Fox v Marshall
2014 NY Slip Op 32407(U)
August 29, 2014
Sup Ct, Nassau County
Docket Number: 14183/08
Judge: F. Dana Winslow
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

JAY H. FOX, individually and as the Executor of the Estate of Denice Fox, ANDREW S. FOX, and REBECCA T. FOX,

Plaintiffs,

-against-

EVAN MARSHALL, SLS RESIDENTIAL, INC., SLS HEALTH, INC., SLS WELLNESS, INC., SUPERVISED LIFESTYLES, INC., SDL CASE MANAGEMENT, INC., SDL CASE MANAGEMENT, LLC, SLS HEALTH, LLC., JOSEPH SANTORO, ALFRED BERGMAN, MARK J. STUMACHER, SHAWN PRICHARD, DAVE MOORE, LINDA PADROF, LAUREN MILLER, KENDRA KOHUT, BETSY BERGMAN, JACQUELINE MARSHALL and JOHN AND JANE DOES, 1 through 30,

Defendants.

MOTION SEQ. NO.: 016, 017, 018, 019, 020, 021

MOTION DATE: 4/23/13

INDEX NO.: 14183/08

The following papers having been read on Motion (numbered 1-20):

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The motion by the defendants Alfred Bergman and Betsy Bergman for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them and an order pursuant to CPLR 8303-a and 22 NYCRR 130-1.1(a) awarding them sanctions in the form of costs and reasonable attorney's fees (Sequence No. 16) is determined as provided herein.

The motion by the defendants SLS Residential, Inc. ("SLS"), SLS Health, Inc., SLS Wellness, Inc., Supervised Lifestyles, Inc., SDL Case Management, Inc., SDL Case Management, LLC ("SDL"), SLS Health, LLC, Joseph Santoro, Shawn Prichard, Kendra Kohut and Lauren Miller ("the SLS defendants") for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them or in the alternative, an order pursuant to CPLR 3212(f) granting them partial summary judgment dismissing the claims for medical malpractice, negligent infliction of emotional distress and Denice Fox's conscious pain and suffering against them and an order pursuant to CPLR 8303-a and 22 NYCRR 130-1.1 awarding them sanctions (Sequence No. 17) is determined as provided herein.

The motion by the defendant David P.Gureasko-Moore s/h/a Dave Moore (hereinafter "Dr. Moore" for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him and an order pursuant to CPLR 8303-a and 22 NYCRR 130-1.1 awarding him sanctions payable by the plaintiffs and/or plaintiffs' attorney (Sequence No. 18) is determined as provided herein.

The motion by the defendant Linda Padroff for an order pursuant to CPLR 3212 granting her summary judgment dismissing the complaint against her (Sequence No. 19) is determined as provided herein.

The motion by the defendant Mark J. Stumacher for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him or in the alternative, an order pursuant to CPLR 3212(f) granting him partial summary judgment dismissing the claim for negligent infliction of emotional distress against him and an order pursuant to CPLR 8303-a and 22 NYCRR 130-1.1 awarding him sanctions in the amount of $10,000.00 payable by the plaintiffs and/or plaintiffs' attorney (Sequence No. 20) is determined as provided herein.

The motion by the plaintiffs for an order sealing the Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions, the unredacted Affirmation of Timothy C. Bauman in Opposition to Defendants' Motions dated March 28, 2013 with Exhibits and the unredacted Affidavit of Angela M. Hegarty sworn to on March 28, 2013 with Exhibits (Sequence No. 21) is determined as provided herein.

The plaintiffs in this action seek to recover for the murder of Denice Fox, the plaintiff Jay Fox's wife and the plaintiffs Andrew and Rebecca Fox's mother, by the defendant Evan Marshall on August 17, 2006. At the time of the murder, Evan Marshall was in a mental health/drug abuse treatment program run by the defendant SLS in Brewster, New York. That program as well as its sister program in which Evan had been previously enrolled are both licensed by the New York State Office of Mental Health. Evan had been a participant in these programs since November 22, 2005, apparently as a result of one or more DWI's. The plaintiffs have alleged that Evan was out on a "pass" to see his mother Jacqueline Marshall on Long Island when the murder took place. Such pass or allowing Evan to leave the defendants' premises was "wholly inappropriate" in light of his prior history of violence and his impulse and anger problems. They allege that the defendants breached their duty to the public by, inter alia, failing to properly diagnose Evan; failing to adequately learn about and consider his mental health and behavioral history, such failure being before and after his November 22nd enrollment; failing to adequately investigate his possession of contraband; failing to properly medicate

him; failing to transfer him to a more secure facility; failing to seek his involuntary commitment; permitting his release; and, failing to hire, employ and train competent employees and agents including but not limited to employees or agents qualified to engage in incident review. They seek to recover for wrongful death, negligence, negligent infliction of emotional distress and medical malpractice.

This Court denied the defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7), however, on appeal, the Appellate Division, Second Department dismissed the complaint against Evan Marshall's mother Jacqueline Marshall as well as all of the claims sounding in medical malpractice (Fox v Marshall, 88 AD3d 131[2d Dept 2011]). The case was dismissed as against Jacqueline Marshall because "a parent cannot be held liable for the actions of an emancipated adult child (citations omitted)" (Fox v. Marshall, supra at 139). The medical malpractice claims were dismissed because "the absence of any doctor-patient relationship between the decedent and the SLS defendants or Stumacher precludes a cause of action based on medical malpractice (citations omitted)" (Fox v. Marshall, supra at 138). The Appellate Division concluded that "regardless of any sense of outrage which is evoked by the heinous actions of Evan Marshall, society's interest is not best served by concluding that a doctor who treats a patient, within the context of mental health, undertakes a duty to the public at large" (Fox v Marshall, supra at 139).

In further analyzing the defendants' motion to dismiss this case pursuant to CPLR 3211(a)(7), the Appellate Division noted that for liability to lie here, the defendants must have had a duty to the plaintiffs which they breached giving rise to the plaintiffs' damages and that whether the defendants, in fact, had a duty is a " 'legal issue for the courts' " (Fox v Marshall, supra at 135, quoting Eisman v State of New York, 70 NY2d 175 , 187 [1987], citing De Angelis v Lutheran Med. Ctr., 58 NY2d 1053, 1055 [1983]; Pulka v Edelman, 40 NY2d 781, 782 [1976]; Palsgraf v Long Is. R.R. Co., 248 N.Y. 339[1928]). The court noted that "[a]s a general rule, '[a] defendant . . . has no duty to control the conduct of third persons . . . to prevent them from harming others' " (Fox v Marshall, supra, at 135, quoting

D'Amico v Christie, 71 NY2d 76, 88 [1987], citing Pulka v Edelman, supra at 783). It further noted, however, that:

> "[o]f course, [t]here exist special circumstances in which there is sufficient authority and ability to control the conduct of third persons that [the courts] have identified a duty to do so. Thus, [the courts] have imposed a duty to control the conduct of others where there is a special relationship: a relationship between defendant and a third person whose actions expose plaintiff to harm such as would require the defendant to attempt to control the third person's conduct; or a relationship between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others (Purdy v Public Adm'r of County of Westchester 72 NY2d 1, 8 [1988], citing Pulka v Edelman, supra, at 783; Harper & Kime, Duty to Control the Conduct of Another, 43 Yale LJ 886, 887-888).

Noting that "[t]here is no bright line rule in New York regarding whether a mental health provider treating a patient on a voluntary basis owes a duty to the general public" (Fox v Marshall, supra at 136, citing Pingtella v Jones, 305 AD2d 38, 39 [4th Dept 2003], app and reargument denied, 307 AD2d 783 [4th Dept 2003], lv denied, 5 NY3d 703 [2005]), the Appellate Division stated that "there is a cognizable cause of action alleging negligence under circumstances where a defendant has the necessary authority or ability to exercise such control over a patient's conduct 'so as to give rise to a duty on their part to protect . . .a member of the general public (emphasis added)' " (Fox v Marshall, supra at 137, quoting Purdy v Public Adm'r of County of Westchester, supra at 8-9; citing Rivera v New York City Health & Hosps.Corp., 191 F Supp 2d 412 [SDNY 2002]; Winters v New York City Health & Hosps. Corp., 223 AD2d 405 [1st Dept 1996]). The Appellate Division further noted that:

> "Marshall was not involuntarily confined to the SLS facility. Nonetheless, the SLS defendants and the SLS employees exercised a

certain level of authority and control over Evan Marshall. Although the degree of such control is **unclear** at this stage of the case, the mere fact that Marshall **appeared** to need a facility-issued pass in order to visit his mother suggests that he was not completely free to leave the facility (emphasis added)" (Fox v Marshall, supra at p 137).

The Court notes that at the time the Appellate Division reached its determination, the question of the existence of a pass requirement had not been determined. Following years of discovery, all of the defendants seek summary judgment dismissing the complaint, or in the alternative, the claims for Denice Fox's conscious pain and suffering and the claims for negligent infliction of emotional distress. Several defendants also seek sanctions based upon the continued advancement of allegedly frivolous claims.

THE FACTS

The facts pertinent to the determination of these motions are as follows:

Evan Marshall was admitted to SLS's Multi-Care Program, an adult residential substance abuse and mental health facility, as a voluntary patient on November 22, 2005. His admission there was, at least in part, to facilitate the resolution of a DWI charge or charges. Dr. Stumacher was the medical director of SLS. The Multi-Care program provided 24 hour supervision and participants were subject to room checks. Evan signed an agreement that applied to SLS's Multi-Care and Post-Acute Treatment a/k/a "Pre-Apartment Training" ("PAT") programs which provided that "[e]nrollment in the SLS residential program is voluntary" and that SLS would not "retain any legally competent member who clearly and rationally expresses a will to leave the program." However, the agreement provided that if a patient is considered a threat to self or others, s/he would be referred to the Putnam County Crisis Team for evaluation. It also provided that patients were subject to room checks and that if a patient "elope[d]" from the program, efforts would be made to find him or her as well as notifying their family, and contacting the police. The agreement provided for a 30 day notice in the event

that the participant wanted to leave the program for SLS planning purposes.

Upon admission, both Dr. Stumacher, a psychiatrist, and Dr. Moore, a clinical psychologist, personally evaluated Evan. Dr. Stumacher noted that Evan denied depression, psychosis and homicidal and suicidal ideations. The Million Multiaxial Inventory test Dr. Stumacher administered to Evan, upon his admission, noted that "temper outbursts may turn into uncontrollable rage and sudden unanticipated violence." The testing revealed that Evan was addicted to alcohol and cocaine and that he could be arrogant in interacting with others. He was diagnosed with General Anxiety Disorder; Asperger's Disorder; Alcohol Dependence; Cocaine Dependence; Occupational Problems; Problems Related to Social Environment; and Moderate Life Stressors. Dr. Stumacher testified at his examination-before-trial that he did not find Evan to be a threat to himself or others. Nothing he said was indicative of suicidal or homicidal ideations. After evaluating Evan, Dr. Stumacher concluded that he had an anxiety disorder. He did not think Evan suffered from Bipolar Disorder; he thought that his drug and alcohol abuse might have made him appear as though he was bipolar. Dr. Stumacher managed Evan's medications while he was in the SLS program. Zoloft was discontinued and he was put on Clonidine and Prozac. Dr. Stumacher was aware that Evan's anger caused him to punch the ground and walls and to exhibit anger at his mother, as well as of Evan's obsessive/compulsive behavior, but those things gradually improved. In fact, Dr. Stumacher never found Evan to be a danger to himself or others and at no time considered seeking his involuntarily commitment. Dr. Moore was assigned as Evan's psychotherapist and treated him throughout his stay at the programs. He saw him on average of twice a week. Essentially, his treatment was aimed at helping Evan develop appropriate social and coping skills for his compulsions and obsessions, to manage his anger and aggression and to develop a plan for sobriety.

Dr. Moore performed a biopsychosocial assessment on Evan on November 28, 2005 to explore his history of aggression and violence and to assess whether he was a danger to others. Evan reported that he did not think about or feel like

harming anyone else and that he did not have past or present homicidal ideations which led Dr. Moore to conclude that he was not a danger to himself or others. In fact, at no time during Evan's participation in the program did Dr. Moore view him as such. Dr. Moore also communicated with Evan's mother and reviewed his prior medical records from South Oaks Hospital and did not find any reason to think that Evan posed a threat to himself or to others. Evan's records from South Oaks indicated that he denied homicidal and suicidal thoughts; he did not exhibit any signs of homicidal ideations; and, the Violence Assessment portion of his records indicated that there were negative signs of aggressive ideation and no history of assaultive behavior including no history of harming people or property. However a close examination of the South Oaks records reveals that there was, at least facially, a question as to whether or not the patient Evan had homicidal ideation. Under the heading "Violence Assessment", the first question reads: "Current Homicidal/Aggressive/Assaultive Ideation, Plan or Intent". The circles next to the words "No" and "Yes" are blank. On the same line, however, it states: "If yes describe:" and on the lines immediately below, there are two notations: "– HI" and "– aggressive". See Plaintiffs exhibit 16 has X's through yes and No's, blanks, R signs and lines at various questions and sub questions (see SLS 000956). The plaintiffs, through their expert, mentioned these notations, but defendants did not directly address this issue. The Court believes that this evidence gives rise to a question of fact for the jury – alone or in conjunction with other issues regarding what Dr. Moore knew or should have known – as to whether or not or, at the time of Evan's intake, there existed, at minimum, a question in the records of another institution regarding homicidal ideation that should have prompted further inquiry.

While Evan's mother reported that he was always a little different than the other kids, she did not report violent behavior. Dr. Moore also testified at his examination-before-trial that in communicating with Evan's prior psychiatrist, Dr. Berman, with whom Evan had been treating for five months before he arrived at SLS, he learned that Dr. Berman believed that Evan was bipolar with strong traits of Pervasive Developmental Disorder and possible Asperger's Disorder. Dr. Berman had not found any reason to think that Evan was suicidal or a danger to

others. At his examination-before-trial, Dr. Moore testified that he also communicated with another one of Evan's prior treating doctors who also never found him to be a danger to himself or to others, but did not record or remember his name. As for the findings in the Million Multiaxial Inventory test, Dr. Moore noted that Evan wanted to be seen by others in a positive light and so Dr. Moore had no reason to think that he would fail to disclose evidence of past violent or aggressive behavior.

Dr. Moore's December 8, 2005 chart reflects that Evan had a history of jumping on railings and sinks which was continuing. Dr. Moore characterized that behavior as "compulsive self-soothing behavior" which served as an attempt to impress his peers, and was consistent with his narcissitic traits by demonstrating his athletic abilities. Dr. Moore did not find that behavior indicative of violence toward others. However, the records also reveal that Evan reported that he broke a sink accidently with his elbow.

On December 22nd, one month after his admission to the Multi-Care program, Evan was transferred to SLS's PAT program since he had progressed so well. In the PAT program, the patients lived amongst one another, had less oversight and assumed responsibility for their medications. On December 23rd, Dr. Moore noted that Evan was "angry" about the stresses of life, being an addict and about his perceived sexual identity issues. Nevertheless, his transition to the PAT program was going well. He was not withdrawing and was socializing relatively well. Dr. Moore noted that Evan went home for Christmas without any problems. Dr. Moore's note of December 30th reflects that he had discussed Evan's repetitive compulsive body movements with him and encouraged him to discuss sensitive topics. While Evan complained of feeling angry about feeling judged by others, Dr. Moore believed that there was no reason to suspect violent tendencies.

Dr. Moore's note of January 6, 2006 reflects that Evan was no longer displaying signs of bipolar disorder (denied by Dr. Stumacher as noted earlier) and that his thoughts were slowly improving. Dr. Stumacher noted on January 12th

that Evan denied suicidal or homicidal ideations and depression and that his anxiety was significantly decreased. On January 25th non-party Gabriele Caputo, MS noted that Evan had been punching holes in the walls of his room out of anger and so he was moved to a single room. Nevertheless, there was still no sign of danger to others. Dr. Moore continued to view Evan's unusual behavior as self-soothing. At his examination-before-trial, Santoro, the Chief Operating Officer of SDL, testified that punching walls was on the low end of the scale of aggressive behaviors and was not indicative of a person posing a danger to others. Dr. Moore's notes from January 24th and 26th indicate that Evan was anxious about an upcoming court appearance but was otherwise alright. In fact, the activity coordinator Megan McCarthy recorded on January 27th that Evan had been sociable with his apartment mates that week. Evan went home to his family on Long Island on January 30th for a court appearance. Defendants learned that he consumed alcohol while at home which led to an argument with his parents. Again, there is no record of any violent behavior. Evan's records indicate that he followed the rules and was cooperative for the following 10 days.

On February 9, 2006 Dr. Stumacher started Evan on Clonidine to control his impulsive acting out. Evan was noted to have been disruptive on February 13th, yelling and screaming in a group session after feeling that he was being laughed at but he was able to calm himself. Dr. Moore's record of February 17th notes that Evan had punched another hole in his wall after losing a video game. He and Evan continued discussing methods for dealing with anger and frustration. Still, there was no record of any violence toward others. Dr. Moore noted that Evan's honesty at therapy was improving as was his attitude toward accepting his advice.

Dr. Moore's note on March 2, 2006, which reflected two therapy sessions, noted that they had discussed an argument between Evan and his mother and discussed how to communicate with her more effectively. While the activity coordinator Melanie Ilemsky's note of March 3rd indicated that Evan continued to have angry outbursts and difficulty handling his emotions, that same day it was noted that he remained structured during the evening program and had been

sociable with staff and members. On March 9th, after learning from his mother that she was considering selling his father's house where he had been living, and putting his belongings into storage, Evan attempted to rip his journal in half out of anger. He did calm down when he sat down, and thought it though. On March 13th, activity coordinator Michele Iannuzzi documented that Evan punched the ground outside and yelled after he was fined for a program violation, and that he cursed and screamed at staff when he was approached. But again, he was able to turn himself around. Dr. Moore noted that Evan was "much calmer" at the recent family session than others that he had previously attended. On March 14th, Dr. Stumacher increased Evan's Prozac in an attempt to alleviate his obsessive/compulsive behavior. A note dated March 23rd indicates that Evan was trying to deal with his obsessive/compulsive behavior such as the need to jump on things, hoarding and counting by 5's. Dr. Moore's note of March 31st notes that a family conference call had gone significantly better than in the past and that Evan was volunteering at the Humane Society. He was also noted to be able to compromise better in many areas but was still obsessed with the need for a couch in his basement at home.

The Court notes that in the two contracts signed by Evan with SLS - SDL, defendants were given latitude to search Evan's room, as well as the contractual right, if not obligation, to notify the police if he eloped from the premises. Thus, whether the information known or available to Dr. Moore gave rise to a requirement on his part to explore the issue further is, again, a factual issue for a jury.

Further, the contracts signed by Evan gave SLS the right to circumscribe Evan's use of his car or his permission to keep the car on the premises, without requiring SLS-SDL to state a reason for such action. The Court notes that, although the record contains communications to and from Judge McCord of Glen Cove, there is no evidence of a determination regarding, or an attempt to ascertain, Evan's criminal status in Florida or in Glen Cove with respect to DWI's or other violations or crimes, which would have affected both his status as a voluntary-involuntary patient and whether or not he had driving privileges. If known, this

information could have affected Evan's opportunity on August 16, 2006 to keep a car on premises and to use the car without SLS restriction.

On April 6, 2006, it was noted that Evan had an uneventful weekend at home with his family related to a court appearance and that he was handling work at the Humane Society well. On April 14th Evan gave a disc to his vocational counselor that contained pornographic cartoon images that were violent in nature and displayed a naked woman in quick sand. When Dr. Moore discussed this disc with Evan, he said that it was old and that he had collected these things when he was doing drugs. He told Dr. Moore that he did not have any other pornographic materials in his possession and that he was not interested in these things anymore. Evan destroyed the disc in front of Dr. Moore. Dr. Moore testified at his examination-before-trial that he had no reason to doubt Evan in light of how open he had been. Evan's mother told Dr. Moore that she had found pornographic materials in Evan's former apartment but she did not describe whether or not it was violent in nature. She did not tell Dr. Moore that there were pornographic materials in Evan's current residence at her home. Kohut testified at her examination-before-trial that she never saw any pornographic materials in Evan's apartment when she helped him organize it. The April 14th entry also indicates that Evan had done well at home again as well as in court which was a positive sign. Dr. Moore's chart entries of April 21st and 28th indicate that Evan was generally calmer; that he was improving with self-soothing; that he was calming himself when he got upset with others; and, that he had been more insightful about his emotions. His mother indicated that she thought he was improving, too.

Similarly, Dr. Moore's note of May 5, 2006 noted that Evan had been significantly more insightful lately, that he appeared committed to sobriety and that he was going to AA without prompting. The note of May 11th reflects that Evan was dealing with the frustration of looking for a job better than in the past without hitting anything or doing inappropriate things owing to anger. Dr. Moore's notes of May 18th, 24th and 26th all reflect continued improvements as well as a discussion

regarding the possibility of Evan transferring to SDL Case Management. On May 19th, Evan got a job at Rockaway Bedding in Brewster as a mattress salesman.

On June 1, 2006, continued improvements were noted and on June 5th, Evan was transferred to the SDL Case Management program. Dr. Stumacher no longer treated Evan or managed his medication at that point; it became the responsibility of Dr. Selwyn Juter. Dr. Moore was the Clinical Director of the SDL program and he continued to be Evan's therapist. Evan lived in an apartment that was either owned or rented by SLS/SDL. Upon his admission to SDL, Evan signed a Case Management and Consent to Receive Behavioral Health Services which was identical to the SLS Multi-Care agreement in all pertinent respects. Again, Evan acknowledged that his participation was voluntary and that he could leave at any time. It noted that he was subject to "apartment checks" but it also noted that "[n]o member shall be deprived of their civil or legal rights that are guaranteed to all citizens." The agreement provided however that the staff reserved the right to use master keys to enter members' apartments "only if endangerment is suspected." The Court notes again, however, that Evan was moved to a single room (with no roommate) after incidents in which he punched holes in the wall of his room, suggesting, if only by inference, some level of suspicion that Evan posed a risk of endangerment.

The records reveal that as a participant in that Program, Evan worked in a mattress store, drove his own car and managed his own finances, but his money was kept by SLS. He lived independently. He treated with Dr. Moore on an outpatient basis twice a week and received other life support services from SDL Case Management Program, including life coach services from Kohut. On June 23rd, Kohut noted that Evan was doing well at work and even ran the store on his own for an entire shift. She noted that Evan had gone home during the week to get his car and bring it to Brewster. Dr. Moore's note of June 29th notes that Evan had thrown a lighter at his case manager at a group meeting after he was called "weird." Kohut, however, testified at her examination-before-trial that Evan did not throw the lighter at her, he just threw it out of frustration and it went in her direction. The

Court observes that such action bears consideration by a jury, particularly when it occurred one and half months before the incident.

On July 14, 2006, Evan admitted that he had used alcohol over the weekend with other SDL members. He said alcohol made him feel more "normal" and "less weird." Dr. Moore testified at his examination-before-trial that Evan had reached the point that he knew he really needed to stay away from drugs but was struggling with refraining from alcohol.

On August 1, 2006 Evan's substance abuse counselor documented that Evan had attended a wedding over the weekend and did not consume alcohol or use drugs. Dr. Moore testified at his examination-before-trial that he had no reason to doubt Evan as he had been open about his relapses while in the program, in contrast to other participants who had lied. Dr. Juter, a psychiatrist, saw Evan for the first time on August 2nd. He noted that Evan was "very obsessional" with a history of cocaine addiction. He put him on Seroquel 25 mg as needed to help control his anger and anxiety. On August 10th Dr. Moore noted that Evan had become very angry because he wanted more control over his money and he wanted to buy a guitar. (At this point, the Court observes that an issue of fact regarding control exists, particularly in view of defendants' prior representations that Evan controlled his own money.) Moore noted that Evan called him to apologize for yelling. Evan also reported feeling good about delving into his feelings and the things that were bothering him. Kohut documented that on August 11th, Evan made inappropriate remarks to her, alluding to starting a relationship with her after he left SDL. She reported this to Dr. Moore who discussed with Evan that that was inappropriate. Dr. Moore testified at his examination-before-trial that Evan responded appropriately when he admonished him about that conduct. Kohut testified at her examination-before-trial that she never felt threatened by Evan, even when they were alone in his apartment, including at night. Dr. Moore last saw Evan on August 16th, the day before he murdered Denice Fox. Evan reported beginning to feel ready to leave SDL since his job was going well and he was feeling well overall. He told Dr. Moore that he was going home to Long Island the

next day to pick up documents from court. Kohut saw Evan that night and expressed concerns about his driving that late but she stated at her examination-before-trial that Evan could come and go as he pleased and that there were no consequences for disregarding her advice.

As to the question of conscious pain and suffering. The investigation of the murder site revealed massive amounts of blood in the vestibule which indicates that Ms. Fox could have survived the fatal blow. The autopsy reports lists the cause of death as multiple stab wounds to the neck.

THE LAW

Initially the Court determines that the plaintiff's expert recited some views that sounded in Medical Malpractice, but also opined about negligence. The Court has dissected the two claims and addresses only the claim of negligence and wrongful death.

A cause of action for wrongful death must be anchored to an underlying claim for wrong-doing by the defendant to the decedent, which led to the decedent's death (EPTL 5–4.1; Allen v. County of Westchester, 172 AD2d 471 [2d Dept 1991]; see also EPTL 5–4.1; Prink v. Rockefeller Ctr., 48 NY2d 309, 315 [1979]). Therefore, if the claim for negligence fails, the wrongful death claim must also be dismissed. "[T]he measure of damages includes 'fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought' " (Johnson v Richmond Univ. Med. Ctr., 101 AD3d 1087, 1088 [2d Dept 2012], quoting EPTL 5-4.3 [a]). "[T]he essence of the cause of action for wrongful death in this State is that the plaintiff's reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent's death" (Gonzalez v New York City Hous. Auth., 77 NY2d 663, 668 [1991]). "Loss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incidental to death, are injuries for which damages may be recovered" (Gonzalez v New York City Hous. Auth., supra at 668).

NEGLIGENCE

"It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff" (Pulka v Edelman, supra at , 782 citing Palsgraf v Long Is. R. R. Co., supra at 342; 1 Shearman and Redfield, Negligence [Rev ed], § 4, pp 10- 11). Typically "In the absence of duty, there is no breach and without a breach there is no liability" (Pulka v Edelman, supra at p782, citing Kimbar v Estis, 1 NY2d 399, 405 [1956]). "The question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is typically a question of law for the courts" (Purdy v Public Adm'r of County of Westchester, supra at 8, citing Eiseman v State of New York, supra at 187; De Angelis v Lutheran Med. Center, supra at 1055). "The imposition of a legal duty of care does not turn merely on the foreseeability of the harm resulting from an actor's conduct... Rather,...'[c]ourts resolve legal duty questions by resort to common concepts of morality, logic and considerations of the social consequences of imposing the duty' " (Cohen v Cabrini Med. Ctr., 94 NY2d 639, 642 [2000], citing Tobin v Grossman, 24 NY2d 609, 615 [1969]; Tenuto v Lederle Labs., 90 NY2d 606, 612 [1997]).

"Generally, there is no 'duty to control the conduct of third persons to prevent them from causing injury to others,' even where, as a practical matter, the defendant could have exercised such control" (Citera v County of Suffolk, 95 AD3d 1255, 1257 [2d Dept 2012], citing Purdy v Public Adm'r of County of Westchester, supra, at 8; citing Engelhart v County of Orange, 16 AD3d 369, 371 [2d Dept 2005], lv denied 5 NY3D 704 [2004] ; Edwards v Mercy Home for Children & Adults, 303 AD2d 543, 544 [2d Dept 2003]). "Yet, 'there exist special circumstances in which there is sufficient authority and ability to control the conduct of third persons' that a duty to do so will be imposed" (Citera v County of Suffolk, supra at 1258-1259, quoting Purdy v Public Adm'r of County of Westchester, supra at 8; citing Engelhart v County of Orange, supra at 371). "Thus, the Court of Appeals has recognized 'a duty to control the conduct of others

where there is a special relationship: a relationship between defendant and a third person whose actions expose plaintiff to harm such as would require the defendant to attempt to control the third person's conduct; or a relationship between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others' " (Citera v County of Suffolk, supra at 1259 "[T]he two requirements for triggering this duty are: (1) sufficient knowledge of the danger posed by the third person; and (2) sufficient ability to control the relevant conduct of the third person" (Saint-Guillen v. U.S., supra at p 384, citing Purdy v. Public Adm'r, 127 AD2d 285, 289 [2d Dept 1987], affd 72 NY2d 1 [1988]). In Schrempf v State of New York (supra at 294-295), the Court of Appeals held that "where the confinement is...in the nature...restraint and, where possible, cure, there is both a duty to the inmate to provide him with reasonable rehabilitational conditions under the circumstances and to the outside public to restrain the dangerous, or potentially dangerous, so that they may not harm others" (Schrempf v State of New York, supra at 294-295, quoting Williams v State of New York, 308 NY 548, 554-555 [1955]). The Court noted that "[t]his duty has been recognized, not only in cases where the State has been negligent in permitting a mental patient to escape but also when it has been negligent in discharging a mental patient (Schrempf v State of New York, supra at 295).

The fact that Evan was considered a voluntary outpatient at the time of the murder and concomitantly that the defendants' "control over him and consequent duty to prevent him from harming others is more limited than in cases involving [clearly confined] persons...." (Schrempf v State of New York, supra, at p 296). It does not negate the existence of a duty in its entirety (see, Schrempf v State of New York , supra; see also, Winters v New York City Health & Hosps. Corp., supra. Indeed, "New York law provides a variety of mechanisms by which a mental health provider can seek commitment, including commitment on an emergency basis, where an outpatient presents a significant and immediate threat to himself or others. Despite out-patient status, " 'the duty does not disappear' and liability may be imposed 'if the failure to place the patient on inpatient status resulted from something other than an exercise of professional judgment ...' " (Lizardi v.

Westchester County Health Care Corp., 21 Misc.3d 1133[A] [Sup Ct Westchester County 2008], quoting Webdale v North General Hosp., supra).

" 'A corporate officer is not held liable for the negligence of the corporation merely because of his official relationship to it. It must be shown that the officer was a participant in the wrongful conduct' " (Aguirre v. Paul, 54 AD3d 302, 303 [2d Dept 2008], quoting Clark v Pine Hill Homes, 112 AD2d 755 [4th Dept1985]; citing Bellinzoni v Seland, 128 AD2d 580 [2d Dept 1987]). However, "a corporate officer who participates in the commission of a tort may be held individually liable . . . regardless of whether the corporate veil is pierced" (Peguero v 601 Realty Corp., 58 AD3d 556, 558 [1st Dept 2009]). "[A] director may be held individually liable to third parties for a corporate tort if he either participated in the tort or else "directed, controlled, approved, or ratified the decision that led to the plaintiff's injury" (Fletcher v Dakota, Inc., 99 AD3d 43, 49 [1st Dept 2012], citing 3A Fletcher, Cyclopedia of Corporations § 1135). "This rule protects individual board members who did not participate or aid and abet the tortfeasors from being held vicariously liable for the tortfeasors' action" (Fletcher v Dakota, Inc., supra at 49).

"Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, 'pierce the corporate veil', whenever necessary 'to prevent fraud or to achieve equity' " (Walkovszky v Carlton, 18 NY2d 414, 417 [1966], quoting International Aircraft Trading Co. v. Manufacturers Trust Co., 297 N.Y. 285, 292 [1948]). "[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (citations omitted)" (Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1983]).

ALFRED AND BETSY BERGMAN

Alfred Bergman has attested that he was on the Board of Directors of SLS and SDL from 2005 to 2006. Those Boards exercised broad supervision over the

businesses' management and objectives of the corporations but did not participate in their day-to-day operations. Neither Alfred Bergman nor the Boards played any part in treating patients at the facilities. Similarly, Betsy Bergman has attested that as Chief Financial Officer, she managed the entities' accounts and supervised the Human Resource personnel. She did not have a license to treat patients nor did she participate in doing so. In her role as the Chairperson of the Health and Safety Committee, she investigated only reported incidents and there were none involving Evan Marshall.

The Bergmans have established their entitlement to summary judgment dismissing the complaint against them. They had no direct role in Evan's care and treatment (Waltz v Lynch, 26 AD3d 894 [4th Dept 2006]; Sawh v Schoen, 215 AD2d 291 [1st Dept 1995]; Ingber v Kandler, 128 AD2d 591 [2d Dept 1987]). Accordingly, they lacked the authority and ability to control Evan and resultantly did not have a duty. In addition, there is no evidence that either of them had any knowledge of Evan's problematic behavior or that he posed a danger to others, nor is there any evidence that they should have known. Furthermore, standing alone, their roles in the defendant entities is not adequate grounds for imposing liability on them (Aguirre v. Paul, supra, at 303, see also, Clark v Pine Hill Homes, supra; Bellinzoni v Seland, supra; Mistrulli v McFinnigan, Inc., 39 AD3d 606 [2d Dept 2007]). Nor are there grounds for imposing liability on the Bergman defendants as corporate shareholders as there is no evidence that they exercised dominion or control over the corporate entities or that they used the entities to perpetuate a fraud or wrong (Matter of Morris v New York State Dept. of Taxation & Fin.,supra at p 141). Simply put, there are no grounds for imposing personal liability on the Bergmans either in their individual capacities or in their corporate roles as there is no evidence that they played any role in the alleged wrong-doing here. The Bergman defendants having established their entitlement to summary judgment dismissing the complaint against them, the burden shifts to the plaintiffs to establish the existence of a material issue of fact.

LINDA PADROFF

Linda Padroff has attested in her affidavit in support of her application for summary judgment that, although she worked at SLS while Evan was a resident there, she never supervised him or any employee who had contact with him. In fact, she never met or had any contact with him or his family. She worked at SLS from 1997 until 2011 as a clinical social worker. In 2003, she became the Director of Psychoeducational Groups during which time Dr. Prichard was her supervisor. She provided therapy to patients on an individual basis and she ran a group therapy session once a week for four or five of her patients but Evan was never among them. Beginning in 2004, as the Director of Psychoeducational Groups, she supervised residential activity coordinators and a Dialectical Behavioral skills instructor who ran psychoeducational groups, and developed educational groups that were led by residential activity coordinators. She oversaw their group facilitation skills and monitored whether they knew the material and how to teach it. She did not act as the direct supervisor of the activity coordinators. The psychoeducational groups that she oversaw were separate and apart from substance abuse groups and anti-social personality groups. Padroff did not participate in the patients' assignment to the various groups or modes of treatment at SLS.

Linda Padroff has established her entitlement to summary judgment dismissing the complaint against her. She had no role in Evan's care and treatment. She was not a treatment provider of Evan (Waltz v Lynch, supra; Sawh v Schoen, supra; Ingber v Kandler, supra). In any event, there is no evidence that she had knowledge of Evan's problematic behavior or that he posed a danger to others, nor is there any evidence that she should have known. She also did not have any managerial responsibility. Accordingly, insofar as she lacked the authority and ability to control Evan, she had no duty to do so. The burden thus shifts to the plaintiffs to establish the existence of a material issue of fact.

MARK J. STUMACHER, M.D.

Dr. Stumacher was the Director of SLS. He examined and assessed Evan upon his arrival at the program and issued a provisional diagnosis and medication

plan. He was responsible for managing Evan's medication until he was transferred to the SDL program on June 5, 2006. Dr. Stumacher testified at his examination-before-trial that at no time did Evan appear to be a danger to himself or to others and so he never considered involuntarily confining him.

In support of his motion, Dr. Stumacher has submitted the affirmation of board certified psychiatrist Dr. Neil Zolkind. The Court notes that much of Dr. Zolkind's opinion is devoted to medical malpractice. Having reviewed the pertinent medical and legal records, Dr. Zolkind opines (to a reasonable degree of medical certainty) that Dr. Stumacher managed Evan's medications appropriately. More specifically, he opines that it was not improper to discontinue Evan's antipsychotic medications as he was not overtly psychotic and was being treated in a structured environment when Dr. Stumacher supervised his medications. Furthermore, he did well following the discontinuance of those medications. More importantly, Dr. Zolkind opines (to a reasonable degree of medical certainty) that "there was no indication that [Evan] had psychotic thoughts at any time, let alone in the days leading up to Mrs. Fox's murder. Although [he] certainly exhibited some bizarre behavior, none of that behavior would lead anyone to suspect that he would murder someone." Dr. Zolkind notes that Dr. Stumacher last treated Evan on May 25, 2006. He stopped treating Evan entirely when he was transferred to the SDL Case Management program on June 5, 2006 and he no longer had any responsibility for him. Dr. Juter took over then, and, it was Dr. Moore who decided to transfer Evan to the SDL program. Dr. Zolkind further opines (to a reasonable degree of medical certainty) that Dr. Stumacher did not have the authority to restrict Evan as he was at all times a voluntary patient/participant who was free to leave the program if he wished. In addition, Dr. Zolkind notes that Dr. Stumacher never had reason to seek restrictions on Evan's freedom: The only possible restriction was involuntary commitment and he did not believe there was a need for that while he was under Dr. Studmacher's care. He describes Evan as not **"overly psychotic"** (The Court's emphasis). Dr. Stumacher did not treat Evan for three moths prior to the murder and he has established that there is no evidence that he

should have taken actions to restrict Evan during the time period he cared for him. He has established his entitlement to summary judgment dismissing the complaint against him thereby shifting the burden to the plaintiffs to establish the existence of a material issue of fact.

DAVID P. MOORE, PH.D.

Dr. Moore's expert psychologist submission has confined itself in part to medical malpractice, which the Appellate Division dismissed on the CPLR 3211 motion. Dr. Moore has maintained that even if he had the authority to stop Evan from traveling to Long Island on the night in question, which this court opines he may have (see infra), he had no reason to do so. Although Evan's records reflect that he did behave dangerously at times, in particular by jumping on railings and sinks and punching the ground and walls, having his room changed as a result, Dr. Moore maintained that none of that behavior indicated that he posed a threat to himself or others; there was no indication of violence and certainly not of homicidal behavior. Similarly, Evan's anger over his stress, addictions and perceived sexual identity did not cause any concern with respect to the possibility of violent behavior. Nor did his compulsive body movements, concern that he was being judged by others, or anxiety regarding upcoming court appearances rise to the level requiring further action. Likewise, his episodes of inappropriate consumption of alcohol and the ensuing angry behavior were not a cause for concern with respect to violent behavior. In short, his inability to control his emotions amounted to nothing more. In fact, he was adapting socially and had had successful visits home.

The Court notes that Dr. Moore's analysis starts with August 16, 2006 (the date of his last session with Evan) instead of November 22, 2005 (the date of intake). This Court believes that a "bottom-up" approach is the appropriate way to analyze Dr. Moore's liability, insofar as the intake was the foundation on which much of the subsequent treatment determinations relied. A complete and proper intake, with receipt of all relevant information and appreciation of its significance, would have provided a foundation from which an entirely different set of treatment determinations could have resulted. The extent to which negligence occurred at intake affects the extent to which any subsequent determinations were the products

of negligence or the reasonable exercise of professional judgment. The salient question is what Dr. Moore knew throughout his care and treatment of Evan Marshall and what should he have known, a question properly reserved for the jury.

The Court finds that Dr. Moore has not established his entitlement to summary judgment dismissing the complaint, and looks to the contentions of both plaintiffs' and defendants' in considering Dr. Moore's liability.

SLS RESIDENTIAL, INC., SLS HEALTH, INC., SLS WELLNESS, INC., SUPERVISED LIFESTYLES, INC., SDL CASE MANAGEMENT, INC., SDL CASE MANAGEMENT, LLC, SLS HEALTH , LLC, JOSEPH SANTORO, SHAWN PRICHARD, KENDRA KOHUT and LAUREN MILLER

Joseph Santoro has attested in his affidavit in support of the SLS defendants' motion for summary judgment that he was the Chief Operating Officer of SDL Case Management, Inc. and SDL Case Management, LLC, a principal of SLS Wellness Inc. until it was dissolved on March 7, 2005, and a principal of Supervised Lifestyles, Inc., which was only a holding company. He attests that he had only managerial responsibilities for the corporate entities, primarily marketing and business strategies, which included monitoring programs and overseeing financial issues. Neither he nor any of these companies participated in Evan's care and treatment or the treatment of any of the patients. Accordingly, he lacked any authority to control Evan. In fact, he never met or interacted with him and therefor, could not have been aware of any dangerous propensities.

Shawn Prichard has attested in his affidavit in support of the SLS defendants' motion for summary judgment that in 2005 through part of 2006, he was the Chief Clinical Officer for the Multicare Residential Clinic and the PAT Residential Clinic portion of SLS and prior to that, he was the Chief Clinical Officer for SDL. When he left that position, Dr. Moore took over as Chief Clinical Officer of SDL, which was before Evan began participating in that program. As Chief Clinical Officer, he participated in the development and implementation of clinical treatment plans. Accordingly, as Chief Clinical Officer of the Multicare

and PAT programs, he would have participated in discussions involving Evan's treatment at Senior clinical meetings. He did not recall participating in discussions of Evan's care while he was in the SDL program as Dr. Moore had taken over as Clinical Director of that program at that point.

When the subject incident occurred, Evan Marshall was a participant in the voluntary out-patient program of SDL. He lived in his own apartment and received counseling from Dr. Moore as well as life skill coaching in organization and budgeting. Dr. Prichard attests that while he was a psychologist who provided services to some participants, he was not assigned to Evan Marshall. He did however supervise Evan's psychologist, Dr. Moore. Finally, Prichard attests that he had no authority to hold Evan against his will and that while his activities were discussed with his psychologist and his case manager, his activities were not controlled by them. He attests that "[p]articipants in the SDL Case Management Program did not require permission or a 'pass' to go to work or otherwise lead their lives." He also attests that he did not see Evan before he left for Long Island so he could not possibly have concluded that he was an imminent danger to himself or others.

Kendra Kohut has attested, in support of the SLS defendants' motion for summary judgment, that she was Evan Marshall's case manager while he was at SDL and that as such, she "helped [him] with life skills, such as hygiene, cleanliness, locating a job and help handling [his] job." While Evan lived in a house with a roommate and there was no lock on the door to his room, she could not restrain him against his will. Kohut explains that Evan had his own car and a job at a mattress store. She had no control over his money; all she could do was advise him on budgeting and with respect to his life skills training. Similarly, she had no control over his job hours and he came and went in his apartment at his will. Kohut further attests that Evan did not need permission or a pass to leave his apartment nor did he need permission to use his car. She maintains that she lacked any ability to keep him from going anywhere. And, she notes that she is not a psychologist, she did not render treatment to Evan or anyone for that matter nor was she responsible for diagnosing or treating participants. Finally, she was never

told by Dr. Moore or anyone else to restrain Evan in any fashion nor did she ever have any basis to believe that Evan was an imminent danger to himself or anyone else.

Lauren Miller attests in support of the SLS defendants' motion that she was the Director of Clinical Administration and a Therapist for companies affiliated with Supervised Lifestyles, Inc. Her sole role in Evan Marshall's care by the defendants was to take minutes at senior clinical meetings where the participants' cases were discussed and to supervise the entry of pertinent information into the participants' records. She was not Evan's therapist and did not participate in his treatment at all. She notes that Evan's participation in therapy and the life skills program was entirely voluntary and attests that she had no authority or ability to control his comings and goings. She further attest that she is unaware of any need for passes to leave one's apartment and she had no involvement in evaluating when and where Evan was permitted to go. Finally, since she never met Evan prior to the subject incident, she clearly could not evaluate whether he was a danger to himself or others.

The individual SLS defendants, Joseph Santoro, Shawn Prichard, Kendra Kohut and Lauren Miller have all established their entitlement to summary judgment dismissing the complaint against them thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact. None of those individuals had a duty to control Evan (Sawh v Schoen, supra; Ingber v Kandler, supra).

It was SDL's program that Evan was enrolled in at the time of Denice Fox's murder. While SDL denies the ability to exercise control over Evan's comings and goings as a participant in the program, in light of the fact that he was residing in one of their apartments as well as consistently receiving care from their employees, including a psychiatrist, a psychologist and a case manager, there were steps they could have taken to restrict Evan's freedom (see, infra, p 10). However, liability on the part of SLS-SDL is potentially imposed by virtue of its status as employer of Dr. Moore.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

"A cause of action to recover damages for negligent infliction of emotional distress does not require a showing of physical injury but 'must generally be premised upon a breach of a duty owed directly to the plaintiff which either unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety' " (Daluise v Sottile, 40 AD3d 801 [2d Dept 2007], quoting E.B. v Liberation Publs., 7 AD3d 566, 567 [2d Dept 2004]; Hecht v Kaplan, 221 AD2d 100, 105 [2d Dept 1996]). The defendants have established that at no time were the plaintiffs' personal physical safety threatened by Evan Marshall nor were they caused by him to fear for their safety. At no time were any of them within the "zone of danger" (Bovsun v Sanperi, 61 NY2d 219 [1984]; Xing Ling Mei v. Metropolitan Transit Authority, 18 AD3d 465 [2d Dept 2005]). Accordingly, all the defendants have established their entitlement to summary judgment dismissing the claims for intentional infliction of emotional distress, and no submission by plaintiff's would or could change that determination.

PLAINTIFFS' OPPOSITION

In opposition, the plaintiffs have asked that these motions be denied or adjourned pursuant to CPLR 3212(f) pending a decision by the Appellate Division on their appeal of an order of the Putnam County Supreme Court dated January 18, 2013 entitled In the Matter of the Application of SLS Residential, Inc., A. Bergman, and J. Santoro, d/b/a Supervised Lifestyles v New York State Office of Mental Health, Michael F. Hogan as Commissioner of the New York State Office of Mental Health (Index No. 2598/08). The Court notes that the matter has been perfected, but not calendared in the Appellate Division. In the lower court order, the court denied both their motion to intervene in that proceeding and to vacate the sealing order in that proceeding. The plaintiffs allege that that record contains factual information relevant to the resolution of this case.

"A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the

facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant (citation omitted) " (Williams v. Spencer-Hall, 113 AD3d 759 [2d Dept 2014]).

These motions for summary judgment will not be denied pursuant to CPLR 3212(f). As the Putnam County Supreme Court found, " a significant part of the Court's review involved consideration of information gleaned from patient records, including, for example, use of physical restraints, punitive measures and the patients' feelings of humiliation as a result of the use of such punitive measures...." Pursuant to Mental Hygiene Law § 33.13, those records are confidential and may only be released based on a finding "that the interests of justice significantly outweigh the need for confidentiality." The plaintiffs have failed to meet that burden. They have access to all of the Office of Mental Health's final reports. The only mention of this incident is the defendants' failure to report the underlying incident.

The plaintiffs have had full access to all of Evan's treatment records and nearly all of the parties who testified at that hearing have been deposed here or could have been. Not only is the need for confidentiality clear, that information would be mostly if not entirely superfluous here. Furthermore, the plaintiffs' assertion that the Appellate Division had denied sealing the record in that proceeding is wrong. In a decision dated January 11, 2012, the Appellate Division in fact directed the sealing of that record.

The Court believes that the Office of Mental Health's findings regarding SDL's control over residents is irrelevant here. The court's decision to the contrary in Romano v SLS Residential, Inc. (supra) is easily distinguished. Romano was a class action suit in which the plaintiffs sought to recover for the very violations that the Office of Mental Health found SLS violated. That is hardly the case here.

As for other findings by the Office of Mental Health, none of them pertain to the issues extant here, in particular with respect to the Bergmans' responsibilities.

For the reasons discussed above, the complaint against Alfred Bergman and Betsy Bergman in this action is dismissed.

The Court turns to plaintiff's opposition on the merits, as it pertains to the remaining defendants. The plaintiffs' expert states that s/he has reviewed the deposition transcripts, Evan's treatment records at the defendant facilities as well as his medical records which pre-date his arrival at SLS, the plaintiffs' medical records, Denice Fox's autopsy report and SLS Residential and SDL Case Management's policies and procedures. S/he has also interviewed the plaintiffs. Succinctly put, the plaintiffs' expert has concluded that the defendants' treatment and care of Evan was negligent. More specifically, s/he opines that they failed to adequately assess his history which would have indicated what a danger he posed to others, in particular when given freedom including access to drugs and alcohol. S/he also faults the defendants for failing to sanction Evan when his behavior warranted it and instead rewarding him with increased freedom. S/he opines that the defendants' failure to impose adequate restrictions on Evan's freedom in light of his irresponsible, angry and violent behavior was negligent and led to Denice Fox's murder. The plaintiff's expert has also concluded that Denice Fox suffered significantly during her struggle with Evan before she died. Finally, S/he opines that the murder of Denice Fox and the surrounding circumstances have had profound lasting effects on all of the plaintiffs' physical and mental health.

In evaluating the defendants' care of Evan, the plaintiffs' expert faults them first and foremost for not obtaining and reviewing his medical history initially, and as time progressed and the need for that information became more obvious. S/he opines that "[r]eview of past records is a routine and customary part of any clinical assessment when all data cannot be presented in a reliable fashion by the client and his family" and "[t]his is increasingly important when dealing with a patient such as [Evan,] an individual...not likely to give his doctors an accurate accounting of his own medical history." In addition, s/he notes that "[i]n cases where the client comes to treatment because he is remanded by a court and would otherwise be unwilling to participate in treatment, getting the records and reviewing them is obviously more essential." The plaintiffs' expert opines that the records that

should have been in the defendants' possession would have made them aware that Evan was "a ticking time bomb." S/he notes that their own Millon Clinical Multiaxial Inventory-III Interpretive Report characterized Evan as capable of "uncontrollable rage and sudden unanticipated violence" and South Oaks Hospital's records described him as having "Homicidal Ideation." The Court earlier observed that this "should have unquestionably caused the defendants to seek [Evan's] prior treatment records" and the defendants' failure to procure Evan's medical history hampered their ability to tailor his treatment.

The plaintiff's expert opines that had the defendants obtained Evan's medical history, they would have learned of his persistent long documented level of anger and violence. Those records indicate a history of violence toward other patients as well as his own doctors. In 2004, one of his longer treating doctors, Dr. Havlick, repeatedly warned Evan's mother to get an order of protection against him which she ultimately did. He also repeatedly told Evan's parents that Evan was a danger to himself and others and consistently urged his arrest and hospitalization, even involuntarily if need be. At one point Evan had to be moved to a more secure hospital because he posed a threat to other patients. He was also involuntarily confined at one point.

The plaintiffs' expert also notes that the defendants failed to set limits when Evan broke rules which only enforced his belief that he could do whatever he wished with no consequences, including engaging in violent behavior. S/he notes that after being promoted to the PAT program, Evan was found jumping on railings after only one month at SLS; on January 31, 2006, he was found kicking and punching holes in walls; and, in February 2006, he consumed alcohol during a visit home. Nevertheless, drug testing was not done until May 1, 2006. On March 13, 2006, he was noted to have angry outbursts and difficulty controlling his emotions. Around April 14th, Dr. Moore discovered that Evan had various items of violent themed pornography on his computer. The plaintiff's expert notes that despite all this, Evan received positive progress reports from Dr. Moore and was put in the SDL Case Management Program.

The plaintiffs' expert notes that after he was transferred to SDL Case Management, he relapsed a second time by consuming alcohol at the defendants' premises on July 19, 2006. It appears that his privileges were still not affected. The plaintiffs' expert explains that the more freedom given an addict in treatment, the more likely it is that they will abuse drugs and/or alcohol which only increases the likelihood of criminal behavior, especially in violence prone individuals. Thus, s/he opines that the defendants' decision to increase Evan's privileges despite the continuance of his aggressive behavior only accelerated his "deteriorating" behavior. The plaintiffs' expert characterizes the defendants' failure to restrict and/or penalize Evan's transgressions and the relative paucity of drug testing on Evan despite the fact that he was working in the community and traveling home as "unreasonable and imprudent." S/he opines that it was unreasonable for the defendants not to have increased structure in Evan's environment or considered a psychiatric evaluation at a hospital. S/he further opines that in failing to employ these measures, they missed the opportunity to achieve success in Evan's treatment.

The plaintiffs' expert concludes:

> The Defendants knew that [Evan] was a psychiatric patient who had serious problems keeping jobs because of aggression. The Defendants knew or should have known that the problems with aggression got so bad that his mother had to get an Order of Protection. [Evan] abused cocaine, a drug known to be associated with increased aggression both in the intoxication phase and in the withdrawal phase, especially in psychiatric patients. Instead of having [Evan] evaluated for psychiatric hospitalization, or placing him in a more restrictive program at SLS, the Defendants turned a blind eye to [Evan's] problems thereby reinforcing his tendency to use his anger to get what he wanted. Had they done what previous providers had done in the face of escalating symptoms, i.e. held him accountable and intensify efforts at treatment by referring him for psychiatric hospitalization, it is likely that he would not have become violent and murdered Ms. Fox on August 17, 2006. Throughout [Evan's] treatment at SLS, the Defendants decision making process,

> lack of due diligence in obtaining [his] prior treatment records and their continued failure to revoke [his] privileges and seek his involuntary commitment directly, was unreasonable and contributed to [his] condition worsening drastically."

S/he further concludes that "[t]he autopsy report, crime scene photographs, medical examiners evaluations and the results of the police investigation including the analysis of the crime scene, indicate that for a period of time, Ms. Fox struggled against her attacker for at least five or ten minutes [and that] [d]uring this time, she was conscious while suffering pain that was severe and endured terror and panic." S/he further opines that "[g]iven the defensive wounds, the high number of non-lethal superficial wounds and the scratch marks on [Evan's] body and, importantly, the absence of a clear single injury that would have definitely caused death in a short time... that the struggle very likely lasted for up to a half an hour, a time during which [Ms. Fox] suffered immense pain and terror." Suffice it to say, the plaintiffs have established a material issue of fact as to whether Ms. Fox suffered conscious pain and suffering (Singer v Friedman, 220 AD2d 574, 577 [2d Dept 1995], citing Star v Berridge, 77 NY2d 899 [1991]).

The plaintiffs' expert has also reviewed all of the plaintiffs' medical records and communicated with the Foxes to evaluate the effects that Denice Fox's murder has had on them. Suffice to say, s/he has clearly identified profound lasting physical and mental effects that the gruesome murder of their wife and mother has had on plaintiffs.

The plaintiffs' allegation that Ms. Padrof knew of Evan's dangerous behavior because she admitted hearing at a meeting that he jumped on sinks and/or recalled hearing that he jumped off a banister fails to raise an issue of fact with respect to her possible liability here. At those meetings, it was only her duty to speak about and address her patients' care and treatment plans and this did not include Evan. The other allegations regarding her alleged knowledge of Evan's violent propensities are purely speculative. Not only did Padrof never treat Evan, she never met him and was never responsible for any portion of his treatment at the

defendant facilities. The fact that his treatment was discussed at staff meetings at which Padrof was present is insufficient for imposing liability on her (Waltz v Lynch, supra; Sawh v. Schoen, supra; Ingber v. Kandler, supra). Thus, the complaint against Linda Padrof is dismissed.

The Court finds that the plaintiffs' attempt to attribute negligent behavior to Dr. Prichard and Dr. Santoro due to their roles as Chief Clinical Officer and Chief Operating Officer of SLS is surmise. This court cannot attribute knowledge of the content of Evan's patient records based solely on their positions. Similarly, Miller's attendance at meetings at which snippets of Evan's behavior may have been discussed is inadequate grounds to attribute responsibility to them for managing Evan's treatment (Waltz v Lynch, supra; Sawh v. Schoen, supra; Ingber v. Kandler, supra).

Dr. Stumacher had not treated Evan for the 70 days immediately preceding Ms. Fox's murder. In addition, the plaintiff has not identified any negligent act by him during the preceding six months that contributed to the outcome here. The complaint against Dr. Stumacher is dismissed.

The Court finds that, contrary to defendants' assertion, Dr. Moore and SLS management did have a duty to the general public including, Denice Fox, with respect to Evan's treatment at their facilities. While Joseph Santoro attested that the SLS defendants could not treat a client on an involuntary basis or otherwise restrict his or her activities or whereabouts, and that the program was voluntary and a resident could elect to leave at any time, he testified at his examination before trial that through its psychiatrist, SLS could seek to have a resident involuntarily committed if and when the circumstances warranted it. Therefore, while Evan may have been free to come and go as he pleased, they could restrict that ability, or at least attempt to do so, which they never did. In fact, the applicable New York State regulations specifically contemplate how a residential treatment facility should address a situation where a "resident's behavior poses an immediate and substantial threat to the health, safety and well-being of the resident or other individuals...." 14 NYCRR 595.9(c)(4). The regulations provide specific procedures for addressing

that very situation in the best interest of the resident and the public including a review process. See, 14 NYCRR 494.9(g). The defendants' professed lack of control or ability to do anything to address a resident like Evan who allegedly posed no danger to himself or others is flatly rejected in the context of the information and records in this case.

The institutions, encompassing the SLS and related affiliates including SDL, had the authority to determine the level of supervision he required and needless to say, would affect his ability to leave the facility. A duty to properly evaluate the status of an out-patient was found in Clark v State of New York (supra). In that case, the patient had a history of being in and out of in-patient treatment and his doctor had an opportunity to convert him to in-patient status before he killed someone. The state was therefore held liable for failing to hospitalize a mental health patient after he attacked a third party, because the state's decision to allow the patient to remain an out-patient was not based on an "intelligent examination" and therefore was not protected by "professional judgment." Likewise, a duty was similarly found in Schrempf (supra). The plaintiff in Schrempf sought to recover for the death of her husband who was murdered by someone who had been released from a state mental institution and was on out-patient status at the time of the murder. The plaintiff's challenge to the State's release of the decedent's assailant and its failure to readmit him did not fail for want of a duty but rather, because not only "did his outward appearance and behavior not show any "warning signs' indicative" of his deteriorating condition, there was no evidence to support her contention that there had not been a proper medical judgment by the defendants. Similarly, in Winters v New York City Health & Hosps. Corp. (supra), while the court obviously found a duty, it found an issue of fact as to whether the defendant hospital's decision to release the patient who later murdered the plaintiff's decedent "was based on professional medical judgment for which it cannot be liable for negligence." In Bell v New York City Health & Hosps. Corp, (supra at 282), the defendant was held liable for releasing a patient who later attempted suicide because the decision was "not founded upon a careful examination" and accordingly "not a professional medical judgment."

CONCLUSION

The Court believes that the focus of liability must be on Dr. Moore. As discussed above, Dr. Moore's analysis focused more on Evan's departure than on his intake.

Dr. Moore saw Evan on August 16, 2006, as indicated by his progress note. This seeming contradiction of the contentions made by the defendants, particularly defendant Dr. Moore, that he ceased seeing Evan in June 2006 is a potential issue of fact when considered in the context of defendant Moore's submission. The Court finds that there was an issue as to whether or not there was a continuity of care and treatment rendered by Dr. Moore from admission until the time of Evan's departure and thus an issue to be examined by a jury. The Appellate Division has determined that this case cannot proceed on the claim of medical malpractice but may proceed, through discovery, on the issue of negligence. The examination of the issues must focus on what Dr. Moore knew or should have known from the very beginning of Evan's admission through his final departure from the institution. The Court finds that the other employees of SLS were entitled to rely on Dr. Moore's record entries based upon the stated table of organization and Dr. Moore's continued contact with Evan. Even though the other employees saw and reported incidents that may have provoked some level of suspicion about Evan's mental health, Dr. Moore had the overview that allowed for an appropriate factual recordation of Evan's present and past history to be used by the SLS staff, including the administrative staff. Failure to obtain from others an accurate and facially complete history may constitute negligence as described by PJI 2:10 and if yes by PJI 2:70 as to causation.

The Court notes in the two contracts signed by Evan with SLS-SDL, defendants were given latitude to search Evan's room. Thus, as discussed above, whether the information known or available to Dr. Moore gave rise to a requirement on his part to explore the issue further is a factual issue for the jury.

The Court further finds that an issue of fact exists in the context of duty that is typically determined by the Court itself; namely the existence of special circumstances in which there is an ability to control, after careful examination, the conduct of third persons. There is no bright line determination of duty. Rather, a cognizable cause of action exists when the defendant has the necessary authority or ability to exercise such control over a patient's conduct so as to give rise to a duty on their part to protect a member of the general public. (Fox v Marshall, supra at 137).

Here, the Appellate Division stated that Marshall's presence at SLS was not a clear voluntary or involuntary admission. In light of the tenor of the decision, however, that phrase was not to be considered as an ultimate determination, but rather an unrefuted supposition that seemed persuasive at the time the CPLR §3211 motion was made. The Court notes that the Appellate Division also stated that SLS exercised a certain level of authority and control over Evan Marshall. Although the degree of such control is unclear at the pretrial stage of the case, the fact that Marshall needed to be processed out of SLS to visit his mother suggests that he was not completely free to leave the facility (Fox v Marshall 137).

Through the discovery process thousands of hours were spent by the parties obtaining evidence and probing fruitful and uneventful areas relating to the case. More than 15,000 pages, reaching four feet in height, have been submitted by the parties evidencing their efforts and disagreements.

Throughout the numerous conferences and submissions, the Court has recognized the extraordinarily cogent and convincing points made by both sides. Moreover, the Court appreciates the need to consider the balance between responsibility imposed on an individual or institution, and the public policy implications of doing so. To hold individuals or institutions liable to third persons or to the public at large might affect the admission, treatment and release of mentally ill patients. Conversely, to ignore the implications of the individual or institution's conduct that could have significant adverse consequences to the public. Even though this Court may be capable of determining duty at this time,

under the circumstances presented, such a determination is properly reached after the facts and issues previously articulated are considered by a jury. Questions must be answered regarding the information Dr. Moore had or should have had about Evan at the time of admission through his last day at SLS. Questions arise regarding the issue of control. Even though there seems to be no formal system for the issuance of a pass, the agreements established SLS's control of Evan's car, as well as its rights to search Evan's room and determine the increase or decrease in his privileges. SLS kept Evan's money. Taken as a whole and taking into consideration the continuum of events from November to August, a jury should properly decide the issues regarding the existence of the requisite control or authority that may have arisen in this matter, and accordingly, the ultimate issue of duty, because, in this case, it depends upon the underlying factual determinations.

Dr. Moore and SLS maintain with equal conviction, that even if duty or control were found, causation would be impossible to prove. The question is more elusive than may initially appear. This Court believes that the seeming elusive nature of the determination is due to the bottom up rather than top down consideration. Instead of starting with the intake and determining what was known or should have been known and the on going implications of that information through ultimate departure from the institution, the analysis focuses on Marshall eloping from the facility and retrospectively justifying prior acts and information. The recognition by the Appellate Division of a duty to protect the general public in the context of the treatment of a mentally ill patient, implies that a breach of such duty may be causally related to an ensuing harm. Further when Evan left SLS, on August 16, 2006 his stated intention, in part realized, was to visit his mother's place which is an attached cooperative at 3 Willada Lane, Glen Cove, New York. The victim Mrs. Fox lived in the same cooperative area at 7 Willada Lane, Glen Cove, New York. A jury could reasonably find that releasing Evan to his mother's residence was causally related to the events that ensued in the same location, doors away from his declared destination. The Court finds, for the reasons previously stated, that the question of causation is appropriately left to the jury.

While the plaintiffs have clearly established their emotional and physical sufferings as a result of Evan's heinous acts, they have cited no law entitling them to recover on those grounds. The cases on which they rely are readily distinguished. In Johnson v State, (37 NY2d 378, 382 [1975]), the court recognized two exceptions to the "zone of danger" requirement: where emotional harm results from the negligent transmission of a telegraph announcing death and emotional harm results from the mishandling of a close relative's corpse.

The defendants' motions for summary judgment are **granted** and the complaint is **dismissed** as against all of the defendants except Dr. Moore and SLS-SLD as employers of Dr. Moore. Finally, the defendants' motions for sanctions is **denied**. Given the complicated facts of this case coupled with the multiple complex legal issues, the imposition of sanctions is inappropriate.

The plaintiffs' motion for an order sealing its Memorandum of Law in Opposition to Defendants' Motions, the unredacted Affirmation of Timothy C. Bauman in Opposition to Defendants' Motions dated March 28, 2013 with Exhibits and the unredacted Affidavit of Angela M. Hegarty sworn to on March 28, 2013 with Exhibits is **granted** without opposition.

This Constitutes the Order of the Court.

Dated: August 29, 2014

ENTER:

J.S.C.

ENTERED

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