NO. KNL-CV-08-5007342S

ALLISON PATTERSON, ADMINISTRATOR OF THE ESTATE OF BRUCE J. PATTERSON	SUPERIOR COURT
	J.D. OF NEW LONDON
VS.	
ANDREW FOLEY, ET AL	FEBRUARY 2, 2009

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO STRIKE

Plaintiff hereby submits her Memorandum of Law in Opposition to Defendant Georgene Didato's[1] Motion to Strike dated December 12, 2008.

I. INTRODUCTION

This matter arises out of the fatal battery of a frail diabetic by a vigorous 18-year-old, Andrew Foley. Defendant Andrew Foley rode his bike through a neighborhood shouting profanities and then challenged Plaintiff's decedent, Bruce Patterson, to a fight. Before Patterson

[1] Hereinafter "Defendant" or "Didato."

could even react, Foley threw him to the ground with great force. See Amended Complaint ¶¶14-18, 20. Patterson suffered a broken hip and other injuries, triggering what turned out to be a complicated and extended course of medical treatment, and ultimately resulted in his untimely death at age 49. Am. Compl. ¶¶21-24.

Foley was legally incompetent, mildly mentally retarded, with a mental condition like that of a child, behavioral and emotional issues, and an anxiety disorder. He lived with his mother, who provided for his day-to-day needs and care—including his shelter, food, clothing, financial and disciplinary needs, and transportation. She also controlled or influenced nearly every aspect of Foley's life.

By her Amended Complaint dated November 24, 2008, Plaintiff brings claims against Foley for negligence, and against his guardian and mother, Georgene Didato, alleging that she breached her duties pursuant to:

Faulkner & Boyce, P.C.
216 Broad Street • P.O. Box 391 • New London, CT 06320 • Tel: (860) 442-9900 • Fax: (860) 443-6428 • JURIS #103027

- Restatement (Second) of Torts, § 316—Parent's Failure to Control/ Supervise Incompetent Child (Second Count);
- Restatement (Second) of Torts, § 319—Custodian's Failure to Control/Supervise Ward with Dangerous Propensities (Third Count); and
- the common law (Fourth Count).

See Amended Complaint, Dckt. No. 115. The Motion to Strike takes aim at those Second, Third, and Fourth Counts arguing that Defendant had no such duties. The Motion should be denied in its entirety.

II. LEGAL STANDARD APPLICABLE TO THE MOTION TO STRIKE

"[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court . . . ." *Eskin v. Castiglia*, 253 Conn. 516, 522 (2000) (citation omitted). When ruling on a motion to strike, the Court must "take the facts to be those alleged in the complaint . . . and . . . construe the complaint in the manner most favorable to sustaining its legal sufficiency . . . ." *Lombard v. Edward J. Peters, Jr., P.C.*, 252 Conn. 623, 626 (2000) (citation omitted; emphasis added). "[If] facts provable in the

Faulkner & Boyce, P.C.
216 Broad Street • P.O. Box 391 • New London, CT 06320 • Tel: (860) 442-9900 • Fax: (860) 443-6428 • JURIS #103027

complaint would support a cause of action, the motion to strike must be denied." *Bross v. Hillside Acres, Inc.*, 92 Conn. App. 773, 781 (2006).

III. RELEVANT FACTUAL ALLEGATIONS TAKEN AS TRUE FOR PURPOSES OF THE MOTION TO STRIKE.

The following facts set forth in the Amended Complaint are germane to the Court's ruling on the Motion to Strike:

At all relevant times, Andrew Foley was legally incompetent, mildly mentally retarded, and with a mental condition like that of a child. He was afflicted with behavioral and emotional issues, suffered from an anxiety disorder, and had been prescribed a drug regimen that included a mood stabilizer, an antidepressant, and an anti-anxiety medication. [Am. Compl. ¶¶5-8]. Foley's mother, Defendant Georgene Didato, had assumed responsibility for his day-to-day needs and care—including providing for his shelter, food, clothing, financial and disciplinary needs, transportation (*i.e.* providing him with the

Faulkner & Boyce, P.C.
216 Broad Street • P.O. Box 391 • New London, CT 06320 • Tel: (860) 442-9900 • Fax: (860) 443-6428 • JURIS #103027

bicycle he used to roam the neighborhood), and medical and psychological care (*i.e.* transporting him to, and accompanying him on medical visits, and making decisions concerning such care). [Am. Compl. ¶¶4, 9] Didato was also responsible for administering and regulating Foley's prescription drug regimen, and was at all times aware of her son's mental retardation, childlike mental condition, anxiety disorder, and behavioral and emotional issues (such as his propensity to engage in verbal confrontations and physical violence, history of anxiety resulting in panic and/or the loss of behavioral self-control, and history of causing disruptions in the neighborhood *including, in particular, incidents involving the Patterson household*). [Am. Compl. ¶¶10-12] Additionally, Didato had the ability to control Foley's behavior and to restrain him as necessary by supervising or monitoring his activities, by properly administering his prescription medications, and by restricting his ability to roam the neighborhood alone. [Am. Compl. ¶13]

These facts are taken as true pursuant to the well-known authority on motions to strike.

IV. ARGUMENT— THE COURT SHOULD DENY THE MOTION TO STRIKE IN ITS ENTIRETY SINCE PLAINTIFF HAS STATED CLAIMS AGAINST DEFENDANT FOR BREACH OF HER DUTIES UNDER RESTATEMENT (SECOND) TORTS § 316, § 319, AND PURSUANT TO THE COMMON LAW.

The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. The Motion to Strike is about duty—a legal conclusion about relationships between individuals, made after the fact.

The test for the existence of a legal duty of care entails

(1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and

(2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case.

With respect to the policy analysis, there generally is no duty that obligates one party to aid or to protect another party. See Restatement (Second) of Torts (1965)[2] § 314. One exception to this general rule arises when a **special relation** exists between the parties.

Restatement § 315 provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) **a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct**, or (b) a special relation exists between the actor and the other which gives to the other a right of protection.

(Emphasis added.). "The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319," (Restatement, § 315, comment (c)). Two of those four sections / relations are at issue here—§ 316 (*parent-child*) and § 319 (*custodial control*).

[2] Hereinafter "Restatement."

A. Plaintiff Has Stated a Claim Pursuant to Restatement (Second) of Torts, § 316 for Defendant's Failure to Control / Supervise Her Incompetent Child.

Restatement § 316 provides:

> Duty of Parent to Control Conduct of Child
>
> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, *if the parent*
>
> a) *knows or has reason to know that he has the ability to control his child, and*
> b) *knows or should know of the necessity and opportunity for exercising such control.*

Restatement § 316 (Emphasis added).

Although § 316 refers to "minor child," it has been appropriately applied in situations involving adult children with mental deficiencies that made them *akin* to minors—precisely the scenario presented here. See e.g., *Silberstein v. Cordie*, 474 N.W.2d 850, 856 (Minn. App. 1991), remanded in part on other grounds (Minn. 1991).

In *Silberstein*, the Minnesota appellate court affirmed the denial of the adult killer's parents' motion for summary judgment due to fact

issues as to whether they had ability to control their son[3] and whether the harm caused by him was foreseeable. 474 N.W.2d at 855-856:

> One exception to the general rule of no duty to control others is based on a parent-child relationship. Restatement of Torts (Second) § 316(b) (1965). This duty is narrow; at the very most, the duty arises when the parent has both the opportunity and the ability to control the child. [Citing comment b to § 316]. We believe the parent/child exception applies in this case. [The killer] lived with his mother and stepfather. [The mother's] deposition testimony indicates in the months before the killing **she assumed the responsibility of her son's day-to-day care.** Moreover, she and her husband knew that [he] was not taking his medication, could not sleep and was nonverbal. Therefore, **even though [the killer] was 27 years old, his mental condition was like that of a child** and, as such fact issues arise whether [his family] had the ability to control him.

474 N.W.2d at 855-866 (Emphasis added.) Here, Plaintiff has alleged—and indeed discovery, particularly Defendant's deposition, has already borne out—that Foley's mental condition was like that of a child, that his mother had not only assumed his "day-to-day care" prior

[3] A defendant's control over the third party is essential, and clearly present here. *See, e.g., Estate of Hernandez v. Flavio*, 924 P.2d 1036, 1038 (Ariz. Ct. App. 1995) (national fraternity organization had knowledge of, and ability to control, chapter's ability to serve alcohol).

Faulkner & Boyce, P.C.
216 Broad Street • P.O. Box 391 • New London, CT 06320 • Tel: (860) 442-9900 • Fax: (860) 443-6428 • JURIS #103027

to the incident, but that she also had both the opportunity and the ability to control him. As in *Siberstein,* Foley's mental condition here was like that of a child. [See Am. Compl. ¶ 5.]

The Defendant's argument (Def.'s Mem. pp. 11-12) that General Statutes § 1-1d requires that Foley be considered an adult for all purposes without exception is shown to be false by the fact that just after the Incident from which this matter arises, Didato was appointed as Foley's guardian, due to his retardation, pursuant to General Statutes § 45a-676 (meaning the probate court found, "by clear and convincing evidence, that [Foley was/is], by reason of the severity of his mental retardation, *totally unable* to meet essential requirements for his physical health or safety and *totally unable* to make informed decisions about matters related to his care). Obviously he is not treated as an adult for all purposes by the State of Connecticut. Indeed, the case that Defendant cites (at Mem. p. 12), *Staub v. Staub*, 2003 WL 22205932 (Conn. Super. FA990550082 Sept. 9, 2003),

demonstrates that citizens over the age of 18 are not always treated as adults by the State. *Staub* noted that one of three exceptions to the rule prohibiting an order of child support past the age of majority (18) is for mentally retarded children, pursuant to Gen. Stat. § 46b-84(e), allowing a court to order support to age 21.

Here, Plaintiff will demonstrate that the Defendant's relationship with Foley pre-Incident (when she was not his court-appointed guardian) and post-Incident (when she became his appointed guardian) did not appreciably differ. Foley was like a child then, as he is now. Plaintiff should be allowed to make her case to a jury.

Defendant acknowledges that Restatement § 315—which necessarily includes §§ 316 – 319, defining which special relationships fall within the exception—is the law of the land in Connecticut. [See Def.'s Mem. at pp. 9-10] That alone demonstrates that the Motion to Strike should be denied, since the factual recitation relating to the

Second Count plainly tracks Restatement §§ 316.[4]

To wit, Plaintiff alleges that, at the time of the Incident, Defendant "had the opportunity to control and supervise Foley, her incompetent child, and knew or should have known that she had that opportunity." [Am. Compl. ¶26] Plaintiff alleges that Defendant also "had the ability to control and supervise Foley, and knew or should have known that she had that ability. [Am. Compl. ¶27] Further, Plaintiff alleges that, "[b]y virtue of the special relationship between Foley and Didato—*whereby Didato controlled or influenced nearly every aspect of Foley's life*—Didato had a duty to exercise reasonable care to control and supervise Foley as to prevent him from intentionally harming others, and to prevent him from conducting himself as to create an unreasonable risk of bodily harm to others." [Am. Compl. ¶28 (Emphasis added.)] No other allegations are needed to state a

[4] The same is true of the Third Count and Restatement § 319.

claim under Restatement § 316.

This factual scenario involving Defendant and her incompetent son is a far cry from the "mere existence" of parent-child relationship. [See Def.'s Mem. p. 11.] Accordingly, denying the Motion to Strike here because of these extraordinary factual allegations is perfectly consistent with *Kaminski*.

Bebry v. Zanauskas, 81 Conn. App. 586, 591-92 (2004) (Def.'s Mem. p. 20), which exclusively discussed § 319 has no place in a discussion of § 316. Likewise, in *Rhea v. Uhry*, 2005 WL 3215961, *1 (D. Conn. 2005) (Def.'s Mem. p. 11) the plaintiffs based their unsuccessful argument on the defendant's liability for failing to prevent his daughter from making defamatory statements solely on § 319.

Additionally, the Florida case Defendant cites (Def.'s Mem. p. 11) actually explains how that case is distinguishable from this one: "We need not speculate on circumstances under which a parent might incur liability for intentional acts of a minor child or an adult dependent child

over whom they may have accepted a lawfully designated responsibility due to the child's incompetency, as such is not alleged here." 751 So. 2d 653, 654 (Fla. App. 4th Dist. 1999).

Allowing Plaintiff to prove her case here, given the highly unusual circumstances of this case, will not lead to the parade of horribles that Defendant imagines. [See Def.'s Mem. pp. 12 – 18.] The professed fear that courts will have to analyze "the internal workings of [ ] families" (Def.'s Mem. p. 13) is bogus—courts make such "case-by-case" factual inquiries into relationships every day. The imaginary surfeit of litigation (Def. Mem., p. 17) and discouragement from vigorous participation (Def.'s Mem. p. 15) are toothless fantasy. The observation that "[a]n adult child is not legally obligated to accept a parent's control and influence" (Def.'s Mem. p. 13) is apropos of nothing—the point here is that Foley accepted his mother's control and influence out of necessity. The analogy to "helicopter parents" (*e.g.* calling to complain about their children's college grades) (Def.'s Mem.

n. 1 pp. 12-13) is therefore absurd—Foley, a man-child, literally could not survive without his mother. Defendant was not over-protectively hovering about her grown son; she was keeping him alive because he lacked the wherewithal to do so himself.

Defendant's invocation of General Statutes § 45a-683 (Def.'s Mem. 14-14) should likewise be disregarded since that statute—by its express terms—simply does not apply. As Defendant was so quick to point out in her Request to Revise [Dckt No. 107])—Didato was not a "plenary guardian of a person with mental retardation, temporary limited guardian or limited guardian of a person with mental retardation who acts in good faith or pursuant to order of a court of probate" And, even if she *were*, the facts as pleaded show that Defendant's negligence rises to the level of the gross negligence exception to that immunity. Compare *Glorioso v. Police Dept. of Burlington*, X01 CV-02-0168481S, 48 Conn. Supp. 10, 16-17 (March 10, 2003) (Sup. Ct. Complex Litig.) (observing, in the context of the Good Samaritan Law,

that gross negligence is merely a heightened form of negligence—less than wanton, willful, reckless, intentional misconduct but more than ordinary negligence, it is "a more blatant degree of negligence."). That aptly describes the Defendant's conduct here. [See Am. Compl. ¶¶11-13, 26-31]

For all of these reasons, the Motion to Strike should be denied with respect to the Second Count.

B. Plaintiff Has Stated a Claim Pursuant to Restatement (Second) of Torts, § 319 for Defendant's Failure to Control/ Supervise Her Ward with Dangerous Propensities.

Restatement § 319 provides that:

> Duty of Those in Charge of Person Having Dangerous Propensities
>
> One who *takes charge* of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

(Emphasis added). For the duty to exist, there must be an actual taking charge of the third person and knowledge of the likelihood that he will cause bodily harm.

Faulkner & Boyce, P.C.
216 Broad Street • P.O. Box 391 • New London, CT 06320 • Tel: (860) 442-9900 • Fax: (860) 443-6428 • JURIS #103027

Here, Plaintiff alleges exactly that: Prior to the date of the Incident, "Didato had taken charge of Foley and was his custodian," and she "knew or should have know that Foley, her ward, was likely to cause bodily harm to others if not controlled." [Am. Compl. Third Count, ¶¶26-27] Moreover, it is alleged (and therefore taken as true in deciding the Motion) that Defendant *controlled or influenced nearly every aspect of Foley's life.* [Am. Compl. Second Count ¶28.] Thus, denying the Motion to Strike on the basis of these extraordinary factual allegations is perfectly consistent with *Kaminski*, 216 Conn. at 36 (see (Def.'s Mem. pp. 19-22), in which the parents "merely made a home" for their adult schizophrenic son (as opposed to undertaking a custodial relationship encompassing responsibility for controlling his behavior):

> Neither the defendant nor our own research has disclosed any case in which a parent, merely by making a home for an adult child who is a mental patient, has been held to be "[o]ne who takes charge of a third person" for the purposes of § 319. It would be anomalous, to say the least, to hold that the plaintiffs

> in this case had "take[n] charge" of Joseph at the very moment when, acknowledging their limited ability and opportunity to control his behavior, they had called the mental health center crisis team for assistance. That call for help distinguishes this case from *Estate of Mathes v. Ireland*, 419 N.E.2d 782, 784 (Ind. App. 1981), in which family members were held to have a duty to prevent a deranged and dangerous twenty year old man from abducting and drowning a member of the general public. A familial relationship does not, *per se*, establish the capacity to control that § 319 envisages as a basis for liability. *Poncher v. Brackett*, 246 Cal.App.2d 769, 771-73, 55 Cal.Rptr. 59 (1966).
>
> On the facts alleged in this case, therefore, § 319 would not furnish a basis for the defendant's counterclaim.

216 Conn. at 35-36.[5]

But more importantly with respect to *Kaminski*, Plaintiff has not alleged that it was the familial relationship that gave rise to Defendant's duty here, but the level of control she held—the nature of their special relation in that she had "taken charge" of Foley. The Amended Complaint makes clear that the basis for liability goes far

[5] *Kaminski*'s citation to *Estate of Mathes*, 419 N.E.2d at 784 directly contradicts Defendant's claim that § 319 can only apply to *professional* custodians.

beyond the mother-son relationship—Defendant's capacity to control Foley is the difference. See e.g. Am. Compl. ¶¶ 9-10.

This case is also distinguishable from *Kaminski* in that it lacks a cry for help such as the Supreme Court found critical there. Quite the contrary, here Defendant had *complete* control over Foley but egregiously failed to exert it.

Bebry v. Zanauskas, 81 Conn. App. 586, 591-92 (2004) (see Def.'s Mem. p. 20) does not provide any reason to grant the Motion either. There, the parents' awareness of their adult son's record of driving while intoxicated and having signed him out of an institution did not constitute the requisite "taking charge"—a much different factual scenario than is alleged here. Likewise, in *Rhea v. Uhry*, 2005 WL 3215961, *1 (D. Conn. 2005) (see Def.'s Mem. p. 21), there was a complete absence of an alleged custodial relationship and the defendant could not therefore be held liable for failing to prevent his adult daughter from making defamatory statements about the plaintiff.

The cases Defendant relies on involved a much lower, if not dubious, level of influence than the near-total control Defendant is alleged to have had over her incompetent son here.[6] Plaintiff has alleged much more than that Didato merely made a home for her adult child—the allegations are that she had taken charge of Foley and was his custodian, and that she knew he was likely to cause bodily harm to others if not controlled. [Am. Compl. ¶¶ 26-27].

Accordingly, the Motion to Strike should be denied with respect to the Third Count.

---

[6] For these same reasons the husband-wife lack-of-control cases Defendant cites at pp. 21 - 22 of her Mem. are so dissimilar from the instant matter as to be worthless in deciding the Motion. See *Benoit v. Edington*, 2008 WL 4150267 (Conn. Super. CV07-5010327 Aug. 14, 2008) (failure to allege that wife "took charge" of her husband); *Wilderman v. Powers*, 2007 WL 1470477 (Conn. Super. CV06-5001065S May 4, 2007) (relationship of husband and wife without "take charge" allegations insufficient to survive summary judgment on § 319 claim); *Nuzzo v. Hitchcock*, 2001 WL 267620 (Conn. Super. CV99-0428801 Feb. 28, 2001) (same—no allegation of any "special relation" contained in Restatement §§ 316 – 320, or § 314A).

C. Plaintiff Has Stated a Claim Pursuant to the Common Law for Defendant's Breach of Her Duty to Protect Foreseeable Third Parties From Foley's Aggressive Behavior.

"At common law, the torts of children do not impose vicarious liability upon parents qua parents, although parental liability may be created by independently negligent behavior on the part of parents." *Kaminski*, 216 Conn. at 34 (cited at Def.'s Mem. pp. 11, 19-22) (emphasis added) (citing *LaBonte v. Federal Mutual Ins. Co.*, 159 Conn. 252, 256 (1970)); see also *Pelletier v. Sordoni/Skanska Construction Co.*, 286 Conn. 563, 578 (2008) ("[a] duty to use care may arise from a contract, from a statute, or from *circumstances* under which a reasonable person, knowing what he new or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or his failure to act."); *Coburn v. Lenox Homes, Inc.*, 186 Conn. 370, 375 (1982) (same).[7]

[7] See also *RK Constructors, Inc. v. Fusco*, 231 Conn. 381, 385 (1994) ("Duty is a legal conclusion about relationships between individuals, made after the fact . . . . The nature of the duty, and the specific persons to whom it is owed, are

"The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if not exercised . . . . [T]he test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" *Orlo v. Connecticut*, 128 Conn. 231, 237 (1941); *Perodeau v. Hartford,* 259 Conn. 729, 754, 791 A.2d 552 (2002).

Here, Plaintiff has alleged that Didato:

- Was responsible for her son's day-to-day needs including providing for and making decisions about his psychological care and administering and regulating his prescription drug regimen [Am. Compl. ¶¶9(g), 10];
- Was at all times aware of Foley's mental retardation, childlike mental condition, anxiety disorder and his eventful behavioral history—including riding through the neighborhood on his bicycle shouting profanities and

---

determined by the circumstances surrounding the conduct of the individual.") (Internal quotation and citation omitted.); see also *K.H. v. J.R.*, 826 A.2d 863 (Pa. 2003). (noting that Pennsylvania's parental liability statute—imposing strict liability for willful tortious acts of children and limiting amount of recovery—"does not affect the common-law liability of parents").

otherwise acting menacingly and inappropriately on several prior occasions [Am. Compl. ¶¶10-12, 16]; and

- Knew or should have known that there was an imminent risk that he would harm someone in the neighborhood / that he was likely to cause bodily harm to others if not controlled [Am. Compl. Second Count ¶29, Third Count ¶27].

Accordingly, Plaintiff has properly stated a claim against Defendant for the breach of her common law duty to protect foreseeable third parties from Foley's aggressive behavior. See *Kaminski*, 216 Conn. at 35 ("legally designated custodians may also have a common law duty to protect foreseeable third parties from their wards' aggressive behavior.") (Emphasis added.); see also *Purzycki v. Fairfield*, 244 Conn. 101, 105 (1998) (recognizing a special relationship exception outside the provisions of the Restatement in the context of a school board and the minor students under its care).

The Motion to Strike should therefore be denied with respect to the Fourth Count.

CONCLUSION

For the reasons stated herein, Plaintiff respectfully requests that the Court deny the Motion to Strike in full.

THE PLAINTIFF:

BY: Dale P. Faulkner
Dale P. Faulkner, of
Faulkner & Boyce, P.C.

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel and pro se parties of record as follows: to Jack G. Steigelfest, Esquire of Howard, Kohn, Sprague & Fitzgerald, P.O. Box 261798, Hartford, CT 06126-1798 and Eileen R. Becker, Esquire of Loughlin FitzGerald, P.C., 150 South Main Street, Wallingford, CT 06492 this 2nd day of February, 2009.

Dale P. Faulkner
Dale P. Faulkner