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COURT OF APPEALS

STATE OF NEW YORK

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DAVIS,

Appellant,

-against-

No. 163

SOUTH NASSAU COMMUNITIES HOSPITAL,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
October 15, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

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1  
2 CHIEF JUDGE LIPPMAN: 163, Davis v. South  
3 Nass - - - Nassau Communities Hospital.

4 Counsel, you want any rebuttal time?

5 MR. DELL: Two - - - two minutes.

6 CHIEF JUDGE LIPPMAN: Two minutes, go  
7 ahead. You're on.

8 MR. DELL: Thank you, may it please the  
9 court, Joseph Dell for the appellants, plaintiff-  
10 appellants. We're here because on March 4th, 2009,  
11 Lorraine Walsh, with severe abdominal pain, appeared  
12 for the second time in two days at South Nassau  
13 Communities Hospital and was admitted to the  
14 emergency room for treatment of the abdominal pain.

15 CHIEF JUDGE LIPPMAN: Yeah, yeah, but  
16 what's the responsibility to your client of the  
17 hospital doctors?

18 MR. DELL: Responsibility to my client is  
19 someone on the roadway knowing that Ms. Walsh came to  
20 the hospital in a car.

21 CHIEF JUDGE LIPPMAN: Yeah, yeah, but  
22 what's their responsibility to you?

23 MR. DELL: To make sure that Ms. Walsh  
24 doesn't leave in a condition that they created on  
25 Ativan and Dilaudid.

1 CHIEF JUDGE LIPPMAN: What precedent is  
2 there in our law to - - - to allow you to - - - to -  
3 - - to make that connection?

4 MR. DELL: Well, when I read Tenuto and  
5 when I read McNulty and I read the decision - - -

6 CHIEF JUDGE LIPPMAN: What does McNul - - -  
7 McNulty say about - - - doesn't McNulty really limit  
8 Tenuto pretty much to its facts, or you don't think  
9 so?

10 MR. DELL: You know what, I think when they  
11 say "arises out of the care and treatment of the  
12 doctor", that you have a condition in this case that  
13 is not the condition she presented with. It's the  
14 condition that they created by giving her Ativan and  
15 Dilaudid.

16 CHIEF JUDGE LIPPMAN: Is your case closer  
17 to Tenuto or to McNulty?

18 MR. DELL: I don't think it's close to  
19 either one on the fact pattern. I think it's so fact  
20 specific that it actually limits the victim class in  
21 the case or the victim class after this case.

22 JUDGE ABDUS-SALAAM: Well, how - - - how do  
23 you - - - how do you limit the victim class when what  
24 you're talking about is third parties who get injured  
25 by someone who you say the hospital and the doctor

1 allow to get into a car and just drive away? That  
2 could be any number of persons could be injured by  
3 someone driving in those conditions.

4 MR. DELL: It could, but I think you limit  
5 the exposure of the doctor and the hospital. And the  
6 - - - it's a setting of a doctor and the hospital,  
7 not a private physician where you made an appointment  
8 and you walked in and you had time and it's not so  
9 emergent. But here in a hospital setting where a  
10 person comes in in extreme pain and they subject  
11 themselves to the doctors and they submit - - -  
12 completely she submitted, she was there for five  
13 hours, she signed the consent for them to treat her  
14 and take care of her and do anything they needed - -  
15 -

16 JUDGE STEIN: Could they legally keep her  
17 there?

18 MR. DELL: Pardon?

19 JUDGE STEIN: Could they legally keep her  
20 there are against her will?

21 MR. DELL: Against her will? No, she could  
22 have signed herself out AMA. And had they warned  
23 her, done a - - - a neurological exam and said you  
24 know something, you shouldn't be driving, we want to  
25 keep you here, this is the half-life of Dilaudid and

1 Ativan, two to four hours, it's only been ninety  
2 minutes, you should not drive, we know you drove  
3 yourself, please don't leave, and she signs herself  
4 out AMA, then - - -

5 JUDGE STEIN: Well, she might very well - -  
6 -

7 MR. DELL: - - - I think it cuts that.

8 JUDGE STEIN: - - - have a malpractice  
9 action against - - - ag - - - against the provider.

10 MR. DELL: She does.

11 JUDGE STEIN: She might.

12 MR. DELL: And my fear is that - - -

13 JUDGE STEIN: But - - - but - - - but  
14 that's not the question that we're looking at. I  
15 mean, whether - - - whether the - - - the medical  
16 personnel should or should not have done something is  
17 - - - is - - - is a different question. But the  
18 question is is if they failed to do something they  
19 should have done, are they - - - do they have a duty  
20 owed to your client and anybody else, as Judge Abdus-  
21 Salaam said, that's out there that might be injured?

22 MR. DELL: I - - - I think that under the  
23 facts of this case, like what our expert said in his  
24 affirmation in opposition, that every emergency room  
25 physician - - - specifically emergency room

1 physicians - - - are trained that drivers - - - and  
2 the AMA and the New York State Medical Society have  
3 come out in 1999 and 2003 with their own advice and  
4 warnings for physicians, but particularly emergency  
5 room physicians, that when you give these types of  
6 controlled substances, 3306 Public Health Law  
7 controlled substances that the FDA and the  
8 manufacturers say you must warn your patient about  
9 driving, that these are the things they need to do.

10 JUDGE STEIN: And let's - - - let's assume  
11 that's true and let's assume that - - - that the  
12 patient then leaves without knowing these warnings  
13 and does something she shouldn't do and is injured.  
14 That's not the circumstance that you're asking us to  
15 look at. The - - - what you're asking us to look at  
16 is is that - - - that duty to warn, does that extend  
17 to other third parties who those doctors don't even  
18 know exist?

19 MR. DELL: These doctors knew that other  
20 drivers on the road were going to come into contact  
21 with Ms. Walsh when she left, because she drove  
22 herself there, and they knew or should have known  
23 that impairing her - - - because they did impair her;  
24 when she was left she was 0 out of 10 in pain, she  
25 had no pain at all. In fact, based on the half-life,

1           those drugs were just kicking in when they let her  
2           go.

3                         JUDGE PIGOTT: I got the impression when I  
4           read the pleadings here that the defendants thought  
5           you were bringing a medical malpractice case against  
6           them.

7                         MR. DELL: It was poorly drafted, I agree.

8                         JUDGE PIGOTT: No, I don't think you're - -  
9           - I - - - I thought what you said was - - - made some  
10          sense but I don't think it was alleging medical  
11          malpractice vis a vis your client. And so in all of  
12          the bills of particulars where they were asking, you  
13          know, what - - - what was the deviation from the - -  
14          - the - - - you know, add - - - addressed to your  
15          client, well there was no deviation of standard of  
16          care for - - - for medical care to you, to your  
17          client; it was to this woman who then killed - - -  
18          hit your - - - hit your client.

19                        MR. DELL: Right, it would be just general  
20          negligence loss.

21                        JUDGE PIGOTT: It looked like the whole  
22          thing got out of hand because all of a sudden then  
23          you're trying to talk about a standard of care that  
24          they think applies on a medical malpractice case  
25          against your plaintiff, and that was not the lawsuit

1 at all.

2 JUDGE ABDUS-SALAAM: Counsel, I - - -

3 MR. DELL: The lawsuit was negligence.

4 JUDGE ABDUS-SALAAM: Yeah, I'm - - - I'm  
5 concerned about this population of - - - of third-  
6 party victims and you're talk - - - you've - - -  
7 you've indicated that it should be very narrow and  
8 apparently you're also attempting to limit it, and  
9 you can tell us what your rule - - - what rule you're  
10 proposing to motor vehicle cases, and that's one of  
11 my questions. Are you talking about other drivers  
12 who might be hurt or - - - or is that the limitation  
13 or are we talking about a pedestrian who might be hit  
14 by someone who falls asleep at the wheel? I'm - - -  
15 I'm just trying to understand what your - - - what  
16 the parameters of your population is. Assuming we  
17 would even consider extending a duty to third  
18 persons, what - - - what would be this population of  
19 third persons that we would be extending the duty to?

20 MR. DELL: I - - - I think if the court was  
21 to extend the duty or extend the exposure, it would  
22 be to those on the road, whether they be pedestrians  
23 in a crosswalk - - -

24 JUDGE FAHEY: That's - - - that's not  
25 exactly what McNulty says. I - - - I'm assuming

1           you're relying on that language in McNulty that says  
2           in - - - "duty could extend to an injury resulted  
3           from the physician's performance of a duty of care  
4           owed to the patient." So here the physician's duty  
5           of care is when you give them a - - - a morphine-like  
6           drug, you got to warn them that you shouldn't drive  
7           yourself home; they didn't do that. So then anyone -  
8           - - to follow through on - - - on Judge Abdus-  
9           Salaam's question, anyone who's injured in the course  
10          of that, they would have failed in their duty of care  
11          to that patient. Therefore anyone injured, any third  
12          party at all in whatever format as a result of their  
13          activity, they would owe a duty - - - they would owe  
14          a duty too?

15                       MR. DELL: Sure.

16                       JUDGE FAHEY: That's the way logically I  
17          read McNulty.

18                       MR. DELL: I think, though, with McNulty -  
19          - -

20                       JUDGE FAHEY: Do you agree with that?  
21          Yeah.

22                       MR. DELL: - - - the argument was they  
23          didn't claim causation in the case, and the nurse  
24          herself, who was the plaintiff, had been exposed to  
25          meningitis - - -

1 JUDGE FAHEY: Um-hum.

2 MR. DELL: - - - by being around her friend  
3 before she even got to the hospital.

4 JUDGE FAHEY: Right, right.

5 MR. DELL: So you couldn't even prove - - -

6 JUDGE FAHEY: Even Tenuto didn't go that  
7 far; they kind of limited it to the family.

8 MR. DELL: But I think it was fact specific  
9 in Tenuto because the court had in front of it - - -  
10 you had a pediatrician treating an infant, so someone  
11 who can't make decisions for themselves like someone  
12 who's been giving Ativan and Dilaudid who's still  
13 under its power, but you had the parents there - - -

14 JUDGE FAHEY: Um-hum.

15 MR. DELL: - - - in close proximity. Here  
16 it - - - it's similar that the rest of the drivers on  
17 the road are almost like the parents in Tenuto who  
18 are going to rely that when someone goes into an ER  
19 and is treated for abdominal pain, that they're not  
20 going to be discharged ninety minutes after an IV.

21 JUDGE STEIN: What - - - what if the  
22 plaintiff here was a - - - I'm going to try to draw  
23 an analogy to the parents in Tenuto. The - - - the -  
24 - - the plaintiff here was, for whatever reason,  
25 incapable of making decisions for herself when she

1           came in and she brought a guardian with her or - - -  
2           or - - - or a parent or - - - you know, but - - - but  
3           she's an adult and - - - and - - - and that parent or  
4           that person then says, you should have told me of the  
5           warnings because she wasn't capable of - - - of  
6           understanding that. That - - - isn't that very, very  
7           different from some unknown motorist or pedestrian or  
8           - - - I mean, maybe she passes out and her car  
9           barrels into a schoolhouse and there's a whole bunch  
10          of kids that are killed, right?

11                       MR. DELL:  If she - - -

12                       JUDGE STEIN:  So - - - but there - - -  
13          there - - - there are just infinite numbers of  
14          possibilities there. How - - - how - - - how can you  
15          compare those two scenarios?

16                       MR. DELL:  I'm - - - I'm - - - I'm trying  
17          to distinguish them. I mean, she could have been an  
18          airline pilot under that facts scenario and they  
19          could have discharged her without a warning or  
20          without a cognitive exam and she could have gotten on  
21          a plane at JFK and passed out driving a plane with  
22          350 people on it. I agree - - -

23                       CHIEF JUDGE LIPPMAN:  Yeah, but the  
24          airlines have their own requirements and medical  
25          things and checkups and whatever.

1                   MR. DELL: But this - - - this hospital,  
2 defendant, had a protocol to warn and document the  
3 warning and do a neurological assessment.

4                   CHIEF JUDGE LIPPMAN: But - - - but as to -  
5 - - but as to her, we get it.

6                   MR. DELL: I - - - I - - -

7                   CHIEF JUDGE LIPPMAN: But as to when she  
8 goes out on the road, boy, you're really opening this  
9 door, and as this discussion indicates, how do you  
10 draw the line? Because - - - because, you know, we -  
11 - - we get it, you know, the - - - the first part  
12 that - - - that, you know, the - - - someone's  
13 getting hurt because - - - because they don't give  
14 the proper warning. But how in the second part - - -  
15 how do you - - - how do you slice this - - - this  
16 baby so that there could be something that could  
17 actually be a rule that could make some sen - - -  
18 sense that wouldn't open the door so wide that it - -  
19 - that it destroys what you're trying to do?

20                   MR. DELL: I think that - - -

21                   CHIEF JUDGE LIPPMAN: How - - - how do you  
22 thread that needle?

23                   MR. DELL: I apologize for interrupting.

24                   CHIEF JUDGE LIPPMAN: No, no.

25                   MR. DELL: Based on the factors that we put

1           forth in our - - - in our brief, this is such a fact-  
2           specific case with so many factors that the  
3           defendants-respondents would have to meet.

4                   CHIEF JUDGE LIPPMAN:  So sort of like - - -  
5           sort of like Tenuto, it's almost sui generis; it's  
6           its own - - -

7                   MR. DELL:  It's its own animal.

8                   CHIEF JUDGE LIPPMAN:  And - - - and each  
9           piece, maybe someone could knit them together, maybe  
10          not, but they're fact specific.  Okay.

11                  MR. DELL:  And - - - and it's never been  
12          here before.

13                  CHIEF JUDGE LIPPMAN:  Okay.

14                  MR. DELL:  That's how fact specific.

15                  CHIEF JUDGE LIPPMAN:  Okay.  Let's - - -  
16          you'll have your rebuttal.  Let's hear from your  
17          adversary.

18                  MR. TUFFIN:  Thank you, my name is James  
19          Tuffin.  I represent Dr. Regina Hammock, Ms.  
20          Christine DeLuca, and Island Medical Physicians, P.C.

21                  CHIEF JUDGE LIPPMAN:  So let me ask you  
22          questions.  Why shouldn't you be held responsible in  
23          this kind of situation?  How could this woman be let  
24          out without at least in a - - - you know, a - - - an  
25          attempt to stop her or to say you can't do this, or -

1           - - why isn't it your responsibility to this poor  
2           soul who was hurt by - - - by the - - - by the  
3           driver?

4                       MR. TUFFIN: My clients are certainly  
5           responsible to their patient.

6                       CHIEF JUDGE LIPPMAN: Yeah, yeah, but I  
7           mean just on an ethical, moral level. Why isn't it  
8           appropriate that you be held responsible? You caused  
9           that accident in the real - - - in a real way.  
10          Because assume, for the sake of argument, that it was  
11          obvious that she shouldn't be driving and, you know,  
12          assume for the sake of argument that you know that  
13          and you let her out on the road, why aren't you  
14          responsible to the person hurt?

15                      MR. TUFFIN: Because - - -

16                      CHIEF JUDGE LIPPMAN: On an ethical, moral  
17          level, tell me why not.

18                      MR. TUFFIN: Because the physicians and the  
19          special relationship the physician has to a patient  
20          is confined to the patient.

21                      CHIEF JUDGE LIPPMAN: You don't have any  
22          responsibility to the public for what you do?

23                      MR. TUFFIN: To hold physi - - - you know,  
24          causation has never been the final determinant of  
25          duty. And - - -

1 CHIEF JUDGE LIPPMAN: No, no, I get that.  
2 And I get the fact, as we were talking about with  
3 your adversary, that you're - - - you - - - you could  
4 be opening up a whole, you know, unlimited liability  
5 kind of situation. But what about in the fact-  
6 specific case here? And talking about it again, what  
7 is your responsibility? How could you not foresee  
8 that? And I understand foreseeability and duty are  
9 two different things, but how could you not look at  
10 this and say, geez, I - - - I am responsible for this  
11 person who got hurt because I did something totally  
12 irresponsible by just letting her go out and drive  
13 the car? And I know these are bigger issues and hard  
14 to answer.

15 MR. TUFFIN: Yeah.

16 CHIEF JUDGE LIPPMAN: But I mean just from  
17 a common-sense point of a view and from a very moral,  
18 ethical way as a healer, as a doctor, as someone  
19 who's responsible to the particular patient and - - -  
20 and in a - - - the broadest context to society. How  
21 - - - why isn't it your responsibility?

22 MR. TUFFIN: Because it's a responsibility  
23 without end or limit.

24 JUDGE FAHEY: So it's the limitless nature  
25 of - - - the - - - the infinite foreseeability of it

1 is - - - is the - - -

2 MR. TUFFIN: Well - - -

3 JUDGE FAHEY: - - - what you think the  
4 problem is?

5 MR. TUFFIN: Yeah, or - - - or the  
6 unforeseeability - - -

7 JUDGE FAHEY: All right. Let me - - - let  
8 me - - -

9 MR. TUFFIN: - - - because otherwise you  
10 wind up with a case-by-case - - -

11 JUDGE FAHEY: Sure, I understand, but let -  
12 - - let me - - - I think this is kind of a profound  
13 question that - - - that Judge Lippman has asked and  
14 it's - - - it's difficult to answer and - - - maybe  
15 even in the context of this case, but the question is  
16 at what point do you fix responsibility to prevent  
17 broad societal harm? Theoretically, like Judge Stein  
18 said, the car - - - car could go out of control,  
19 somebody could run into a school, the infinite  
20 possibly is an airplane pilot. And so you - - - what  
21 you try to do, I think, in any - - - in assigning  
22 negligence and responsibility for harm and where your  
23 duty exists is with the minimum of cost, assign  
24 responsibility.

25 The cost here seems to be very minimal to

1 the institution or to the medical profession or to  
2 anyone who's in a physician-patient relationship  
3 because all they have to say is, we can't let you go  
4 for two hours aft - - - after you take this  
5 medication, you can't drive. Just like when I go and  
6 get my procedures, because I'm an old man, they tell  
7 me bring your wife with you, you got - - - you got to  
8 have somebody drive you home, you can't drive home.  
9 That's what they tell all of us, right? That - - -  
10 that's what a respons - - - the responsible thing to  
11 do. So it seems the cost to the - - - to the  
12 plaintiff is very - - - the defendant, excuse me, is  
13 very small while the harm can be vast if you don't -  
14 - - if we don't require some sort of rule that  
15 establishes a responsibility to warn in a situation  
16 like this.

17 MR. TUFFIN: Well, Judge, I think we don't  
18 know what the cost is.

19 JUDGE FAHEY: But we - - - but we all agree  
20 here, and - - - and you agree, too, that it could be  
21 rather vast.

22 MR. TUFFIN: And - - - and we also, you  
23 know - - - if you give the warning you still don't  
24 have any control in enforcing - - -

25 JUDGE FAHEY: Well, that's a different

1 question, I totally understand you there. But the  
2 problem is the warning. As - - - as - - - we all  
3 know this, I mean, this is - - - this is a given; no  
4 one leaves the hospital that I know of now without  
5 being told, you just had this medication, don't go.  
6 My doctor won't let me go, no one does; they say  
7 bring somebody with you to drive you home.

8 MR. TUFFIN: Yeah, and - - - and - - -

9 CHIEF JUDGE LIPPMAN: And you know what?  
10 You have the same warning for really very limited  
11 procedures that aren't like giving - - -

12 JUDGE FAHEY: Well, I don't want to talk  
13 about my procedures but - - -

14 CHIEF JUDGE LIPPMAN: No, no, I won't talk  
15 about your - - -

16 JUDGE FAHEY: I want to avoid that today,  
17 Judge. But - - - but - - -

18 CHIEF JUDGE LIPPMAN: - - - procedures  
19 either, but we know from our own experience that very  
20 limited procedures, it is always the warning, bring  
21 someone to drive, you can't - - - you can't drive,  
22 without having the serious, heavy-duty drugs given  
23 here.

24 MR. TUFFIN: You know, to - - - to address  
25 this from a moral basis - - -

1 CHIEF JUDGE LIPPMAN: Yes, please.

2 MR. TUFFIN: - - - from a bit more of a  
3 philosophical basis, I represent two women who go to  
4 work every day to take care of people. I would  
5 reject any assertion that they are fundamentally  
6 indifferent to the welfare of their patients.

7 JUDGE PIGOTT: Well, before - - - before  
8 you get too moral about it, I think you misunderstood  
9 this case. I - - - I - - - I read your answer, I'm  
10 looking at your notice for discovery and inspection.  
11 You want "radiologic films, tissue samples, pathology  
12 slides in possession of the plaintiff." You want - -  
13 - you want "all records and correspondence between  
14 Hammock and the plaintiff." There aren't any. She  
15 didn't treat him; she treated the woman in between.  
16 But your whole - - - your - - - your answer and your  
17 - - - and your notices for discovery and inspection  
18 and bill of particulars are all addressed to a  
19 medical malpractice case.

20 You think, at least somebody did in your  
21 office, that they were - - - that this was a medical  
22 malpractice case. Then you brought a 3211 - - - not  
23 a 3212, you brought a 3211 saying, based on these  
24 pleadings, we - - - we don't owe Mr. Davis, because  
25 he - - - you know, because he wasn't our - - - our -

1 - - our client, a physician-patient privil - - -  
2 well, of course not, but that's not the lawsuit.  
3 They sued you in straight negligence. And that - - -  
4 and that, to my knowledge, hasn't been addressed in  
5 this case yet.

6 MR. TUFFIN: Your Honor, it is a medical  
7 malpractice case - - -

8 JUDGE PIGOTT: No, it's not. It's - - -  
9 it's a negligence case brought about the fact that  
10 when - - - with Dilaudid, which has an - - - a  
11 warning on it which says, if you take this don't  
12 drive, and - - - and you discharged her ninety  
13 minutes after you gave her the drug, and within  
14 twenty minutes of that she drives into this guy and -  
15 - - and - - - and causes injury. That's a negligence  
16 case.

17 MR. TUFFIN: The challenged conduct is  
18 medical treatment or substantially related to medical  
19 treatment.

20 JUDGE PIGOTT: So you're - - - no, what it  
21 is is you - - - you treated her, and we don't say Dr.  
22 Hammock in any way was - - - was indifferent or  
23 whatever; maybe it's an oversight, who knows. Maybe  
24 this lady needed the Dilaudid, that's fine, but as  
25 we're all saying here, if you're coming to the

1 hospital they usually say, you know, do something.  
2 This didn't happen here and because there was a  
3 breach of that duty, there was an injury. And we're  
4 at a 3211, so we don't even know - - - we don't even  
5 know what proximate cause is or whether you're going  
6 to prevail in this thing; you may. But you want to  
7 say as a matter of law, they can't do this, right?  
8 That's - - - that's where you are, but you're in a  
9 medical malpractice context in your pleadings.

10 MR. TUFFIN: Well, I would also contend  
11 that because this case arises out of medical - - -

12 JUDGE PIGOTT: I guess that didn't make any  
13 impression.

14 MR. TUFFIN: I would also contend, Your  
15 Honor, that because the case arises out of medical  
16 treatment and questions such as the effect of  
17 medications and what is the professional standard for  
18 the information that a physician gives to the  
19 patient, that whether you want to label it medical  
20 malpractice or you want to label it negligence - - -

21 JUDGE PIGOTT: If I have a dog and I think  
22 the dog is dangerous, all right, I owe a duty to the  
23 dog, I suppose, to feed and take care of it and  
24 everything else. But if it comes out and bites you,  
25 you know, I think I'm going to be responsible, not

1 because I didn't take care of the dog but because I  
2 didn't take care of you. I wasn't - - - I wasn't - -  
3 - I wasn't conscious of the fact that - - - or I  
4 didn't use the - - -

5 MR. TUFFIN: Right.

6 JUDGE PIGOTT: - - - the nec - - -  
7 necessary care to prevent you from being hurt by my  
8 dog. That's what they're saying, you didn't - - -  
9 you didn't use the necessary care to make sure that  
10 your patient, properly treated or not, didn't injure  
11 him. Now maybe there's a case there, maybe there  
12 isn't, but it doesn't seem to me that it's a  
13 malpractice case.

14 MR. TUFFIN: If I could - - -

15 CHIEF JUDGE LIPPMAN: And why is - - - and  
16 - - - and to piggyback on Judge Pigott, why - - - why  
17 is it so unusual? Master-servant, parent-child,  
18 common carrier-passenger, doctor-patient. Why isn't  
19 it a logical kind of extension of all those theories  
20 as to where you hold you responsible for someone  
21 getting hurt?

22 MR. TUFFIN: Well, if you own a dog, you  
23 could put a leash on the dog. If you're the  
24 employer, you can learn through experience your  
25 employee's propensity for following your instructions

1 and discharge the employee if the employee's not  
2 likely to do it. Here, we simply don't have the same  
3 measure of control - - -

4 JUDGE PIGOTT: Wait, let's just say if you  
5 - - - if you - - - if you're a doctor and you have a  
6 patient, you have duties with respect to that  
7 patient.

8 MR. TUFFIN: Yes.

9 JUDGE PIGOTT: All right, and if - - - and  
10 if you don't perform the duties required for that  
11 patient and that results in injury to a third person,  
12 you may be responsible.

13 MR. TUFFIN: I think we ask a lot of  
14 doctors. We hold them to a professional standard and  
15 we ask them to worry. We ask our doctors to worry  
16 about us. I ask my doctor, worry about me.

17 JUDGE RIVERA: But counsel, counsel,  
18 counsel, under your interpretation of the law, so  
19 what - - - what's - - - what is then the distribution  
20 of risk and accountability? Is it only to the  
21 patient and what happens to the patient? That - - -  
22 do you say that's where it stops, that's what the law  
23 requires, there's no reason to expand it?

24 MR. TUFFIN: The duty of professionals or  
25 facilities rendering medical treatment extends to the

1 person with whom there's a physician-patient  
2 relationship and to identified members of the  
3 patient's household who the physician knows or has  
4 reason to know are acting in reliance on the  
5 treatment or the advice.

6 JUDGE PIGOTT: Let - - - let's assume for a  
7 minute that it's - - -

8 MR. TUFFIN: We - - - think that that's the  
9 rule.

10 JUDGE PIGOTT: Now your light's on.

11 MR. TUFFIN: I'm sorry, Your Honor.

12 JUDGE PIGOTT: No, it's okay. Your light's  
13 on. I didn't want to interrupt you.

14 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
15 you.

16 MR. TUFFIN: Thank you.

17 MR. VIZZA: May it please the court, my  
18 name is Bob Vizza from Bartlett, McDonough &  
19 Monaghan. We represent South Nassau Communities  
20 Hospital. To address the Chief Judge's moral and  
21 ethical question of where the duty is, certainly  
22 there is a duty to that patient which is going to  
23 give that healthcare provider the motivation to  
24 provide the necessary care.

25 CHIEF JUDGE LIPPMAN: But you're such a

1 provider in your community. Your - - - by your  
2 nature, a hospital, you serve the community. Does it  
3 make sense to draw the line and say you serve the  
4 community, but it's so limited it's just when - - -  
5 when this patient is within your doors, you know, you  
6 owe an obligation to her, but put her out in the  
7 street and all hell is going to break loose and you -  
8 - - you then - - - that obligation to community has  
9 ended?

10 MR. VIZZA: Well, let's break down - - -

11 CHIEF JUDGE LIPPMAN: We've been talking  
12 about, as you started on, moral and ethical. You - -  
13 - you are the community.

14 MR. VIZZA: Sure.

15 CHIEF JUDGE LIPPMAN: Of all people,  
16 hospitals serve the people of a particular area. So  
17 can we really cut it off in a situation like this and  
18 say that you have no responsibility to, again, some  
19 poor individual who - - - who gets hurt that was so  
20 avoidable that - - - you know, to say no, you can't -  
21 - - don't go out there because you - - - you just got  
22 some morphine and you're going to hurt somebody?

23 MR. VIZZA: If we break down the difference  
24 between control and stopping her there and the  
25 warning, there's no legal duty to control her because

1           there's no power over her.  It's not a mental hygiene  
2           law case, okay.  So we couldn't have stopped her from  
3           walking out.

4                         JUDGE PIGOTT:  Mr. Dell says you had  
5           protocols that were violated.  Is that true?

6                         MR. VIZZA:  No.

7                         JUDGE PIGOTT:  You don't have protocols?

8                         MR. VIZZA:  We have protocols referable to  
9           the discharge.  She was seen by the PA before she  
10          left.

11                        JUDGE PIGOTT:  If - - - if - - - if - - -

12                        MR. VIZZA:  Reevaluated.

13                        JUDGE PIGOTT:  - - - those protocols were  
14          violated, would you be responsible?

15                        MR. VIZZA:  We'd be responsible to her.

16          Now - - -

17                        JUDGE PIGOTT:  All right, not to any - - -

18                        MR. VIZZA:  - - - where are we going to  
19          draw the line?  Do we have a clear rule of law that  
20          says where is the duty going to be?  Not from  
21          everywhere you get causation.

22                        CHIEF JUDGE LIPPMAN:  That's what we're  
23          grap - - - that's what we're grappling with - - -

24                        MR. VIZZA:  Sure.

25                        CHIEF JUDGE LIPPMAN:  - - - what should the

1 duty be?

2 MR. VIZZA: Sure, and our suggestion is to  
3 adhere to what this court set out in Tenuto and  
4 clarified in McNulty. How did Mc - - - how did  
5 McNulty clarify it? By saying those third parties  
6 known to the physician who were reasonably relying on  
7 the physician's care and treatment. McNulty, that  
8 hallway conversation was not enough for that patient  
9 - - -

10 JUDGE PIGOTT: Would that - - - would that  
11 - - -

12 MR. VIZZA: - - - to reasonably have walked  
13 out.

14 JUDGE PIGOTT: Would that apply in this  
15 case if you - - - hypothetical, I suppose, that you  
16 say I'm giving this drug to this - - - to this  
17 patient and if she wanders out of the hospital or if  
18 she leaves the hospital and drives, she's putting  
19 herself in danger and of course anyone else that may  
20 be on the road. Would that be a proper judgment for  
21 a physician and/or a hospital to make?

22 MR. VIZZA: Well, you're bringing in the -  
23 - -

24 JUDGE PIGOTT: Yes, I am. Would that be -  
25 - - would that - - - would that be something that a

1 physician ought to consider that if I give her this  
2 drug and she gets in a car, because the - - - the  
3 drug says don't drive, I may be putting her in danger  
4 and I also may be putting people in danger who are on  
5 the road where she's on the road? Would that be  
6 something for a doctor to consider?

7 MR. VIZZA: Yes, and now the doctor has to  
8 consider two different people. Do they serve two  
9 masters? Do they have a dilemma of between what the  
10 patient needs - - -

11 JUDGE PIGOTT: So you want to say - - - you  
12 want to say that if - - - that if - - - if - - - if  
13 this woman, Ms. Walsh, if - - - if she gets killed,  
14 then we're responsible for her death, but if she  
15 killed a - - - a pedestrian child, that's not our  
16 problem?

17 MR. VIZZA: Well, does the physician then  
18 have to consider the risk to that child?

19 JUDGE PIGOTT: Is that a yes? Is that a  
20 yes? Are you saying that the fact that - - - that -  
21 - - that she killed herself, we're responsible for,  
22 or may be, but the fact that she killed someone else  
23 in the process of killing herself, we are not  
24 responsible for that. That - - - is that what you're  
25 arguing?

1 MR. VIZZA: Yes, the line has to be drawn  
2 there because the physician can't be burdened to two  
3 masters, both the patient and the public at large.

4 JUDGE PIGOTT: It's not masters. It's - -  
5 - it's a question - - - seems to me it's a question  
6 of what you're - - - what you're supposed to do.  
7 You're supposed to make sure that this person doesn't  
8 drive, you know, at least warn her not to drive, at  
9 least do what - - - you know. And - - - and it seems  
10 to me that whatever the - - - the damages are a  
11 proximate cause, so the failure of that duty you  
12 might have to respond to.

13 JUDGE STEIN: Could - - - could there ever  
14 be a - - - that split duty or - - - or serving two  
15 masters issue that you're concerned about when - - -  
16 when - - - if we're only talking about a duty to  
17 warn?

18 MR. VIZZA: Sure, because the - - -

19 JUDGE STEIN: Give me an example.

20 MR. VIZZA: - - - physician now is deciding  
21 whether or not to prescribe that medication and might  
22 - - -

23 JUDGE STEIN: No, no, no, no.

24 MR. VIZZA: - - - withhold - - -

25 JUDGE STEIN: You prescribe the medication.

1 MR. VIZZA: Okay.

2 JUDGE STEIN: The only issue is once you do  
3 that, is there a duty to warn the patient not to  
4 drive? Even if you can't control what he or she  
5 does, is there a duty to warn the patient, and if so,  
6 how - - - does that - - - is that any way - - - in  
7 any way affected by some considerations of other  
8 people out there in the world?

9 MR. VIZZA: The doctor would have that duty  
10 to warn running to the patient.

11 JUDGE STEIN: Okay.

12 MR. VIZZA: The breach of which would be a  
13 medical malpractice claim by the patient.

14 JUDGE STEIN: I understand, but you said  
15 that this - - - that extending the duty to others,  
16 okay, would put you in a position of trying to serve  
17 two masters. How does that play out in this  
18 situation if we're only talking about a duty to warn?

19 MR. VIZZA: Well, it gives you the dilemma  
20 of, for one thing, how does the doctor defend that  
21 claim where you don't have the patient in the  
22 scenario because - - -

23 JUDGE PIGOTT: But you're not serving two  
24 masters; you're serving one, your patient, and you're  
25 responding for any damage that patient - - - caused

1 to that patient or by that patient.

2 MR. VIZZA: As the - - -

3 JUDGE PIGOTT: I mean, it wouldn't be two  
4 masters, would it?

5 MR. VIZZA: Well, the amicus pointed out  
6 that you might have the dilemma of withholding  
7 appropriate treatment to the patient because of the  
8 risk to other people. So that the - - - the woman  
9 might not have gotten pain medicine.

10 CHIEF JUDGE LIPPMAN: But that would - - -  
11 but that would not be ethical, right?

12 MR. VIZZA: Well, the dilemma spills over  
13 to how do you - - -

14 JUDGE RIVERA: Well, you're saying it might  
15 - - - it might be problematic because you've got to  
16 give the per - - - or the Chief Judge say you've - -  
17 - you've got to treat your patient and you're saying  
18 but if I know that the treatment may very well result  
19 in perhaps incredible harm, perhaps death, is now the  
20 doctor faced with this - - - forget moral dilemma,  
21 legal dilemma about what to do? Am I understanding  
22 your point on that?

23 MR. VIZZA: Yes, it could - - - it could  
24 affect the treatment decisions.

25 JUDGE RIVERA: Okay, so now let me - - -

1 let me ask you about the way you see the - - - the -  
2 - - the actual duty, the one that you agree to, which  
3 is the - - - the patient that the doctor has a  
4 relationship with. So you agree you have a duty to  
5 warn?

6 MR. VIZZA: Certainly.

7 JUDGE RIVERA: Okay, do you have a duty to  
8 ensure that they understood the warning or is your  
9 duty only, don't drive?

10 MR. VIZZA: Oh, I think the warning would -  
11 - - I concede the warning would be inadequate if the  
12 patient - - - if the doctor knows the patient doesn't  
13 understand.

14 JUDGE RIVERA: So how - - - how much of a  
15 conversation do you have to have? How much do you  
16 have to - - - well, how hard to you have to work in  
17 that scenario to ensure the patient understands?

18 MR. VIZZA: Aside from the communication,  
19 we're not talking about controlling the patient and  
20 stopping them from going off?

21 JUDGE RIVERA: No, we're not talking about  
22 control.

23 MR. VIZZA: Okay, the physician would have  
24 the duty to provide that warning to let them know  
25 it's not safe to drive. Of course, we're willing to

1 prove at trial that that happened here. But then to  
2 whom are they liable if the plaintiff wants to prove  
3 - - -

4 CHIEF JUDGE LIPPMAN: Counsel - - -

5 MR. VIZZA: - - - that didn't happen.

6 CHIEF JUDGE LIPPMAN: - - - why - - - why  
7 at this point should we throw this out? Don't we  
8 need to know whether you - - - you violated your  
9 protocols or it just doesn't matter?

10 MR. VIZZA: Well, I - - -

11 CHIEF JUDGE LIPPMAN: Vis a vis the person  
12 who got hurt, it doesn't matter whether you violated  
13 your protocol?

14 MR. VIZZA: I think we need a clarification  
15 that Tenuto still applies and why McNulty was a  
16 narrowing and a clarification that that - - -

17 CHIEF JUDGE LIPPMAN: Well, we're - - -  
18 we're trying - - -

19 MR. VIZZA: - - - that known third party is  
20 - - -

21 CHIEF JUDGE LIPPMAN: - - - to clarify  
22 things. That's why we're here. Anyway, thank you.

23 MR. VIZZA: Thank you, Your Honor.

24 CHIEF JUDGE LIPPMAN: Let's get to your  
25 rebuttal.

1                   MR. DELL: Thank you. I think to answer  
2 the question, the underlying duties that the  
3 defendants had to Ms. Walsh would never change with a  
4 decision from this court allowing us to proceed with  
5 Mr. Davis's case.

6                   CHIEF JUDGE LIPPMAN: Are we breaking new  
7 ground here, counsel? How much new ground would we  
8 be breaking?

9                   MR. DELL: I - - - I think - - -

10                  CHIEF JUDGE LIPPMAN: Or you think it's  
11 limited to your - - -

12                  MR. DELL: I - - - I think it's limited,  
13 but I think it's - - - this court has always, in the  
14 history of the court, based on the changing and times  
15 that we have, and since the last decision that I saw  
16 in 2003, we're twelve years advanced, with the  
17 onslaught of narcotic medication, pain medication,  
18 people going into ERs and - - - and being treated for  
19 pain with IV medications, that - - - that times have  
20 changed. And to answer the moral and ethical  
21 question, of course they had to warn. They  
22 incapacitated her and let her drive out. They knew  
23 she drove there.

24                  JUDGE ABDUS-SALAAM: Counsel - - -

25                  MR. DELL: And she didn't have anyone to

1 drive with her.

2 JUDGE RIVERA: That - - - that - - - that  
3 explains why she may have an action against them.  
4 That - - - that's not the issue.

5 MR. DELL: I understand.

6 JUDGE RIVERA: Give you that one.

7 MR. DELL: My - - - my fear is this at - -  
8 -

9 JUDGE RIVERA: The issue is what happens  
10 when she gets on the road.

11 MR. DELL: Understood.

12 JUDGE RIVERA: Does she - - - right, does  
13 she have - - - does - - - does the doctor in the  
14 hospital have a duty to Davis? But I'll give you  
15 another one. What if she's feeling terribly ill and  
16 before she passes out, she figures out I am about to  
17 pass out, I can't believe that doctor didn't tell me  
18 this, and actually pulls over, she actually pulls  
19 over, and another car is trying to avoid her and ends  
20 up hitting a tree and the person is dead? Now is the  
21 doctor liable and the hospital liable to the person  
22 who's trying to avoid the patient - - -

23 MR. DELL: I - - - I'm not sure - - -

24 JUDGE RIVERA: - - - who pulled over?

25 MR. DELL: I'm not sure you'd be able to -

1           - - I - - - in - - - in that fact pattern, we'd have  
2           to know what was an underlying medical syndrome that  
3           she may have been suffering from and what was induced  
4           from their actual treatment.

5                    JUDGE RIVERA:   Why does that matter?

6                    MR. DELL:   Well, because if it's a  
7           naturally occurring condition like happened in - - -  
8           I believe it's Purdy.

9                    JUDGE RIVERA:   You mean the reason she's  
10          pulling over in my hypothetical?

11                   MR. DELL:   The reason she'd feel sick - - -

12                    JUDGE RIVERA:   Let's - - -

13                    MR. DELL:   - - - and is pulling over.

14                    JUDGE RIVERA:   No, let's assume it's the -  
15          - - it's the drugs.

16                    MR. DELL:   Okay.

17                    JUDGE RIVERA:   She - - - she's figuring - -  
18          - she for some reason, let's take - - -

19                    MR. DELL:   But Your - - -

20                    JUDGE RIVERA:   - - - run with this  
21          hypothetical for the moment, she understands that I  
22          am not feeling right, I need to pull over before I  
23          kill someone.

24                    MR. DELL:   And then she's hit in the rear.

25                    JUDGE RIVERA:   Is the doctor in the

1 hospital liable to the person who's avoiding her - -  
2 - I'm going to be careful on the highway home tonight  
3 - - - and hits a tree?

4 MR. DELL: No, I think that the argument in  
5 that case under the vehicle traffic law would be that  
6 the driver coming up behind her wasn't paying  
7 attention, was driving too fast, and was reckless  
8 themselves.

9 JUDGE RIVERA: Okay.

10 MR. DELL: My case, we could actually have  
11 a verdict where the jury finds under the emergency  
12 doctrine that Ms. Walsh, through no fault of her own,  
13 was confronted with an emergency situation because of  
14 Ativan and Dilaudid and the jury exonerates her.

15 JUDGE RIVERA: Um-hum.

16 MR. DELL: They award her against the  
17 defendants. But my client, who's completely  
18 innocent, was doing nothing but driving an empty  
19 school bus minding his own business, is hit head on  
20 and gets nothing, and that would be what flows from  
21 this case in the current state that it's in and we  
22 had no discovery.

23 CHIEF JUDGE LIPPMAN: Okay.

24 MR. DELL: And we haven't gone anywhere  
25 with this.

1 CHIEF JUDGE LIPPMAN: Yeah, we understand  
2 all your arguments. Thank you so much.

3 MR. DELL: Thank you.

4 CHIEF JUDGE LIPPMAN: Appreciate it.

5 (Court is adjourned)

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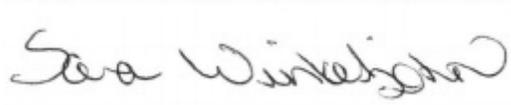
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Davis, v. South Nassau Communities Hospital, et. al., No. 163 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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