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CLAUDIA FELDER[1] vs. THE CHILDREN'S HOSPITAL CORPORATION & others.[2]

No. 19-P-298.

Suffolk. December 3, 2019. - June 11, 2020.

Present: Vuono, Milkey, & Englander, JJ.

Guardian, Consent to medical treatment. Medical Malpractice, Consent to medical treatment. Minor, Medical treatment. Negligence, Medical malpractice, Causing loss of consortium. Parent and Child, Custody of minor, Consortium. Intentional Conduct. Consortium. Practice, Civil, Summary judgment, Special verdict.

Civil action commenced in the Superior Court Department on November 6, 2013.

A motion for summary judgment was heard by Elizabeth M. Fahey, J.; the case was tried before Joseph F. Leighton, Jr., J., and a motion for a new trial, filed on November 22, 2017, was heard by him.

Peter J. Duffy for the plaintiff.

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[1] Individually and on behalf of her minor child, K.W.

[2] Children's Hospital Integrated Care Organization, LLC, doing business as Children's Hospital Boston; Colleen Ryan; Gary J. Gosselin; and Molly Schofield.

Richard J. Riley (Stephen D. Coppolo also present) for the defendants.

ENGLANDER, J. This case presents questions regarding the duties owed by medical providers to the parent of a minor child to whom they are providing psychiatric treatment. The plaintiff, Claudia Felder, is the mother of K.W., who was fourteen years old when she was committed voluntarily to the psychiatric ward at defendant Boston Children's Hospital (BCH) in 2012,[3] and remained there for six weeks. In 2013 both Felder and K.W. sued BCH and several of the medical providers who cared for K.W.[4] The complaint alleged seven counts; in brief, K.W.'s claims alleged medical malpractice (negligence) and intentional infliction of emotional distress, while Felder asserted direct claims for negligence and intentional interference with custodial relations, among others, as well as a derivative claim for loss of filial consortium. The majority of Felder's claims were dismissed on summary judgment by a Superior Court judge. K.W.'s negligence claim and Felder's loss of filial consortium

[3] Defendant The Children's Hospital Corporation is the corporate entity that owns BCH.

[4] Because K.W. was a minor at the time suit was brought, K.W.'s claims were actually brought in Felder's name, as next friend for her minor child.

claim went forward to trial by a jury, which returned a verdict in favor of the defendants on all counts.

Felder now appeals from the dismissal of her claims on summary judgment, and from the jury's verdict.[5] Felder's appeal focuses, in particular, on her claims that the defendant medical providers breached duties owed directly to her, in connection with the provision of care to her daughter. For example, Felder claims that as part of their standard of care the defendants owed duties to provide "family-driven" treatment to her and her daughter, and to "facilitate adequate contact" between her and her daughter. Felder asserts that the defendants breached these duties, and acted in derogation of her relationship with her daughter. These claims were dismissed at summary judgment, with the motion judge ruling that no such duties were owed. We conclude that while the hospital and the defendant medical providers do have certain obligations to the parent of a minor child in their care -- in particular, the obligation to confer regarding treatment and to obtain informed consent -- they do not owe the duties asserted by Felder. We accordingly affirm.[6]

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[5] K.W. did not appeal, and is no longer a party.

[6] The motion judge also dismissed Felder's claim for intentional interference with custodial relations. We also affirm that summary judgment.

Felder raises appellate issues with respect to the trial as well, which are discussed infra.

Background.[7] K.W. was born in 1997 to Felder and Patrick Wetzel (father), both citizens of Switzerland. The couple divorced in 2007; Felder received sole legal custody of K.W. During the summer of 2011, Felder sent K.W. to live with her godmother, Alexandra Ponder, in Haverhill, Massachusetts for one year.

On May 19, 2012, K.W. ingested aspirin and pills prescribed to Ponder.[8] After being treated at a local hospital, K.W. was eventually transferred to the BCH emergency room. Both Felder and Ponder gave initial consent for K.W. to be treated at BCH. Ponder signed a BCH emergency department document titled "CONSENT FOR DIAGNOSIS & TREATMENT." Ponder also provided two forms to BCH, by which Felder had authorized Ponder to obtain medical care for K.W.[9] Felder also orally consented to K.W.'s

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[7] The facts are taken from the summary judgment record. We discuss those facts that are material to the issues presented, and that would be admissible in evidence. Those facts are viewed in the light most favorable to Felder, the nonmoving party. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 713-714 (1991); Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991), citing Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974).

[8] The parties dispute whether K.W. took the pills as part of a suicide attempt or whether Ponder forced K.W. to take them. They also disagree about what specific substance or substances K.W. ingested. Neither factual issue is material to the issues on appeal.

[9] Felder signed the two documents before K.W. came to the United States. The more important document for present purposes

admission to the hospital on a telephone call with BCH personnel.[10]

The BCH emergency department recorded an impression of K.W. as having suicidally ingested multiple medications. After a four-day stay in the hospital's intermediate care program (ICP), BCH recommended that K.W. be transferred to BCH's inpatient psychiatric unit, Bader 5, out of concern for K.W.'s safety. At Felder's request, BCH discussed this recommendation with K.W.'s

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is the "Temporary Guardianship Authorization for [K.W.]." This document sets forth K.W.'s information, and has Felder's name under the heading "Parent or Legal Guardian." Ponder's information appears under the heading "Temporary Guardian." The penultimate section, "Authorization and Consent of Parent or Legal Guardian," states in relevant part:

> "2. I give my full authorization and consent for the child to live with and travel with the temporary guardian . . . .
>
> . . .
>
> 4. I give the temporary guardian permission to authorize medical and dental care for the child, including but not limited to . . . hospital care or other treatments that in the temporary guardian's sole opinion are needed or useful for the child."

Felder's signature follows. Ponder's signature follows the final section, "Consent of Temporary Guardian."

[10] The record contains a "GENERAL CONSENT" form, which states in relevant part that Felder, as parent or legal guardian, gave "[t]elephone [c]onsent" for BCH to treat K.W. "as they deem appropriate. I understand that under such circumstances a reasonable effort will be made to reach me." The form is signed by a witness, and Felder's name follows the field "Telephone Consent."

Swiss pediatrician, Dr. Andreas Schmidt. Dr. Schmidt agreed with the plan. Felder and Ponder each also communicated their support. K.W. was thereafter voluntarily admitted to Bader 5 on May 23, after Ponder signed an "Application For Care And Treatment On A Conditional Voluntary Basis" pursuant to G. L. c. 123, §§ 10 and 11.

K.W. remained under psychiatric care at BCH for the next six weeks, until she was discharged into Ponder's care on July 2. For purposes of discussing Felder's claims of negligence and intentional interference with custodial relations, we summarize below the communications and interactions between Felder and the defendants during that six-week period.

1. Communications regarding whether K.W. would or should be discharged. Bader 5 is a restrictive care unit; K.W. was not permitted to leave BCH premises until her final week there. K.W.'s treatment regimen involved a variety of individual and group sessions, as well as therapy sessions that included Ponder, conducted by the treatment team.[11]

[11] In Bader 5, K.W.'s treatment team included, but was not limited to, defendant Dr. Colleen Ryan, an attending psychiatrist; defendant Molly Schofield, a licensed independent clinical social worker; and Noel Comer, a social work intern supervised by Schofield. Defendant Dr. Gary J. Gosselin was the medical director of Bader 5.

Within days of K.W.'s admission to Bader 5, the treatment team recommended that K.W. be transferred to an adolescent residential treatment, or "step-down," program for further treatment in a less restrictive setting. In accordance with Felder's prior instructions, the team spoke with Dr. Schmidt, who agreed that transfer to a step-down program was desirable.

The treatment team arranged for K.W. to be discharged from Bader 5 on June 7, 2012, and transferred to a step-down program at McLean Hospital in Belmont (McLean). Prior to K.W. being discharged, however, Ponder informed the treatment team that Felder planned for K.W. to fly to Switzerland that day, rather than having her admitted to McLean. Felder confirmed this over the telephone with the treatment team, and also stated that she could no longer afford to pay out-of-pocket for K.W.'s treatment. After consulting with BCH's legal and patient relations departments, the treatment team decided not to discharge K.W. to Ponder, out of concern for K.W.'s safety.

That day (June 7) Ponder signed a "[t]hree [d]ay" notice of the intention to withdraw K.W. from Bader 5, pursuant to G. L. c. 123, §§ 10 and 11. Due to an intervening weekend, the notice would have expired on June 12.[12] Between the signing of the

[12] The form stated, "The three day period begins at 9:00 A.M. tomorrow, and ends at 5:00 P.M. on the third day, (Saturdays, Sundays and Legal Holidays are not included)." We take judicial notice of the fact that June 7, 2012 fell on a

three-day notice and its expiration on June 12, Felder and the defendants were in frequent communication.[13] Then, on June 12, Ponder rescinded the three-day notice after speaking with Felder and Felder's lawyer. The following day, on a telephone call with Dr. Ryan and Schofield, Felder agreed to have K.W. admitted to McLean's step-down program.

K.W. was never admitted to McLean, however, and so she remained in Bader 5 until July 2. On June 18, McLean informed BCH that it would not accept K.W. into its step-down program. Neither Felder nor Ponder submitted another three-day notice thereafter. The period between June 13 and July 2 was marked by a great deal of legal wrangling between Felder, the father, and Ponder (who became adverse to Felder). Those proceedings are summarized in the margin, but they bear only tangential relevance to the issues we address.[14] Felder revoked Ponder's

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Thursday, and that the following third business day was Tuesday, June 12.

[13] From the documentary record, it is clear that Felder's position during this period vacillated with respect to what to do with K.W. Ultimately, however, the three-day notice was rescinded.

[14] On June 16, the treatment team contacted K.W.'s father regarding insurance for K.W. The father apparently had been unaware of K.W.'s whereabouts. Thereafter, on June 19, the father contacted the Luzerne Guardianship Authority (LGA) in Switzerland and requested that Felder's custodial rights over K.W. be "remove[d]" and that Ponder be made K.W.'s guardian. Two days later, on June 21, the LGA ordered that Felder's custody over K.W. be preliminarily "withdrawn as a precaution."

temporary guardianship on June 20. Ponder thereafter obtained an order from the Massachusetts Probate and Family Court appointing her as K.W.'s temporary guardian, on June 25. Custody proceedings after K.W.'s release resulted in K.W. being returned to Felder's custody.[15]

2. Felder's contacts with K.W. Felder's direct contacts with K.W. while at Bader 5 were not extensive. She spoke with K.W. at least twice before June 7. She also spoke with K.W. twice on June 12. Ponder, however, spoke with K.W. regularly throughout K.W.'s stay at Bader 5, and Ponder was Felder's designated temporary guardian until Felder revoked that authorization on June 20.

Felder stated in her deposition, and in an affidavit submitted in opposition to summary judgment, that BCH staff denied her the opportunity to speak with K.W. by telephone. When questioned at her deposition, Felder did not identify any specific dates on which she attempted to reach K.W., and

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[15] On July 10, 2012, Felder filed a lawsuit against Ponder, the father, and BCH in United States District Court in Massachusetts, invoking the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention). During that litigation, the United States Court of Appeals for the First Circuit issued a decision recognizing that Felder had custody rights to K.W. under the Hague Convention. Felder v. Wetzel, 696 F.3d 92 (1st Cir. 2012). In January 2013, the Federal lawsuit settled; the settlement provided for K.W.'s return to her mother's custody in Switzerland.

identified only one BCH staff member to whom she spoke, although she did not identify when. Notably, there are statements in the hospital records, and in deposition testimony, that indicate that K.W. did not wish to speak to her mother, at least during some of the period she was in Bader 5.

After Felder and Ponder became adverse and Felder revoked Ponder's guardianship authority, Felder traveled to Massachusetts and met with K.W. on June 21. Defendants Ryan and Schofield, among other BCH staff, were present at the meeting. The following day, Felder again sought to see K.W. As of the day before (June 21), however, the Luzerne Guardianship Authority (LGA) in Switzerland had "withdrawn" Felder's custodial rights "as a precaution." Felder was advised that K.W. did not want to see her. As noted, K.W. was discharged into Ponder's care on July 2.

3. Procedural history of the instant case. Over one year after K.W. was discharged, in November 2013, Felder and K.W. filed this lawsuit in the Superior Court. As noted, the complaint alleged seven counts, including a negligence (medical malpractice) claim brought by K.W., and a negligence claim brought by Felder. The theory advanced as to Felder's negligence claim was that the defendant medical providers not only owed duties to their patient, K.W., but also owed broad duties to Felder, as the parent, which they had breached. In

February 2017, the motion judge granted the defendants' motion for summary judgment on all counts except (1) K.W.'s negligence claim and (2) Felder's derivative loss of filial consortium claim.

The parties proceeded to a jury trial on those two surviving claims. At trial the jury returned a first and then a second special verdict slip, each of which the judge rejected as inconsistent -- an issue discussed infra. Judgment entered for all the defendants on the jury's third special verdict.

Felder appeals, raising issues arising out of both the summary judgment order, and the trial.

Discussion. 1. Summary Judgment. a. Felder's negligence claim. With respect to Felder's negligence claim, the first question we face is what duties, if any, the defendants owed to the custodial parent of their fourteen year old patient. Felder claims she was owed four such duties: (1) to provide "family-driven" treatment to her, as well as to K.W., (2) to "facilitate adequate contact" between her and K.W., (3) to "support the [mother-daughter] relationship," and (4) to "provide reasonable aftercare." The Superior Court judge ruled that no such duties were owed. While we agree that the defendants did not owe the duties asserted by Felder, the defendants did have certain obligations to communicate with Felder (or her designee) in connection with their treatment of K.W. We discuss those

obligations below, and then explain why summary judgment was properly granted as to Felder's negligence claim.

The duties owed by a physician arise out of the physician's professional relationship with a patient. "A physician owes a legal duty to a patient to provide medical treatment that meets the standard of care of the average qualified physician in his or her area of specialty" (emphasis added). Medina v. Hochberg, 465 Mass. 102, 106 (2013), citing Brune v. Belinkoff, 354 Mass. 102, 109 (1968). As Justice Greaney said, concurring in part in Coombes v. Florio, 450 Mass. 182, 197 (2007): "To a physician, it is the patient (and not a third party with whom the physician has no direct contact) who must always come first."[16,17]

Here the defendants' patient was K.W., a fourteen year old. As a baseline rule, the defendants owed their professional duties to her, not to her custodial parent. One of the duties the defendants owed to K.W., however, was to obtain informed consent in connection with her treatment. See G. L. c. 111, §

[16] While Coombes announced a rule that in some circumstances a physician's duty can extend beyond the patient, those circumstances are limited. See Medina, 465 Mass. at 107-109.

[17] Two of the individual defendants are physicians (psychiatrists), and the other, Schofield, was a licensed independent clinical social worker. None of the parties have argued that a different standard of care obtained for Schofield under the circumstances. For purposes of this opinion we focus on the duties owed by physicians.

70E (describing patients' and residents' rights). This duty has been described as follows:

> "[A] physician owes to his patient the duty to disclose in a reasonable manner all significant medical information that the physician possesses or reasonably should possess that is material to an intelligent decision by the patient whether to undergo a proposed procedure. The information a physician reasonably should possess is that information possessed by the average qualified physician or, in the case of a specialty, by the average qualified physician practicing that specialty."

Harnish v. Children's Hosp. Med. Ctr., 387 Mass. 152, 155 (1982). The duty is not limited to physically invasive treatments, but applies as well to the psychiatric treatment at issue here. See 243 Code Mass. Regs. § 2.07(26) (2019) (physicians are obligated "to obtain and record a patient's written informed consent before diagnostic, therapeutic or invasive procedures, medical interventions or treatments").

When the patient is a minor, the person responsible for making decisions regarding medical treatment generally is the minor's legal custodian. See G. L. c. 208, § 31 (defining legal custody of child as right and responsibility to make "major decisions regarding the child's welfare including matters of . . . medical care").[18] Assuming the custodian has not delegated

[18] There are some exceptions to this rule, pursuant to statute. See, e.g., c. 112, § 12F (exempting medical providers from liability for failure to obtain custodial adult's consent for emergency treatment; and, enumerating six contexts where minor's consent to care suffices). Furthermore, there are circumstances where the courts have ruled that the parent's

those decisions to another (an issue discussed infra, at note 20), the duty to obtain informed consent necessarily means that the medical provider must discuss significant treatment decisions with the custodial adult. And the duty of reasonable disclosure includes the duty to disclose significant medical information reasonably available to the physician, which might include the minor's diagnosis, prognosis, and the range of potential treatment options and their potential outcomes. See Harnish, 387 Mass. at 155-156. Moreover, where treatment is ongoing the duty of disclosure and to obtain informed consent would include the need to provide reasonable updates as the treatment progresses.[19]

Accordingly, in K.W.'s case the defendants had an obligation to obtain informed consent with respect to her treatment. That consent ordinarily would be obtained from Felder, as the custodial parent, although in this case Felder had delegated "concurrent" authority to Ponder, up until June 20 when Felder revoked Ponder's authority. This means that,

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decision may not control. See Matter of Rena, 46 Mass. App. Ct. 335, 337 (1999).

[19] While not a legal authority, we note that the American Psychiatric Association advises practitioners that informed consent is an "ongoing process." American Psychiatric Association, APA Commentary on Ethics in Practice § 3.2.4, at 5 (2015).

through June 20, the defendants were required to make reasonable disclosure to Felder or to Ponder, so as to obtain informed consent for the treatment of K.W.[20]

The duties that Felder asserts in this case, however, are not duties to make disclosure so as to facilitate the informed treatment of K.W. Rather, Felder asserts that because the defendants were treating her daughter, the defendants owed duties to her. We agree with the motion judge that no such duties were owed. A psychiatrist treating a minor child does not have an obligation also to treat the child's parents, or other family. Nor does a psychiatrist owe a general duty to the parents to "facilitate" the child's relationship with them, or to provide the parents "reasonable aftercare."[21]

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[20] There are a number of complex legal issues related to who had the authority to give informed consent for K.W., but for reasons discussed herein, we need not resolve those issues in this case. As noted previously, when K.W. came to the United States, Felder had provided Ponder with an "Authorization and Consent of Parent or Legal Guardian" document, so that Ponder could authorize medical care for K.W. Assuming, without deciding, that this document met the requirements of G. L. c. 201F, the statute that addresses "caregiver authorization" (the parties do not address the issue), then under that statute Felder's "authorization" gave Ponder "concurrent parental rights" relative to medical care, so long as Felder did not make a "conflicting decision." General Laws c. 201F, § 2.

[21] As K.W.'s legal custodian, Felder also had the right to remove K.W. from the defendants' medical care (unless the hospital petitions the courts, see note 25, infra). Felder's claims, however, are not based upon an assertion that the defendants denied her this right, and in any event the record

There are sound, fundamental reasons for concluding that no such duties are owed. First, as discussed, the foundation of a physician's duties is the physician-patient relationship. That relationship is, as a general rule, consensual. Doherty v. Hellman, 406 Mass. 330, 333 (1989). The physician decides which patients he or she will take on and, in general, the limits of the relationship. The patient similarly must agree to be treated. Accordingly, a psychiatrist who takes on a patient is not thereby obliged to be a caregiver to other "family" -- ill-defined and perhaps even unknown to them. Second, a physician's obligation to a patient should not be compromised by conflicting loyalties. Such conflicts certainly may arise in a family setting, where a child's best interests may diverge from those of her parents or other custodial adults. Such conflicts may particularly be anticipated when it comes to psychiatric care. This case illustrates the point, as there is evidence that K.W. did not wish to talk to her mother -- an issue that the

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would not support such a claim. See the discussion of intentional interference with custodial relations, infra.

defendants, as K.W.'s physicians and care providers, needed to navigate without the burden of conflicting loyalties.[22,23]

Applying the above principles to the facts here, summary judgment was appropriate on Felder's negligence claim. The defendants did not owe the duties that Felder asserts. The defendants owed duties to their patient, K.W., to properly obtain informed consent for her treatment from her adult custodian, but Felder does not assert that the defendants breached the duty to obtain informed consent -- she does not claim that any lack of communication with her resulted in an uninformed or unconsented treatment decision. In that connection, we note that the undisputed facts are that from the time K.W. was admitted to Bader 5 through June 21 (when Felder's custodial rights were "withdrawn" by the Swiss authorities), the

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[22] To support the proposition that the defendants owed Felder a duty to provide "family-driven treatment," Felder goes beyond the summary judgment record. She points to trial testimony in which Dr. Ryan described how BCH strives to provide "patient and family centered care." Such evidence, even if we could properly consider it, does not alter our conclusion regarding the tort duties that are (and are not) owed by psychiatrists to their patients. Felder has not claimed that the defendants undertook broader duties through contract, and we do not address the issue.

[23] We address here what duties the medical providers may owe to the minor's parent and custodian. Whether the medical providers should be facilitating the parent-child relationship, as part of the care owed to their minor patient, presents a different question not before us.

defendants not only spoke on several occasions with Felder, but also spoke regularly with Ponder, who was Felder's designee for medical decision making.[24] Felder's purported claim of negligence as to her was properly dismissed.

b. Intentional interference with custodial relations. Felder also asserted a claim for intentional interference with custodial relations. The elements of this tort have been described as follows: "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has [] left him, is subject to liability to the parent." Murphy v. I.S.K.Con. of New England, Inc., 409 Mass. 842, 861 (1991), quoting Restatement (Second) of Torts § 700 (1977).

The motion judge dismissed this claim as well, as the summary judgment record did not support a claim of active and wrongful efforts by the defendants to induce K.W. not to return to her mother. On appeal, Felder points to only two documents in the record to support this claim, without explaining their

[24] Although Felder complains that she was not allowed to speak to K.W., she does not claim that any such interference impaired her ability to make treatment decisions and, as noted, Ponder had direct access to K.W. throughout.

relevance. Neither document provides admissible evidence that would raise a triable issue of fact.[25]

Felder's failure to provide factual support for her appeal is alone grounds for affirmance. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019); Kellogg v. Board of Registration in Med., 461 Mass. 1001, 1003 (2011). We note, however, that we have also considered the record evidence surrounding the events of June 7 through June 12, where Felder requested BCH to discharge K.W. to Ponder, and BCH did not. Under Massachusetts law, G. L. c. 123, § 11, BCH was authorized to require three days' notice in advance of the withdrawal of a patient voluntarily committed under G. L. c. 123, § 10. "The

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[25] The first document Felder points to appears to be a copy of notes regarding two telephone conversations that occurred on June 21, 2012. We do not know the author of the notes, which were apparently originally written in German. One conversation purports to have been between K.W. and an unknown person; the other purports to have been between defendant Ryan and an unknown person. As noted, the plaintiff's brief offers no explanation or argument with respect to the document. Moreover, the document's description of what K.W. purportedly said, and what Ryan purportedly said, is multi-tiered hearsay. Assuming it is presented for its truth, it is not subject to any hearsay exception that would render it admissible.

The second document is a BCH record from June 20 that apparently contains Dr. Ryan's notes from a therapy session with K.W. The notes state that K.W. discussed her feelings about her mother with Noel Comer (the social worker intern), and told Comer that she did not wish to see her mother on June 21. Even if the hearsay description of K.W.'s statements were admissible, the notes do not present a triable issue of fact as to whether the defendants compelled or induced K.W. to leave her mother's custody.

superintendent [of a health facility] . . . , in his discretion, may require persons [retained in a facility] or the parents or guardians of persons to give three days written notice of their intention to leave or withdraw." G. L. c. 123, § 11. BCH accordingly was authorized by statute to delay K.W.'s discharge until June 12.[26] On June 12 Ponder withdrew the demand to release K.W., and Felder did not disagree. BCH thus did not violate any duties by these actions.

2. Trial. Finally, we turn to Felder's arguments regarding the trial, and specifically, to the judge's rejection of the second special verdict slip. That verdict slip purported to find in favor of Felder's derivative claim for loss of filial consortium. With respect to K.W.'s claim, however, the verdict slip did not find that any particular defendant was both (1) negligent, and (2) caused K.W. injury. In his jury instructions the judge properly had explained, as to Felder's loss of consortium claim, that the jury could not find for Felder unless they first found that at least one of the defendants satisfied both of these elements as to K.W. The judge accordingly

[26] Pursuant to G. L. c. 123, § 11, if BCH had disagreed with the discharge request it could have sought a court order to retain K.W. at Bader 5, by filing with the District Court a petition for K.W.'s involuntary commitment prior to the expiration of the three-day notice period.

rejected the second special verdict slip as inconsistent.[27] The judge ultimately entered judgment for the defendants on a third special verdict slip.

Felder argues the trial judge should have accepted the second verdict slip because the answers to the special questions were not inconsistent. Relying on Solimene v. B. Grauel & Co., 399 Mass. 790, 799-801 (1987), she contends the judge should have "harmonized" the jury findings. Solimene, however, teaches that "[i]f the answers cannot be harmonized with the evidence and the instructions . . . then the jurors must be instructed to reconsider their answers to the special questions." Id. at 800-801. Here the answers in the second verdict slip were plainly inconsistent. A parent has a loss of consortium claim only against one "who is legally responsible" for causing injury to her child. G. L. c. 231, § 85X. See Thomas v. Chelmsford, 267 F.Supp.3d 279, 315 (D. Mass. 2017) ("Consortium claims are derivative in nature, so [the cause of action provided in G. L. c. 231, § 85X] requires an underlying tortious act"). The jury's finding of liability on Felder's claim without an

[27] The jury's first special verdict slip did not find that any of the defendants were negligent, but then purported to find for Felder on loss of consortium. After that slip was rejected as inconsistent, the jury's second special verdict slip found that two of the defendants were "negligent," but did not find that either defendant had caused injury to K.W.

underlying finding of both negligence and causation as to K.W. was inconsistent with the judge's proper instructions. There was no error in rejecting the second verdict slip and entering judgment on the third slip.[28,29]

Judgment affirmed.

Order denying motion for new trial affirmed.

[28] Felder raises two other challenges to the trial proceedings. First, she argues that the motion judge erred in denying her pretrial motion to compel documents withheld on grounds of attorney-client privilege. The argument lacks factual support, and accordingly fails. See Mass. R. A. P. 16 (a) (9) (A). Second, Felder contends that the trial judge erred in not compelling the defendants to produce the withheld documents as a result of a purported waiver of the attorney-client privilege during trial. On cross-examination, Dr. Ryan briefly referenced the fact that K.W.'s treatment team consulted with the hospital's lawyers about K.W., which Felder argues constituted a waiver. Felder's brief omits, however, that this issue was litigated during the trial, and that the trial judge concluded that Dr. Ryan had not "invoked advice of counsel." We see no reason to disturb this ruling.

[29] Although Felder noticed an appeal from the order denying her motion for a new trial as well, she did not address the order in her briefs.