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	MARCH 4, 2009

RESPONSE TO DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE

Plaintiff hereby submits her Response to Defendant's Reply Memorandum in Support of Motion to Strike.

I. DEFENDANT WRONGLY CLAIMS THAT RESTATEMENT (SECOND) OF TORTS § 316 CAN NEVER CREATE A DUTY ON THE PART OF PARENTS OF CHILDREN WHO ARE OVER THE CHRONOLOGICAL AGE OF 18 YEARS BUT HAVE THE MENTAL CAPACITY OF A MUCH YOUNGER CHILD. THE SILBERSTEIN DECISION PROVES OTHERWISE.

As noted, generally, under common law, a person owes no duty to warn or protect others who may be endangered by a third party's conduct. This rules applies 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." Restatement of Torts (Second) § 315(a) (1965). One such special relation is the duty of a parent to control the conduct of a child. *Silberstein v. Cordie*, 474

N.W.2d 850, 855 (Minn. App.) (citing Restatement of Torts (Second) § 316(b) (1965), review denied and remanded in part on other grounds, 477 N.W.2d 713 (Minn. 1991). However, this duty is narrow and, at the very most, the duty arises when the parent has both the opportunity and the ability to control the child. Restatement of Torts (Second) § 316 cmt. b (1965). In *Silberstein*, the court found that duty existed where the stepparents had control of the day-to-day care of a 27-year-old with the mental condition of a child. 474 N.W.2d at 856. The court noted that the man lived with his stepparents and they knew he was not taking his medication, could not sleep, and was nonverbal. *Id.*

Defendant tries to distract the Court from the appropriate focus—whether there was a "special relationship," which includes the ability to control—by the meaningless assertion that Defendant did not have a "right" to control her son's behavior. Even if it mattered, it is nonsense to suggest that Defendant did not have a "right" to control her Foley's conduct. Of course she did—he was and is completely dependent on her. This is not just a "relationship between a parent and an adult child" (**Reply, p. 3**). Defendant had assumed the "day-to-day care" of her son because his mental condition was like that of a child. See Opp., p. 6.

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Foley was not emancipated—meaning free from the restraint, power, or control of another[1]—in any true sense of the word. This is why *Hartsock v. Hartsock*, 189 A.D.2d 993 (N.Y. 1993) (**Reply, p. 5**), where the central allegation was negligent storage of a shotgun, is a much different case. The son's activities there were completely independent of his parents; he was described as a "24-year-old, married, [and] self-supporting." *Id.* at 994. The tenuous link found insufficient to give rise to a duty was that he stored the gun used in the killings at his parents' house. That is in sharp contrast to Defendant's allegedly having controlled nearly every aspect of Foley's life, including providing him with the bicycle he used to roam the neighborhood, and permitting him to do so despite being aware of his mental deficiencies and his history of behavioral problems involving the neighbors. See Am. Compl. ¶¶4–12.

Drysdale v. Rogers, 869 P.2d 1, 3 (Utah App. 1994) (**Reply, p. 5**) is likewise easily distinguished—the son's capacity in that case was not in any way diminished. He was certainly not akin to a child. Moreover, unlike the Defendant's enablement here, in *Drysdale* "not only did Mr. and Mrs. Rogers not offer Billy

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[1] See Merriam-Webster's OnLine Dictionary at http://www.merriam-webster.com/dictionary/emancipated.

Rogers alcohol nor authorize him to use it or give it to others, but in fact, they left specific instructions to the contrary." Accordingly, "it can not be said that Mr. and Mrs. Rogers knew, or should have known, that Billy Rogers would present a danger to Strong or someone similarly situated." 869 P.2d at 3. (Internal citation omitted.)[2] Here, of course, Plaintiff has alleged that Defendant "[o]n or about June 22, 2007, Didato knew or should have known there was an imminent risk that Foley would harm someone in his neighborhood." Am. Compl. ¶29.

Another statement in *Drysdale* suggests that that court, if faced with the instant Motion to Strike, would deny it:

> [W]e will only find 'a special relationship and consequent duty when a defendant knew of the likely danger to an individual or distinct group of individuals or when a defendant should have known of such a danger....

Id. at 4 (Emphasis added). That is exactly what Plaintiff has alleged here. Am. Compl., Second Count ¶¶28 ("By 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

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[2] Additionally, *Hartsock* and *Drysdale* both affirmed summary judgments, meaning that the allegations in both cases were presumably sufficient to withstand a preliminary challenge to strike.

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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., Second Count, ¶29 ("Didato knew or should have known there was an imminent risk that Foley would harm someone in his neighborhood"); see also Am. Compl. ¶¶11-12 (Didato was aware of Foley's mental retardation, childlike mental condition, anxiety disorder and his behavioral history). Why Defendant insists Plaintiff has failed to sufficiently plead a "special relationship" (**Reply pp. 3-4**) is a mystery.

State Farm Fire & Cas. Co. v. Watters, 268 Ill. App. 3d 501, 511-12 (1994) (**Reply, pp. 5-6**) does not help the Defendant's argument any. That was a declaratory judgment coverage action—the issue was whether the mother's homeowner's policy should respond to allegations of sexual assault on minors by her 28-year-old son who lived with her. The appellate court decided no coverage for policy reasons, and reversed the lower court's declaration. The only claim in *State Farm* pertinent to the instant Motion to Strike was against the assailant's mother for "negligently and carelessly allow[ing the] sexual molestation and assault and battery to take place in her home…" *Id.* at 511. However that "cause

of action and potential coverage under the policy [was] not argued on appeal by either party, which was understandable, as there was no evidence presented before the trial court that [the assailant's] mother had any knowledge of [his] activities...." *Id.* Thus, *State Farm* too is in sharp contrast to this case where Didato is alleged to have been aware of Foley's mental retardation, childlike mental condition, anxiety disorder and his behavioral history. She is also alleged to have been aware of his behavioral and emotional issues such as his propensity to engage in verbal confrontations; propensity towards physical violence; history of anxiety resulting in panic and/or the loss of behavioral self-control; and his history of causing disruptions in the neighborhood including, in particular, incidents involving the Patterson household. Am. Compl. ¶¶11-12. Furthermore, Plaintiff alleges that "On or about June 22, 2007, [Defendant] knew or should have known there was an imminent risk that Foley would harm someone in his neighborhood. Am. Compl., Second Count ¶29. Finally, Foley's routine—which he was in the process of when he committed the assault and battery—would not have been possible but for Defendant's assistance and permission. See Am. Compl. ¶31. These allegations are more than sufficient.

The Motion to Strike must be denied with respect to the Second Count.

II. DEFENDANT WRONGLY CLAIMS THAT RESTATEMENT (SECOND) OF TORTS § 319 ONLY APPLIES TO *PROFESSIONAL* CUSTODIANS.

Section § 319 does not only apply to *professional* custodians as Defendant claims (**Reply, pp. 6-8**). The text of § 319 simply refers to "[o]ne who takes charge of a third person," making no mention of "professionals." Likewise there is no stated requirement of remuneration or particular training or competence.[3]

Despite these indisputable truths, Defendant seizes on the fact that courts have generally applied § 319 to professional custodians, and tries to twist that into a "professional" precondition for recovery under this section. There is no such requirement, but it is not surprising that as a matter of course most cases that arise under this provision do involve professional custodians of some type.

Second, it is completely disingenuous for Defendant to claim that the basis for Plaintiff's section 319 claim here is that "Foley lived at home with his mother" (**Reply, p. 8**)—the pertinent factual allegations go far beyond that: "Didato had taken charge of Foley and was his custodian" (Am. Compl., Third Count ¶26); "Didato had assumed responsibility for Foley's day-to-day needs and care,

[3] In any event, there was no professional custodian in the world with more "special competence" to control its charge than Didato had with respect to Foley.

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including but not limited to, providing for Foley's [shelter, food, clothing, financial needs, disciplinary needs, transportation, medical and psychological care]," and for administering and regulating his prescription drug regimen (Am. Compl. ¶¶9-10) (Emphasis added).

Accordingly, *Bartunek v. State*, 266 Ne. 454, 441 (2003) (**Reply, p. 8**) could hardly be more factually distinct. There, the issue was whether the State (through "intensive supervision probation" ("ISP") officers) owed a duty to protect individual citizens from harm caused by the criminal conduct of probationers.[4] As to what "take charge" means under Rest. § 319, the *Bartunek* court observed (a) that the phrase "take charge" refers to a custodial relationship (Plaintiff does not dispute this point and has alleged that the Defendant was Foley's custodian (Am. Compl., Third Count ¶26)), and (b) that courts are divided on whether a parole or supervising probation officer has a duty under section 319 to control the behavior of a parolee or probationer. *Bartunek* observed,

> … the majority of courts have concluded that the **level of contro**l afforded to a parole or probation officer is not such that an officer assigned to

[4] Answer: yes, if "police have specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking," but those circumstances were not present there.

> supervise a parolee or probationer 'takes charge of a third person' within the meaning of the Restatement.

Bartunek, 266 Ne. at 463 (Emphasis added). That is precisely what makes *Bartunek* a much different case. Here, Plaintiff has alleged a much higher level of control over Foley by the Defendant than a probation officer would ever have — even apparently one practicing "intensive supervision." A probationer is "generally free to conduct his or her day-to-day affairs and is responsible only for reporting certain activities to the probation officer as they occur." *Id.* at 463. Foley was not nearly so free. See Am. Compl. ¶¶5-10.

Accordingly, and for the reasons previously stated, the Motion to Strike must be denied with respect to the Third Count.

III. DEFENDANT MISAPPREHENDS THE POWER OF THE COMMON LAW AND THE NATURE OF A RESTATEMENT.

Defendant is sorely mistaken with respect to the relationship between the common law and the Restatement (Second) of Torts (**Reply, pp. 8-11**). As the Court is well aware, a Restatement is secondary authority published by the American Law Institute as a guide to the majority common law rule on particular legal issues and topics. When Connecticut courts adopt a Restatement provision it thus becomes, like any other common law provision, part of Connecticut's

primary law, part of its common law. See *e.g. Wachtel v. Rosol*, 159 Conn. 496 (1970) (explaining how section 402A of the Restatement became common law in Connecticut). That does not mean, however, as Defendant suggests, that it necessarily supplants or overrules the existing common law of the state. Indeed, the common law is not even abrogated or trumped by the *Evidence Code*, let alone a mere Restatement. See *State v. DeJesus*, 288 Conn. 418 (2008) (concluding that the adoption of the Evidence Code by the Superior court judges did not divest the Supreme Court of its inherent common law adjudicative authority to develop and change evidence rules on a case-by-case basis).

Defendant is also confused when claiming that *Purczycki v. Fairfield*, 244 Conn. 101, 105 (1998) does not actually stand for the proposition Plaintiff cited it for at p. 15 of Opposition—"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." *Purczycki* certainly does stand for that proposition.

Defendant "search[ed" the *Purczycki* decision thoroughly and did not find a single reference to the Restatement—this why the parenthetical description of the case in Plaintiff's Opposition reads: "*outside the provisions of the Restatement.*"

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In *Purzycki*, the superior court had granted the defendant's motion to set aside a verdict in favor of the parents of an 8-year-old child who had been injured at school due to the school's admitted failure to supervise. After the Appellate Court affirmed, the Connecticut Supreme Court reversed and remanded with directions to enter judgment in favor of the plaintiffs because "the risk of harm was significant and foreseeable, as shown by the principal's testimony 'that if elementary schoolchildren are not supervised, they tend to run and engage in horseplay that often results in injuries.'" 244 Conn. at 114-115. *Purczycki* is therefore a prime example of a duty to supervise / control case—under the common law, without any reference to the Restatement—in which the duty sprang from the special relationship between school and student given the undisputed foreseeability of the harm.

Contrary to the Defendant's claims, there is no question as to the continued vitality of the common law. The concept of negligence—conduct that is culpable because it falls short of what a reasonable person would do to protect another individual from foreseeable risks of harm—is alive and well too.

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

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IV. CONNECTICUT GENERAL STATUTES § 45A-683 HAS NO BEARING ON THIS ACTION SINCE THE PARTIES AGREE THAT DEFENDANT WAS NOT HER SON'S LEGAL GUARDIAN AT THE TIME OF THE EVENTS THAT CAUSED PLAINTIFF'S INJURIES.

According to the Defendant "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 a guardian" **(Reply p. 11)**. She is therefore apparently asking this Court to apply General Statutes §45a-683 even though, by its plain terms, it does not apply. See *Emergency Medical Services Commission v. Freedom of Information Commission*, 19 Conn. App. 352, 355 (1989) ("Where the words of a statute are clear and unambiguous courts are not free to infer a meaning other than that expressed in its plain language ... Courts cannot, by construction, read into statutes provisions which are not clearly stated.") (Citation omitted; internal quotation marks omitted.). The same is true here—the statute simply does not apply. It is the province of the legislature, not the courts, to change it. The Court cannot apply Conn. Gen. Stat. §45a-683 here.

Conclusion

For these reasons and those previously stated in the Opposition, Defendant's Motion to Strike must be denied.

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 and faxed 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 [Fax: 1-860-247-4201] and Eileen R. Becker, Esquire of Loughlin FitzGerald, P.C., 150 South Main Street, Wallingford, CT 06492 [Fax: 1-203-269-3487] this 4th day of March, 2009.

Dale P. Faulkner
Dale P. Faulkner

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