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PHOENIX MARINO

*McArdle v. Mission Hospital, Inc.*

63 N.Y.L. SCH. L. REV. 333 (2018–2019)

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*The disappearance of a sense of responsibility is the most far-reaching consequence of submission to authority.*<sup>1</sup>

The basis of a state's authority to commit an individual to an institution against his or her will is based upon two legal theories: *parens patriae*, or the protection of the individual from himself or herself; and police power, the protection of society from the individual.<sup>2</sup> Regardless of which theory a state uses to justify involuntary commitment, its primary interest when acting under such authority is "protection."<sup>3</sup> Yet, in a recent decision, a North Carolina hospital escaped civil liability when it authorized the release of Joshua McArdle, a troubled Iraqi-war veteran, resulting in the serious injury of his family members and his suicide.<sup>4</sup>

In *McArdle v. Mission Hospital, Inc.*, the North Carolina Court of Appeals held that Mission Hospital was not liable for negligence to the McArdle family because there was no special relationship creating a duty to protect the family in the pre-commitment stage of the involuntary commitment process.<sup>5</sup> The court found that the hospital did not have custody over Joshua, thus his family could not demonstrate the special relationship necessary to impose liability.<sup>6</sup>

This Case Comment contends that the North Carolina Court of Appeals erred in its analysis of the state's involuntary commitment statute and failed to consider relevant precedent establishing the hospital as a state actor, which would have created the special relationship needed for the negligence case against Mission Hospital to proceed. By precluding hospitals from owing a duty to third parties initiating commitment proceedings, the *McArdle* court sets a dangerous precedent that allows state actors like Mission Hospital to escape its responsibility of protecting society, a duty which comes with their involuntary commitment authority.

Joshua McArdle was a former U.S. Marine stationed in Iraq who suffered from post-traumatic stress disorder (PTSD) and severe drug and alcohol addiction.<sup>7</sup> Because of his "Other than Honorable" discharge from the Marine Corps due to drug use in 2008, Joshua was ineligible to receive care and health services through the Veterans Administration (VA).<sup>8</sup> As a result, Joshua never received any treatment

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1. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 8 (1974). A psychologist at Yale University, Stanley Milgram achieved notoriety by conducting an experiment that tested the boundaries of the human conscience against authority. John Greenwood, *How Would People Behave in Milgram's Experiment Today?*, BEHAV. SCIENTIST (July 24, 2018), <https://behavioralscientist.org/how-would-people-behave-in-milgrams-experiment-today>.
  2. See Andrew Scull, *The Theory and Practice of Civil Commitment*, 82 MICH. L. REV. 793, 796–97 (1984).
  3. See generally Debra T. Landis, Annotation, *Modern Status of Rules as to Standard of Proof Required in Civil Commitment Proceedings*, 97 A.L.R.3d 780 (2017).
  4. *McArdle v. Mission Hosp., Inc.*, 804 S.E.2d 214 (N.C. Ct. App. 2017).
  5. *Id.* at 224.
  6. *Id.*
  7. *Id.* at 216.
  8. *Id.*

for his PTSD or his addictions, despite his growing paranoia and massive personal collection of weapons and ammunition.<sup>9</sup>

In early May of 2013, the McArdle family gathered in Asheville, North Carolina to celebrate the wedding of Joshua's sister, Seldon.<sup>10</sup> On May 7 and 8, Joshua engaged in multiple violent episodes with various family members, including choking his brother Banning while Banning was driving, attempting to break down the door of his parents' house, and attacking his brother Jacob.<sup>11</sup> Seldon called the police, but Joshua left the home before the sheriff's deputies arrived.<sup>12</sup> At the suggestion of one of the responding deputies, Arthur McArdle, Joshua's stepfather, executed an Affidavit and Petition for Involuntary Commitment (the "Petition") before the Buncombe County Assistance Clerk of Superior Court (the "Clerk"), seeking "involuntary commitment of Joshua on the grounds that he was (1) mentally ill and dangerous to self or others and in need of treatment . . . and (2) a substance abuser and dangerous to self and others."<sup>13</sup> Finding reasonable grounds to believe the alleged facts in the Petition, the Clerk issued a Findings and Custody order for Involuntary Commitment<sup>14</sup> and directed the Buncombe County Sheriff's Department to pick up Joshua and transport him to Mission Hospital for an initial examination pursuant to North Carolina law.<sup>15</sup>

On May 8, the sheriff's department delivered Joshua to Mission Hospital, where nurses in the emergency department made initial observations about Joshua's anxiety

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9. *Id.* ("[Joshua] abused alcohol, cocaine, Percocet, and marijuana, experienced extreme paranoia, and amassed a personal arsenal of weapons and ammunition.").

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*; see also N.C. GEN. STAT. §§ 122C-261(a), -281(a) (2018) (prescribing that anyone with knowledge of a person's mental illness or substance abuse can execute an affidavit and petition a clerk or magistrate to take them into custody for examination).

14. *McArdle*, 804 S.E.2d at 216; see also §§ 122C-261(b), -281(b):

If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true . . . the clerk or magistrate shall issue an order to a law enforcement officer or any other person authorized under G.S. 122C-251 to take the respondent into custody for examination by a physician or eligible psychologist.

15. *McArdle*, 804 S.E.2d at 216. According to §§ 122C-263(a) and 122C-283(a):

Without unnecessary delay after assuming custody, the law enforcement officer or the individual designated by the clerk or magistrate under G.S. 122C-251(g) to provide transportation shall take the respondent to an area facility for examination by a physician or eligible psychologist; if a physician or eligible psychologist is not available in the area facility, the person designated to provide transportation shall take the respondent to any physician or eligible psychologist locally available. If a physician or eligible psychologist is not immediately available, the respondent may be temporarily detained in an area facility, if one is available; if an area facility is not available, the respondent may be detained under appropriate supervision in the respondent's home, in a private hospital or a clinic, in a general hospital, or in a State facility for the mentally ill, but not in a jail or other penal facility.

and threat levels.<sup>16</sup> Dr. James Roberson, a physician for the hospital, referred Joshua to the hospital’s psychiatric unit for the required first examination, where he was eventually examined by social worker and hospital employee Dina Paul (“Paul”).<sup>17</sup> In conducting interviews with Joshua, Arthur, Banning, and Jacob, Paul learned of Joshua’s addictions, his “Other than Honorable” discharge from the Marine Corps, his lack of VA benefits, and his self-acknowledged anger issues.<sup>18</sup> Paul also learned of the violent physical altercation between Joshua and his brother Jacob that led to the filing of the Petition.<sup>19</sup>

In her evaluation report to Dr. Roberson, Paul recommended against inpatient commitment for Joshua after concluding that he “can benefit from return to home with referral to VA for help with benefits and therapy.”<sup>20</sup> After a discussion with Paul, Dr. Roberson signed the “Examination and Recommendation to Determine Necessity for Involuntary Commitment” form indicating that Joshua did not meet the criteria for inpatient commitment.<sup>21</sup> That evening, Mission Hospital discharged Joshua without notifying the McArdle family, thus terminating the involuntary commitment proceedings.<sup>22</sup>

Three nights after the discharge, at around 1:20 a.m., on his sister’s scheduled wedding day, Joshua, intoxicated and armed with a .357 Magnum revolver, broke into the McArdle family residence, where he shot and severely wounded Banning and Arthur before fatally shooting himself in the head in front of his mother and sisters.<sup>23</sup> The weight of his body landed on his mother’s leg, breaking it in several places.<sup>24</sup>

On December 29, 2014, the McArdle family brought suit against defendants Mission Hospital, Inc. and Mission Health System, Inc. (“Defendants”) for negligence, gross negligence, and negligent infliction of emotional distress arising from the acts and omissions of Defendants’ employees in the first examination.<sup>25</sup> Defendants filed their answer and a motion to dismiss, arguing that they owed no legal duty to the

16. *McArdle*, 804 S.E.2d at 216. The nurses at Mission Hospital initially recorded in Joshua’s medical chart that he “appeared ‘Anxious’ with ‘Impaired Focus/Concentration’ and that he ‘Denies suicidal ideation/homicidal ideation at present’ and ‘Minimizes problem[s].’” *Id.* at 217.

17. *Id.* at 217. The McArdles contend that Paul was not qualified per §§ 122C-263(a) and 122C-283(a) to examine Joshua, but the court never reached that issue. *Id.*

18. *Id.*

19. *See id.*

20. *Id.* Paul’s report apparently assumed Joshua’s eligibility for VA benefits despite his “Other than Honorable” discharge. *Id.*

21. *Id.* Dr. Roberson’s form stated that Joshua “was able . . . to contract for safety—denie[d] suicidal ideation and homicidal ideation with no psychotic symptoms,” and had “[n]o psychiatric history.” *Id.* The form failed to indicate that Joshua was “mentally ill and/or a substance abuser and dangerous to himself or others,” even though Arthur had expressed this concern. *Id.*

22. *Id.*

23. Plaintiffs-Appellants’ Brief at 5–6, 12, *id.* (No. COA16-554).

24. *Id.* at 6.

25. *McArdle*, 804 S.E.2d at 217–18.

McArdles during or after Joshua's examination.<sup>26</sup> The McArdles argued that a duty to the McArdle family existed because a special relationship was created between Defendants and Joshua by virtue of Defendants' legal right to control Joshua, thereby creating a legal duty to the McArdle family.<sup>27</sup> They also noted a distinction between "custody" and a "legal right to control," maintaining that Defendants ultimately had the "legal right to control" because they had the authority to retain Joshua by recommending involuntary commitment for either mental illness or substance abuse.<sup>28</sup> The Superior Court of North Carolina granted Defendants' motion to dismiss, holding that Defendants owed the McArdles no legal duty.<sup>29</sup> The McArdles appealed.<sup>30</sup>

The issue of first impression before the North Carolina Court of Appeals was whether Defendants, in conducting the first examination of Joshua in the pre-commitment stage, owed a legal duty to the McArdles as third parties under state common law or the involuntary commitment statutory scheme.<sup>31</sup> In analyzing the common law rule that "there is neither a duty to control the actions of a third party, nor to protect another party," the court relied largely on *Scadden v. Holt*, which set forth the exception that a duty to third parties may exist where there is a special relationship between the defendant and a third party, such that "(1) the defendant knows or should know of the third person's violent propensities and (2) the defendant has the ability and opportunity to control the third person at the time of the third person's criminal acts."<sup>32</sup> The court emphasized that the "ability and opportunity to control must be more than mere physical ability to control. Rather, it must rise to the level of custody, or legal right to control."<sup>33</sup>

The court had previously recognized a special relationship between healthcare facilities and third-party plaintiffs when "an individual is involuntarily committed, negligently released by the defendant, and the negligent release proximately results in harm . . . ."<sup>34</sup> By contrast, the court had found no special relationship when a

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26. *Id.* at 218.

27. *Id.* at 222–23.

28. *See McArdle*, 804 S.E.2d at 219.

29. *Id.* at 218. The Superior Court also held that no amended set of facts or circumstances would support a finding that Defendants owed the McArdle family a legally recognized duty. *Id.*

30. *Id.*

31. *Id.* at 219.

32. 733 S.E.2d 90, 93–94 (quoting *Stein v. Asheville City Bd. of Educ.*, 626 S.E.2d 263, 269 (N.C. 2006)).

33. *Id.* at 94.

34. *McArdle*, 804 S.E.2d at 219; *see, e.g., Gregory v. Kilbride*, 565 S.E.2d 685, 690 (N.C. Ct. App. 2002) ("[A]n independent duty arises to protect third persons from harm by the release of a mental patient who is involuntarily committed."); *Davis v. N.C. Dep't of Human Res.*, 465 S.E.2d 2, 7 (N.C. Ct. App. 1995) ("Rivers was involuntarily committed into defendant's custody and [the defendant], therefore, had a duty to exercise reasonable care in the protection of third parties from injury by Rivers."); *Pangburn v. Saad*, 326 S.E.2d 365, 367–68 (N.C. Ct. App. 1985) (recognizing a duty to third parties where the defendant prematurely released an involuntarily-committed patient who then stabbed the plaintiff approximately twenty times).

voluntarily-committed individual is released and thereafter causes harm.<sup>35</sup> Thus, the issue of whether a special relationship exists during the “pre-commitment” stage of the involuntary commitment process was an open question.<sup>36</sup>

The court then reviewed the statutory scheme, and although it recognized that the statute’s language may have imposed a duty of care on Defendants as to Joshua, it refused to extend that duty to the McArdle family.<sup>37</sup> The court ultimately accepted Defendants’ arguments, concluding that North Carolina law does not recognize an affirmative duty of psychiatric care providers to seek involuntary commitment for individuals.<sup>38</sup> In affirming the lower court’s decision, the court held that “the examiner has no discretion whether or not to release a respondent. It is the statutes that dictate the results based on the examiner’s findings, and the examiner is not authorized by law to deviate from those statutorily-imposed results.”<sup>39</sup> The court, therefore, declined to extend liability to third parties in the pre-commitment stages of involuntary commitment proceedings for fear of having the special relationship exception “swallow the rule.”<sup>40</sup>

This Case Comment contends that the North Carolina Court of Appeals erred in affirming the lower court’s decision to grant Defendants’ motion to dismiss. First, the *McArdle* court inappropriately examined North Carolina General Statute section 122C through a plain meaning analysis because ambiguity existed surrounding the meaning of “custody,” and the court failed to resolve the ambiguity in the statute. Second, the court failed to consider persuasive precedent that would have established Defendants’ custody over Joshua through the statutory delegation of state police power. Finally, allowing medical professionals to escape responsibility when failing to protect third parties from dangerous, mentally-ill patients runs counter to societal values of accountability and justice.

The court’s first error was that it failed to recognize the ambiguity of the word “custody” and thus incorrectly engaged in a plain meaning analysis of the statute. Courts are only to construe a statute by its plain meaning if there is no ambiguity.<sup>41</sup> When the statute’s language is susceptible to multiple interpretations, it is the court’s duty to determine the legislature’s intent and interpret the statute consistent with that

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35. *McArdle*, 804 S.E.2d at 219; see, e.g., *King v. Durham Cty. Mental Health Dev. Disabilities & Substance Abuse Auth.*, 439 S.E.2d 771, 775 (N.C. Ct. App. 1994) (finding defendants lacked custody over a voluntarily-committed individual without a court order).

36. *McArdle*, 804 S.E.2d at 219.

37. *Id.* at 221–23.

38. *Id.*

39. *Id.* at 223.

40. *Id.* at 224. On September 19, 2018, the McArdle family filed a petition for discretionary review of the appellate court’s decision, but they were denied certiorari on all issues without an opinion. See *McArdle v. Mission Hosp., Inc.*, 807 S.E.2d 150 (N.C. 2019).

41. *Burgess v. Your House of Raleigh, Inc.*, 388 S.E.2d 134, 136 (N.C. 1990) (citing *North Carolina ex rel. Util. Comm’n v. Edmisten*, 232 S.E.2d 184 (N.C. 1977)).

intent.<sup>42</sup> To properly determine legislative intent, courts must fully consider the context of the ambiguous term in accordance with all provisions of the statute, with the understanding that no provision should be considered mere “surplusage.”<sup>43</sup> Courts may also rely on dictionary definitions to determine the meaning of ambiguous terms.<sup>44</sup>

The word “custody” is used throughout the various provisions of the North Carolina involuntary commitment statute. The provisions that dictate the initiation of involuntary commitment proceedings state that “the clerk or magistrate shall issue an order to a law enforcement officer or any other person authorized under G.S. 122C-251 to take the respondent into custody for examination by a physician or eligible psychologist.”<sup>45</sup> The language in the provisions discussing the first examination in the involuntary commitment process also refer to custody: “Without unnecessary delay after assuming custody, the law enforcement officer or the individual designated by the clerk . . . shall take the respondent to an area facility for examination by a physician or eligible psychologist . . .”<sup>46</sup> The legislature, however, does not define custody in the definitions provision of the statute.<sup>47</sup> Not only is the term “custody” left undefined, but none of the language in any provision ever clarifies *who* is supposed to have custody over the respondent, the police or the hospital, or *when* such custody is to be transferred, rendering it ambiguous. Thus, instead of applying a plain meaning analysis, the court should have examined the words surrounding “custody” in the context of all the provisions, reviewed legislative intent, or consulted a dictionary in order to resolve the ambiguity.

Merriam-Webster defines “custody” as “immediate charge and *control* (as over a ward or a suspect) exercised by a person or an authority.”<sup>48</sup> To further clarify this definition, Merriam-Webster defines “control” as “to exercise restraining or directing influence over.”<sup>49</sup> Further, the words “for examination” directly follow “custody” in the statutory provisions governing the petition for seeking involuntary commitment.<sup>50</sup>

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42. *Id.* at 136–37 (citing *Young v. Whitehall Co.*, 49 S.E.2d 797 (N.C. 1948)); *see also* *Dickson v. Rucho*, 737 S.E.2d 362, 369–70 (N.C. 2013) (determining the legislative intent behind a North Carolina redistricting statute that contained ambiguous language).

43. *Burgess*, 388 S.E.2d at 140 (quoting *Jolly v. Wright*, 265 S.E.2d 135, 139 (N.C. 1980)).

44. *Wind v. City of Gastonia*, 738 S.E.2d 780, 785 (N.C. Ct. App. 2013) (quoting *Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 616 S.E.2d 602, 607 (N.C. Ct. App. 2005)).

45. N.C. GEN. STAT. § 122C-261(b) (2018).

46. *Id.* §§ 122C-263(a), -283(a). Custody is also discussed in the transportation provision of the statute: “[L]aw enforcement officers, to the extent possible, shall advise respondents when taking them into custody that they are not under arrest and have not committed a crime, but are being transported to receive treatment and for their own safety and that of others.” *Id.* § 122C-251(c).

47. *See id.* § 122C-3.

48. *Custody*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/custody> (last visited Mar. 23, 2019) (emphasis added).

49. *Control*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/control> (last visited Mar. 23, 2019).

50. §§ 122C-261(b), -281(b).



These words cannot be mere surplusage—in context, it is clear that the legislature’s intended purpose of custody is examination, and therefore anyone performing the examination would have authority via statute to “exercise restraining or directing influence over” the respondent throughout their examination. The determination by the examiner in the pre-commitment stage ultimately affects whether or not someone being examined will be released,<sup>51</sup> establishing custody and creating the necessary grounds for the special relationship, and thus a duty of care, to third parties like the McArdles.

Furthermore, had the court attempted to take into consideration legislative intent when reviewing the statutory language, it would have found that Senate Bill 630, submitted to the General Assembly of North Carolina prior to the *McArdle* decision, introduced proposed revisions to the applicable statutes, further supporting the legislature’s intent to treat the term “custody” broadly.<sup>52</sup> The additional language proposed for General Statute section 122C-261 is as follows:

No commitment examiner . . . *responsible for the custody*, examination, detention, management, supervision, treatment, or release of an individual examined for commitment . . . shall be held liable . . . for taking reasonable measures to temporarily detain an individual for the period of time necessary to complete a commitment examination, . . . as long as the commitment examiner has a reasonable and good-faith belief that detention pending the examination and issuance of a custody order is necessary to protect the individual or others from bodily harm or life endangerment.<sup>53</sup>

The legislature clearly intended for the commitment examiner to be “responsible for the custody” and “detention” of the respondent, as suggested by these proposed changes. The changes even go so far as to shield examiners from liability for taking the necessary steps to prevent harm to third parties,<sup>54</sup> an affirmative directive implying a pre-existing duty to third parties absent this statutory revision. Had the court considered the legislature’s intent as evidenced by these proposed changes, it would have found that Defendants did, in fact, have custody over Joshua during the examination in the pre-commitment stage such that a special relationship was formed and a legal duty flowed to the McArdle family.

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51. See §§ 122C-263(d), -283(d).

52. S. 630, 2017 Gen. Assemb., 2017–2018 Sess. (N.C. 2017), <http://www.ncleg.net/Sessions/2017/Bills/Senate/PDF/S630v1.pdf>. The proposal was referred to the Committee on Rules, Calendar, and Operations of the House on April 27, 2017, nearly three months before the *McArdle* court issued its opinion. See *Senate Bill 630 / SL 2018–33*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/BillLookup/2017/S630> (last visited Feb. 24, 2019).

53. N.C. S. 630 at 33 (emphasis added). Indeed, this new version has been signed into law and takes effect October 1, 2019. See N.C. G.S. 122C-261(d)(8) (effective Oct. 1, 2019).

54. See N.C. S. 630. This exemption from liability applies to a commitment examiner, area facility, acute care hospital, general hospital, or other site of first examination, or its officials, staff, employees, or any individual “who follows accepted professional judgment, standards, and practice.” *Id.* Thus, had the court properly considered legislative intent, it would have needed to separately determine whether Defendants “follow[ed] accepted professional judgment, standards, and practice” to shield them from liability. See *id.*

The *McArdle* court's second error was that it ignored persuasive authority involving involuntary commitment statutes akin to those in North Carolina. Indeed, other courts have recognized that first examiners have legal control over respondents through a statutory delegation of state police power to make a factual determination regarding an individual's deprivation of personal liberty.

In *Plain v. Flicker*, the United States District Court of New Jersey held that the state of New Jersey "delegated to physicians its police power" to deprive an individual of his liberty pursuant to state law, whether or not "the physicians are in private practice or are public employees."<sup>55</sup> Using a two-prong "joint action test" for determining whether private action constitutes state action, the court recognized that private hospitals and physicians with statutory authority to examine and make a determination affecting a person's liberty had such a significant level of control as to be subject to due process claims as state actors.<sup>56</sup> The court equated public doctors and hospitals acting under authority from the involuntary commitment statutes with "state actors," namely police, who have the authority to quarantine the individual in the first place.<sup>57</sup>

Similarly, in *Kay v. Benson*, the United States District Court for the District of New Hampshire also held that a defendant physician, in issuing an emergency detention certificate for involuntary commitment under New Hampshire law, "was clothed with state authority so substantial in nature as to render his actions virtually identical to actions taken by the state," upholding the due process claim against him under 42 U.S.C. § 1983.<sup>58</sup> The court further justified its holding by explaining that under New Hampshire law, the state legislature delegated to private individuals the power to detain a person against his wishes, a power historically exercised by government entities that a private physician would not otherwise have.<sup>59</sup>

Finally, in *Cummings v. Charter Hospital*, the Supreme Court of Nevada held that Nevada statutes dictating involuntary commitment procedures constitute a delegation of state power by authorizing private parties to restrain individuals against their will, an exercise of "significant power over those alleged to be mentally ill."<sup>60</sup> In response to

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55. 645 F. Supp. 898, 908 (D.N.J. 1986).

56. *Id.* at 907–08. The two-part test for determining whether private action qualifies as state action was set forth by the U.S. Supreme Court in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155 (1978) ("[Plaintiffs] are first bound to show that they have been deprived of a right 'secured by the constitution and the laws' of the United States. They must secondly show that [the defendant] deprived them of this right acting 'under color of any statute' of the [state].").

57. *Plain*, 645 F. Supp. at 908.

58. 472 F. Supp. 850, 851 (D.N.H. 1979).

59. *Id.*

60. 896 P.2d 1137, 1144–45 (Nev. 1995). Like North Carolina, Nevada's statutes allow for private persons and state actors to take an individual into custody for an examination to determine whether they should be involuntarily committed. *See* NEV. REV. STAT. ANN. §§ 433A.160, .200 (West 2019). They may also "transport the person alleged to be a person with mental illness to a public or private mental health facility or hospital . . ." *Id.* § 433A.160(1)(a)(2). The petition for involuntary admission may be filed by a "spouse, parent, adult children or legal guardian of the person to be treated or by any physician, physician assistant, psychologist, social worker or registered nurse, by an accredited agent of the Department or by any officer authorized to make arrests in the State of Nevada." *Id.* § 433A.200.

the argument that the defendants were private parties and thus could not be sued for denying due process, the court instructed that the “public function” test considers a private entity a state actor when the state grants them “powers traditionally exclusively reserved to the [s]tate.”<sup>61</sup> The court concluded that the defendant hospital was “clothed with the authority of state law and exercised a power possessed by virtue of that law” when it detained the plaintiffs against their will, thus rendering them state actors.<sup>62</sup>

Here, it is clear that the *McArdle* court ignored the realm of case law in which hospitals and physicians with state-delegated authority to control are accountable as state actors during the involuntary commitment process. By not considering the above precedent, the North Carolina Court of Appeals failed to recognize that Defendants, under the North Carolina involuntary commitment scheme, were delegated and exercised state police power to deprive Joshua of his personal liberty, and as such, had legal “custody” in the pre-commitment stage which created a duty to the McArdle family. The court acknowledged that law enforcement had custody of Joshua from the moment the Petition was executed by the Clerk,<sup>63</sup> but failed to acknowledge that legal custody transferred to Defendants once they performed the initial examination, during which time they had the legal authority to exercise control over Joshua. In its holding, the *McArdle* court credited the operation of the statute itself with creating the responsibility of exercising control over Joshua, stating that the hospital would have had custody of Joshua once he was admitted under the statute.<sup>64</sup> However, absent the initial examination during the pre-commitment stage, the statute fails to operate, and as such, the power to determine whether someone shall be involuntarily committed equates to substantial control and custody at that time.

Lastly, the *McArdle* decision provides no minimum standards for hospitals to do what is necessary to protect third parties who initiate involuntary commitment proceedings, highlighting a gap in accountability during the pre-commitment stage. Medical professionals involved in the first examination have a moral and social duty to take all appropriate, cautionary measures to protect respondents and third parties when a real threat is expressed.<sup>65</sup> A 2001 article by Alan Felthous and Claudia Kachigian properly characterizes a clinician’s duty to warn third parties:

Regardless of what legal protective duties are in effect, as a rule, the most prudent and preventative measure to handle a patient who is seriously mentally ill, and as a result is dangerous to others, is hospitalization. In such a case, hospitalization is the most reasonable intervention regardless of whether the risk is generalized to anyone or specific to an identifiable victim. . . . If the patient refuses voluntary hospitalization, civil commitment should

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61. *Cummings*, 896 P.2d at 1142 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)).

62. *Id.* at 1144–45.

63. *McArdle v. Mission Hosp., Inc.*, 804 S.E.2d 214, 221 (N.C. Ct. App. 2017).

64. *Id.* at 222.

65. See generally Alan R. Felthous & Claudia Kachigian, *To Warn and to Control: Two Distinct Legal Obligations or Variations of a Single Duty to Protect?*, 19 BEHAV. SCI. & L. 355 (2001).

not be avoided merely because of a possible increase in exposure to liability where a duty to control exists only if the patient is committed.<sup>66</sup>

The *McArdle* decision overlooks society's moral outrage when those with state authority fail to protect others who are at risk of being harmed.<sup>67</sup> Hospitals that provide the first examination in an involuntary commitment proceeding must be legally required to reasonably intervene when they are made aware that a third party faces an imminent threat by a mentally unstable individual.<sup>68</sup> As a result of the *McArdle* decision, no party can be held responsible for failing to heed the legitimate fears of those closest to the person whose commitment is sought, an outcome that is at odds with the sense of morality that tort law generally seeks to enforce.<sup>69</sup>

The court should have enforced social morality by recognizing that with such state authority to control comes a responsibility to protect—not only the individuals who are being evaluated for commitment, but also third parties who initiate involuntary commitment proceedings. The consequences of allowing hospitals acting under state authority to escape responsibility will be far-reaching in its effect of separating law from social morality.<sup>70</sup>

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66. *Id.* at 370.

67. See Nurit Guttman & William Harris Ressler, *On Being Responsible: Ethical Issues in Appeals to Personal Responsibility in Health Campaigns*, 6 J. HEALTH COMM. 117, 127 (2001) (citing J. W. Douard & W. J. Winslade, *Tarasoff and the Moral Duty to Protect the Vulnerable*, in HEALTH CARE ETHICS: CRITICAL ISSUES 316 (J. F. Monagle & D. C. Thomasa eds., Aspen Publishers 1994)).

68. See Alan R. Felthous, *The Clinician's Duty to Protect Third Parties*, 22 PSYCHIATRIC CLINICS OF N. AM. 49, 50 (1999).

69. See Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 407–10 (1989).

70. Cf. MILGRAM, *supra* note 1.