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COURT OF APPEALS

STATE OF NEW YORK

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KOWALSKI,

Appellant,

-against-

No. 128

ST. FRANCIS HOSPITAL AND  
HEALTH CENTERS, et al.,

Respondents.

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20 Eagle Street  
Albany, New York 12207  
May 28, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 128, Kowalski?  
2 Counsel, would you like any rebuttal time?

3 MS. GALVAO: Three minutes, please.

4 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

5 MS. GALVAO: Good afternoon, may it please  
6 the court, my name is Susan Galvao. I'm with  
7 Bleakley, Platt & Schmidt in White Plains and I  
8 represent the plaintiff/appellant Kevin Kowalski in  
9 this appeal.

10 On the afternoon of December 20th, 2006,  
11 Kevin Kowalski was a forty-eight year old father of  
12 two young children. He had friends and family - - -

13 JUDGE PIGOTT: At what point does proximate  
14 cause enter into this?

15 MS. GALVAO: Excuse me?

16 JUDGE PIGOTT: At what point does proximate  
17 cause enter into this?

18 MS. GALVAO: It's at the heart of it, but  
19 the analysis has to focus first on the duty of care,  
20 on the reasonableness under the circumstances of  
21 their acts and their omissions, and on the, you know,  
22 the chain of events that led him that afternoon out  
23 to Route 9.

24 JUDGE READ: Why doesn't the mental hygiene  
25 law define the duty of care - - - totally define it?

1 MS. GALVAO: I think that's - - - honestly,  
2 Your Honor, where, the Appellate Division went wrong  
3 in this case, because the Mental Hygiene Law and its  
4 provisions - - - there's a couple of different  
5 articles at issue here. Initially, the arguments  
6 made below by the medical defendants related to  
7 mental illness, involuntary confinement, civil  
8 commitment, and they shifted - - -

9 JUDGE READ: Well, the law - - - I guess  
10 the law, as I read it, says that you can only retain  
11 somebody if - - - they're only empowered to  
12 involuntarily retain someone who voluntarily came in,  
13 if he's a threat to himself or others. And you're  
14 arguing that there's something left to the common  
15 law?

16 MS. GALVAO: I think - - - yes, absolutely,  
17 the common - - -

18 CHIEF JUDGE LIPPMAN: What's the duty?

19 MS. GALVAO: The duty of care is the  
20 standard duty of care that applies to all patients in  
21 the State of New York, which is a duty of a health  
22 care provider and a hospital to safeguard and protect  
23 the patient commensurate with that person's capacity  
24 to safeguard and protect himself.

25 JUDGE SMITH: And what - - - what

1 specifically did this hospital do wrong?

2 MS. GALVAO: It was a combination of errors  
3 on the part of the hospital staff - - -

4 JUDGE SMITH: What's the biggest one?

5 MS. GALVAO: The biggest one is in failing,  
6 frankly, or the clearest one is in failing to  
7 implement their own written protocols and procedures  
8 for someone with Mr. Kowalski's presentation, his  
9 condition on that day, and his reasonable - - -

10 CHIEF JUDGE LIPPMAN: What about when he  
11 disregards what they tell him to do, and in this  
12 case, just eloped and left? They set out a protocol.  
13 They saw him talking to his friend, and then he just  
14 leaves. What's their responsibility in that  
15 situation?

16 MS. GALVAO: I - - - I think the record  
17 isn't as clear as that, that - - - that they set out  
18 a protocol. In fact - - -

19 CHIEF JUDGE LIPPMAN: What does the record  
20 show about what they did?

21 MS. GALVAO: The record shows that he was -  
22 - - that he had expressed a desire a leave at some  
23 point on the afternoon of December 20th. He had  
24 presented just a couple of hours before with a .369  
25 blood alcohol content - - -

1 JUDGE SMITH: Do you - - - do you concede  
2 that if he's absolutely determined to leave, they  
3 can't stop him?

4 MS. GALVAO: No. I - - - I don't - - - I  
5 don't think that can be concluded on this record, for  
6 one.

7 JUDGE SMITH: But you - - - you - - - you  
8 say they could have - - - they could have grabbed him  
9 and tied him up?

10 MS. GALVAO: I think there's a point, and  
11 it's well settled in our - - - in our case law, and  
12 it's just the common law duty of care, which says  
13 that if someone is in such a condition that they  
14 present a danger to themselves or others - - -

15 JUDGE SMITH: And you say - - - you say  
16 this record shows the kind of condition that would  
17 allow them to tie him to the bed.

18 MS. GALVAO: If it - - - if it became  
19 necessary to do that, but frankly, I think they  
20 didn't do any of the steps in - - -

21 JUDGE GRAFFEO: So he wasn't brought in by  
22 law enforcement. He came in with a friend. He came  
23 in - - -

24 MS. GALVAO: Absolutely, and he - - -

25 JUDGE GRAFFEO: - - - completely

1 voluntarily. Isn't that different?

2 MS. GALVAO: I - - - I don't think it's  
3 different at all, and that's where I think the - - -  
4 the misconception is here.

5 JUDGE GRAFFEO: So anyone that walks in who  
6 appears to be inebriated, the hospital takes on a  
7 special duty of care to that individual, if they  
8 decide after a while they want a drink, so they want  
9 to leave?

10 MS. GALVAO: I think that if we were to  
11 conclude that there was no duty of care to this  
12 patient because he didn't come in the back of a  
13 police car, we'd be leaving a gap - - - a gap in the  
14 standard in care that's existed all along.

15 JUDGE GRAFFEO: But you can't completely  
16 ignore the statute, can you?

17 MS. GALVAO: I think that you have to put  
18 this - - -

19 JUDGE GRAFFEO: About whether he's a danger  
20 to himself or to others. It makes a difference if  
21 they've engaged in some kind of conduct and the  
22 police bring them to the hospital.

23 MS. GALVAO: I think - - - no, honestly, I  
24 think that the statute has its place. The statute  
25 was enacted as part of the chemical dependence and

1 treatment programs construct, that the State of New  
2 York has put in place. There's a whole host of - - -

3 CHIEF JUDGE LIPPMAN: But - - - but counsel  
4 - - -

5 JUDGE GRAFFEO: So every - - - everyone who  
6 goes to an emergency room, who's inebriated, the  
7 hospital's got to put them into treatment?

8 MS. GALVAO: No, absolutely not; that's not  
9 our position.

10 CHIEF JUDGE LIPPMAN: Do you agree there's  
11 a main distinction between voluntary and involuntary  
12 and the circumstances are very different as to how  
13 you come in? That is important, isn't it?

14 MS. GALVAO: I agree that if the person  
15 comes in in the back of a police car and is being  
16 brought in pursuant to the Mental Hygiene Law  
17 provisions that permit that, then the standard of  
18 care might be looked at in view of the statutory  
19 provisions; which, frankly, allow the doctor or the  
20 staff of the hospital to retain the person if it's  
21 concluded that they do, in fact, represent a danger  
22 to themselves or others.

23 CHIEF JUDGE LIPPMAN: But what do we look  
24 at when they don't come in under that circumstance?

25 MS. GALVAO: Then you look to - - - well,

1           there's - - - there's two ways to look at it. You  
2           look to the common law. The common law says what's  
3           reasonable under the circumstances for this patient.  
4           If you have a patient who comes in and he is  
5           "inebriated", but he shows over the course of the day  
6           there's - - - there's reasonable and consistent  
7           application of protocol to establish that, in fact,  
8           he does not present a threat to himself or others, or  
9           that his condition is so improved that he would no  
10          longer - - -

11                         JUDGE ABDUS-SALAAM: What does the hosp - -  
12          -

13                         CHIEF JUDGE LIPPMAN: What's specifically  
14          in this record that tells us - - - that supports your  
15          position as to - - - that they had a duty here to do  
16          more than what they did?

17                         MS. GALVAO: In terms of his capacity at  
18          that given point in time?

19                         CHIEF JUDGE LIPPMAN: What is it that jumps  
20          out at us that the hospital neglected their duty  
21          here?

22                         MS. GALVAO: Okay. Initially, to look at  
23          his condition, they failed to implement their own  
24          protocols in terms of checking their own records as  
25          to his last admission into the hospital.

1                   JUDGE SMITH: So they - - - they - - - they  
2 should have found that he had been suicidal the last  
3 time.

4                   MS. GALVAO: That a month before he had  
5 been in the hospital - - - the same hospital - - -

6                   JUDGE SMITH: Okay, but does he - - - how  
7 do you connect that - - - let's suppose it was a  
8 departure from the standard of care for them not to  
9 look up the last visit and say that he came in with  
10 sui - - - with suicide problems. How did that  
11 proximately cause his injury?

12                   MS. GALVAO: Because in failing to - - - to  
13 access those records and learn about his recent  
14 history, they then failed - - - that failed to  
15 trigger them to do what they should have under the  
16 protocols with someone with that recent history.

17                   JUDGE SMITH: What - - - what is - - - what  
18 is that they should - - - you - - - you're say - - -  
19 you said they could have tied him up, but short of  
20 tying him up, what could they do?

21                   MS. GALVAO: They could have and should  
22 have implemented a one-on-one surveillance watch,  
23 which they've done on other occasions with other  
24 patients. They - - -

25                   JUDGE RIVERA: And he says he wants to

1 leave. What are they supposed to do?

2 MS. GALVAO: What they're - - -

3 JUDGE RIVERA: He gets up and says, I want  
4 to leave.

5 MS. GALVAO: Well, it's - - - it's  
6 essentially the same as - - - as any person who's in  
7 a pos - - - in a state of mind such that you can  
8 conclude, based upon their lab reports, their  
9 behavior, their recent history, that they're - - -  
10 that they're saying that they want to leave under  
11 these circumstances is not good enough. You need to  
12 protect them. You have that duty to them.

13 What you would - - - you would counsel them  
14 not to leave. You would put in a one-on-one  
15 surveillance. If necessary, you could use the  
16 nonelastic restraints, which were part of their  
17 policy.

18 JUDGE PIGOTT: Well, you have two experts  
19 to back you up on that, right? Dr. Yates and Dr.  
20 Abramson (ph.).

21 MS. GALVAO: Absolutely. And to that  
22 point, the experts that were offered by the  
23 defendants in support of summary judgment were  
24 addressing the wrong standard. They were addressing  
25 the standard of care under the Mental Hygiene Law for

1 the commitment - - - the civil commitment - - - of  
2 the mentally ill. And that's a great and very  
3 significant decision - - -

4 JUDGE GRAFFEO: Well, why is it if  
5 somebody's brought in under the Mental Hygiene Law,  
6 they have more rights than someone who comes in  
7 voluntarily? Because not everyone who's brought in,  
8 in a police car is going to be found by two  
9 physicians to be a danger to themselves or others.  
10 They'd be allowed to leave. Here you're saying, the  
11 person who comes in voluntarily and has this kind of  
12 BAC has got to be bound and - - -

13 MS. GALVAO: What - - -

14 JUDGE GRAFFEO: - - - and - - - and  
15 committed to a treatment program.

16 MS. GALVAO: No, I'm saying that - - - that  
17 - - - that the doctor - - -

18 JUDGE GRAFFEO: It doesn't seem to me - - -  
19 it doesn't seem to be balanced here.

20 MS. GALVAO: I'm saying that the doctor and  
21 the health care professionals have to apply the same  
22 level of judgment, the same level of reasoning that  
23 they do to anyone who comes into their care. It's a  
24 duty to safeguard and protect, commensurate with  
25 their capacity. The Mental Hygiene Law, and I

1 started to refer to it before, but has set up - - -  
2 the treatment system, under the law, has evolved to  
3 be a voluntary treatment system. They don't want  
4 people being carted off to Four Winds or carted off  
5 to AA against their will. They don't - - - the State  
6 of New York is not endorsing people being treated  
7 over their objections.

8 JUDGE GRAFFEO: And they can't - - - they  
9 can't keep someone either - - -

10 MS. GALVAO: They can't - - -

11 JUDGE GRAFFEO: - - - at a treatment  
12 program.

13 MS. GALVAO: Right, they can - - -

14 JUDGE GRAFFEO: If you want to leave and  
15 you're a voluntary admission, you get to walk out the  
16 door.

17 MS. GALVAO: Absolutely. So - - -

18 JUDGE GRAFFEO: Why is the hospital under a  
19 much stricter standard?

20 MS. GALVAO: It's - - - it's not a stricter  
21 standard, because 2209 simply says that if we have  
22 these programs, these treatment centers set up, Four  
23 Winds and AA or, you know, a Betty Ford Clinic, and  
24 police bring someone in. You've been qualified as a  
25 clinic; you're a hospital; you have this type of

1 service available.

2 If the police bring you in, in an  
3 intoxicated condition, the statute sets up a process.  
4 It says, do you want to stick around? Are you here  
5 voluntarily? You want to stay, okay. We can set you  
6 up and - - - we can set you up at Turning Point or  
7 wherever.

8 However, if the police bring you in and you  
9 say I don't want that, you're - - - and you're not at  
10 that time incapacitated, they have to let you go.  
11 But if you are incapacitated, they have to give you  
12 that care, that same standard of care, that applies  
13 to everyone, reasonableness, care and - - -

14 JUDGE ABDUS-SALAAM: Counsel, what was - -  
15 -

16 CHIEF JUDGE LIPPMAN: Is there a particular  
17 alcohol level that determines whether they're  
18 inebriated? It is based on when they see what's in  
19 your blood and that's how they determine what they do  
20 with you?

21 MS. GALVAO: Um - - -

22 CHIEF JUDGE LIPPMAN: What's the deciding  
23 factor?

24 MS. GALVAO: I don't think that the courts  
25 or the medical profession would - - - would

1 necessarily impose a specific blood alcohol content,  
2 but what is important on this record, is that this  
3 man had nothing less than a .369 when he came in  
4 shortly before noon, and .350 when he was brought  
5 back on a gurney. Even the expert affidavit  
6 submitted by the medical defendants, the  
7 toxicologist, even his scenario of the normal rate of  
8 metabolism, he opines the - - - Mr. Kowalski would  
9 still have had something "below .300" at the time he  
10 eloped.

11 JUDGE ABDUS-SALAAM: So is that - - - is  
12 that the main point here, that he was inebriated and  
13 therefore, he - - - the doctors and the hospital  
14 violated their duty to this patient?

15 MS. GALVAO: The main point was that the  
16 Appellate Division should not have decided as a  
17 matter of law that this man was not entitled to the  
18 care that any other patient in the State of New York  
19 would have been entitled to under the circumstances.

20 JUDGE GRAFFEO: Duty's a legal issue,  
21 right? The courts can weigh in on duty.

22 MS. GALVAO: Right. And this court - - -

23 JUDGE GRAFFEO: Proximate cause may be a  
24 jury question, but the duty issue is a legal issue.

25 MS. GALVAO: Ab - - - right. And the way

1           this Appellate Division decision is written by  
2           reference to 2209, the Mottau case and the Lawlor  
3           case, it's creating a standard of law whereby it, you  
4           know, a general counsel to a hospital or a medical  
5           professional has to say, wait a minute, okay, how did  
6           you get in here today? Did you come in by the police  
7           or did you come in on your - - - with your friend's  
8           help this morning?

9                         JUDGE SMITH: Is this - - -

10                        JUDGE PIGOTT: If this - - - if this guy  
11           had just come in with his fractured nose, and he  
12           didn't say anything about being intoxicated, but they  
13           obviously learned that later on that he was, would  
14           they owe him a duty?

15                        MS. GALVAO: They'd owe him the same duty  
16           that they'd owe any other patient, if they assessed  
17           him and concluded based upon lab or other results.  
18           And it really shouldn't be by reference to his  
19           history of alcoholism. You could have had a twenty-  
20           one year old on their - - - you know, on their first  
21           night out at the bars, comes in by his friend, very  
22           intoxicated, same state.

23                        JUDGE SMITH: Is it - - - is it fair to  
24           summarize your argument as saying you think this is  
25           just a medical malpractice case and they departed

1 from the standard of care?

2 MS. GALVAO: It's a medical malpractice and  
3 it's a negligence case. And it's really not about  
4 alcohol treatment centers. It's not about  
5 alcoholism. It shouldn't be about that, but the way  
6 it's written by the Appellate Division and the way it  
7 was decided as a matter of law, Mr. Kowalski, having  
8 been an alcoholic, is somehow put into a new category  
9 and we have to apply a new standard.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.  
11 Thanks, you'll have your rebuttal time.

12 MS. GALVAO: Thank you.

13 CHIEF JUDGE LIPPMAN: Counsel?

14 MR. SPOLZINO: Chief Judge Lippman, may it  
15 please the court, my name is Robert Spolzino, and I  
16 represent Dr. Chintapalli.

17 CHIEF JUDGE LIPPMAN: Counsel, let me ask  
18 you a question. Would it have been a better practice  
19 for the doctor to have told whoever he was dealing  
20 with that they should notify the police? That this  
21 guy is terribly drunk, and eloped and left, and that  
22 it really may cause problem - - - that would have  
23 been better, right?

24 MR. SPOLZINO: Given the facts here, Judge  
25 Lippman, there was no reason to do that. The - - -

1 if you look at the plaintiff's condition at 3:45 when  
2 he left - - - not his condition at 11:30 when he came  
3 into the hospital - - - he was alert. He had  
4 ambulated to the bathroom on his own without a  
5 problem. He had spoken to the nurse, and he was  
6 asked - - - when he was asked by the nurse - - - when  
7 she said, don't leave by yourself, call a friend, he  
8 called his friend. He spoke to his friend, because  
9 we know that from the friend's affidavit, and the  
10 friend said, I'll come and get you. And when he was  
11 actually leaving in the lobby, he ran into Nurse  
12 Soto, she - - - her deposition testimony is in the  
13 record, and she said, he looked fine, looked  
14 appropriate; I thought he'd be discharged.

15 CHIEF JUDGE LIPPMAN: So basically,  
16 counsel, didn't you have any responsibility here? I  
17 mean, is it - - - did - - - did the doctor in the  
18 hospital conduct themselves exactly the way they  
19 should have? Can anyone just come in, seek  
20 treatment, obviously in some distress, and then just  
21 leave, you know, without any kind of a - - - any kind  
22 of further monitoring?

23 MR. SPOLZINO: It depends, Judge Lippman,  
24 on whether the patient is competent.

25 JUDGE PIGOTT: Is what?

1 MR. SPOLZINO: If the patient can - - - if  
2 the patient is competent.

3 JUDGE PIGOTT: Oh.

4 MR. SPOLZINO: If the patient can - - - a  
5 patient has a right to leave.

6 CHIEF JUDGE LIPPMAN: What was he - - - I  
7 guess what I'm getting at - - - what was your duty  
8 here? Did you have a duty? If so, what was it? And  
9 tell us how you met that duty?

10 MR. SPOLZINO: Dr. Chintapalli is a  
11 physician. He had a - - - had a duty to treat the  
12 plaintiff - - -

13 CHIEF JUDGE LIPPMAN: Right.

14 MR. SPOLZINO: - - - in accordance with the  
15 applicable standard of care. What he did here to  
16 meet that duty was he evaluated the patient. After  
17 discussing the patient, the patient's history, and so  
18 forth, he found that the patient was competent.

19 JUDGE PIGOTT: Why did he - - - why did  
20 recommend detox?

21 MR. SPOLZINO: Because the patient had a  
22 significant blood alcohol content, and had the  
23 patient had been told - - - he had told Dr.  
24 Chintapalli that he was there for detox, and that he  
25 had been detoxed four or five or six times in the

1 past.

2 JUDGE PIGOTT: But the doctor knew that he  
3 blew a .36 - - -

4 MR. SPOLZINO: The doctor knew that he - -  
5 - right. The doc - - -

6 JUDGE PIGOTT: - - - well, it's not blowing  
7 it, but he got a - - - he got a .36, which is dean's  
8 list. I mean, I'm surprised he's - - - he's  
9 comatose.

10 MR. SPOLZINO: Well, that may be true,  
11 Judge Pigott, but there's certainly nothing in the  
12 record here that establishes that someone who has a  
13 .369 blood alcohol content is incompetent.

14 JUDGE PIGOTT: But if that's true - - -

15 MR. SPOLZINO: By - - - on its own, by  
16 itself.

17 JUDGE PIGOTT: Why - - - why did the  
18 hospital do what it did a month earlier? In other  
19 words, you know, one of - - - one of the things your  
20 opponent raises is that when he came in a month  
21 earlier, they did the one-on-one, they brought in a  
22 shrink, they did a number of things based upon his  
23 condition at that time.

24 His condition a month later is worse. So  
25 even if they didn't look at his previous month, why

1           wouldn't he have gotten that same care and treatment  
2           as her experts say she - - - he should have gotten,  
3           and why isn't that a question of fact?

4                     MR. SPOLZINO: Well, respectfully, Judge  
5           Pigott, when he came in a month before, he ca - - -  
6           the record noted that he had suicidal ideations.  
7           That's what he was there for. There was no - - -  
8           there was no such indication in the record here and  
9           nothing he said gave the - - -

10                    JUDGE SMITH: Should - - - shouldn't they -  
11           - - shouldn't they have looked back at the previous  
12           record?

13                    MR. SPOLZINO: Dr. Chintapalli testified  
14           that the patient was alert, had told him his history,  
15           he was - - -

16                    JUDGE SMITH: Well, you - - - you say that  
17           he - - - I - - - supp - - - let us suppose that a  
18           jury could find that not looking back at the previous  
19           record was a departure from the standard of care.

20                    MR. SPOLZINO: I - - -

21                    JUDGE SMITH: Does that defeat summary  
22           judgment?

23                    MR. SPOLZINO: I don't think so, Judge  
24           Smith, and I thin - - - I don't think so because the  
25           - - - if there had been something in the prior record

1 that would have mattered, maybe, but there was  
2 nothing. He had been treat - - - he had come in with  
3 a suicidal ideation, he had been seen by a  
4 psychiatrist, and had been - - - satisfied the  
5 psychiatrist.

6 JUDGE SMITH: Would you - - -

7 JUDGE ABDUS-SALAAM: Well, what about the  
8 hospital requirement for - - -

9 JUDGE GRAFFEO: What was the hospital  
10 protocol and did they violate it?

11 MR. SPOLZINO: I'm sorry.

12 JUDGE GRAFFEO: What was the hospital  
13 protocol and did they violate it?

14 MR. SPOLZINO: I don't believe they - - -

15 JUDGE GRAFFEO: I mean, they don't have a  
16 protocol to look at previous treatment - - -

17 MR. SPOLZINO: I don't believe they  
18 violated any protocol - - -

19 JUDGE GRAFFEO: - - - of the patient?

20 MR. SPOLZINO: - - - Judge Graffeo.

21 JUDGE ABDUS-SALAAM: Well, is the  
22 requirement for one-on-one monitoring only that you  
23 have s - - - the patient have suicidal ideation or is  
24 there some other requirement for one-on-one  
25 monitoring?



1 Lippman, number one.

2 CHIEF JUDGE LIPPMAN: I know, but I'm  
3 talking about - - -

4 MR. SPOLZINO: They didn't discharge him.

5 CHIEF JUDGE LIPPMAN: - - - your duty, the  
6 duty of the hospital, the doctor, whatever.

7 MR. SPOLZINO: But they didn't discharge  
8 him.

9 JUDGE PIGOTT: But - - - but - - - I'm a  
10 layman, but it seems to me .36, red eyes, injuries to  
11 right eye, garbled speech, CAT scan showed a swollen  
12 nose, head contusions and his nose had been  
13 fractured, the clinical impression was detox. He was  
14 admitted. It says that ER attempted a final de - - -  
15 tried to find a detox facility to accept him. It  
16 seems to me that there was a pretty intense focus on  
17 his condition. And now all of a sudden it - - -  
18 they're saying, well, he was fine; he left.

19 MR. SPOLZINO: No, I'm not saying he was  
20 fine, Judge Pigott. But he was - - -

21 JUDGE PIGOTT: But isn't that a question of  
22 fact, I guess, is what - - -

23 MR. SPOLZINO: He was - - - I would suggest  
24 not. He may have been intoxicated. He certainly was  
25 at 11:30. Focusing on his condition at 3:30, he

1 didn't exhibit any signs of being unable to take care  
2 of himself. He was alert; he was conscious. He  
3 spoke to people normally. He did all the things that  
4 normal people do, who have a right to say, I'm out of  
5 here; I'm leaving the hospital.

6 CHIEF JUDGE LIPPMAN: Okay, counsel.

7 MR. SPOLZINO: Thank you.

8 CHIEF JUDGE LIPPMAN: Thanks.

9 Counsel?

10 MR. HASKINS: May it please the court, my  
11 name is Robert Haskins. I'm counsel for St. Francis  
12 Hospital.

13 CHIEF JUDGE LIPPMAN: Counsel, what's the  
14 hospital's duty here?

15 MR. HASKINS: The hospital's duty is - - -  
16 I would say that the hospital's duty is to follow the  
17 policy, which despite a statement by the appellant  
18 here, the hospital did do. The specific policies  
19 that the plaintiff has - - - or that the appellant  
20 has discussed at various points, have gone through  
21 various transmogrifications during the way they've  
22 been - - -

23 JUDGE PIGOTT: Well, your nurse - - - your  
24 nurse had - - - when - - - when the plaintiff left,  
25 your nurse said to Dr. Chintapalli, should we call

1 the police? And he said, no. Now - - -

2 MR. HASKINS: Correct.

3 JUDGE PIGOTT: - - - there must have been a  
4 reason why the nurse thought that maybe the police  
5 ought to be called, and there must have been a reason  
6 why Dr. Chintapalli felt that, you know, the answer  
7 is no, and we don't know those answers in - - - isn't  
8 that a question of fact?

9 MR. HASKINS: With - - - with the regard to  
10 the record, the play - - - the patient was leaving  
11 AMA.

12 JUDGE PIGOTT: Right.

13 MR. HASKINS: The question at that point  
14 is, if a patient is leaving AMA, is there some reason  
15 to bring them back? The determination as to whether  
16 the patient should be brought back or not is  
17 rightfully that of the emergency department  
18 physician, who was discharging the patient, because  
19 the patient, irrespective of how he appeared with  
20 garbled speech and such in the morning, four hours  
21 later - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but - - - but  
23 he - - - but he wasn't - - - it wasn't a good  
24 practice, was it, to let him be discharged on his  
25 own? That's why he was asked to call somebody,

1 right?

2 MR. HASKINS: He was - - - he was asked to  
3 call someone, and quite - - -

4 JUDGE GRAFFEO: They must have recognized  
5 that he wasn't in great enough shape to leave alone  
6 without having someone with him - - -

7 MR. HASKINS: And then he changed his mind.

8 JUDGE GRAFFEO: - - - or they wouldn't have  
9 - - - they wouldn't have recommended that he call  
10 someone - - -

11 MR. HASKINS: Right.

12 JUDGE GRAFFEO: - - - to transport him.

13 MR. HASKINS: I think the case, actually,  
14 the Maldonado case down in the Second Department has  
15 some analogy to here, where there's no obligation.  
16 If an individual is in a safe place and has the means  
17 and the ability to have someone come and take them  
18 home, there's no obligation to detain and watch over  
19 him.

20 JUDGE PIGOTT: And that's the question,  
21 right?

22 MR. HASKINS: That is the question.

23 JUDGE PIGOTT: And by that I mean, it's not  
24 - - - it's not the Mental Hygiene Law, which talks  
25 about Mental Hygiene facilities, chemical dependence

1 program, treatment facilities, and services. It's -  
2 - - that's a whole different animal from what we're  
3 talking about as your opponent argues - - -

4 MR. HASKINS: Well - - -

5 JUDGE PIGOTT: - - - where you - - - where  
6 someone presents at a hospital with certain injuries  
7 and the question then becomes what did the hospital  
8 do?

9 MR. HASKINS: What the - - - if one boils  
10 down what the opponent is saying here, is that we  
11 should have kept him. We should not have let him go.

12 JUDGE SMITH: Could - - - could you have if  
13 you wanted? I mean, could you have kept him if you  
14 wanted to?

15 MR. HASKINS: If he had shown an imminent  
16 risk of harm to himself or others - - -

17 CHIEF JUDGE LIPPMAN: How do we know that -  
18 - - how do we know that, whether he's showing an  
19 imminent risk of harm to himself or others?

20 MR. HASKINS: That - - - that is a matter  
21 of clinical - - -

22 CHIEF JUDGE LIPPMAN: Totally up to the  
23 physician?

24 MR. HASKINS: That's a matter of clinical  
25 judgment.

1                   JUDGE PIGOTT: And Dr. Yates says that - -  
2                   - that he was incapacitated. Her - - - her experts,  
3                   Dr. Yates, said that they "clinically failed to  
4                   properly evaluate his physical and mental condition,  
5                   failed to take the necessary and requisite action to  
6                   protect his safety, deviated from the expected  
7                   standard of care by failing to abide by hospital  
8                   policy, and given the plaintiff's known incapacitated  
9                   condition, failed to monitor him to protect him from  
10                  eloping from the ER, and when he didn't - - - when he  
11                  did elope, failing to notify the police, so he could  
12                  be returned to the hospital."

13                  MR. HASKINS: Interestingly - - -

14                  JUDGE PIGOTT: All of that sounds like it's  
15                  a question of fact.

16                  MR. HASKINS: Interestingly, Dr. Yates,  
17                  however, makes no statement with regard to the  
18                  condition of the plaintiff at the time that he was  
19                  walking out the door. The only evidentiary expert  
20                  proof with regard to that was Dr. Muskin, who  
21                  actually opined as to what his condition was when he  
22                  left, after he had been evaluated as being capable of  
23                  walking, talking, being coherent. And the policy  
24                  with regard to whether someone should be discharged,  
25                  the standard at the hospital "discharged when patient

1 is able to walk unassisted down the hall, has a  
2 destination" - - - he had a home, and had - - -

3 JUDGE PIGOTT: But Muskin - - - Muskin, if  
4 I remember right, is an expert, right, he was not  
5 there.

6 MR. HASKINS: Neither - - - neither was, uh  
7 - - -

8 JUDGE PIGOTT: Yates.

9 MR. HASKINS: - - - neither were the other  
10 experts.

11 JUDGE PIGOTT: Exactly. So aren't they the  
12 same? In other words, you know, when we talk about  
13 who knew what, it's not as if Muskin was standing at  
14 the yard, saying, I watched him as he went out and he  
15 was fine.

16 MR. HASKINS: Right.

17 JUDGE PIGOTT: He says, based upon the  
18 records as I understand them, and he - - - and he  
19 even goes so far as to say, based upon his blood  
20 alcohol content when he was killed, or when he was  
21 injured, he must have drunk in between, which is - -  
22 - there's no evidence of that that we know of, right?

23 MR. HASKINS: That we know of at this  
24 point. There is - - - I have to say, though, that  
25 the court - - - this court in the Romano case, Romano

1 v. Stanley, in citing Burnell v. La Fountain, made a  
2 very on-point observation. With regard to the fact  
3 that individuals - - - the effects of alcohol  
4 consumption may differ greatly from person to person,  
5 and that the tolerance is subject to wide, individual  
6 variation.

7 JUDGE PIGOTT: Many of us know that.

8 CHIEF JUDGE LIPPMAN: Okay, counsel,  
9 thanks.

10 MR. HASKINS: Thank you.

11 CHIEF JUDGE LIPPMAN: Counselor?

12 MR. BRENNAN: Good afternoon, Tim Brennan  
13 for Emergency Physician Services of New York. I'd  
14 like to, if I may, jump right in with the statute,  
15 because I believe under the facts and circumstances  
16 we have here, it defines the duties specifically and  
17 it defines exactly when a patient may be held.

18 JUDGE PIGOTT: Do you rise and fall with  
19 Dr. Chintapalli?

20 MR. BRENNAN: Yes.

21 JUDGE PIGOTT: He's your employee, right?

22 MR. BRENNAN: We absolutely rise and fall  
23 with Chintapalli.

24 JUDGE PIGOTT: So is this the same  
25 argument?

1 JUDGE GRAFFEO: Why does this - - -

2 JUDGE PIGOTT: I'm sorry.

3 MR. BRENNAN: So jumping right to the  
4 statute, when you look at the statute, we had some  
5 discussion about what the experts' opinions were.  
6 The statute actually says, when you can - - - when  
7 you can hold them, there has to be, not only  
8 intoxication, but it's intoxication plus a likelihood  
9 to result in harm - - -

10 CHIEF JUDGE LIPPMAN: What's the statute  
11 really have to do this? Why - - - why isn't this a  
12 general negligence case?

13 MR. BRENNAN: Because the statute actually  
14 tells us when we can hold the person.

15 JUDGE PIGOTT: Are you talking about  
16 Article 22?

17 JUDGE GRAFFEO: But he wasn't - - - he  
18 wasn't brought in, like he was a month earlier with  
19 suicidal ideations, where - - -

20 MR. BRENNAN: Exactly.

21 JUDGE GRAFFEO: - - - you might say he was  
22 covered by the Mental Hygiene Law. This is separate,  
23 isn't it?

24 MR. BRENNAN: Exactly.

25 JUDGE GRAFFEO: What's the connection to

1 the statute - - -

2 MR. BRENNAN: The connection to this - - -

3 JUDGE GRAFFEO: - - - on this fact pattern.

4 MR. BRENNAN: The statute is actually  
5 called, if I'm not mistaken, and I'm paraphrasing,  
6 circumstances where you can hold an intoxicated  
7 person against their will in order to be treated.

8 JUDGE PIGOTT: Not in hospitals. We're  
9 talking about clinical - - - "chemical dependence  
10 programs, treatment facilities, and services."  
11 They're not talking about someone who walks into a  
12 hospital with a broken nose, and happens to be drunk.

13 MR. BRENNAN: Well, we are the first step.  
14 We are where they would come to get that transfer  
15 out. We fit that definition of a treatment facility  
16 - - -

17 JUDGE PIGOTT: But that's - - - I mean,  
18 what you're trying to say, though, is that this  
19 hospital, if - - - if any patient comes in and is  
20 drunk, there's a whole - - - you - - - you put away  
21 your standards, and you go to the MHL, and you say,  
22 leave, be good, because we can't hold you and we're  
23 not responsible for anything that then happens.

24 MR. BRENNAN: I wouldn't say that we can't  
25 hold him. I say we - - - I say I agree with you that

1 we go to the Mental Hygiene Law - - -

2 JUDGE PIGOTT: No, you don't, is my point.

3 You don't.

4 MR. BRENNAN: To 2209.

5 JUDGE PIGOTT: No.

6 MR. BRENNAN: I - - - I believe that we fit  
7 that definition of the treatment facility. That we  
8 are the first step. That we are the treatment  
9 facility.

10 JUDGE GRAFFEO: You didn't have a detox  
11 arm, right? You're operating certificate - - -

12 MR. BRENNAN: No, we were - - -

13 JUDGE GRAFFEO: - - - didn't approve a  
14 detox facility, did it?

15 MR. BRENNAN: We were going to transfer to  
16 Turning Point under the circumstances.

17 JUDGE PIGOTT: Yeah, you recommended this -  
18 - - and - - -

19 MR. BRENNAN: And arranged it.

20 JUDGE PIGOTT: - - - and if he'd gone there  
21 - - - if he'd gone there, then 22 would kick in,  
22 wouldn't you agree?

23 MR. BRENNAN: I - - - I believe it kicked  
24 in right away because we had arranged that transfer.  
25 We were holding him while he was awaiting transport.

1 CHIEF JUDGE LIPPMAN: So it makes no  
2 difference whatsoever that this guy walks in on his  
3 own?

4 MR. BRENNAN: It - - - I mean, it makes all  
5 the difference - - -

6 CHIEF JUDGE LIPPMAN: The statute  
7 immediately kicks in?

8 MR. BRENNAN: I think it makes all the  
9 difference in the world. The statute immediately  
10 kicks in and it has two arms. One arm: voluntary -  
11 - -

12 CHIEF JUDGE LIPPMAN: It makes all the  
13 difference in the world that he walks in voluntarily  
14 or not?

15 MR. BRENNAN: Under the - - - under the  
16 statute, I - - - the statute applies immediately, and  
17 then it has two arms: one if you walk in  
18 voluntarily, one if you are brought here  
19 involuntarily.

20 JUDGE PIGOTT: One of the things that we  
21 haven't discussed a lot about is - - - as Ms. Galvao  
22 points out, is no one called the police. Now, is it  
23 your - - - is it your argument that under the MHL you  
24 had no obligation to call the police either?

25 MR. BRENNAN: I don't believe we did have

1 an obligation to call the police. It's just - - -  
2 it's - - -

3 JUDGE SMITH: Does the MHL govern that, or  
4 is that a question of general common law duty?

5 MR. BRENNAN: Well, I think - - - I think  
6 if you look at - - - at the Mental Hygiene Law, you  
7 can get the answer to that question. The Mental  
8 Hygiene Law does not require it, but what it requires  
9 is - - - is if you're brought in involun - - -

10 JUDGE SMITH: But you're - - - you're not  
11 saying that no hospital has any - - - ever has a duty  
12 to do anything the Mental Hygiene Law doesn't  
13 require?

14 MR. BRENNAN: No, I - - - I think that they  
15 could have, but I think that the answer is right in  
16 the Mental Hygiene Law, and if you'd - - - you'd give  
17 me one - - -

18 JUDGE PIGOTT: You're saying the Mental  
19 Hygiene Law immunizes the hospital from any liability  
20 if the person is half nuts?

21 MR. BRENNAN: No, I think the Mental  
22 Hygiene Law gives the hospital a playbook to follow  
23 under these circumstances given the competing  
24 societal interests.

25 JUDGE READ: That's - - - that's what? It

1 sets a floor? It sets a floor of cases - - -

2 MR. BRENNAN: It sets a floor - - - well, I  
3 think it sets the floor, and not only in this  
4 situation. When you have these competing societal  
5 interests, on the one hand, you have the desire to  
6 protect society against somebody who's intoxicated,  
7 and on the other, you have this individual freedoms,  
8 something our country and our state hold - - - hold  
9 dear. And you have these competing principals - - -

10 CHIEF JUDGE LIPPMAN: Individual freedoms  
11 to go out and kill himself?

12 MR. BRENNAN: No, his individual freedom is  
13 to go out and - - - and he can drink alcohol and he  
14 can decide when and if he wants - - -

15 CHIEF JUDGE LIPPMAN: But under the  
16 circumstances, was that a dereliction of your duty,  
17 to let him go out and effectively, you know - - - as  
18 good as committed suicide?

19 MR. BRENNAN: I think under the statute,  
20 you have - - -

21 CHIEF JUDGE LIPPMAN: He was a danger to  
22 himself was the conclusion that, you know, the doctor  
23 could have drawn, but in this case, you think that  
24 good practice was consistent with just letting him  
25 leave alone, not even - - -

1 MR. BRENNAN: I don't think - - -

2 CHIEF JUDGE LIPPMAN: - - - getting him to  
3 a safe place?

4 MR. BRENNAN: I don't think under the  
5 statutory definition that Dr. Chintapalli could have  
6 concluded, as a matter of law, that this patient  
7 could have been - - -

8 CHIEF JUDGE LIPPMAN: Couldn't have said -  
9 - - could he have at least said, you better call the  
10 police; this guy's going to hurt himself?

11 MR. BRENNAN: Well, he could have said to  
12 call the police, but then the police have to decide  
13 whether they can bring - - - bring this person in,  
14 and this is a person who had been under observation,  
15 and the most significant thing that has been pointed  
16 out by counsel that demonstrated a danger, is that he  
17 pulled out an IV, something that was treatable with a  
18 cotton swab.

19 CHIEF JUDGE LIPPMAN: Counsel, was there no  
20 - - - I guess, what - - - what I'm driving at, is  
21 there no factual issue about what went on here?

22 MR. BRENNAN: I don't believe there is.

23 CHIEF JUDGE LIPPMAN: In letting this guy  
24 just elope and not doing anything about it?

25 MR. BRENNAN: When - - - when you look at

1 the terms of the Mental Hygiene Law and - - - and  
2 specifically in 2209 - - -

3 CHIEF JUDGE LIPPMAN: You think that's  
4 dispositive, the Mental Hygiene - - -

5 MR. BRENNAN: I think it's - - - I think  
6 it's dispositive because he does not, as a matter of  
7 law - - -

8 JUDGE PIGOTT: If - - - if it's not in  
9 there - - - if the Mental Hygiene Law is gone, what  
10 does the case look like to you?

11 MR. BRENNAN: If the Mental Hygiene Law is  
12 gone, I still think you have to look to those  
13 concepts, even under the common law, when can you  
14 compel - - -

15 JUDGE PIGOTT: No, take it away. Take away  
16 - - - take - - - I want to - - - I want to get you  
17 out of the MHL. Now, you got somebody who presents  
18 to the hospital with a very high alcohol content and  
19 a broken nose, and you're treating him. And he rips  
20 out his IV, and he walks out, and did - - - is there  
21 any duty on the part of the hospital, separate and  
22 apart from the MHL, with respect to a patient who  
23 elopes in that fashion, in your view?

24 MR. BRENNAN: Well, I think that there  
25 wouldn't be a duty under the circumstances, because I

1 don't think we had any right to retain him - - -

2 JUDGE SMITH: Well, yeah, maybe - - - I  
3 guess your usage of the right proceeds the duty. I  
4 mean, you - - - you - - - there's a limit, obviously,  
5 on whether you can physically restrain someone who  
6 wants to walk out of the hospital.

7 MR. BRENNAN: Absolutely.

8 JUDGE SMITH: Whether - - - whether - - -  
9 where the MHL has been enacted or not, you can't just  
10 grab anybody you think is better off in the hospital.

11 MR. BRENNAN: Um-hum. And this particular  
12 patient was, according to the record, told, you  
13 should call somebody. In fact, we know that he did.  
14 He was exercising some rational judgment. He  
15 actually called Jason Herring, his friend.

16 JUDGE SMITH: And he told - - - and he told  
17 the nurses, I remember, I'm waiting for my - - -  
18 waiting for my friend to pick me up.

19 MR. BRENNAN: And Mr. Herring, the friend,  
20 actually confirmed that that call occurred and that  
21 was done, so it's not that this is a completely  
22 irrational patient. This is somebody who actually  
23 was advised, and understood, and did those things.

24 CHIEF JUDGE LIPPMAN: Okay, counselor.

25 MR. BRENNAN: Thank you.

1 CHIEF JUDGE LIPPMAN: Thank you, appreciate  
2 it.

3 Counselor, rebuttal?

4 MS. GALVAO: Yes, Your Honor. Just to  
5 address a couple of key points. Much has been made  
6 about his condition at 3:45, which obviously is  
7 relevant, but contrary to respondent's position,  
8 there is certainly record evidence as to his  
9 condition at that time and it having been dangerously  
10 intoxicated still.

11 As I mentioned earlier, even by their own  
12 affidavits - - - experts' affidavit - - - his blood  
13 alcohol content would still have been in the  
14 neighborhood of .300.

15 JUDGE SMITH: Do you not - - - would there  
16 not have been, if you - - - if they had restrained  
17 him at this point, would there not have been a rather  
18 promising false imprisonment suit that you might be -  
19 - - you'd be standing here arguing that instead of  
20 this one?

21 MS. GALVAO: No. Under the circumstances,  
22 the record would bear out that it would have been  
23 reasonable, at that time and for his own safety and  
24 the safety of others, to have undertaken the  
25 protocols. It wasn't - - -

1 JUDGE SMITH: So any - - - any time a guy  
2 is drunk, it's reasonable - - - if you th - - - if  
3 it's reasonable to think he shouldn't be out in the  
4 street, you can tie him up and keep him there, if  
5 you're a hospital?

6 MS. GALVAO: No, I think that's overstating  
7 the position. The - - - what's reasonable under the  
8 circumstances is inherently a factual question, but  
9 under these circumstances - - -

10 JUDGE SMITH: Yeah, that's what I'm  
11 suggesting.

12 MS. GALVAO: - - - where you have a man  
13 whose blood alcohol content is in excess of .3, who's  
14 ingested six to eight Librium, with the affidavit  
15 testimony - - - expert testimony - - - we have as to  
16 the interaction of those two, with the admissions of  
17 the witnesses for the defendants in testimony - - -  
18 deposition testimony - - - as to the effect that  
19 would have on someone's judgment and on perception  
20 and on - - - on mobility and risk taking when you  
21 have reason for alarm - - -

22 JUDGE SMITH: Well, you say - - - you - - -  
23 well, you - - - it sounds to me like you're saying  
24 you can get a jury to find that it was reasonable to  
25 restrain him, and you can get a good jury to find

1 that it wasn't. So the hospital's going to lose  
2 either way. They lose this case; they lose the false  
3 imprisonment case.

4 MS. GALVAO: No, because the State of New  
5 York has long recognized that there is - - - there is  
6 a common law protection, sort of, exemption where  
7 someone is, for their own safety held temporarily,  
8 and only for so long as necessary to ensure their  
9 safety - - -

10 JUDGE SMITH: And whether - - - whether it  
11 was re - - - and whether this is the case would be a  
12 jury question.

13 MS. GALVAO: Exactly, but - - -

14 JUDGE PIGOTT: If the - - - if the question  
15 was - - - went to the jury - - - if, in fact, as is  
16 the evidence that he called the friend and - - - and  
17 the hospital had every reason to expect that that  
18 friend was going to come to pick him up, do you lose?

19 MS. GALVAO: No, well, the record doesn't  
20 really support that type of conclusion, because, for  
21 instance, Sue Soto, the nurse who testified - - -  
22 excuse me, who was deposed, but did not put in an  
23 affidavit on the motions - - - her - - - the  
24 information as to what she - - - her encounter with  
25 the plaintiff was put in, in a late entry note

1 following the accident.

2 Two nurses came in after the fact and  
3 recorded this late entry note, which, you know, in -  
4 - - which actually Nurse Soto acknowledged in  
5 deposition was not for purposes of treatment or care  
6 of Mr. Kowalski, it was - - - it was the classic case  
7 of you better cover this; you know, we have a problem  
8 here.

9 Nurse Vacca, actually, in deposition  
10 testimony, admitted that she put in this late entry  
11 note at the suggestion of her supervisor. And when  
12 asked why, she said, it should be obvious, because I  
13 was worried for the patient; I was worried for the  
14 hospital. This - - - there's - - - there's - - -

15 JUDGE SMITH: Well, you - - - you have the  
16 right to - - - to tie up every patient you're worried  
17 about?

18 MS. GALVAO: No, you - - - what you have a  
19 duty to do is to exercise reasonable judgment to  
20 protect, safeguard a patient from that sort of - - -

21 JUDGE SMITH: So every time you're worried  
22 about a patient you exercise reasonable judgment. If  
23 your reasonable judgment tells you he's better off  
24 tied to the bed, you tie him to the bed.

25 MS. GALVAO: If - - - only for so long as

1 he's - - - he's attempting to - - -

2 JUDGE SMITH: For as long - - - for as long  
3 as your reasonable judgment tells you he better  
4 stayed tied to the bed.

5 MS. GALVAO: Right, well, just as - - - in  
6 any medical malpractice case, there's always going to  
7 be a question of fact arguably - - - what you're  
8 going to have competing experts perhaps, and - - -  
9 and if - - - if there had, in fact, there had been a  
10 reasoned judgment here made consistent with this situ  
11 - - -

12 JUDGE SMITH: I mean, aren't you - - -  
13 aren't you giving - - - aren't giving hospitals a  
14 frightening amount of power over human beings? Every  
15 time they reasonably think you - - - they - - - they  
16 need to make you a prisoner, they can do it?

17 MS. GALVAO: No, I don't think I'm giving  
18 hospitals any more of the burden than they have every  
19 day when they operate, and they have to use the best  
20 judgment in practice - - -

21 JUDGE SMITH: I didn't say "burden". I  
22 said "power".

23 JUDGE GRAFFEO: If his friend had picked  
24 him up and brought him to the detox center, and he  
25 walked in and said, I don't want to be here; I refuse

1 to be detoxed. They couldn't keep him, could they?

2 MS. GALVAO: They - - - well, under 2- - -

3 -

4 JUDGE GRAFFEO: And say he walks out of

5 there - - -

6 MS. GALVAO: If he - - -

7 JUDGE GRAFFEO: - - - and has the same

8 accident that he has here.

9 MS. GALVAO: No, I disagree that - - - that

10 they would have no ability - - -

11 JUDGE GRAFFEO: They have - - -

12 MS. GALVAO: They have - - - under - - -

13 JUDGE GRAFFEO: - - - they have the same

14 standard of care, as well?

15 MS. GALVAO: Under 2209, which - - - which

16 they've relied upon and somewhat - - -

17 JUDGE GRAFFEO: I thought you said the

18 statute doesn't apply here.

19 MS. GALVAO: The statute doesn't apply to

20 the circumstances, because they have the duty of - -

21 - the hospital has a duty of care to assess and treat

22 him consistent with his - - - and safeguard and

23 protect him consistent with his capacity at the time.

24 2209 does not prevent or otherwise abrogate this

25 common law duty.

1           I - - - yeah, I think it's also People v.  
2 Warner, which we cited - - - I believe was also cited  
3 by respondents - - - at - - - in one fashion or  
4 another - - - specifically held - - - this court has  
5 held - - - that in enacting the Mental Hygiene Law,  
6 the court wasn't - - - wasn't abrogating, wasn't  
7 superseding or supplanting the common law. It - - -  
8 it has its place, and when it applies, then you look  
9 to the statute. But even in that circumstance - - -

10           JUDGE GRAFFEO: But what's the answer to my  
11 question? Can the detox center keep him?

12           MS. GALVAO: The detox center - - -

13           JUDGE GRAFFEO: He can walk out of the  
14 detox center, can't he?

15           MS. GALVAO: 2209 has a slight ambiguity in  
16 the sense that it has one provision that says, if you  
17 come voluntarily, but even there, it says, you shall  
18 treat - - - you shall treat and provide care, and  
19 could be discharged to a home, or a - - - or, you  
20 know, to admit, if they come in voluntarily.

21           And then it has a second provision that  
22 says, if they come in over their objection, then you  
23 do the same assessment. You see where they're at,  
24 and then, if only - - - if they've determined to be  
25 incapacitated such that they present a danger - - -

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CHIEF JUDGE LIPPMAN: Okay, counselor.  
Thanks, counselor. Thank you all, appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Kowalski v St. Francis Hospital and Health Centers, No. 128 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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