NO. KNL CV 08-5007342-S	:	SUPERIOR COURT
ALLISON PATTERSON, ADMX. OF THE ESTATE OF BRUCE J. PATTERSON	:	J.D. OF NEW LONDON
VS.	:	AT NEW LONDON
ANDREW FOLEY, ET AL	:	FEBRUARY 13, 2009

REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

BACKGROUND

By Motion dated December 12, 2008, the defendant Georgine Didato sought an Order striking the Second, Third and Fourth Counts of the Amended Complaint for the reason that she owed no duty as a matter of law to protect the decedent from injury allegedly caused by her adult son, Andrew Foley.

The plaintiff has now filed her Memorandum of Law in Opposition to Motion to Strike, contesting the bases for the Motion as to each count. The parties cite to the same basic authority, the Restatement (Second) of Torts, §§315, 316, and 319, but reach opposite conclusions as to the application of the rules stated in those sections to the allegations of the Amended Complaint. Georgine Didato respectfully submits that the arguments of the plaintiff are insufficient to save her pleading, which must be stricken as a matter of law.

ARGUMENT

I. Restatement (Second) of Torts §319 Does Not Create a Duty on the Part of Parents of Adult Children.

The plaintiff first relies on Restatement (Second) of Torts §316 as supporting the existence of a duty on the part of Georgene Didato to prevent her adult son Andrew Foley from injuring the decedent. Restatement (Second) of Torts §316 provides:

> Duty of Parent to Control Conduct of Child
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> 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.

(emphasis added). The plaintiff argues that because she has plead sub-parts a) and b), this court should impose a duty even though she cannot satisfy the basic pre-requisite that a duty exists only with respect to a minor child. Andrew Foley was not a minor child.

The sole decision relied upon by the plaintiff falls into this exact trap. In Silberstein v. Cordie, 474 N.W.2d 850 (Minn. App. 1991), the court held that factual

issues as to the parents' ability to control their adult child left open the possibility of liability under §316. Thus, the court keyed the existence of a duty to the opportunity and ability to control.

In doing so, the Silberstein court and the plaintiff here, miss an essential point. The opportunity and ability to control a third person, by themselves, are never legally insufficient to support the existence of a legal duty to do so. As a comment to Restatement (Second) of Torts §315 recognizes:

> In the absence of either one of the kinds of special relations described in this Section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm. **This is true although the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial efforts and without any inconvenience to himself.**

Restatement (Second) of Torts §315, comment b (emphasis added). Thus, the plaintiff's allegations that Georgene Didato had the opportunity and ability to control Andrew Foley cannot establish a duty absent a special relationship recognized in the Restatement (Second). The relationship between a parent and an adult child is not such a special relationship.

There is a reason why the Restatement (Second) limits its recognition of a

special relationship to that between a parent and a minor child, and does not extend a duty to the parents of adult children. Those limited relations recognized as supporting a duty all share one essential element that is absent here. That element is the **right**, as distinguished from the opportunity and ability, to control the conduct of the other person. A parent has the legal right to refuse to allow a minor child to act so as to injure another (§316), a master has the legal right to refuse to allow a servant to use the master's premises or chattels to injure another (§317), the possessor has the legal right to refuse to allow another to use his land or chattels to injure another (§318), one who takes charge of a third person has the legal right to control that person's behavior (§319).

With rights come duties to exercise those rights properly. A parent has the right as well as the duty to control minor children. *See* State v Leavitt, 8 Conn. App. 517 (1986) ("[a] parent, being charged with the training and education of his child, has the right to exercise such control and restraint and to adopt such disciplinary measures for the child as will enable him to discharge his parental duty") (citation omitted). By contrast, where, as here, the parent of an adult child has not been appointed legal guardian and thus has no legal right to control the adult child, the rationale behind the

recognition of a special relationship sufficient to support the existence of a duty does not exist. *See, e.g.*, Hartsock v. Hartsock, 189 A.D.2d 993, 994, 592 NYS2d 512 (1993) ("Inasmuch as parents have no legal right to control their adult child's activities, they cannot be held liable for those activities"); Drysdale v. Rogers, 869 P.2d1, 3 (Utah App. 1994) ("The fact that Billy Rogers is a non-minor is a critical factor in this analysis.").

Thus the plaintiff's argument that Andrew Foley was child-like and therefore should be treated as a child misses the mark. Andrew Foley was not child-like in the critical sense that Georgene Didato did not have the legal right to control him as she did when he was a minor. Absent that legal right, she stood in no different shoes in the eyes of the law than any other person who allegedly had the ability and opportunity to control him so as to prevent injury to a third person. Indeed, to treat her differently is indefensible.

> It would be discriminatory and grossly unfair to hold the parents of a developmentally disabled adult to a higher degree of responsibility for the conduct of their child than the degree of responsibility to which parents of a normal adult child are held. There was no evidence presented and we refuse to presume, find, or take judicial notice, that developmentally disabled persons are some kind of menace to society. It would seem that the adult child with normal intelligence, who happens to have an addiction to alcohol or drugs or who is just plain mean, is more of a menace to society than the vast majority of developmentally disabled persons, and we do not hold the parents of these so-called normal children to a duty to

supervise their problem adult child.

State Farm Fire & Cas. Co. v. Watters, 268 Ill.App.3d 501, 511-12, 644 N.E.2d 492 (1994). The law imposes no duty in these circumstances, and the Revised Complaint therefore states no viable cause of action.

II. Restatement (Second) of Torts §319 Creates A Duty Only Upon Professional Custodians.

The plaintiff's reliance upon Restatement (Second) of Torts §319 is based on her conclusory allegation of the words of that provision. But a motion to strike does not admit conclusory allegations, and the plaintiff's argument that the facts alleged state a viable cause of action can only be made by consciously ignoring the interpretation of §319 in appellate decisions constituting controlling authority upon this court.

Restatement (Second) of Torts §319 is entitled Duty of Those in Charge of Persons Having Dangerous Propensities. It reads as follows:

> 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.

There are two Illustrations provided to §319:

> 1. A operates a private hospital for contagious diseases. Through the negligence of the medical staff, B, who is suffering from

scarlet fever, is permitted to leave the hospital with the assurance that he is entirely recovered, although his disease is still in an infectious stage. Through the negligence of a guard employed by A, C, a delirious smallpox patient, is permitted to escape. B and C communicate the scarlet fever and smallpox to D and E respectively. A is subject to liability to D and E.

2. A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C.

As noted in the initial memorandum of law accompanying the Motion to Strike, our Supreme Court in Kaminski v. Fairfield, 216 Conn. 29, 34-35 (1990), observed that "[b]oth of the official illustrations to §319 deal with the liability of institutions, such as hospitals, that have formal custodial responsibility for those in their charge" and that "the reported cases that have recognized a duty to control have generally done so in the context of professional custodians with special competence to control the behavior of those in their charge." Our Appellate Court has interpreted Kaminski as saying that "**§319 imposes no duty to control the conduct of another in any relationships other than those involving professional custodians with special competence to control those in their charge** . . .." Bebry v. Zanauskas, 81 Conn. App. 586, 591 (2004) (emphasis added).

Under the interpretation of §319 by these controlling authorities, the plaintiff has

no legally sufficient claim against Georgene Didato. There is no allegation that Georgene Didato was a professional custodian with special competence. To the contrary, the allegation is that Andrew Foley lived at home with his mother.

Connecticut's limitation of liability pursuant to §319 to custodial arrangements is not unique. *See* Bartunek v. State, 266 Ne., 454, 441, 666 N.w.2d 435 (2003) ("'takes charge' is intended to refer to a custodial relationship"); Vaugn v. United States, 933 F. Supp. 660 (E.D. Ky. 1996) ("apply only to situations where a custodial relationship exists"); Prosser & Keeton on Torts (W. Keeton 5th. Ed. 1984) (relationships discussed in §319 "are custodial in nature"). However, even if Connecticut had not adopted the more persuasive interpretation (as it has), the controlling authority of the Connecticut Supreme and Appellate Courts cannot be bypassed.

Georgene Didato had not taken charge of Andrew Foley within the meaning of Restatement (Second) of Torts §319 and that section does not support the existence of a viable claim.

III. The Common Law Will Not Recognize a Duty in Conflict with the Limitations of the Restatement (Second).

The final argument made by the plaintiff is that if the exceptions recognized in the Restatement (Second) do not apply, this court should create a novel exception to

the general rule that one person does not owe a duty to protect another from the conduct of a third person based on the facts of this case and thus allow the plaintiff to recover under the common law without the support of the Restatement (Second), which the parties otherwise agree has been adopted and controls this area of the law in Connecticut.

In making this argument, the plaintiff ignores an early part of her memorandum. On page 7, she recites the general rule of the Restatement (Second) of Torts §315 that no duty exists unless 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, then goes on to quote the comment stating that "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. . . ." Despite this clear direction for finding the relations that support liability, the plaintiff asks the court to ignore those rules when they do not help her and create a new rule out of whole cloth.

The authorities cited by the plaintiff in support of this position come nowhere near to doing so. First the plaintiff quotes Kaminski v. Fairfield, 216 Conn. 29, 35 (1990) as stating that "legally designated custodians may also have a common law duty to

protect foreseeable third parties from their wards' aggressive behavior." This statement seems to recognize the basis for the defendant's motion: Mrs. Didato was **not** a legally designated custodian of Andrew Foley at the time of the incident. All the Court in Kaminski was stating was that it might be wise to adopt Restatement (Second) of Torts §319 as the law in Connecticut in an appropriate case. However, where the parents are not legal custodians, as true here as in Kaminski, the wisdom of adopting of §319 as the law in Connecticut need not be reached. Nothing in Kaminski supports the recognition of a duty outside of the Restatement (Second) parameters.

Next the plaintiff cites Purzycki v. Fairfield, 244 Conn. 101, 105 (1998) as "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." This Court will search page 105 of volume 244 of the Connecticut Reports in vain for anything remotely supporting that statement. Indeed, there is nothing at all in the entire opinion that comes close to the proposition for which the plaintiff cites the case. Rather, in Purzycki, the Court found that the plaintiff's claim of injury after he was tripped and fell into a wire mesh door at school fell within the "imminent harm" exception to qualified municipal immunity. Nowhere does the opinion even mention the Restatement

(Second) of Torts or discuss any "special relationship" between the school board and the student necessary to find a duty. To the contrary, the Court specifically rejected the defendant's claim that it ought to be entitled to parental immunity since it stood *in loco parentis* with respect to the child.

There is simply no support for the plaintiff's claim that the common law, independent of the Restatement (Second) provisions, would or should recognize liability based solely on the foreseeability of harm, rejecting the policy based limitations stated in the Restatement (Second) defining the narrow relationships that could support the existence of a duty. The plaintiff's argument is inconsistent with, rather than supported by, Connecticut authority.

IV. Any Duty Imposed by Virtue of a Constructive Guardianship Should Not Exceed the Duty Owed in the Context of an Actual Guardianship.

As articulated above and in her initial memorandum, Georgene Didato maintains that the law imposes no duty on her to protect others from the conduct of her adult son at the time she was not his legal guardian. However, if the plaintiff succeeds in convincing the court otherwise, Georgene Didato maintains that it makes no sense to impose a greater duty on her as a constructive guardian of her adult son than would be imposed if she had the legal status of guardian.

Ms. Didato pointed out in her initial memorandum that General Statutes §45a-683 provides that the legal guardian of a mentally retarded person "who acts in good faith . . . shall be immune from civil liability, except that such immunity shall not extend to gross negligence." The plaintiff argues that Ms. Didato's relationship with her adult son pre-incident (when she was not his court-appointed guardian) and post-incident (when she became his appointed guardian) did not appreciably differ; Plaintiff's 2/2/09 Memorandum of Law; yet seeks to impose a simple negligence standard for the pre-incident period where Connecticut law makes her immune from such liability for the post-incident period. This makes no sense. If any duty is imposed on Georgene Didato, and it should not be, exposure to liability flowing from that duty should be consistent with that defined by the statute.

And contrary to the single citation in the plaintiff's Memorandum (at page 15), it is not at all clear that a complaint alleging gross negligence can support civil liability in these circumstances. To the contrary, the Superior Court decisions are evenly split on the question of whether a statute providing immunity for all but gross negligence thereby creates an otherwise cause of action for gross negligence that does not otherwise exist. In support of her argument, the plaintiff cites to Glorioso v. Police Dept.

Of Burlington, 48 Conn. Supp. 10 (2003). Additional authority she could have cited would include Crandall v. Stonington Volunteer Ambulance Corp., 2007 WL 1416704 , 43 Conn. L. Rptr. 308, Docket No. CV 5001172 (Conn. Super. KNL 5/2/07) (Hurley, J.); Cordero v. American Medical Response, 2004 WL 1098509, 36 Conn. L. Rptr. 866, Docket No. CV 02-0458609S (Conn. Super. NNH 4/23/04) (Devlin, J.); Sanada v. Plymouth, 2003 WL 21675509, 35 Conn. L. Rptr. 179, Docket No. CV 03-519045S (Conn. Super. HHB 6/9/03) (Cohn, J.); Hansen v. Mohegan Fire Co., 2003 WL 1962933, 34 Conn. L. Rptr. 479, Docket No. CV 111388 (Conn. Super. KNL 4/7/03) (Corradino, J.).

On the other hand, an equally weighty list of decisions, including opinions by our current Chief Justice and a current Judge of the Appellate Court, hold that a statute immunizing a party from claims of negligence except for gross negligence does not create a cause of action for gross negligence, which does not otherwise exist at common law. Wattman v. New Hartford Vol. Fire Dept., 2001 WL 1284773, 30 Conn. L. Rptr. 554, Docket No. CV 00-0156795S (Conn. Super. 10/10/01) (Rogers, J.); Gaudet v. Braca, 2001 WL 761053, Docket No. CV 98-0351943S (Conn. Super. 6/13/01) (Skolnick, J.); Shaham v. Wheeler, 1998 WL 131709, Docket No. CV 0321879 (Conn.

Super. 3/12/98) (Nadeau, J.); Croteau v. American Medical Response of CT, 1997 WL 435050, Docket No. CV 97-0256039S (Conn. Super. 7/22/97) (DiPentima, J.); Shaham v. Wheeler, 1997 WL 12415, 18 Conn. L. Rptr. 539, Docket No. CV 321879 (Conn. Super. 1/2/97) (Moraghan, J.).

It is respectfully submitted that it is this latter set of decisions that is more persuasive in light of the legislature's direction that the meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes, without reference to extratextual evidence if the meaning is plain and unambiguous and does not yield absurd or unworkable results. General Statutes §1-2z. As pointed out by then Judge Rogers,

> At common law, Connecticut has never recognized gross negligence as a separate basis of liability in the law of torts. Decker v. Roberts, 125 Conn. 150, 157, 3 A.2d 855 (1939).
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> * * *
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> The Supreme Court held in Rumbin v. Utica Mutual Ins., 254 Conn. 259, 266, 757 A.2d 526 (2000), that "[w]e recognize only those alterations of the common law that are clearly expressed in the language of the statute ..." Id., 265-66. "In the absence of such explicit language, we adhere to our long-standing rule that '[n]o statute is to be construed as altering the common law, farther than its words import [and a statute] is not to be construed as making any innovation upon the common law which it does not fairly express.' " Id., 266. Thus, § 52-557b(b) must contain explicit language in order to create a cause of action in gross

> negligence, not implicit or implied language. Conn. Gen.Stat. § 52-557b(b) does not explicitly create a cause of action for gross negligence. Accordingly, the defendants' motion to strike count six of the plaintiffs' complaint is granted.

Wattman v. New Hartford Vol. Fire Dept., 2001 WL 1284773 at *3-4. General Statutes §45a-683, like General Statutes §52-557b(b) discussed in Wattman, does not contain language explicitly creating a cause of action for gross negligence. The contrary authority implying the creation of a cause of action without such explicit language is contrary to General Statutes §1-2z and the authorities cited in Wattman and the other similar cases.

The result is that a count alleging gross negligence is legally insufficient, since no such cause of action exists in Connecticut law.

There are two reasons why this court need not reach the issue discussed immediately above. The first is that no duty can be found as to Ms. Didato in any event and the entire discussion of what duty might be recognized is therefore moot. Moreover, the issue need not be reached because the Amended Complaint, properly construed, does not even allege gross negligence.

In Hanks v. Powder Ridge Restaurant Corp., 276 Conn. 314, 337-38 (2005), the Court quoted a basic law encyclopedia as defining gross negligence to be "very great or

excessive negligence, or as the want of, or failure to exercise, even slight or scant care, or 'slight diligence.'" Judge Cohn provided a further definition in Sanada v. Plymouth, 2003 WL 21675509, at *4:

> Gross negligence is also more serious than ordinary negligence, involving an extremely unjustified risk. Dobbs, *supra* at 350-51. Our Supreme Court has quoted the Massachusetts definition as follows: "Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilful, wanton and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence ... It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong." Gondek v. Pliska, 135 Conn. 610, 613-14, 67 A.2d 552 (1949), quoting Altman v. Aronson, 231 Mass. 588, 591, 121 N.E. 505 (1919).

Judge Cohn concluded that gross negligence is "essentially a reckless disregard for human life." Id. Review of this authority confirms the wisdom of Connecticut's approach

rejecting the recognition of such distinctions in the law of negligence.

In any event, attempting to apply this definition to the allegations leads to the conclusion that no legally sufficient claim of gross negligence is alleged in the Amended Complaint. Rather, each count alleges only simple negligence in failing to adequately supervise, monitor, take reasonable precautions, provide appropriate medications, control or meet the applicable standard of care of a reasonable person in the defendant's position. Even if Georgene Didato could be held liable for gross negligence, and that conclusion is erroneous for all the reasons stated above, the Amended Complaint does not state such liability and must therefore be stricken.

CONCLUSION

For the foregoing reasons, the defendant Georgene Didato maintains that the arguments made in the plaintiff's Memorandum of Law in Opposition to Motion to Strike must be rejected and that the defendant's Motion to Strike should therefore be granted.

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CERTIFICATION

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