 1982) (indicating the Bureau of Prisons may be liable to third parties for failing to provide proper psychiatric care for a

patient while in jail); Hicks v. United States, 511 F.2d 407, 417 (D.C. Cir. 1975) (holding government mental hospital liable in third party case for failing to properly advise court about patient/criminal defendant's mental condition).

E. KATHY HIGGINS' CLAIMS ARE NOT BARRED BECAUSE SHE FAILED TO FILE A NOTICE OF CLAIM.

SLCMH erroneously claims the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1, et. seq., required Kathy Higgins to file a notice of claim on her own behalf. The Act in 1984 only required notice for "essential" governmental functions. Schultz v. Conger, 755 P.2d 165 (Utah 1988). An essential governmental function is one "which only government can perform." Id. The courts have widely held that treating, evaluating and hospitalizing the mentally ill can be performed by a private health care provider and universally dismiss the assertion of governmental immunity to defeat a victim's claims. See Petersen v. State, 671 P.2d 230, 241 (Wash. 1983); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980); Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976).

F. APPELLANT'S CLAIMS DO NOT ARISE OUT OF FAILURE TO PERFORM A DISCRETIONARY ACT.

SLCMH asserts that Count V of Appellant's Amended Complaint, alleging a duty to hospitalize Trujillo, complains of the breach of a discretionary act for which it is immune. Appellant asserts the acts to not admit or commit Trujillo were not governmental and the Governmental Immunity Act does not apply. (See Point E.)

Moreover, even if failing to admit or commit Trujillo is considered to be a governmental function, the act is not "discretionary" but "operational" for which there is no immunity. See Frank v. State, 613 P.2d 517 (Utah 1980).

This fundamental legal principle is made clear in cases arising in the federal courts that construe the immunity provisions of the Federal Torts Claim Act, and hold that treating and evaluating the mentally ill, and taking reasonable precautions to protect others, does not constitute a discretionary function for which there is immunity. See Lipari v. Sears, 497 F. Supp. at 185; Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d at 127 (4th Cir. 1976); Fair v. United States, 234 F.2d 288, 293 (5th Cir. 1956); Merchant's National Bank v. United States, 272 F. Supp. 409, 417-418 (D.C.N.D. 1967). Accord Petersen v. State, 671 P.2d 230, 239-241 (Wash. 1983).

G. THE ASSAULT AND BATTERY EXCEPTION TO GOVERNMENTAL LIABILITY DOES NOT APPLY.

SLCMH next argues this action is barred by the provisions of Utah Code Ann. § 63-30-10 which provides there is no immunity from suit for an injury proximately caused by the negligent act or omission of an employee "except if the injury arises out of assault."

The Federal Torts Claims Act is again instructive because it has a very similar provision at 28 U.S.C. § 2680 that provides for immunity for assaults. The Federal cases construe 28 U.S.C. § 2680(h) to not avoid liability where the harmful attack is caused by someone other than a governmental employee.

The leading case is Panella v. United States, 216 F.2d 622, 624 (2d Cir. 1954), where Judge (later Justice) Harlen expressed that the assault and battery exception did not bar suit for negligence leading to an assault by a non-governmental employee. See, also, Rogers v. United States, 397 F.2d 12 (4th Cir. 1968) (permitting claim where assault by non-governmental employee); Underwood v. United States, 356 F.2d 92 (5th Cir. 1966).⁴

H. APPELLANT KATHY HIGGINS HAS A CAUSE OF ACTION FOR INFLICTION OF EMOTIONAL DISTRESS.

SLCMH further claims that Kathy Higgins does not have a cause of action for infliction of emotional distress because she was not present at the time Caroline Trujillo stabbed Shaundra, and was not within the "zone of danger" required for this cause of action. [Appellant's Brief at 41.]

The facts in this case indicate that Kathy Higgins heard her daughter scream, saw her fall, and then caught her as she collapsed. Kathy, therefore, "witnessed" the stabbing which has caused her emotional shock and trauma. See Navaroff v. Superior Court, 145 Cal. Rptr. 657, 80 Cal. App. 3d 553 (1978) (mother hearing but not seeing infant that had fallen into pool permitted to have trial for emotional shock).

Johnson v. Rogers, 763 P.2d 771 (Utah 1988) does not expressly eliminate this claim. Appellant acknowledges the majority of the

⁴ The reference by SLCMH to the case of Connell v. Tooele City, 572 P.2d 697 (Utah 1977) is inopposite. In that case, the claims were for injuries arising out of false imprisonment by Tooele City. Obviously, the physical conduct giving rise to the complaint was committed by a governmental employee and the claim was not by a third party.

Court did adopt the zone of danger rule of the Restatement. The Court also wrote that at some future date other approaches may be used, including those set forth in Johnson by Justice Durham. 763 P.2d at 285. Justice Durham noted that many jurisdictions have rejected the "zone of danger" rule. 763 P.2d at 781-85.

This case is an appropriate one for the Court to depart from the zone of danger rule. It is factually distinguishable from the classic case of Johnson v. Rogers, supra, where a bystander to an automobile/pedestrian accident pursued a claim for emotional distress and is factually similar to cases departing from the zone of danger rule.

I. THE SUMMARY JUDGMENT DENIES A REMEDY IN VIOLATION OF THE UTAH CONSTITUTION.

The Utah Constitution in the Open Court Provision at Article 1, § 11 specifically provides that persons "shall have a remedy" by due course of law for injury done to the substantive interests of their person. This constitutional guarantee has been in place since statehood. See Berry by and through Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985).

SLCMH argues in its brief that this constitutional provision should not apply because there was "sufficient justification" to excuse liability in this lawsuit. [Appellee's Brief at 42.] The "sufficient justification" upon which SLCMH relies is that mental health care providers are only "remotely able to predict the often dangerous behavior of their voluntary patients." This claim has little evidentiary support in the record and has been overwhelmingly rejected. See, e.g., Perreira v. State, 768 P.2d

1198 (Colo. 1989); Schuster v. Altenberg, 424 N.W.2d 159 (Wis. 1988); Naidu v. Laird, 539 A.2d at 1074 (Del. Supr. 1988).

Likewise, the claim of SLCMH that the potential for liability would impose a "chilling affect upon the practice of mental health disciplines" is without support. The effect of this case will be to impose the standard of care upon mental health professionals that all medical professionals must meet. See Schuster v. Altenberg, 424 N.W.2d 159, 162 (Wis. 1988); Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976); McIntosh v. Milano, 403 A.2d 500 (N.J. 1979).

Finally, the right sought to be protected is the right to recover for personal injuries that have tragically impacted a young girl's life. It is a "substantial right, not only of monetary value but . . . fundamental to [Shaundra Higgins'] physical well being and ability to live a decent life." Condemarin v. University Hospital, 775 P.2d 348, 360 (Utah 1989) (citing Hunter v. North Mason High School Dist., 539 P.2d 845, 848 (Wash. 1975)).

The Appellant does not challenge the summary judgment procedure as violating Article I, Section 11. It is the substantive effect of the summary judgment that arbitrarily deprives the Appellant of her constitutionally guaranteed remedy. Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989). There is no legitimate objective in carving out psychotherapists from traditional negligence principles that impose upon medical professionals the duty to meet recognized standards of care.


The cases cited by SLCMH to claim Appellant does not have a constitutionally guaranteed right do not apply. Martinez v. California, 444 U.S. 277 (1980) and Dimas v. County of Quay, W.M., 730 F. Supp. 373 (N.M. 1980) are civil rights cases under 42 U.S.C. § 1983 in which the courts dismissed claims that conduct of state corrections officials in releasing prisoners that harm third parties is "state action" "under color of law" that deprives "life or property." Martinez 444 U.S. at 282; Dimas 730 F. Supp. at 375. Appellant is not challenging the state in the corrections area and does not base her claims on 42 U.S.C. § 1983. She is challenging the arbitrary protection provided to a class of medical professionals who failed to exercise due care in treating and evaluating a patient and failed to meet the accepted standard of care to protect the patient's victims.

CONCLUSION

For the foregoing reasons, Appellant requests the Court reverse the summary judgment and remand this case for trial.

RESPECTFULLY SUBMITTED this 3rd day of April, 1991.

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CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of April, 1991, four copies of the foregoing Reply of Appellant to Appellee Salt Lake County were hand-delivered to the following:

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