IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOANN F. CHRISTIAN, individually and as Administratrix of the Estate of BRUCE J. CHRISTIAN, NICOLE C. CHRISTIAN, LYNDSEY M. CHRISTIAN and BRUCE J. CHRISTIAN, JR.,	)	
Plaintiffs,	)	C.A. No.: N09C-10-202 EMD
v.	)	
COUNSELING RESOURCE ASSOCIATES, INC., a Delaware Corporation, J. ROY CANNON, LPCMH, ARLEN D. STONE, M.D., Individually and doing business as Abby Family Practice, and THE FAMILY PRACTICE CENTER OF NEW CASTLE, P.A., a Delaware Professional Association, individually and doing business as Abby Family Practice,	)	TRIAL BY JURY OF TWELVE DEMANDED
Defendants.	)	

Submitted: June 9, 2014
Decided: July 16, 2014

Upon Defendants Arlen D. Stone, M.D. and
The Family Practice Center of New Castle's Motion for Summary Judgment
GRANTED

Richard J. Heleniak, Esquire, Messa & Associates, Philadelphia, Pennsylvania and Timothy A. Dillon, Esquire, McCann & Wall, LLC, Wilmington, Delaware, *Attorneys for Plaintiffs*.

John D. Balaguer, Esquire, and Dana Spring Monzo, Esquire, White and Williams LLP, Wilmington, Delaware, *Attorneys for Defendants Arlen D. Stone, M.D. and The Family Practice Center of New Castle, P.A.*

John A. Elzufon, Esquire, and Gary W. Alderson, Esquire, Elzufon Austin Tarlov & Mondell, P.A., Wilmington, Delaware, *Attorneys for Defendants J. Roy Cannon, LPCMH, and Counseling Resource Associates, Inc.*

DAVIS, J.

INTRODUCTION

Plaintiff Joann Christian, along with her three children, have filed this action for professional negligence against Defendants Arlen Stone, M.D. and The Family Practice Center of New Castle, P.A., and J. Roy Cannon, LPCMH, and Counseling Resource Associates, Inc. (collectively "Defendants"). The Christians seek damages for the January 8, 2008 suicide of Mrs. Christian's husband, Bruce Christian. The Christians' claim that Dr. Stone, Mr. Christian's primary care physician, and Mr. Cannon, Mr. Christian's mental health counselor, were negligent in their treatment of Mr. Christian, which in turn caused his death by suicide. Now before the Court is Dr. Stone's Motion for Summary Judgment (the "Motion").

Dr. Stone argues that summary judgment should be granted because Mr. Christian's suicide was an intentional and deliberate, intervening act which prevents the Christians from holding Dr. Stone liable. Mr. Cannon has filed a motion to join Dr. Stone in all of Dr. Stone's pending motions, including Dr. Stone's Motion for Summary Judgment now before the Court. For the reasons stated in this Opinion, Defendants' Motion for Summary Judgment is **GRANTED**.

FACTUAL BACKGROUND

The background of this case begins with Dr. Stone's treatment of Mr. Christian as his primary care physician. Dr. Stone is a general practitioner with a family practice. Dr. Stone is not a psychologist or a psychiatrist. Dr. Stone is affiliated with the Family Practice Center of New Castle, P.A. Dr. Stone became Mr. Christian's primary care physician in February of 2001.

On October 18, 2007, Mr. Christian went to Dr. Stone for a check-up. On October 30, 2007, Mr. Christian sought care for a constant urge to urinate and a cold. At that time Dr. Stone

diagnosed Mr. Christian with prostatitis and referred him to a urologist. In addition, Dr. Stone prescribed Levaquin (an antibiotic) and instructed Mr. Christian not to return to work until November 5, 2007.

On November 5, 2007, Mr. Christian returned to Dr. Stone's office feeling very anxious and nervous with a loss of appetite and concerns about returning to work. Dr. Stone examined Mr. Christian and diagnosed him with panic attacks and anxiety. Dr. Stone prescribed Xanax for Mr. Christian, noting that Mr. Christian was to see the urologist in a week and that he should stay off of work until then. Dr. Stone also noted that if Mr. Christian's symptoms persisted, Mr. Christian would need to meet with a mental health professional.

On November 13, 2007, Mr. Christian returned again, reporting that he was suffering from frequent urination pressure but was otherwise doing better. Dr. Stone diagnosed Mr. Christian with "prostatitis" and "anxiety." Dr. Stone noted that if his symptoms persisted Mr. Christian would need a mental health professional.

On November, 26, 2007, Mr. Christian returned again, reporting left head pain, dizziness, loss of appetite and panic attacks. Dr. Stone felt that Mr. Christian's symptoms were such that Dr. Stone asked Mr. Christian about suicidal thoughts and ideations. Dr. Stone noted that Mr. Christian denied having suicidal thoughts. Dr. Stone continued Mr. Christian's prescription of Xanax and added Effexor XR (an anti-depressant). Dr. Stone also prescribed Rhinocort (nasal spray), and ordered a CT of Mr. Christian's head/sinus. Dr. Stone recommended counseling and advised Mr. Christian to call Dr. Stone if he felt worse.

Three days later, on November 29, 2007, Mr. Christian returned to Dr. Stone, stating that he had to leave work the night before, he was very dizzy and had a loss of appetite. Mr. Christian also requested that he remain off of work until his CT results were available. Dr. Stone

noted that Mr. Christian was "not suicidal" in Mr. Christian's medical records which, according to Dr. Stone, indicates that Dr. Stone had again asked if Mr. Christian was suicidal.

On December 5, 2007, Mr. Christian was seen by Dr. Stone in order to review the CT results. Mr. Christian denied depression but indicated that he felt spacey. Dr. Stone referred Mr. Christian to an ENT. Dr. Stone also recommended that Mr. Christian seek counseling as well as the help of a psychiatrist, but did not refer Mr. Christian to any specific counselor or psychiatrist.

On December 11, 2007, Mr. Christian returned to Dr. Stone, reporting that his symptoms were unchanged. Mr. Christian spoke to Dr. Stone about the ENT visit and discussed scheduling an appointment with a psychiatrist and a psychologist. Mr. Christian agreed to schedule an appointment with a psychologist and a psychiatrist. Dr. Stone also ordered lab work, which included a drug screen – out of concern that Mr. Christian might be using some drugs that were not prescribed. The drug screen results were negative.

On December 22, 2007, Mrs. Christian called Dr. Stone after noting changes in Mr. Christian's behavior and overhearing a conversation between Mr. Christian and a friend in which Mr. Christian stated he was having "bad thoughts." Mrs. Christian relayed this to Dr. Stone, leaving a message that "Dr. Stone, Bruce is not doing well at all, he is having bad thoughts." Mrs. Christian indicates that when Dr. Stone returned her phone call Dr. Stone refused to discuss Mr. Christian's condition and insisted that she speak to Mr. Christian directly.

Dr. Stone advised Mr. Christian to continue taking the Effexor but to come to the office during the following week to begin a program to reduce its dosage. Dr. Stone also recommended that if Mr. Christian was really feeling bad he should go to Meadow Wood Center for evaluation. Mr. Christian reported that he was not feeling bad, denied any suicidal thoughts or plans and felt that restarting the Effexor and seeing Dr. Stone at his office would work. Dr. Stone instructed

Mr. Christian to contact him or go to the hospital for help if he felt worse or was going to hurt himself.

Dr. Stone last had contact with Mr. Christian on December 28, 2007. Dr. Stone and Mr. Christian discussed coming off of the Effexor. Mr. Christian denied having any suicidal plans. Dr. Stone gave Mr. Christian a titration schedule for the Effexor. Dr. Stone and Mr. Christian discussed Mr. Christian's upcoming appointment with a psychologist and Dr. Stone again recommended that Mr. Christian see a psychiatrist. Mr. Christian said that this had been denied by his insurance. Dr. Stone again instructed Mr. Christian to call if his symptoms worsened and to follow up in two weeks or sooner if needed. Dr. Stone did not hear anything from or about Mr. Christian again until Dr. Stone was advised of Mr. Christian's suicide attempt on January 8, 2008.

On January 3, 2008, Mr. Christian had an initial consultation with Defendant J. Roy Cannon, LPCMH. Mr. Cannon is not a medical doctor or a psychiatrist. Mr. Cannon is affiliated with Counseling Resource Associates, Inc.

Mr. Christian informed Mr. Cannon that he had been very depressed. Mr. Christian also told Mr. Cannon that the antidepressants he had been prescribed were not helping and that he experienced suicidal ideations prior to Christmas. Mr. Cannon questioned Mr. Christian as to how he would do so and Mr. Christian informed Mr. Cannon that he had thoughts of shooting himself. Mr. Christian assured Mr. Cannon that he did not have any current suicidal ideations and agreed that he would call Mr. Cannon at any time if he started to have any suicidal ideations.

On January 8, 2008, Mr. Christian attempted suicide at his home. At the time Mr. Christian's family was home as well. Mr. Christian went into a bedroom, placed a gun in his

mouth and pulled the trigger. Mr. Christian was rushed to Christiana Hospital where he remained until his death on January 14, 2008.

PROCEDURAL POSTURE

Dr. Stone filed this Motion on May 14, 2014. Subsequently, Mr. Cannon filed a Notice of Joinder to motions filed by Dr. Stone. On June 2, 2014, this Court held a hearing on the Motion as well as a number of motions in limine filed by each party. The Court heard argument on the following motions in limine: (1) Plaintiffs' Motion in Limine to Preclude Certain Opinions of Defendants' Expert James R. Roberts, M.D.; (2) Motion in Limine to Preclude the Expert Testimony of Avram Mack, M.D. on Behalf of Defendants Arlen Stone, M.D. and Abby Family Practice, P.A.; (3) Motion in Limine to Preclude the Causation Testimony of Plaintiffs' Expert Terrance L. Baker, M.D. on Behalf of Defendants Arlene Stone, M.D. and Abby Family Practice, P.A.; (4) Motion in Limine of Cannon Defendants to Bar Causation Testimony of Plaintiffs' Expert, Avram H. Mack, M.D.; (5) Motion in Limine of Cannon Defendants to Bar Causation Testimony of Plaintiffs' Expert, Samuel Romirowsky, PhD; (6) Motion in Limine by Cannon Defendants to Bar Questions or Comments on Causation That are Not Stated or Asked in Terms of the "But For" Standard; and, (7) Motion in Limine by Cannon Defendants to Bar Questions or Comments on Causation that are not Stated or Asked in Terms of Probabilities.

At the hearing, the Court denied the Christians' motion to preclude certain opinions of Dr. Roberts. Both motions to preclude the testimony of Dr. Mack were denied, however the Court allowed Defendants to reassert the motions after taking an additional deposition of Dr. Mack. Dr. Stone's motion to preclude the testimony of Dr. Baker was granted in part. The Court reserved decision on Mr. Cannon's motion to bar the causation testimony of Dr. Romirowsky, but later granted the motion in a subsequent order. The Court denied both Mr. Cannon's motion

to bar causation testimony not stated in terms of the "but for" standard and Mr. Cannon's motion to bar causation testimony not stated in terms of probability.

The Court inquired as to whether or not the Christians were pursuing a cause of action under an "uncontrollable impulse" theory.[1] The Christians' counsel indicated that the Christians' claims were not based on an "uncontrollable impulse" theory. Rather the cause of action was based on a breach of Defendants' applicable professional duties of care, which required that they take further steps to prevent Mr. Christian from committing suicide. Specifically, the Christians alleged that both Dr. Stone and Mr. Cannon should have involved a psychiatrist—who may have taken further actions such as involuntary commitment—and should have informed Mr. Christian's family of his suicidal ideations. Further, counsel reasoned that had those steps been taken, Mr. Christian would not have committed suicide.

The Court reserved decision on the Motion and allowed the parties the opportunity to provide additional case law regarding a physician's duty to prevent the suicide of a patient through supplemental briefing. Supplemental briefing on the issue was submitted on behalf of the Christians as well as Defendants.

PARTIES' CONTENTIONS

In his Motion, Dr. Stone contends that he is not liable for Mr. Christian's suicide because, in general, suicide is considered an intervening cause which cuts off liability. Dr. Stone argues that there are two exceptions to this rule: a duty exception and an "uncontrollable impulse" exception.[2] Dr. Stone asserts that under the duty exception a "special relationship" must have existed between the defendant and another which would impose affirmative duty to act to control

[1] *Porter v. Murphy*, 792 A.2d 1009, 1015 (2001) ("if the negligent wrong causes mental illness which results in an uncontrollable impulse to commit suicide, then the wrongdoer may be held liable for the death").
[2] As mentioned above, counsel for the Christians indicated at oral argument on the Motion that the Christians were not alleging a cause of action based on an "uncontrollable impulse" theory.

the conduct of the other or protect the other from harm. Dr. Stone further argues that no such special relationship exists between physician and patient. Therefore, Dr. Stone maintains that he cannot be held liable for Mr. Christian's suicide.

The Christian's argue that a special relationship between physician and patient exists under Delaware law as well as other jurisdictions. The Christians point out that the Delaware Supreme Court has extended a special relationship between psychiatrist and psychiatric patient. The Christians argue that this special relationship also extends to the relationships between a primary care physician and his patient and a mental health counselor and his client. Further, the Christians assert that many other jurisdictions have found special relationships in those circumstances. Therefore, the Christians contend that a special relationship existed between Mr. Christian and both Dr. Stone and Mr. Cannon. The Christians maintain that, based on those special relationships, Defendants had a duty to act and that Defendants can be held liable for breach of that duty.

STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[3] Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[4] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the

[3] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del .1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del.Super.Ct.1973).
[4] *Merrill*, 606 A.2d at 99-100; *Dorr-Oliver*, 312 A.2d at 325.

law to the factual record, then summary judgment will not be granted.[5] The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.[6] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.[7]

DISCUSSION

The Christians allege that both Dr. Stone and Mr. Cannon were negligent in their treatment of Mr. Christian for failing to take any steps to alert the Christian family of Mr. Christian's plan for suicide, failing to take steps to obtain the treatment of a psychiatrist and failing to remove the instrumentality used in his suicide. Negligence is generally defined as the failure to meet the standard of care which the law requires; however, liability for negligence is limited by the scope of a legally defined duty.[8] In order to impose liability for negligence, the appropriate duty of care under the circumstances must be established.[9] Thus, the issue before the Court becomes, whether either a family physician or a mental health counselor has a duty to affirmatively act — taking steps to prevent the suicide of a patient who may have suicidal ideations — under Delaware law. While there are opinions addressing situations similar to the one present here, this Court did not find any reported or unreported opinion in Delaware dealing with the suicide of a patient and a negligence claim asserted against a general practice physician or a mental health provider who was not a psychologist.

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[5] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del.1962). *See also Cook v. City of Harrington,* 1990 WL 35244, at *3 (Del.Super.Ct. Feb. 22, 1990)(citing *Ebersole,* 180 A.2d at 467)("Summary judgment will not be granted under any circumstances when the record indicates ... that it is desirable to inquire more throughly into the facts in order to clarify the application of law to the circumstances.").

[6] *Moore v. Sizemore,* 405 A.2d 679, 680 (Del.1979)(citing *Ebersole,* 180 A.2d at 470).

[7] *See Brzoska v. Olson,* 668 A.2d 1355, 1364 (Del.1995).

[8] *Rogers v. Christina Sch. Dist.*, 73 A.3d 1, 6 (Del. 2013).

[9] *Id*.

A. DUTY UNDER DELAWARE LAW

Under Delaware Law, the existence and parameters of a duty is a question of law to be determined by the Court.[10] "Generally, to determine whether one party owed another a duty of care, we follow the guidance of the Restatement (Second) of Torts."[11] In, *Riedel v. ICI Americas Inc.*, the Court declined to adopt a broader view of duty taken from the Restatement (Third) of Torts:

> At this time, we decline to adopt any sections of the Restatement (Third) of Torts. The drafters of the Restatement (Third) of Torts redefined the concept of duty in a way that is inconsistent with this Court's precedents and traditions. The Restatement (Third) of Torts creates duties in areas where we have previously found no common law duty and have deferred to the legislature to decide whether or not to create a duty.[12]

Thus, the Supreme Court has made it clear that the Restatement (Second) of Torts presently governs the common law duty analysis. As such, this Court will approach the issues here by applying Delaware precedent and, where applicable, reference to the Restatement (Second).

The Restatement, at Section 4, defines "duty" as follows:

> The word "duty" is used throughout the Restatement of this Subject to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause.

Section 282 of the Restatement (Second) addresses and defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[13] Negligence does not include "conduct recklessly disregardful of an interest of others."[14] Section 284 states that negligent conduct may be either:

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[10] *See Naidu v. Laird*, 539 A.2d 1064, 1070 (Del. 1988); *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 20 (Del. 2009).
[11] *Riedel*, 968 A.2d at 20.
[12] *Id.*
[13] Restatement (Second) of Torts § 282 (1965).
[14] *Id.*

> (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or
>
> (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

Section 302 of the Restatement further explains negligent actions and negligent omissions:

> A negligent act or omission may be one which involves an unreasonable risk of harm to another through either
>
> (a) the continuous operation of a force started or continued by the act or omission, or
>
> (b) the foreseeable action of the other, a third person, an animal, or a force of nature.

According to the Supreme Court, the difference between a negligent act (misfeasance) and a negligent failure to act (nonfeasance) is as follows:

> Comment (a) to Section 302 states that there are dissimilar duties owed by "one who merely omits to act" versus one "who does an affirmative act." Comment (a) explains that "anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." But, "one who merely omits to act" generally has no duty to act, *unless* "there is a special relation between the actor and the other which gives rise to the duty."[15]

In order to hold a defendant liable in negligence for an omission or failure to act, there generally must be a special relationship between the defendant and either the plaintiff or a third person. Section 314 states that, "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."

Section 314A outlines certain exceptions to this rule:

> (1) A common carrier is under a duty to its passengers to take reasonable action
>
> (a) to protect them against unreasonable risk of physical harm, and

[15] *Rogers*, 73 A.3d at 7 (citing Restatement (Second) of Torts § 302 cmt. a); *see also Riedel* 968 A.2d at 22.

> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to his guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
>
> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Thus, to qualify under any of the exceptions under Section 314, there must be a special relationship between defendant and plaintiff. Similarly, Section 315 of the Restatement requires that a special relationship exist in order to create a duty to control the conduct of another:

> 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 to protection.[16]

Sections 314A and 316 through 324A provide exceptions to the general rule that there is no affirmative duty to act in the Restatement.[17] These exceptions require that a special relationship exists in order to create a duty to act. The Supreme Court has indicated that its holdings are "entirely consistent with the (Second) Restatement's requirement of a legally significant relationship in negligence actions grounded in nonfeasance."[18] Therefore, in order to hold either Dr. Stone or Mr. Cannon liable based on a failure to take an affirmative action to

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[16] Restatement (Second) of Torts § 315 (1965).

[17] *Riedel*, 968 A.2d at 20; Restatement (Second) of Torts: § 314A Special Relations Giving Rise to Duty to Aid Or Protect; §316 Duty of Parent to Control Conduct of Child; § 317 Duty of Master to Control Conduct of Servant; § 318 Duty of Possessor of Land or Chattels to Control Conduct of Licensee; § 319 Duty of Those in Charge of Person Having Dangerous Propensities; § 320 Duty of Person Having Custody of Another to Control Conduct of Third Persons; § 321 Duty to Act When Prior Conduct is Found to be Dangerous; § 322 Duty to Aid Another Harmed by Actor's Conduct; § 323 Negligent Performance of Undertaking to Render Services; § 324 Duty of One Who Takes Charge of Another Who is Helpless; § 324A Liability to Third Person for Negligent Performance of Undertaking.

[18] *Riedel*, 968 A.2d at 25 (Del. 2009).

prevent Mr. Christian from committing suicide, the Christian's must show that a "special relationship" existed, sufficient to have imposed an affirmative duty to act.

B. SPECIAL RELATIONSHIP

As discussed above, Section 314A outlines four special relationships giving rise to a duty to act for the protection of others: (1) a common carrier and its passengers; (2) an innkeeper and his guests; (3) a possessor of land and his licensees; and (4) a person "required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other." However, the Supreme Court has stated that "Section 314A only applies to situations requiring assistance where the injured party is in the custody of the defendant."[19]

This requirement of "custody" makes section 314A inapplicable to this case. Here, Dr. Stone was Mr. Christian's primary care physician. No evidence in the record suggests that Dr. Stone had custody of Mr. Christian at any point in time. Likewise, Mr. Cannon saw Mr. Christian during an initial consultation for mental health counseling. The parties provide no facts that demonstrate that Mr. Cannon had custody of Mr. Christian in any way. Therefore, without custody, Defendants and Mr. Christian never had the form of special relationship necessary to make Section 314A applicable.

Section 315 is a provision which is often used to establish a legal duty. "Section 315 of the Restatement is a catch-all provision for establishing legal duty of care."[20] As mentioned above, Section 315 states the following:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

[19] *Rogers*, 73 A.3d at 11.
[20] *Id.*

> (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 to protection.[21]

As the language of this provision indicates, in order for there to be a duty to act under Section 315, there must be a special relationship. This special relationship may be between the defendant and a third person, requiring the defendant to control the third person's conduct; or between the defendant and the plaintiff, requiring the defendant act to protect the plaintiff from harm.

Delaware courts have considered whether or not such a special relationship exists in various circumstances.[22]

> Delaware courts have not hesitated to find a duty to act based upon § 315 when the requisite "special relationship" between the actor and a third person or actor and the plaintiff was pled in the complaint and/or established in the summary judgment record. In each of these cases, the "special relationship" was well articulated and/or clearly evident in the record. And, in each of these cases, the "special relationship" was of a nature where the court readily could determine that the defendant "was in a unique position to control the conduct" of the third person who allegedly caused harm to the plaintiff.[23]

The Supreme Court has determined that a special relationship can exist between a psychiatrist and his psychiatric patient such that the psychiatrist can have a duty to protect third persons from the dangerous propensities of the patient. In *Naidu v. Laird*, a psychiatrist discharged a patient who subsequently killed a man in an automobile accident while in a

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[21] Restatement (Second) of Torts § 315 (1965).

[22] *See e.g. Rogers*, 73 A.3d at 10-12 (special relationship did not exist between a high school and suicidal student creating a duty to take steps to prevent suicide); *Riedel*, 968 A.2d at 24-26 (no special relationship existed between an employer and its employee triggering a duty to prevent employee from spreading asbestos fiber on work clothing); *Naidu*, 539 A.2d 1072-73 (special relationship existed between psychiatrist and psychiatric patient creating an affirmative duty to third persons require the psychiatrist to exercise reasonable care in the treatment and discharge of patient); *Shively v. Ken Crest Ctr. for Exceptional Persons*, 2001 WL 209910, *5-6 (Del. Super. Jan. 26, 2001) (special relationship existed between operator of halfway house for mentally impaired individuals with behavioral problems and its residents triggering a duty to warn of dangerous propensities of residents).

[23] *Doe v. Bradley*, 2011 WL 290829, *7 (Del. Super. Jan. 21, 2011) (citing *Naidu*, 539 A.2d at 1072-73; *Shively*, 2001 WL 209910 at *6).

psychotic state.[24] Prior to his discharge, the patient had been voluntarily committed after a 72-hour emergency commitment — secured by police — when the patient locked himself in a hotel room.[25] At trial, the plaintiff offered expert testimony that under the circumstances the patient was eligible for involuntary commitment.[26] Upon his discharge from the facility, the patient caused an automobile accident while in a psychotic state, resulting in a fatality.[27] The Court held that "based on the special relationship that exists between a psychiatrist and a patient, a psychiatrist owes an affirmative duty to persons other than the patient to exercise reasonable care in the treatment and discharge of psychiatric patients."[28]

The Christians argue that the special relationship extended in *Naidu* should also be extended in this case to a primary care physician and a mental health counselor. Although the situation in the present case appears similar to *Naidu*, the factual situation is distinguishable in several ways. First, neither Dr. Stone nor Mr. Cannon are psychiatrists. This is significant due to the fact that, in Delaware, written certification of a psychiatrist is required in order to involuntarily commit a psychiatric patient:

> No person shall be involuntarily admitted to the hospital as a patient except pursuant to the written certification of a psychiatrist that based upon the psychiatrist's examination of such person, such person suffers from a disease or condition which requires the person to be observed and treated at a mental hospital for the person's own welfare and which either renders such person unable to make responsible decisions with respect to the person's hospitalization, or poses a present threat, based upon manifest indications, that such person is likely to commit or suffer serious harm to that person's own self or others or to property, if not given immediate hospital care and treatment.[29]

Dr. Stone is a primary care physician and Mr. Cannon is a mental health counselor. Neither Dr. Stone nor Mr. Cannon had the ability to involuntarily commit Mr. Christian, unlike

[24] *Naidu*, 539 A.2d at 1069-70.
[25] *Id.* at 1069.
[26] *Id.* at 1071.
[27] *Id.* at 1069-70.
[28] *Id.* at 1072.
[29] 16 *Del. C.* § 5003.

the psychiatrist in *Naidu*. Thus, neither Dr. Stone nor Mr. Cannon had the ability to control or the ability to obtain control of Mr. Christian like the psychiatrist in *Naidu*.

Second, the patient in *Naidu* was released from in-patient care, after being in the custody of the defendants – as opposed to Mr. Christian who was treated as an out-patient and never in the custody of either Dr. Stone or Mr. Cannon. Not only does this make Section 314A inapplicable due to a lack of custody, but it further indicates that Dr. Stone and Mr. Cannon lacked control over Mr. Christian. With in-patient psychiatric treatment — as was the case in *Naidu* — health care providers have a degree of control over the patient that does not exist in an out-patient setting. In part, this is due to the control over a patient's discharge that a health care provider would have in an in-patient setting. As an outpatient, no such control over Mr. Christian would have existed.

Third, the behavior of the patient as well as the circumstances during and leading up to the medical care in *Naidu* is in notable contrast to the case at bar. In *Naidu*, police took the patient into custody and secured a 72-hour emergency commitment during a psychotic episode. The patient was uncooperative during his treatment, exhibited hostility and refused to take his medications.[30] Conversely, the factual situation surrounding Mr. Christian's medical treatment could not be further from the circumstances in *Naidu*. Mr. Christian actively pursued and participated in his own care. Mr. Christian cooperated with his health care providers and was responsive to their recommendations. As such, it is questionable as to whether or not Mr. Christian would have even been a candidate for a psychiatric involuntary commitment.

In summary, there is no basis with which to find that Dr. Stone or Mr. Cannon had a special relationship with Mr. Christian as required by the Restatement regarding actions based in nonfeasance. No special relationship can be created under Section 314A as custody is required

[30] *Naidu*, 539 A.2d at 1069-70.

but not present. Likewise, no special relationship can be created under Section 315. Defendants had no ability to control or assume control over Mr. Christian based on the involuntary commitment statute. As Defendants had no way of exercising control over Mr. Christian, Section 315 cannot require Defendants to do so.

Further, the special relationship extended in *Naidu* is inapplicable to the present case. That relationship was between a psychiatrist and psychiatric patient under inpatient care. This case is factually different based on: (1) Defendants' inability to involuntarily commit Mr. Christian; (2) Mr. Christian being treated out-patient as opposed to an in-patient, psychiatric setting; and (3) Mr. Christian's willing participation in his treatment and cooperation with his healthcare providers. In light of these three distinctions, the special relationship extended in *Naidu* is inapplicable to this case.

The Supreme Court's decision in *Rogers* reaffirmed the special relationship analysis discussed above in connection with Sections 314A and 315.[31] In *Rogers*, the Supreme Court held that Section 314A only applies to situations requiring assistance where the injured party is in the custody of the defendant.[32] Moreover, the Supreme Court stated that in order to find a duty based on Section 315, there must be a special relationship between the defendant and the third person which imposes a duty on the defendant to control the third person.[33] The *Rogers* decision indicates a traditional application of Sections 314A and 315 that relies upon custody or control over the actor. [34]

[31] *Rogers*, 73 A.3d at 10-12.
[32] *Id.* at 11.
[33] *Id.* at 12.
[34] Given certain representations by the Christians' counsel regarding the application of the "special relationship" discussed in *Naidu* in other jurisdictions, the Court requested that the parties submit supplemental briefing on "special relationships." Each of the cases that the Christians relied upon in their supplemental briefing either: dealt with a psychiatrist/patient relationship; did not apply the Restatement (Second) of Torts; or departed from Delaware law or precedent in some other fashion. *See, e.g., Rudolph v. Lindsay*, 626 So. 2d 1278 (Ala. 1993) (involved a psychiatrist discharging a patient from in-patient care; no discussion of whether a "special relationship" existed);

Mr. Christian's suicide took place at his home and not while in the custody of Mr. Cannon or Dr. Stone. Dr. Stone and Mr. Cannon did not have the ability to legally control Mr. Christian through an involuntary commitment. Additionally, Delaware does not impose a duty on Dr. Stone or Mr. Cannon to protect Mr. Christian based merely on the medical provider-patient relationship. Based on the above, there is not sufficient evidence in the record of either custody or control over Mr. Christian to find that a special relationship existed that would trigger the duty to act under the Restatement. Therefore, neither Dr. Stone nor Mr. Cannon can be held liable based on a duty to act to prevent the suicide of Mr. Christian.

CONCLUSION

Viewing the evidence in the light most favorable to the non-moving party, the Christians have failed to present sufficient evidence to show that either Dr. Stone or Mr. Cannon had an affirmative duty to act under which they can be held liable for Mr. Christian's suicide. Therefore Summary Judgment in favor of all Defendants is **GRANTED**.

IT IS SO ORDERED.

/s/ Eric M. Davis
Eric M. Davis
Judge

Edwards v. Tardif, 240 Conn. 610, 692 A.2d 1266 (1997) (physician's duty to prevent suicide defined solely by the standard of care in medical malpractice; no discussion of a "special relationship"); *White v. Lawrence*, 975 S.W.2d 525 (Tenn. 1998) (physician's instructions to patient's wife to covertly administer prescription medication without patient's knowledge could be considered a substantial factor in patients suicide; duty was based on forseeability alone with no discussion of any "special relationship"); *Granicz v. Chirillo*, 2014 WL 626586 (Fla. Dist. Ct. App. Feb. 19, 2014) (psychiatrist's duty was based on forseeability without any application of the Restatement or discussion of whether "special relationship"). The Defendants' supplemental briefing provided case law that was more consistent with the Supreme Court's recent holdings on the duty to act in *Rogers* and *Riedel*. *See Maloney v. Badman*, 156 N.H. 599, 938 A.2d 883 (2007) (primary care physician had no duty to prevent suicide of patient because no "special relationship" existed due to a lack of the necessary control over patient in outpatient setting); *Lenoci v. Leonard*, 2011 VT 47, 189 Vt. 641, 21 A.3d 694 (2011) (duty to prevent suicide only applies in limited cases where defendant has the power or control necessary to prevent suicide).