

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

CASE NO.: 11-25428 CA 06

DEBRA A. MARTINEZ, as surviving
spouse, and Personal
Representative of the Estate of
ALEXANDER MARTINEZ, for the
benefit of DEBRA A. MARTINEZ,
surviving spouse, and as parent
and natural guardian of
ALEXANDER R. MARTINEZ, JR., a
minor child and surviving son,
MAXIMILLIAN D. MARTINEZ, a
minor child and surviving son,

Plaintiff,

-vs-

SOUTH MIAMI HOSPITAL, INC., a
Florida Corporation, CARLOS
LAROCCA, M.D., P.A., a Florida
Professional Association, JAMES
VINCENT MILLERICK, LMHC, and
BAPTIST HEALTHSOUTH FLORIDA,
INC., a Florida Corporation,

Defendants.

Thursday, January 5, 2012
10:15 A.M. - 11:15 A.M.
Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130

The above-styled case came on for hearing
(Special Setting) before the Honorable David Miller

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{STENOGRAPHICALLY} REPORTED BY:
DONNA GUNION, FPR
FLORIDA PROFESSIONAL REPORTER

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APPEARANCES :

ON BEHALF OF THE PLAINTIFF :

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BY: SPENCER ARONFELD, ESQUIRE

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BY: BRUCE I. YEGELWEL, ESQUIRE

1 (Thereupon, the following proceedings were had:)

2 THE COURT: We're here in the matter of Martinez
3 et cetera, et al., verses South Miami, et cetera, et
4 al.

10:09 5 I have four motions to dismiss and I'm looking at
6 some case law and a second amended complaint. I
7 understand that there is also -- may be some discovery
8 issues, but let's deal with the motions first.

9 So I understand, the first issue is that the
10:09 10 defense believes they are not responsible for a
11 suicide.

12 MR. MENDLESTEIN: Yes, Your Honor.

13 THE COURT: So plaintiff, how are they
14 responsible for some kind of suicide? What do you
10:10 15 allege?

16 MR. ARONFELD: Okay. Your Honor, may it please
17 the Court. My name is Spencer Aronfeld. I have the
18 privilege of representing the Martinez family in
19 regards to their claim for a wrongful death medical
10:10 20 malpractice case against South Miami Hospital, Baptist
21 Hospitals and James Millerick and Doctor LaRocca.

22 Mr. Martinez was a nurse at Baptist Hospital, an
23 employee of their facility for over 20 years. He also
24 was a double Master's Degree nurse teaching and also
10:10 25 studying at Barry University and teaching Barry

1 University nursing students at Baptist Hospital. He
2 was married and had two children and was very
3 functional all day long except at night, he was a
4 full-bore alcoholic and had been for approximately
10:10 5 30 years.

6 Some issue happened one day at Barry University
7 where he was confronted by his professor-supervisor
8 and told that if he doesn't report himself to IPN,
9 which is the Impaired Nursing Program, they were going
10:11 10 to report him. When you report a nurse to IPN, their
11 license to practice nursing is immediately suspended
12 until it can be shown that they are competent.

13 I don't know precisely what happened on that day
14 at Barry University, but Mr. Martinez showed up at the
10:11 15 addiction treatment program at South Miami Hospital,
16 which is owned and operated by Baptist Hospital
17 Services, and surrendered himself to them.

18 At the admission to the hospital, he was joined
19 by a representative of the employee assistant program
10:11 20 of Baptist Hospital. He was interviewed by an
21 employee of the addiction treatment program and
22 admitted into the facility by Doctor LaRocca.

23 At the time of his admission ---

24 THE COURT: Let me ask you a question. I went to
10:11 25 high school with a person named Craig Witty whose

1 brother is John Witty, and I know John Witty is
2 associated with the South Miami treatment facility
3 that you're talking about.

4 Was he personally involved in this case in any
10:12 5 way?

6 MR. ARONFELD: That name has not come up yet,
7 sir, in any of the discovery we have done.

8 THE COURT: John Witty?

9 MR. FALK: Your Honor, I'm intimately involved
10:12 10 and that name has not come up, to my knowledge.

11 THE COURT: Okay. I would just throw that out
12 there, that I went to high school with his brother. I
13 do know John and if that were an issue with anyone,
14 I'd at least listen to what your complaint was.

10:12 15 MR. ARONFELD: Thank you, sir.

16 THE COURT: Go ahead. I'm sorry for the
17 interruption.

18 MR. ARONFELD: At the time of the admission, he
19 signed a release authorizing all of the information
10:12 20 that he provided while he was a patient to go to his
21 employer, which is Baptist Hospitals, to go to IPN,
22 which is the Impaired Nursing Program, and to go to
23 his spouse. And it's important to remember this is a
24 nurse for 20 years at the very hospital that was not
10:12 25 only his employer but was now treating him. He was

1 admitted and put on a severe phenobarbital protocol
2 which is the highest level of phenobarbital that you
3 can give a patient who is going through alcohol
4 withdrawals, and in approximately three days -- one
10:13 5 day for admission, three days of the phenobarbital and
6 one day for discharge -- he was discharged from the
7 inpatient residential detox to an outpatient evening
8 program.

9 Now Baptist Hospital has three options for
10:13 10 discharging patients. One is they can keep them in
11 the hospital. Two is they can discharge them into an
12 outpatient evening program, which is the lowest
13 threshold of supervision and care. It's only
14 operating four days -- four nights a week. It's not
10:13 15 open on the weekends and there's no medical
16 supervision on a daily basis there.

17 Or they can admit them, as what they do almost on
18 every occasion, into their residential treatment
19 program, which is either a 30, 60 or 90-day
10:13 20 residential program that's a lot like a camp where you
21 live and sleep and eat with other recovering addicts.

22 For some reason they decided to put him in the
23 outpatient evening program, and before discharging him
24 where he had self-reported and it says this in his own
10:13 25 words on admission, erratic behavior, emotionally

1 bottoming out and had an episode that required him to
2 withdraw from Barry University and self-report himself
3 to IPN, they discharged him without doing a
4 psychiatric evaluation.

10:14 5 The addiction treatment program has in-house, a
6 psychiatrist available 24-hours a day to evaluate
7 patients. They never obtained his records from a
8 previous history of depression. He reported that he
9 had taken depression medications before. They never
10:14 10 found out why. And most importantly, they never
11 inquired precisely what happened at Barry University
12 that required him as a medical professional to report
13 himself to IPN.

14 They discharged him into the care of the evening
10:14 15 program. James Millerick, who is not a physician but
16 is a licensed mental health counselor, was given the
17 responsibility of taking care of him. They never did
18 an appropriate suicide evaluation. The only time they
19 did any type of suicide evaluation occurred while he
10:15 20 was doing a phenobarbital withdrawal protocol. They
21 did not do one ---

22 THE COURT: During those first three days at
23 South Miami?

24 MR. ARONFELD: Correct, which essentially he is
10:15 25 intoxicated because phenobarbital replaces the

1 alcohol. They never did one of him sober. They never
2 did one of him by a licensed psychiatrist prior to
3 discharge. Mr. Millerick is not a psychiatrist.

4 They never spoke to his wife about a previous
10:15 5 suicidal attempt that was unsuccessful, nor did they
6 inquire about his access to a firearm. He went home
7 and in the next ensuing 3 or 4 days, committed suicide
8 by blowing his head off.

9 This claim is against the hospital for a failure
10:15 10 to properly assess, diagnose, treat an impending
11 suicidal patient. Clearly he had a mental illness
12 that was not diagnosed, and in all due respect to the
13 defense, their position has been since the onset of
14 this case, that you cannot proceed against the
10:15 15 hospital because the suicide transpired outside of the
16 premises.

17 There is case law right on point that says that
18 if a hospital fails to properly diagnose or treat a
19 patient who then goes out and commits suicide, the
10:16 20 hospital is responsible. It's a 3rd DCA case. It's
21 the Garcia case. I don't believe the defense has
22 cited that case. They have cited a number of cases
23 that all involve patients who committed suicide after
24 being fully assessed and evaluated by competent
10:16 25 psychiatrists outside of the premises.

1 That is completely irrelevant to the facts of
2 this case, Your Honor.

3 THE COURT: Do you have a copy of your case I can
4 read?

10:16 5 MR. ARONFELD: Absolutely.

6 MR. YEGELWEL: Citation, Spencer, please.

7 MR. ARONFELD: Yes, sir.

8 MR. FALK: I sent it to Spencer.

9 MR. MENDLESTEIN: We have it. It's not in our
10:16 10 motion. It's Garcia versus Lifemark Hospitals of
11 Florida. It's 754 So. 2nd 48.

12 THE COURT: Is it in this package you gave me?

13 MR. MENDLESTEIN: Probably not, Your Honor. It's
14 not cited in the motion but I have a copy of it.

10:16 15 THE COURT: Okay.

16 MR. ARONFELD: Glenn, if you sent it to me, I
17 apologize.

18 MR. FALK: No, I told you on the phone I gave you
19 this case.

10:17 20 MR. ARONFELD: You didn't give me the Paddock
21 case.

22 THE COURT: So anyway, Regina Garcia versus
23 Lifemark Hospitals and does this have a Westlaw cite?

24 MR. MENDLESTEIN: 754 So. 2nd 48. It's a Third
10:17 25 District Case from 1999, Your Honor.

1 MR. ARONFELD: But to say that a hospital ---

2 THE COURT: Give me a couple of minutes because I
3 didn't get a chance.

4 MR. ARONFELD: Absolutely, sir.

10:17 5 MR. MENDLESTEIN: This is the same case you're
6 looking at, right?

7 MR. ARONFELD: Yes. Yes.

8 MR. MENDLESTEIN: Okay.

9 THE COURT: I have read the case.

10:22 10 MR. ARONFELD: Okay. So, how this case supports
11 our cause of action is, he wasn't discharged from
12 their care and out in the free world. He was part of
13 their outpatient evening program. That was a decision
14 that they negligently made but he was still required
10:22 15 to report to their outpatient evening program every
16 single night and, in fact, did so, so he was still in
17 their care. So saying that the hospital is not liable
18 for the suicidal death of a patient who is an
19 outpatient evening care, is completely distinct from
10:23 20 all of the cases that they are supporting which are
21 patients who have no further care or supervision by
22 the hospital or their physicians.

23 He was still their patient. They had records of
24 him every single day. He had to give urine and blood
10:23 25 tests to prove he wasn't taking medications or drugs

1 that were inappropriate. He was still under their
2 care. The negligence in this case is they put him in
3 an outpatient evening program, which has the lowest
4 threshold of care, and this is what really is the core
10:23 5 of our case. You have a man who is very highly
6 functional on alcohol, but what happens when you take
7 that alcohol suddenly away from a human being who has
8 survived and thrived for 30 years with that? He has
9 no support system. It's basically like taking insulin
10:23 10 away from a diabetic and he had nothing to, whatever
11 he was medicating -- whatever pain he was medicating
12 with that alcohol, he no longer had the medication
13 for. And they didn't have anyone to watch him
14 appropriately in this evening outpatient program, but
10:24 15 he was still their patient.

16 So for that reason alone, I believe that this is
17 not an appropriate motion to dismiss. First of all,
18 it should be denied but we properly stated a cause of
19 action. It's no different than had they discharged a
10:24 20 patient who is having a heart attack and says we're
21 going to put you into an outpatient physical therapy
22 session, and he ends up having a heart attack.

23 The reason that they are liable is because they
24 negligently put him into the outpatient evening
10:24 25 program instead of keeping him in a residential

1 program.

2 THE COURT: My concern is there may be a
3 distinction between a psychiatric hospital admission
4 and care, and this alcoholic or addiction treatment
10:24 5 center hospital and its care because even in Garcia,
6 he went back to the hospital, there was a police
7 report that he had tried to commit suicide. They
8 didn't even look into it.

9 MR. ARONFELD: Right.

10:25 10 THE COURT: So you haven't told me that they were
11 aware of any psychiatric -- that it was a psychiatric
12 facility and that he was there for psychiatric service
13 or even -- and it didn't make any difference to the
14 Third District -- but even that there was a suicide
10:25 15 attempt or fear.

16 MR. ARONFELD: Well, let me address that.

17 THE COURT: We're several steps away from this
18 just on my analysis of the case. I don't know what
19 you guys think of that.

10:25 20 MR. MENDLESTEIN: I don't know if you want me to
21 speak yet.

22 THE COURT: Not yet. Sorry.

23 MR. ARONFELD: Alcohol and addiction and
24 psychiatric and mental and emotional issues go hand in
10:25 25 hand. They are one in the same. If you are a

1 suffering alcoholic, you have some underlying
2 psychological and emotional issues that have to be
3 addressed.

4 When he reported himself to the hospital, he said
10:26 5 I had an emotional bottoming out. I have had erratic
6 behavior. I have had previous treatment for
7 depression. I have taken medications before for
8 depression. He wasn't at some kind of facility that's
9 out there in Arizona where it's just rehab. This was
10:26 10 a hospital environment where they had available to
11 them a psychiatrist in-house solely for the care and
12 treatment of addiction treatment patients at that
13 tower, not some random psychiatrist on call. He works
14 in that facility because folks who are going through
10:26 15 alcohol addiction recovery have psychiatric needs.
16 They didn't address it. They failed to diagnose it,
17 and clearly he had a problem because five days later
18 he blew his head off.

19 So it's not like he went to an E.R. on a
10:26 20 different issue. He surrendered himself to their care
21 and they clearly dropped the ball. All they had to
22 have done was have a licensed psychiatrist examine
23 him.

24 And another important factor, Judge, is there was
10:27 25 a waiver of privacy. Everything he said to them,

1 their employer, his employer and co-employees was
2 hearing, seeing and reading. He should have been
3 given an opportunity, and the standard of care
4 requires that he be given a confidential psychiatric
10:27 5 assessment so that he could fully express how he
6 feels. How could he if he is being asked about
7 psychiatric, suicidal or homicidal ideations tell his
8 employer any more than Mr. Mendlestein could tell
9 Mr. Falk the truth about how he feels knowing it's
10:27 10 going to affect his ability to be employed or continue
11 to be employed? He should have been sent to another
12 facility, and our expert is going to testify to that,
13 that there's an inherent conflict of interest when an
14 employer is providing these kinds of services to their
10:27 15 own employee. This case is distinguishable from the
16 cases they are citing because of that. And by
17 evidence of the fact that he committed suicide while
18 their patient, it didn't occur on their premises but
19 the only reason it didn't occur on their premises or
10:28 20 probably the only reason this occurred at all was
21 because of their negligence. By letting a 30-year
22 alcoholic out without any care, treatment or
23 medication or support or evaluation, is a recipe for
24 disaster.

10:28 25 And we respectfully ask the Court to deny their

1 motion to dismiss and allow this case to proceed to a
2 jury and let a jury decide what the standard of care
3 is here.

4 They have not produced a single case that says
10:28 5 that under this factual scenario, that they are
6 entitled to a motion to dismiss.

7 THE COURT: Let me look at your facts that you've
8 alleged and then I'll let the defense go ahead.

9 MR. ARONFELD: Do you want me to recite them
10:28 10 again?

11 THE COURT: No, I'm looking at your complaint.

12 You allege in here -- you told me I think that
13 Mr. Martinez self-admitted to the Baptist or rather
14 the South Miami treatment center. Was he sent there?
10:29 15 Do you allege that he was sent there by his employer?

16 MR. ARONFELD: We don't have deposition testimony
17 yet as precisely what happened.

18 Let me clarify. He reported himself to IPN. He
19 was told by his Barry University folks if you don't
10:29 20 report yourself, we're going to report you.

21 THE COURT: Where is that in your complaint?

22 MR. ARONFELD: I don't know if I knew that at the
23 time of the drafting of the complaint. Some of this
24 has been flushed out since we started discovery, but
10:30 25 he showed up at South Miami Hospital's addiction

1 treatment program. How he got there, why he got
2 there, we have no testimony precisely yet as to how
3 that happened. There's a lot of depositions that still need
4 to be taken. But that's not an issue for a motion to
10:30 5 dismiss anyway. That would be appropriate for a
6 motion for summary judgment, which this is, I think, a
7 disguised motion for summary judgment.

8 THE COURT: Well, you talk about a conflict of
9 interest. That's why it brought up in my mind who
10:30 10 chose South Miami as a treatment center.

11 MR. ARONFELD: I can't represent that to you,
12 Your Honor.

13 THE COURT: You can't accuse them of a conflict
14 of interest if sending someone to their own hospital
10:30 15 if you have no basis for that, it would seem to me.

16 MR. ARONFELD: Your Honor, it doesn't matter to
17 me who sent him. It matters who admitted him.

18 When they had presented to them at the admission
19 office at the addiction treatment program their own
10:30 20 employee, it is our position at that point they should
21 have said wait a second, we have a conflict of
22 interest, and there's a conflict. They want to get
23 him back to work as fast as possible. They don't want
24 him on long term disability. They don't want to have
10:31 25 to replace him. If they put him in the residential

1 treatment program, who is going to pay for that?
2 Baptist Hospital. So there is an inherent conflict of
3 interest there in terms of getting him back to work as
4 fast as possible. He has a conflict of interest
10:31 5 himself because he can't give his full story to his
6 own employer, and so there's the conflict.

7 THE COURT: But if he chose to go to his
8 employer, seek help from his employer and consented to
9 give all the information to his employer, you're now
10:31 10 here complaining that he gave that consent.

11 MR. ARONFELD: I'm complaining that they accepted
12 him. You're giving somebody who is self-reporting,
13 I've had erratic behavior, I've had an emotional
14 bottoming out and I've self-reported myself to IPN.
10:31 15 This is not a stable human being, obviously.

16 THE COURT: And if they had kicked him out and
17 said we can't take you, we have a conflict and he goes
18 home and blows his head off, you'd be here saying that
19 they failed to admit him.

10:31 20 MR. ARONFELD: No, they should have transferred
21 him to an independent facility or admitted him and
22 said, look, you're waiving all this.

23 THE COURT: Because he's an alcoholic?

24 MR. ARONFELD: No. There is obviously more than
10:32 25 just an alcoholic, and that's the big problem here.

1 You have somebody saying I've had an emotional
2 bottoming out and I've just reported myself to IPN
3 where I've surrendered my nursing license, something
4 significant happened. What it is, I don't know yet
10:32 5 because that discovery hasn't been taken.

6 It's like a lawyer calling the Florida Bar up and
7 saying I'm surrendering my license because I can't
8 practice. That's what he's telling them.

9 THE COURT: Okay. Doesn't that happen?

10:32 10 MR. ARONFELD: Well, if you are an addicted or an
11 impaired attorney, I think you have an obligation --
12 the Florida Bar I know has resources to help addicted
13 and impaired attorneys.

14 THE COURT: Right, for lawyers and judges.

10:32 15 MR. ARONFELD: Correct.

16 THE COURT: They have all the judges, you report
17 to other judges or people that watch judges or, if
18 you're a lawyer, you report to the Florida Bar. It's
19 that same kind of conflict.

10:32 20 MR. ARONFELD: But then it would be like having a
21 fellow Judge on this -- in this district taking care
22 of you and wanting to get you back on the bench as
23 fast as possible and you knowing that everything you
24 tell that Judge, say he's your sponsor, everything
10:33 25 you're telling that Judge is to get yourself back on

1 the bench as fast as possible.

2 What should have been provided is an independent
3 facility and our expert will testify to that, that
4 Jackson Memorial Hospital has got a facility that is
10:33 5 just eight miles down the road.

6 THE COURT: So you would equate this almost to a
7 person bleeding out in a hospital, the hospital
8 doesn't have the facilities and they have to send him
9 to a place that does have the facility.

10:33 10 MR. ARONFELD: Yeah, or admit him in and say,
11 look, waive everything you want but we're still going
12 to give you a confidential evaluation here with our
13 psychiatrist where none of that is going to be
14 provided to your employer and none of that is going to
10:33 15 be provided to IPN.

16 THE COURT: Is there any record in the outpatient
17 counseling session records, a report in those records,
18 about suicidal ideation or suicidal attempts, anything
19 like that?

10:33 20 MR. MENDLESTEIN: No.

21 MR. ARONFELD: It's all rubber stamped. No
22 suicidal ideations, no homicidal ideations. It's
23 rubber stamped with the boiler plate language. There
24 are several days though, and I believe they'll admit
10:34 25 to this, no records at all. They have no record of

1 seeing him at all in the outpatient treatment so the
2 records there are abominable, and this is a man who
3 was desperately in need of help, and it's really res
4 ipsa loquitur for him to blow his brains out with two
10:34 5 little babies and a 20-year job and a double Master's
6 Degree. This guy was screaming for help but nobody
7 heard him because he was in an outpatient evening
8 facility. And so this -- for summary judgment, we
9 will have expert testimony that says all the signs and
10:34 10 symptoms were there, they just failed to diagnose it.
11 No different than if they failed to diagnose a stroke
12 and sent the patient into outpatient care.

13 THE COURT: Interesting. Defense?

14 MR. MENDLESTEIN: Thank you, Your Honor.

10:35 15 My learned partner is chomping at the bit to
16 correct the factual record here and some of it may be
17 pertinent, and perhaps for record purposes that would
18 be appropriate.

19 I do want to short circuit from counsel's perhaps
10:35 20 opening argument or closing argument to a jury to the
21 motion to dismiss argument on the duty issue here, and
22 kind of bring everything back into focus for the Court
23 and then maybe Mr. Falk can correct the factual
24 record. We're talking about ---

10:35 25 THE COURT: Well, the facts I can read from the

1 complaint, at least the allegations I can read from
2 the complaint.

3 MR. MENDLESTEIN: I'll put on the record then
4 that there a lot of things that plaintiff recited to
10:35 5 the Court that we do not accept as being true, and I'm
6 refocusing on what's being pled in the complaint and
7 what the law says on the duty issues.

8 THE COURT: I would agree that there were many
9 things that Mr. Aronson said that are not pled but he
10:35 10 gave reasons for that and who knows, I'm hopeful that
11 something will show up and it's all a function of your
12 sloppy record keeping that we don't have these better
13 allegations.

14 MR. MENDLESTEIN: And to that extent, if Mr. Falk
10:36 15 can correct the record so be it, but I didn't know if
16 you wanted me to address the legal part of this
17 question first.

18 THE COURT: Go right ahead.

19 MR. MENDLESTEIN: Because we are here on the
10:36 20 duty, Your Honor, and there are cases which are
21 directly on point, and in fact the Garcia case that
22 Mr. Aronfeld gave to you, I think kind of goes towards
23 proving my point but I'll direct the Court to two
24 cases and they are cited in our motion, and they're
10:36 25 Lowlor versus Orlando and Paddock versus Chacko.

1 THE COURT: Which one do you want me to look at?

2 MR. MENDLESTEIN: Lowlor, I believe is the best
3 one to start with, Your Honor, because the Court asked
4 the question about outpatient care and this seems to
10:36 5 directly address that and at the top of the second
6 column, it says: "Although Florida law would clearly
7 impose a duty on a psychotherapist for failure to
8 safeguard a patient from harming himself in a
9 custodial setting, no Florida case has extended duty
10:37 10 of custodial supervision and care to the outpatient
11 relationship between a psychotherapist and a patient."

12 And that's what we're talking about here. If the
13 suicide was committed within the walls of the facility
14 that my client is alleged to own or operate, perhaps
10:37 15 Mr. Aronfeld would have a duty argument to make, but
16 in the outpatient setting and where the suicide
17 occurred miles away from the facility and as it's pled
18 in the complaint, the suicide occurred on Old Cutler
19 Road, which is not where the facility is located ---

10:37 20 THE COURT: I think Mr. Aronfeld is one step
21 apart from what you're talking about. He's saying
22 that he should not have been in a non-custodial
23 setting, he should have been in a custodial setting.

24 MR. MENDLESTEIN: Well, okay, but that's not what
10:37 25 is beeping alleged here. There is no allegation from

1 what I can tell that the discharge itself was
2 improper. There's a litany of things that were said
3 that could have been done better during the discharge,
4 but the proximate cause argument and the
10:38 5 foreseeability argument goes to where the suicide was
6 actually committed, and in this case it was outside
7 the walls of the facility and it was on Old Cutler
8 Road and not in the custodial setting of the facility.
9 And in fact the Paddock case kind of deals with a
10:38 10 similar scenario where the patient had been seeking
11 treatment, had seen the doctor, had been released and
12 ultimately set herself on fire, and the Court said
13 that it's not the responsibility of the caring
14 psychiatrist where it occurs off the premises and
10:38 15 that's what it says in Paddock and in Chacko.

16 And in fact, I should probably hand this to
17 Mr. Aronfeld and to the Court. This is the Kelley
18 case. It's a Third District case that just came out.
19 It adopts those two cases in dealing with the suicide
10:38 20 issue.

21 THE COURT: Kelley versus Beverly Hills.

22 MR. MENDLESTEIN: I'm sorry, 68 So. 3rd 954.

23 THE COURT: August of last year.

24 MR. MENDLESTEIN: Yeah, 2011. Third District.

10:39 25 It's factually dissimilar insofar as certain

1 allegations, but if you'll look at the top of Page 2,
2 the bottom right hand column, it cites right to
3 Paddock, it actually cites to Garcia also and to
4 Lowler, and Garcia was a motion to dismiss case.

10:39 5 THE COURT: Let's look at this.

6 MR. MENDLESTEIN: Sure.

7 THE COURT: Go ahead.

8 MR. MENDLESTEIN: Your Honor, I provided Kelley
9 for two reasons; number one, it shows that the Third
10:51 10 District, as recently as this past August, has told us
11 on the motion to dismiss standard and granting and
12 affirming the motion to dismiss, that Paddock, Lowlor
13 and Garcia are good law when it comes to what we're
14 talking about here.

10:51 15 The important cases from a distinguishing
16 standpoint and for a supportive standpoint for our
17 motion really come from Paddock and Lowlor, and
18 perhaps this will help address the Court's concerns
19 about Mr. Aronfeld's argument about before
10:51 20 Mr. Martinez got to the outpatient program.

21 In Paddock, there are a few things that are
22 important here and a few things that are very
23 analogous to our case. This was an involuntary -- I'm
24 sorry, this was a voluntary admission here. We've
10:52 25 established that with Mr. Aronfeld. This wasn't a

1 Baker Act, this wasn't a Marchman Act. This was
2 somebody who voluntarily admitted themselves into the
3 program and that's what Paddock talks about and what
4 Paddock says was: "The plaintiff offered an
10:52 5 alternative that the doctor should have caused the
6 plaintiff to be involuntarily hospitalized under the
7 Baker Act."

8 This holding says: "We're not prepared under the
9 facts to impose such a legal duty. The language of
10:52 10 the Baker Act is permissive and there's no basis for
11 imposing an affirmative obligation on other mental
12 health care professionals or psychiatrists to do this.
13 We decline to force every psychiatrist to navigate the
14 waters in deciding whether or not to involuntarily
10:52 15 detain and examine a patient."

16 So to the extent that Mr. Aronfeld argues that,
17 well, they should have done something different than
18 discharge him, this was a voluntary admit to the
19 hospital. Mr. Martinez could have left any time he
10:53 20 wanted to unless they decided to Baker Act him, and
21 there is no such argument being made here and there's
22 no such duty under the law that is extended to health
23 care providers to forcibly or involuntarily commit
24 somebody when they are voluntarily admitted into such
10:53 25 a program.

1 That dovetails nicely into the Lowlor case which
2 specifically holds its last sentence:

3 "Florida law has not yet imposed a legal duty on
4 a psychotherapist for the suicide of a client who is
10:53 5 being treated in an outpatient situation."

6 Those are the two exact circumstances we're
7 dealing with in this case. A voluntary admission to a
8 program and an outpatient suicide. There is no
9 allegation and there is no duty under Florida law to
10:53 10 transfer or make a voluntary admitmant into a Baker
11 Act or involuntary commitment. Mr. Martinez was free
12 to leave under the terms of the voluntary commitment
13 and when he committed suicide, it was done during an
14 outpatient treatment basis and there is no duty under
10:54 15 the law under that set of circumstances.

16 THE COURT: Anything else or ---

17 MR. MENDLESTEIN: Well, from the duty
18 perspective, no. I don't know if Mr. Falk wants to
19 correct the factual aspect of the record, Your Honor.

10:54 20 THE COURT: Mr. Falk, do you want to say
21 anything?

22 MR. FALK: If the Court wants me to, there are
23 certain factual assertions that although not made in
24 the complaint which might make it easier for the Court
10:54 25 to understand ---

1 THE COURT: Well, I really have no preference.
2 This is your record.

3 MR. FALK: Okay, then I will because sometimes
4 lawyers don't know when to shut up.

10:54 5 The IPN, when he self-reported himself to the
6 IPN, you don't lose your license. What you do is when
7 you self-report yourself to the IPN, they say to you
8 you must go to a treatment facility. In addition to
9 going to the treatment facility, you must advise your
10:54 10 employer of the situation.

11 THE COURT: Well, that's outside of the
12 pleadings, right?

13 MR. FALK: Right.

14 THE COURT: So please confine yourself to the
10:54 15 complaint any way.

16 MR. FALK: And the other point is that
17 Mr. Aronfeld in his argument said well, we had to tell
18 IPN. Pursuant to the terms, we must tell IPN.
19 Otherwise he can't keep his license.

10:55 20 THE COURT: Again, outside the complaint.

21 MR. FALK: Outside. I wanted the Court to
22 understand the factuals.

23 THE COURT: Now that you've told me, I have to
24 forget about that.

10:55 25 MR. FALK: Okay.

1 MR. YEGELWEL: I just need one minute for the
2 record.

3 I have filed a memorandum in support of the
4 motion to dismiss the second amended complaint on
10:55 5 behalf of my client, Doctor LaRocca and his PA. It
6 was filed December 7th. You don't have to go to it,
7 Your Honor, because it essentially incorporates the
8 arguments which I think were very clearly made by
9 hospital counsel on the issue of the Lowlor and the
10:55 10 Paddock cases, which are the key cases argued today
11 and cited in Doctor La Rocca's memorandum so the
12 grounds are the same, for the record, as cited in the
13 memorandum and the arguments are adopted.

14 THE COURT: Thank you.

10:56 15 Mr. Aronson?

16 MR. ARONFELD: Aronfeld.

17 THE COURT: Aronfeld, I'm sorry.

18 MR. ARONFELD: Just briefly in response ---

19 THE COURT: Aronson was a famous racer. Isn't he
10:56 20 the guy that was killed?

21 MR. FALK: Yeah, Arrington.

22 THE COURT: Aronson. I don't know. Never mind.
23 Strike that.

24 MR. ARONFELD: The Chacko case has absolutely
10:56 25 nothing to do with this because in Chacko, the

1 psychiatrist was begging the family to have the kid
2 admitted that burned herself to death. Doctor Chacko
3 suggested hospitalization and the Paddocks refused.
4 It has nothing to do with this case, and the Beverly
10:56 5 Hills case is almost a landlord tenant dispute that is
6 a rental property. It has absolutely nothing to do
7 with the facts in this case. It all boils down to two
8 important factors in my humble opinion; custody. What
9 is custody, and why was he in the outpatient program?
10:56 10 If he's in the outpatient program is that still
11 custody? Yes. He had an obligation to report there
12 every single day. He was being treated by their
13 employees, Mr. Millerick. Doctor LaRocca was still
14 his physician. He had to and gave urine and blood
10:57 15 samples while he was in the outpatient facility. He
16 had to attend meetings there, so he is still in their
17 custody. The only reason he is in that outpatient
18 facility is because of the negligence and here's what
19 frightens me: If you agree with the defense on this,
10:57 20 Judge, what frightens me is you'll basically be
21 telling them, "You know what, round up all of your
22 potentially suicidal patients. Don't give them a
23 psychiatric evaluation. Let's discharge them, let's
24 bus them down to Pinecrest and if they commit suicide,
10:57 25 it happened outside our premises, it's not our

1 responsibility."

2 It's a very, very dangerous road you would be
3 leading the hospitals, doctors, addiction treatment
4 program, psychologists in the State of Florida down if
10:57 5 you were to rule in their favor by saying, "Look, as
6 long as it happens outside of our four square walls,
7 it's not our fault."

8 It presupposes that he got the proper treatment
9 while he was in the four square walls, so our
10:58 10 allegation is they were negligent in their care and
11 treatment. The only reason he was outside of their
12 four square walls was because of their negligence, and
13 he was still under their custody and control. And
14 until they green lit him, his nursing license was
10:58 15 suspended.

16 THE COURT: Green lit?

17 MR. ARONFELD: Green lit him that he could go
18 back to work and say that he was done with their
19 treatment. He couldn't go back to work. His license
10:58 20 was still suspended so this isn't a voluntary
21 admission. It was mandatory for him to maintain his
22 license to practice nursing and he was under their
23 care and custody while he committed suicide. It just
24 didn't happen in the four square walls of their
10:58 25 building, and it would have never happened had he not

1 been discharged through their negligence.

2 THE COURT: Well, it seems to me and please, help
3 me with this, with your complaint if you have alleged
4 something more than this, but when I look at this and
10:59 5 when I distill down your allegations, what I come up
6 with is a man came in who was an alcoholic and who
7 obviously, by virtue of his condition and claiming to
8 be bottomed out, might possibly be depressed.

9 Fair enough?

10:59 10 MR. ARONFELD: And he had a history of depression
11 and had taken depression medication before.

12 THE COURT: So possibly depressed; now alcohol,
13 depression, I can sort of see that allegation.

14 And then you say that they failed to
10:59 15 psychiatrically evaluate him and that they failed to
16 keep him in custody, instead sent him to an outpatient
17 program.

18 MR. ARONFELD: Evening program.

19 THE COURT: Well, outpatient. Evening, day,
10:59 20 either way. Outpatient.

21 MR. ARONFELD: Right.

22 THE COURT: I don't find any duty to do
23 otherwise, and let me tell you why.

24 In Lowlor, which I didn't finish putting my notes
11:00 25 on, there were notes about possible depression but the

1 Court made note that there was no indication of
2 suicidal tendencies, no evidence of suicide attempts,
3 threats of suicide or any mention of suicide, although
4 there was depression but that alone did not
11:00 5 necessarily create a foreseeable zone of risk of
6 suicide imposing a legal duty on a psychotherapist.
7 And I believe that is a duty to keep him in the
8 hospital or ---

9 MR. ARONFELD: And you might note, Your Honor, in
11:00 10 Lowlor it was months after discharge. This is days
11 after discharge from the inpatient facility.

12 THE COURT: These cases talk about there being a
13 fuzzy gray area, whether days or months.

14 MR. ARONFELD: Did they ask him about a prior
11:00 15 suicide attempt or his family about prior suicide
16 attempts?

17 THE COURT: Let me go on because Paddock is a
18 stronger case for the defense because they cite to a
19 string of cases all over the country and I'll quote
11:01 20 from just some of them.

21 "The liability of doctor, psychiatrist," I guess
22 that's an ALR 4, "Authorities," I guess the ALR
23 suggests that "The authorities actually support the
24 holding that a psychiatrist has no duty to assume
11:01 25 custodial care over his patient."

1 On the next column, I'm reading from Page 6,
2 apparently, there is a Paradies, P-A-R-A-D-I-E-S,
3 case, and the blurb there is, "Mental hospital had no
4 duty to involuntarily commit patient once he had been
11:01 5 released."

6 Then we go on to Reid, Runyon versus Reid where
7 they say "Summary judgment affirmed in favor of
8 psychiatric hospital where decedent committed suicide
9 while an outpatient," so apparently that hospital let
11:01 10 him become an outpatient and in New York, they say
11 that, "The psychiatrist's decision to release a
12 patient from a mental hospital is a matter of
13 professional medical judgment for which liability
14 cannot attach."

11:02 15 Going on to the Fowler case, Washington held
16 that: "Whether self-destructive patients are to be
17 placed in an open ward or physically restrained is a
18 matter of medical judgment." I would equate that to
19 in-hospital treatment versus outpatient treatment
11:02 20 through this night program.

21 And then finally, they go on to say:

22 "Under the facts and circumstance of this case,"
23 which are pretty similar, "they are unwilling to
24 extend the duty of custodial supervision and care to
11:02 25 an outpatient relationship between a psychiatrist and

1 a patient."

2 So the decision about in the hospital treatment
3 versus outpatient treatment apparently is protected.

4 MR. ARONFELD: I don't disagree, Your Honor, and
11:02 5 here's the distinction in this case: Chacko, the
6 psychiatrist, wanted the patient admitted. No
7 psychiatrist saw Mr. Martinez. They had one in there
8 and they didn't call the consult in.

9 THE COURT: That's where you get to without any
11:03 10 expressions of suicidal ideation or indication of
11 suicidal attempts, which there was even a police
12 report in another case where there was a suicide
13 attempt report in a police report, that there was no
14 duty to then have him evaluated. So we have a guy
11:03 15 coming in because he's an alcoholic.

16 MR. ARONFELD: And an emotional bottoming out.

17 THE COURT: Let's give him depressed.

18 MR. ARONFELD: And erratic behavior.

19 THE COURT: I'll call it depressed. Erratic
11:03 20 behavior is not necessarily suicidal.

21 MR. ARONFELD: And a history of depression where
22 he took medication, and you combine all those and you
23 have a psychiatrist right there in-house and you fail
24 to utilize it, and the documents are all sheered so
11:03 25 everything he says is being told to his employer.

1 Everything he says is being told to his wife and
2 everything he says is to IPN. So we can't allow the
3 records to deprive this case of going to a jury
4 because the records aren't really valid because it's
11:04 5 not a real evaluation.

6 In every case that Mr. Mendlestein cited and that
7 you just rattled off, all had real psychiatrists that
8 evaluated a real patient. This is a distinguishable
9 case, Your Honor.

11:04 10 THE COURT: So you're saying that someone comes
11 in for alcoholic treatment, it would be below the
12 standard of care not to have a psychiatrist evaluate
13 him and then, to evaluate him to keep him in the
14 hospital as opposed to outpatient?

11:04 15 MR. ARONFELD: No. You've got to add the
16 alcoholic.

17 THE COURT: So inference on inference on
18 inference on inference, you end up with a very
19 speculative situation.

11:04 20 MR. ARONFELD: It's not different than a medical
21 malpractice case where you have signs and symptoms.
22 So here's the signs and symptoms: You have a medical
23 professional of 20 years who had an emotional
24 bottoming out with erratic behavior and had to
11:05 25 surrender their license. A 20-plus history of

1 alcoholism and a history of taking depression
2 medications. These are all in the records. They
3 never find out what any of these things were. Then
4 you take the alcohol away from this guy in three days
11:05 5 and you discharge him without doing a psychiatric
6 evaluation and he goes and blows his brains out.
7 Obviously he had a mental illness that they failed to
8 diagnose. So I want to talk specifically about this
9 case.

11:05 10 It's a negligent evaluation, assessment and
11 discharge of this particular man with these problems.
12 And the fact that they asked him as a co-employer,
13 co-employee asking their own employee while he is
14 under a phenobarbital protocol, "Sir, do you have any
11:05 15 suicidal ideation or homicidal ideations? No. No."
16 That's not a sufficient evaluation of this man and by
17 virtue of the fact that he blew his brains out within
18 a few days, he had an underlying problem that they
19 failed to diagnose.

11:05 20 These are distinguishable cases from the ones
21 that the defense has cited. Had he had a psychiatric
22 evaluation and had this happened months and months
23 later while he was no longer their patient, I would
24 agree with Mr. Mendlestein. But he was still their
11:06 25 patient and they failed to give him the appropriate

1 care.

2 THE COURT: I would find that Garcia undercuts
3 that argument because there is no duty to fully assess
4 every condition of a patient.

11:06 5 MR. ARONFELD: I don't disagree, Your Honor, but
6 this is not ---

7 THE COURT: They assessed his alcoholic issues
8 and decided he needed to be in an outpatient facility
9 and he decides to commit suicide and that is something
11:06 10 that doctors, I don't think, can be held responsible
11 for all around the country. Doctors or hospitals.

12 MR. ARONFELD: If you go in, sir, saying, you
13 know what, I've got a bullet hole in my arm, and by
14 the way, when they take your blood pressure it's
11:06 15 elevated and your blood sugar is high, you can't
16 ignore those other things and discharge him. He was
17 telling them I have got depression. I've been treated
18 for depression. He had a previous suicide attempt
19 which they never inquired about. They never spoke to
11:06 20 his wife about it. They never asked about his access
21 to a firearm. So you can't just ignore the other
22 signs and symptoms and say, "You know what, you
23 reported yourself because of a bullet wound, we're
24 going to ignore the fact that you're a heart attack
11:07 25 waiting to happen."

1 THE COURT: Garcia undercuts that completely
2 because in Garcia, the allegation was that there was
3 even a police report made at the time where there was
4 supposedly an indication that what lead him to the
11:07 5 hospital was a suicide attempt, and they never paid
6 any attention to it. So that's even a stronger case
7 then what you're presenting.

8 MR. ARONFELD: I understand, but he was in an
9 emergency room and Garcia said look, he didn't get a
11:07 10 full physical, the emergency doctors were busy and
11 they were taking care of many things. This is a guy
12 that was in there for five days.

13 THE COURT: But that plaintiff alleged the
14 hospital was actually on notice of a suicide attempt
11:07 15 leading him to the hospital.

16 MR. ARONFELD: But the Court distinguished and
17 said, look, the E.R. doctors are there for specific
18 reasons and they're not there to do an evaluation of
19 every possible problem. This is completely different.
11:08 20 This is not an E.R. urgent life-threatening situation.
21 They had five days with this man plus three days in
22 outpatient to do what the appropriate standard of care
23 is.

24 THE COURT: You expressed one fear. My fear is
11:08 25 that anyone who gets depressed will be Baker Acted

1 without process. Basically, doctors will just have to
2 keep everybody in so you go in, whatever, you're an
3 alcoholic, you want some treatment, you're staying.
4 Or you go in and you say I'm depressed, you're
11:08 5 staying. We can't take the risk of letting you go
6 because you might kill yourself, and then we're going
7 to be sued.

8 So I don't know where the policy is going to fall
9 in the state but it seems like around the country
11:08 10 they're giving psychiatrists a break when it comes to
11 suicide because it's such a gray area and no one,
12 apparently under the law, can predict when someone is
13 going to do that, and your circumstances are even
14 weaker than these other cases that are presented, I
11:08 15 believe, so I'm going to grant the motion to dismiss
16 with prejudice.

17 Let the Third District chew on it and if they
18 send it back, these guys will be gutted of their
19 arguments and then we'll be on to merits of the case.

11:09 20 MR. MENDLESTEIN: I would imagine that is as to
21 all motions, Your Honor, all defendants?

22 THE COURT: Yes, they are all in the same boat as
23 far as this is concerned, whether they conspire
24 together to do a legal act or not.

11:09 25 MR. MENDLESTEIN: And there are lots of other

1 arguments which we don't have to get to because you're
2 just deciding the duty issue right now, correct?

3 THE COURT: That's all I'm deciding. I'm not
4 granting anything else.

11:09 5 MR. ARONFELD: Since this is definitely going to
6 the 3rd DCA, I'd just like to put on the record we're
7 not talking about an involuntary admission into the
8 hospital where he is being restrained or Baker Acted.
9 I'm talking about putting him into a residential
11:09 10 treatment program or the day program, situations where
11 he would have had a greater degree of supervision and
12 care as opposed to releasing this man into an unstable
13 environment of going home all day and just having to
14 report at night. These are not -- that's the
11:09 15 difference. I'm not talking about either you
16 discharge him or Baker Act him. There's a lot between
17 black and white here, Your Honor, and we're saying he
18 should have been put into the residential treatment or
19 given the option or put into the day treatment. He
11:10 20 wasn't given either option.

21 THE COURT: Well, whichever option was taken, it
22 would have been speculative as to what would have
23 happened beyond anyway to get this to a jury.

24 MR. ARONFELD: Our expert says more likely than
11:10 25 not, and that is not the appropriate issue for a

1 motion to dismiss, that would have been a directed
2 verdict ---

3 THE COURT: I think it's speculative as a matter
4 of law.

11:10 5 MR. ARONFELD: Our expert is going to say that
6 more likely than not he had the underlying signs and
7 symptoms of an impending depression, and had he been
8 put into a residential treatment program or day
9 program or had been psychiatrically evaluated by a
11:10 10 psychiatrist, which he never got, this suicide would
11 have been avoided.

12 THE COURT: Well, I wish you luck on appeal
13 because I feel sorry for this particular family on a
14 personal level.

11:10 15 MR. ARONFELD: Thank you, Your Honor. I
16 appreciate that, sir. So do I.

17 THE COURT: And I'm glad they at least have a
18 good attorney to take it out to the 3rd and see if you
19 can get this, another exception to what seems to be
11:10 20 the course of the way the law is going around the
21 country.

22 MR. ARONFELD: In all due respect, I appreciate
23 what you're saying and I'll give your sentiments to
24 the family, I don't think that they cited a single
11:11 25 case that is on point to what we're talking about. I

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respect your ruling, sir, but I don't think their cases are on point since they all had psychiatric evaluations, which he never got.

THE COURT: Well, off the record.

11:11

(A discussion was held off the record.)

(The proceedings were concluded at 11:12 a.m.)

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C E R T I F I C A T E

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I, Donna L. Gunion, Court Reporter, State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 11th day of January, 2012.



Donna Gunion

Donna L. Gunion

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