IN THE SUPREME COURT OF DELAWARE
No.: 446, 2014

JOANN F. CHRISTIAN, Individually and as Administratrix of the ESTATE OF BRUCE CHRISTIAN, NICOLE C. CHRISTIAN, LYNDSEY M. CHRISTIAN AND BRUCE J. CHRISTIAN, JR.

Appellants

v.

COUNSELING RESOURCE ASSOCIATES, INC., a Delaware Corporation and J. ROY CANNON, LPCMH and ARLEN D. STONE, M.D., and THE FAMILY PRACTICE CENTER OF NEW CASTLE P.A., a Delaware Professional Association, individually and doing business as Abby Family Practice,

Appellees

APPELLANTS' SECOND SUBSTITUTED OPENING BRIEF

On Appeal from the Orders and Decisions of The Superior Court of the State of Delaware in and for New Castle County, in C.A. No. 9C-10-202PLA The Superior Court's Order and Decision dated July 16, 2014 Granting Defendants' Motion for Summary Judgment, Order and Decision dated June 12, 2014, Granting Defendant Roy Cannon's Motion *in Limine* Precluding the expert testimony of Samuel Romirowsky, Ph.D. and Order and Decision of July 1, 2014, Denying Plaintiff's Motion for Reargument, and the Court's Order Granting Defendants' Motion *in Limine* Precluding the Causation Testimony of Terrance L. Baker, M.D.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES

I. NATURE OF THE PROCEEDINGS

This appeal results from the Trial Court's rejection of the Delaware Supreme Court's holding in *Naidu v. Laird*, 539 A.2d 1064 (1988) in finding that no "special relationship" exists to create a duty of care between mental health professionals and their mentally ill patients who committed suicide. In *Naidu*, the Delaware Supreme Court followed the long line of cases throughout the United States that a "special relationship" exists between mental health professionals and their patient. *Id.* at 1072. (internal citations omitted). The Trial Court disregarded the plain application of *Naidu* to this wrongful death action brought by the Estate and family of Bruce Christian against Arlen D. Stone, M.D. and J. Roy Cannon, LPCMH, both of whom treated Mr. Christian's mental illness. Mr. Christian committed suicide just days after disclosing his suicide plan to counselor Cannon and Mrs. Christian sought intervention from Dr. Stone. The Trial Court declined to apply *Naidu,* finding that the mental health treatment was on an outpatient basis and that Stone and Cannon did not have custody over Mr. Christian to create a "special relationship." A3022-A3024. The Trial Court's truncated application of *Naidu* stands in stark contrast to the Delaware Supreme Court's adoption of *Tarasoff v. Regents of the University of California,* 551P.2d 334 (Cal. 1976), based on the RESTATEMENT (SECOND) OF TORTS §315. *Id.* at 1072. In limiting the duty of care to psychiatrists who can involuntarily commit mental health patients, the Trial Court essentially granted blanket immunity from suit to all non-psychiatrist mental health professionals who provide outpatient care in Delaware. The Supreme Court in *Naidu* did not contemplate such a narrow duty of care for mental health professionals. The Trial Court's grant of summary judgment should be reversed.

Dr. Stone was Mr. Christian's primary healthcare provider from February 21, 2001 through his death on January 14, 2008. Dr. Stone first began treating Mr. Christian's mental health illness on August 27, 2001. Dr. Stone assumed primary responsibility for the medical treatment of Mr. Christian's mental illness and prescribed anti-depressant/anti-psychotic medications throughout his treatment. A1108-A1111; A1142-A1173. Counselor J. Roy Cannon, a Delaware licensed professional counselor of mental health ("LPCMH") began treating Mr. Christian on January 3, 2008 at which time Christian disclosed his specific plan to commit suicide. A1401–A1403. Though Mr. Christian was a threat to harm himself, neither Dr. Stone, nor LPCMH Cannon took affirmative steps to address his suicidal tendencies, ensure that Mr. Christian received additional mental health treatment, or notify Mr. Christian's wife about his deteriorating mental health. These failures are precisely the type of conduct for which the Supreme Court in *Naidu* would impose liability. On January 8, 2008, Mr. Christian shot himself with a handgun kept by his bed and succumbed to his wounds on January 14, 2008. The family of Bruce Christian contends that Stone and Cannon's negligence caused Christian's injuries and death. On July 16, 2014, the Trial Court dismissed the action after concluding that as a matter of law, Dr. Stone and LPCMH Cannon owed no duty of care to Mr. Christian because neither had a "special relationship" with their patient. A3008-A3025.

Appellants seek review of the following Orders of the Superior Court:

- July 16, 2014, Granting Defendants' Motion for Summary Judgment (attached hereto as Exhibit "A");

- June 12, 2014, Granting Defendant Roy Cannon's Motion *in Limine* Precluding the expert testimony of Samuel Romirowsky, Ph.D. (attached hereto as Exhibit "B");
- July 1, 2014, Denying Plaintiff's Motion for Re-argument of the June 12, 2014 Order (attached hereto as Exhibit "C");
- June 2, 2014, Granting Defendants' Motion *in Limine* Precluding the Causation Testimony of Terrance L. Baker, M.D. (attached hereto as Exhibit "D").

II. SUMMARY OF ARGUMENT

1. In disregarding the Delaware Supreme Court's holding in *Naidu v. Laird*, 539 A.2d 1064 (1988), the Trial Court erred as a matter of law by granting Defendants' Motion for Summary Judgment in finding that no special relationship exists between physicians/mental health professionals and their patients in an outpatient setting to create a duty of care. Though, Mr. Christian's licensed professional counselor of mental health determined that his patient's risk of suicide is "**likely to increase significantly**," he did nothing to address this risk. A1257-A1259.

2. The Trial Court incorrectly determined that LPCMH Cannon owed no duty to his patient which would warrant taking interventional steps to address the foreseeable risk of harm. This Court found in *Naidu* that mental health providers owe a duty of care to take reasonable precautions if they knew or should have known that their patient's dangerous propensities presented an unreasonable risk of harm to himself or others. *Naidu*, 539 A.2d at 1073. Not only were Mr. Christian's suicidal tendencies foreseeable to LPCMH Cannon, they were in fact foreseen by him. LPCMH Cannon was treating Mr. Christian's mental illness, knew he had a suicide plan, and knew he had the means to carry out this plan. He knew that the risk was "likely to increase significantly," yet, the Trial Court erred in finding as a matter of law that "no special relationship" and its intendant duty existed between LPCMH Cannon and Mr. Christian.

3. The Trial Court incorrectly granted summary judgment in favor of Dr. Stone, Mr. Christian's primary care physician. For years, Dr. Stone was Mr. Christian's sole physician treating his mental illness. He had prescribed anti-depressants and anti-psychotic medications

for Mr. Christian. A month before his suicide, Dr. Stone conceded that Mr. Christian needed, "more than what I can offer with medication." A162. Just before Christmas in 2007, Mr. Christian's wife sought Dr. Stone's direct intervention because she overheard him say that he was, "having bad thoughts." A3212. Like LPCMH Cannon, Dr. Stone foresaw the risk of harm Mr. Christian posed to himself; he failed "to initiate whatever precautions are reasonably necessary to protect potential victims of the patient." *Naidu,* 539 A.2d at 1073 (citing *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 193 (D. Neb. 1980). The Trial Court found that Dr. Stone also owed no duty to Mr. Christian to act in any way to protect him. A3008-A3025.

4. The Trial Court also abused its discretion by precluding Plaintiffs' experts, Samuel Romirowsky, Ph.D. and Terrance Baker, M.D. from offering expert causation testimony against Counselor Cannon and Dr. Stone because Dr. Romirowsky and Dr. Baker did not properly verbalize the "but for" rule in their causation testimony. A2548-A2549; A1837-A1838; A3066-A3067.

III. STATEMENT OF THE FACTS

Primary care physician Dr. Stone treated Bruce Christian's mental illness for years, beginning in 2001 and continuing through Mr. Christian suicide act on January 8, 2008, Dr. Stone diagnosed Mr. Christian with anxiety disorder, depression, and panic disorder and treated him with various prescription drugs including Xanax/Alprazolam, Effexor and Ambien. A1104-1105; A1108-A1109; A1142-A1150. In January, 2004, Dr. Stone failed to recognize an incident in which Christian "nicked" his wrist with a razor as a potential suicide attempt. A1110-A1111. Beginning in October 2007, Dr. Stone determined that Mr. Christian suffered from anxiety, and then later depression and panic disorder which left him unable to work. A3207; A1142. Dr. Stone diagnosed "anxiety disorder" and prescribed Xanax (a/k/a Alprazolam), and later added Effexor and Ambien. A1143-A1150. While Dr. Stone stated from time to time that if Mr. Christian's symptoms persisted, he would need to see a mental health professional/psychiatrist, he made no specific referrals and did not contact any mental health professionals on Mr. Christian's behalf. A1144-A1150. In early December, Dr. Stone concluded that Mr. Christian's panic attacks were persistent and interfering with his life, warranting a conversation regarding Mr. Christian's suicidal thoughts. A1564. Despite recognizing that Mr. Christian needed "more than what I can offer with medication", Dr. Stone still did not refer Mr. Christian to a specific counselor or psychiatrist. A162; A1573; A164-A165. On December 11, 2007, Dr. Stone completed a "Physician Statement of Medical Condition" for Christian's employer indicating that he was suffering from loss of focus,

dizziness, headaches, anxiety and panic, was unable to concentrate or problem solve and was unsteady and disconnected. A1153-A1154.

On December 22, 2007, Joann Christian called Dr. Stone after noting changes in her husband's behavior, having overheard a conversation in which her husband stated he was having "bad thoughts." A3212-A3213. Mrs. Christian also called the pharmacist who advised that Bruce should stop Effexor. A3212. When Dr. Stone returned her call, he refused to discuss her husband's condition with her and instead insisted that he speak to Mr. Christian directly. A3214. Dr. Stone advised Mr. Christian to continue taking Effexor but to come to the office during the following week to begin a program to reduce the Effexor dosage. A1968. Dr. Stone also recommended that Mr. Christian go to Meadow Wood for to his psychological condition if he felt worse. A1968. Dr. Stone, however, did not convey this recommendation to Mrs. Christian. A1968. Mr. Christian returned to Dr. Stone on December 28, 2007, who again diagnosed depression and anxiety. A1156-A1157. Dr. Stone determined that Mr. Christian needed to see a psychiatrist but made no referral or recommendation, and provided no assistance in obtaining an appointment. A1156-A1157. Dr. Stone continued as the professional treating Mr. Christian's mental conditions as diagnosed by Dr. Stone and to prescribe the antidepressant/antipsychotic medication. A1156-A1157.

On January 3, 2008, Mr. Christian had an initial consultation with LPCMH Cannon of Counseling Resource Associates, Inc. A1257. In the suicidal and/or homicidal ideations section of the LPCMH Cannon's report, he wrote that Mr. Christian, "last thought of harming himself

the week before Christmas… When asked how he thought he might harm himself, he said that he has a 22 rifle but that there is no ammunition for it." A1258. Counselor Cannon determined, "while not suicidal during [Mr. Christian's] clinical interview, without significant progress in achieving identified treatment goals, his **level of risk is likely to increase significantly**." A1259 (emphasis added). LPCMH Cannon determined that Christian was having "suicidal thoughts," and concluded that the goal was to "eliminate suicidal thoughts." A1259. LPCMH Cannon further concluded that it was necessary to have "close monitoring of SI [suicidal ideations] with intervention to have weapons removed from home." A1259. LPCMH Cannon did not implement any type of "close monitoring" or any "interventions" to have Mr. Christian's weapons removed from the home. For five days, LPCMH Cannon failed to implement any of his recommended interventions. On January 8, 2008, Bruce Christian shot himself in the bedroom of his home by placing the barrel of a gun in his mouth and pulling the trigger. A984. Mr. Christian's entire family was at home at the time. The bullet severed Mr. Christian's spinal cord. A984. Mr. Christian was taken to Christiana Care Hospital, where he regained consciousness until he passed away on January 14, 2008 after life support was removed. A984.

This medical malpractice claim was instituted against Defendants Counseling Resource Associates, Inc. J. Roy Cannon, LPCMH, Arlen J. Stone, M.D. and the Family Practice Center of New Castle by separate Complaints of October 20, 2009, and March 26, 2010, respectively. The Complaints were supported by Affidavits of Merit by Dr. Terrance L. Baker, M.D., M.S.

and Samuel Romirowsky, Ph.D. The separate actions were consolidated by Order dated June 24, 2010. After original counsel withdrew his representation of the Christians, due to a personal conflict with Defendant Cannon, the Christians retained Messa & Associates who were admitted to the Delaware Court *pro hac vice.*

Facts Giving Rise To The Instant Appeal

On March 13, 2013, the Supreme Court of Delaware issued an Opinion and Order holding that the Trial Court abused its discretion by granting Summary Judgment, and reinstated Plaintiffs' Complaint. *Christian v. Counseling Res. Assocs., Inc.,* 60 A.3d 1083, 1086 (Del. 2013). After remand, Defendant Stone filed a Motion *in Limine* to preclude the causation testimony of Plaintiff's expert, Terrance L. Baker, M.D. A1314. Defendant Cannon filed a Motion *in Limine* to bar the expert causation testimony of Plaintiffs' expert, Samuel Romirowsky, Ph.D . A2404. On May 15, 2014, Defendants Stone filed a Motion for Summary Judgment, arguing that if their Motions *in Limine* were granted, Plaintiff would be unable to support their claims with expert testimony. Defendants' additional argument, ultimately adopted by the Trial Court, representing a fundamental misunderstanding of mental health and suicide, is summarized as follows: "Dr. Stone is entitled to summary judgment because as a matter of law, Mr. Christian's suicide was a deliberate, intentional, intervening act for which Dr. Stone cannot be held liable." A2772.

During oral argument on June 2, 2014, the Trial Court granted Defendants' Motion *in Limine* barring Dr. Baker's causation testimony. A1837–A1838. On June 12, 2014, the Trial

Court granted Defendants' Motion *in Limine* barring Plaintiffs' expert, Samuel Romirowsky, from offering causation testimony and from offering expert testimony regarding medical causation at trial. A2548-2549. On June 20, 2014, Plaintiffs filed a Motion for Re-argument on the Motion *in Limine* precluding Dr. Romirowsky's testimony. A3188-A3194. On July 1, 2014, the Trial Court denied Plaintiffs' Motion for Re-argument. A3200. Thereafter, on July 16, 2014, on the eve of trial, the Trial Court granted Defendants' Motion for Summary Judgment. A3008-A3025. In granting Defendants' Motion for Summary Judgment, the Trial Court summarized the issue before it as follows: "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." A3018.

The Trial Court cited the Restatement Second of Torts to support the conclusion that "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." A3020. The Trial Court reasoned that under Delaware law a "special relationship" between Plaintiffs' decedent and his physician and mental health counselor cannot exist because neither the physician nor the mental health counselor had custodial control over their patient and therefore the Defendants could not legally be held liable for failing to prevent Mr. Christian's suicide.

The Trial Court anchored its argument on section 314A(4) of the Restatement (Second) of Torts, holding that a special relationship arises only if 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 another." A3020.

The Trial Court reasoned:

> This requirement of "custody" makes section 314(A) inapplicable to his 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. 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 314(A) applicable. A3020.

According to the Trial Court's understanding of Delaware law, only a psychiatrist has the power to involuntarily commit an individual, and without the ability to involuntarily commit an individual against his or her will, neither a primary care physician nor a mental health counselor can "control" their patient. Thus, neither a primary care physician of mental health counselor could be privy to a "special relationship" with their patient. A3024-A3025. Additionally, the Trial Court reasoned that treatment in an outpatient setting differs from treatment in an inpatient setting, "as an outpatient, no such control over Mr. Christian would have existed." A3025. According to the Trial Court: "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." A3019.

IV. ARGUMENT

A. The Trial Court Abused its Discretion By Holding As a Matter of Law That Contrary to *Naidu v. Laird* That Physicians and Mental Health Counselors Who Treat Their Patient's Do Not Have a Duty to Take Actions to Prevent Foreseeable Harm to Their Patients Because They Do Not Have a 'Special Relationship' With Them

A.1 Question Presented

Whether the Trial Court abused its discretion by granting Defendant's Motion for Summary Judgment holding that physicians and mental health counselors do not owe a duty to their patients suffering from significant mental illness because they do not have a "special relationship" with their patients being seen in an outpatient setting. Question Preserved at: A2953-A2957; A3077-A3079.

A.2 Scope of Review

The standard of review of the Trial Court's grant of summary judgment is *de novo*. *Simmons v. Bayhealth Med. Ctr., Inc.*, 950 A.2d 659 (Del. 2008). An Appellate Court must "determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute." *Green v. Weiner*, 766 A.2d 492, 494 (Del. 2001).

A.3 Merits of Argument

Under Delaware law, "medical negligence" is defined as "any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider to a patient." 18 Del. C. § 6801(7). A "patient" is defined as "a natural

person who receives or should have received health care from a licensed health care provider under a contract, express or implied." 18 Del. C. § 6801(8). As revealed by these definitions, medical negligence is premised upon the delivery of health care services in an existing doctor-patient relationship. When a doctor-patient relationship exists, the doctor has a "total duty of care" to the patient, and liability can be imposed for negligent nonfeasance. *Murphy v. Godwin*, 303 A.2d 668, 673-674 (Del. Super. Ct. 1973). Importantly, the definitions above **do not require** a custodial, or control, requirement to find medical negligence.

"The sanctity of the physician-patient relationship is embroidered in the fabric of Delaware's public policy." *Total Care Physicians, P.A. v. O'Hara,* 2002 Del. Super. LEXIS 493, 24 (Del. Super. Ct. Oct. 29, 2002). The Trial Court disregarded the physician-patient relationship when it ruled that a primary care physician and mental health counselor did not have a "special relationship" with their mentally ill patient. Plaintiffs' experts, Dr. Baker and Dr. Romirowsky both testified that mental health professionals and primary care physicians owe a duty to their mentally ill patients to prevent their patients from acting on their own suicidal tendencies. Any holding by the Trial Court contrary to these opinions violated 18 Del. C. § 6853, which this Court has held:

> ...does not require medical experts to couch their opinions in legal terms or to articulate the standard of care with a high degree of legal precision or with "magic words." Similarly, to survive a motion for judgment as a matter of law, the [plaintiff is] not required to provide uncontradicted evidence of the elements of their negligence claim. Instead, the [plaintiff] must provide credible evidence of each of these elements from which a reasonable jury could find in [his] favor. So long as [the expert]'s testimony provides this minimal evidence, any inconsistencies in [the expert]'s testimony must be

> resolved by a jury and are thus irrelevant for purposes of ruling on a motion for judgment as a matter of law.

Simmons v. Bayhealth Med. Ctr., Inc., 950 A.2d 659, 9, n.7 (Del. 2008), (quoting *Green v. Weiner,* 766 A.2d at 495-96 (internal citations omitted). By ruling that no special relationship exists, the Trial Court usurped the role of the jury by rejecting credible expert evidence of negligence. *Id.*

"The voluntary acceptance of the physician-patient relationship by the affected parties creates a prima facie presumption of a contractual relationship between them. The existence of the relationship of physician and patient is a matter of fact depending on the questions whether the patient entrusted himself to the care of the physician and whether the physician accepted the case." *Anderson v. Russell,* 2012 Del. Super. LEXIS 174, 16-17 (Del. Super. Ct. Apr. 18, 2012). Summary Judgment was inappropriate because both Defendants voluntary accepted the responsibility to care for Mr. Christian and Mr. Christian accepted their treatment and guidance affirming their special relationship.

1. The Trial Court's Grant of Summary Judgment is Contrary to The Delaware Supreme Court's Decision in *Naidu v. Laird*

In *Naidu v. Laird*, the Supreme Court of Delaware held that, "the Delaware statutes concerning the care of the mentally ill do not fully define all the duties of mental health professionals. These statutes do not eliminate the common law duty to use reasonable care in the treatment and discharge of mentally ill patients to protect against reasonably foreseeable events." *Naidu*, 539 A.2d at 1072. In *Naidu,* this Court adopted the holding in *Tarasoff v.*

Regents of the University of California, Cal. Supr., 17 Cal.3d 425, 551 P.2d 334, 340, 131 Cal. Rptr. 14 (1976). In adopting the California Supreme Court's conclusions, this Court held, "a special relationship exists between mental health professionals and a patient which provides the underlying basis for imposition of an affirmative duty to persons other than the patient." *Id.* That "special relationship," as discussed in *Naidu,* sets forth the standard for mental health professionals:

> A psychiatrist **or therapist** may have a duty to take whatever steps are reasonably necessary to protect an intended or potential victim of his patient when he determines, or should determine, in the appropriate factual setting and in accordance with the standards of his profession established at trial, that the patient is or may present a probability of danger to that person. The relationship giving rise to that duty may be found either in that existing between **the therapist and the patient**, as was alluded to in *Tarasoff II*, or in the more broadly based obligation a practitioner may have to protect the welfare of the community . . .

Id. (quoting *McIntosh v. Milano*, 168 N.J. Super. 466, 403 A.2d 500, 511-512 (1979))(emphasis added). "Encompassed within this affirmative duty, courts have recognized both a psychiatrist's duty to warn third persons, **and a duty to control the actions of a mentally ill patient by taking reasonably necessary precautions.**" *Id.* (internal quotations omitted)(emphasis added). "This duty requires that the psychiatrist **or other mental health professional** initiate whatever precautions are reasonably necessary to protect potential victims of the patient." *Id.* at 1073 (emphasis added). Accordingly, a mental health professional's duty to protect potential victims of the patient is also a duty to protect the patient from himself.

Despite the Trial Court's differentiation between *Naidu* and this case, the facts are remarkably similar, and *Naidu* controls. The underlying rationale of *Naidu* establishes that a

"special relationship" existed and a duty of care that was owed to Mr. Christian by both Dr. Stone and LPCMH Cannon. *Naidu*, 539 A.2d at 1072. The Trial Court found that no duty existed because neither Dr. Stone nor Counselor Cannon are psychiatrists, unlike the defendant in *Naidu*. A3022. The Trial Court indicated that the importance of that distinction is that pursuant to Delaware law, a psychiatrist can involuntarily commit their patients whereas Dr. Stone and Counselor Cannon could not. A3023. This distinction is not indicated in *Naidu* which applies not just to a psychiatrist but, "other mental health professional[s]." The Supreme Court has already held that involuntary commitment is not the only weapon available to a mental health professional to treat mental illness. The *Naidu* Court held: "In this case, the duty of reasonable care does not necessarily imply that involuntary commitment was the only possible course of action. Dr. Davis testified that remedial measures such as discharge with a program for continuing care, referral to a V.A. hospital or other outpatient clinic, and implementation of a program to monitor Putney's medication could have been employed." *Naidu*, 539 A.2d at 1073-1074.

The Trial Court additionally differentiated this case from *Naidu,* in that by finding "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 outpatient and never in the custody of either Dr. Stone or Mr. Cannon." A3023. In *Naidu,* a psychiatrist discharged a mentally ill patient from the hospital on March 22, 1977. The patient moved to New York where "he led a rather unremarkable life until September 6, 1977, when, in a psychotic state, he drove his car into that

of George Laird with tragic results." *Id.* at 1069. The jury returned a $1.4 million verdict against the psychiatrist on the grounds he was grossly negligent. In *Naidu,* the former mental health care professional last treated his patient 159 days prior to his psychotic episode. Even though the psychiatrist had not treated his former patient in five and a half months, this Court reasoned that mental health care professional owed a duty to his patient and the public by virtue of their special relationship. *Id.* at 1073.

Yet, the Trial Court in this case determined as a matter of law that a mental health care provider and a primary care physician who were both currently treating a mentally ill patient did not owe a duty to him because they did not have a special relationship with him. *Id.* at 1072. The Trial Court's conclusion in this case represents a significant departure from this Court's holding in *Naidu.* The Trial Court further differentiated *Naidu* from this case by stating:

> 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. 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 been a candidate for a psychiatric involuntary commitment.

A3023. Under the Trial Court's logic, because Mr. Christian actively sought assistance from his healthcare providers he did not enter into a "special relationship" with them. Mr. Christian's willingness to seek assistance from his mental healthcare providers confirms his special relationship he had with LPCMH Cannon and Dr. Stone. Because Mr. Christian was a willing

participant in his own care, LPCMH Cannon and Dr. Stone owed a duty to their patient to take interventional steps to address the foreseeable risk of harm.

Further, the Trial Court held that "no special relationship can be created under Section 315." A3024. Yet, in *Naidu,* the Supreme Court adopted the reasoning of *Tarasoff* based on Restatement (Second) of Torts §315. The *Naidu* Court found that, "a special relationship exists between mental health professionals and a patient which provides the underlying basis for imposition of an affirmative duty owed to persons other than the patient. We find the rationale of these cases persuasive. In addition, as the Superior Court stated, subsection (b) of § 315 provides an additional impetus for imposition of a duty owed to persons other than a patient." *Naidu,* 539 A.2d at 1072. In this case, however, the Trial Court rejected *Naidu* to find that "no special relationship can be created under section 315." A3024. The Trial Court's holding is contrary to Delaware law and an abuse of the Trial Court's discretion. The following chart illustrates the Trial Court's departures from the *Naidu* Court:

Delaware Supreme Court in *Naidu*	Trial Court in *Christian*
"[A] special relationship exists between ***mental health professionals*** and a patient which provides the underlying basis for imposition of an affirmative duty owed to persons other than the patient."[1]	"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 non-feasance." A3019.
"This duty requires that the psychiatrist ***or other mental health professional*** initiate whatever precautions are reasonably	*Naidu* is "distinguishable" because, "First, neither Dr. Stone nor Mr. Cannon are psychiatrists…Dr. Stone is a primary care

[1] *Id.* at 1072.

necessary to protect potential victims of the patient."[2]	physician and Mr. Cannon is a mental health counselor." A3022.
In *Tarasoff v. Regents of the University of California*, the California Supreme Court recognized the existence of a special relationship between a psychotherapist and a patient which provides the underlying basis for imposition of an affirmative duty owed to persons other than the patient. 551 P.2d at 343 (citing **Restatement (Second) of Torts § 315-320** (1965))…. **We find the rationale of these cases persuasive**. In addition, as the Superior Court stated, subsection (b) of **§ 315 provides an additional impetus for imposition of a duty** owed to persons other than a patient when the psychiatrist is state-employed.[3]	"No special relationship can be created under [Restatement (Second) of Torts] Section 315." A3024-A3025.
"The Delaware statutes concerning the care of the mentally ill do not fully define all the duties of ***mental health professionals***. These statutes do not eliminate the ***common law duty to use reasonable care in the treatment*** and discharge of mentally ill patients to protect against reasonably foreseeable events."[4]	"Further, the special relationship extended in *Naidu* is inapplicable to the present case. That relationship was between a psychiatrist and a 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 outpatient as opposed to an in-patient, psychiatric setting;……" A3024.

[2] *Id.* at 1073 (citing *Lipari v. Sears, Roebuck & Co.,* 497 F. Supp. at 193).

[3] *Id.* at 1072.

[4] *Id.* at 1072 (*citing Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 191 (D. Neb. 1980); *Tarasoff v. Regents of the Univ. of California*, Cal.Supr., 17 Cal.3d 425, 551 P.2d 334, 340, 131 Cal. Rptr. 14 (1976); *Bradley Center, Inc. v. Wessner*, 161 Ga. App. 576, 287 S.E.2d 716, 721, *aff'd.*, Ga. Supr., 250 Ga. 199, 296 S.E.2d 693 (1982); *McIntosh v. Milano*, 168 N.J. Super. 466, 403 A.2d 500, 511-12 (1979); *Petersen v. State*, Supr., 100 Wash.2d 421, 671 P.2d 230, 237 (Wash. 1983)).

Psychiatrist owes a duty of care to protect third persons from harm involving **former patient** who was last treated **five and a half months** before the injury and lived an "unremarkable life" during that time.[5]	Physician and mental health professional owed no duty to protect patient from harm because, *inter alia*, "Mr. Christian actively pursued and participated in his own care. Mr. Christian cooperated with his health care providers and was responsive to their recommendations." A3023.
Both the special relationship that existed between Dr. Naidu and Putney as well as Dr. Naidu's broad-based obligation to protect the public from potentially violent patients who present an unreasonable danger support imposition of an affirmative duty owed Mr. Laird. The record shows that Putney had been under Dr. Naidu's care from as early as 1969; therefore, Dr. Naidu had firsthand knowledge of Putney's longstanding and continuing dangerous propensities. Whether Dr. Naidu, in accordance with the standards of the profession, knew or should have known that Putney's dangerous propensities presented an unreasonable risk of harm to himself or others and whether Dr. Naidu took reasonable precautions to protect potential victims were issues which were properly submitted to the jury.[6]	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 outpatient and never in the custody of either Dr. Stone or Mr. Cannon. A3023.

[5] *Id.* at 1069.

[6] *Id.* at 1073.

*"**[T]he duty of reasonable care does not necessarily imply that involuntary commitment was the only possible course of action.*** Dr. Davis testified that remedial measures such as discharge with a program for continuing care, referral to a V.A. hospital or other outpatient clinic, and implementation of a program to monitor Putney's medication could have been employed. Even if the record supported the assertion that Dr. Naidu had a statutory obligation to release Putney, ***Dr. Naidu was not necessarily relieved of his duty to take some other steps in the exercise of reasonable care.*** Dr.Davis' testimony concerning alternatives to involuntary commitment could be considered by the jury when it determined whether Dr. Naidu breached his duty of reasonable care and was grossly negligent.[7]	Neither Dr. Stone nor Mr. Cannon had the ability to involuntarily commit Mr. Christian, unlike 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*. A3022-3023.

In granting summary judgment, the Trial Court relied upon *Rogers v. Christina Sch. Dist.* 73 A.3d 1 (Del. 2013), to find that a special relationship did not exist. *Rogers*, however, is inapposite. Rather than rely on the Supreme Court's holding that a special relationship existed between a patient and a medical doctor, the Trial Court likened the factual scenario in *Rogers* to this case. Unlike this case involving licensed professionals, *Rogers* involved a student's claim against an unlicensed school-based therapist. Further, the issue in *Rogers* revolved around whether a school system had custodial control over a student. Although the Court held that the school did not have custodial control over the student, utilizing the common carrier analysis, it held that the defendants were negligent *per se* for failing to disclose the student's suicidal ideas to his family. *Id.* at 16. By likening this case to *Rogers*, the Trial Court discarded the

[7] *Id.* at 1073-74.

physician-patient relationship and analyzed the facts in the context of custody under Restatement (Second) of Torts §314(A). Under the Trial Court's reasoning, no physician or mental health care provider could ever be found negligent for breaching the standard of care unless they had custody over their patient. In that sense, no mental health provider could be liable in tort if they provide outpatient care because they could not exercise "control" over the patient.

By comparing the special relationship between a mentally ill patient and his healthcare provider to a common carrier, inn keeper, possessor of land or someone who is required by law to take custody of another, the Trial Court overlooked the important relationship that is the fundamental cornerstone of the medical system. The relationship is at its apex when a mentally ill patient knowingly approaches a mental health provider for help to combat his mental illness which has potential to override the natural protections against self-inflicted harm.

In this case, Dr. Stone and Counselor Cannon knew of Mr. Christian's mental illness and suicidal tendencies. Counselor Cannon knew that Mr. Christian had the means to commit suicide and Dr. Stone knew that Mr. Christian's medication regimen was not properly treating his mental illness. Though Dr. Stone and Counselor Cannon knew that Mr. Christian was relying on them to help him combat his mental illness, the Trial Court incorrectly concluded that they owed no duty of care to take affirmative steps to protect their patient from harm. By ruling that Dr. Stone and Counselor Cannon did not have a "special relationship" with Mr.

Christian, the Trial Court demeaned the sanctity of the physician-patient relationship and abused its discretion by taking a contrary position to that of the Delaware Supreme Court.

Additionally, the Trial Court's decision, that a mental health counselor and a primary care physician who are treating a mentally ill patient do not have a special relationship with their patient is illogical and contrary to Delaware law and the standards created by the governing bodies of the American Medical Association and the National Board for Certified Counselors.

2. Pursuant to the American Medical Association Dr. Stone Had a "Special Relationship" With Mr. Christian

Defendant Dr. Stone is a licensed physician and member of the American Medical Association. The American Medical Association initially adopted their principles of medical ethics in June 1957. The principles of ethics were revised in June 1980 and again in June 2001. Paragraph eight of the current principles of ethics states "a physician shall, while caring for a patient, regard responsibility to the patient as paramount." *Principles of Medical Ethics,* American medical Association, adopted June 1957; revised June 1980; revised June 2001 (emphasis added).

The American Medical Association describes the role of physicians in the lives of their patients as follows:

> From ancient times, physicians have recognized that the health and well-being of patients depends upon a collaborative effort between physician and patient. Patients share with physicians the responsibility for their own health care. The patient-physician relationship is of greatest benefit to patients when they bring medical problems to the attention of their physicians in a timely fashion,

> provide information about their medical condition to the best of their ability, and work with their physicians in a mutually respectful alliance....
>
> (4) The patient has the right to confidentiality. The physician should not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest.

American Medical Association, *Fundamental Elements of the Patient-Physician Relationship*, Opinion 10.01, adopted June 1990 (JAMA. 1990; 262: 3/33); Updated 1993. The American Medical Association has determined that the physician needs to protect the welfare of his or her client as paramount to their relationship. *Id.* Contrary to the Trial Court's decision, the American Medical Association does not hold that a physician only has a duty to protect the welfare of their patient when the patient is in their "custody." Rather, the American Medical Association has determined that their physicians have a responsibility to "protect the welfare" of their patients in any setting, no matter what level of custodial control the physician has over their patient. Additionally, Opinion 10.015 of the American Medical Association, entitled *the Patient-Physician Relationship*, states:

> The practice of medicine, and its embodiment in the clinical encounter between a patient and a physician, is fundamentally a moral activity that arises from the imperative to care for patients and to alleviate suffering.
>
> A patient-physician relationship exists when a physician serves a patient's medical needs, generally by mutual consent between physician and patient (or surrogate). In some instances the agreement is implied, such as in emergency care or when physicians provide services at the request of the treating physician. In rare instances, treatment without consent may be provided under court order (see Opinion 2.065, "Court-Initiated Medical Treatments in

> Criminal Cases"). Nevertheless, the physician's obligations to the patient remain intact.
>
> **The relationship between patient and physician is based on trust and gives rise to physicians' ethical obligations to place patients' welfare above their own self-interest and above obligations to other groups, and to advocate for their patients' welfare.**
>
> **Within the patient-physician relationship, a physician is ethically required to use sound medical judgment, holding the best interests of the patient as paramount.**

American Medical Association, *the Patient-Physician Relationship,* Opinion 10.015, Issued December 2001, adopted June 2001. (emphasis added). As the Jury Instruction used in *Naidu* stated "where a national standard of practice exists in a profession that is the applicable standard." *Naidu v. Laird,* 539 at 1075 fn 8. Here, not only has the Delaware Supreme Court held that Dr. Stone had a special relationship with Mr. Christian, but the American Medical Association also dictates that Mr. Stone had a special relationship with Mr. Christian and that Dr. Stone was ethically required to hold the best interest of his patient, Mr. Christian, as paramount. Said another way, the American Medical Association has determined that its physicians, like Dr. Stone, have a moral imperative to prevent their patients from harming themselves, yet the Trial Court found that Dr. Stone did not even have a special relationship with his mentally ill patient.

3. Under Delaware Law, Counselor Cannon Had a Special Relationship With Mr. Christian and an Affirmative Duty to Take Reasonable Steps to Safeguard Mr. Christian from Himself

Counselor Cannon is a licensed professional counselor of mental health (hereinafter, "LPCMH"). The American Mental Health Counselors Association specifies that "Clinical Mental Health Counselors are first responsible to society, second to consumers, third to the profession, and last to themselves." *American Mental Health Counselors Association,* Standards for the Practice of Clinical Mental Health Counseling, Revised 2011, p.11.

Pursuant to Title 24, Chapter 30 of the Delaware Code, licensed professional counselors of mental health, such as counselor Cannon, must be certified by the National Board for Certified Counselors, Inc. (NBCC) or the Academy of Clinical Mental Health Counselors (ACMHC). Title 24 Del. C. §3032. The Board of Professional Counselors of Mental Health and Chemical Dependency Professionals adopted the ethical standards of the NBCC. Section 2.5 (Ethics) of the Board's code states that "the practice of all persons licensed as an LPCMH shall conform to the principles of the National Board for Certified Counselors' Code of Ethics (Code). Violation of the Code shall constitute grounds for discipline." CDR 24-3000 §2.5.

> The **very first directive** of the NBCC Code states that:
>
> National Certified Counselors [such as Counselor Cannon], recognizing the potential for harm, shall not share information that is obtained through the counseling process without specific written consent by the client or legal guardian **except to prevent clear, imminent danger to the client** or others or when required to do so by a court order.

Code of Ethics, National Board for Certified Counselors, June 8, 2012. (emphasis added).

The Trial Court held, as a matter of law, that despite the State of Delaware's adoption of the NBCC code, that mental health counselors such as counselor Cannon, do not have to act to prevent a clear and/or imminent danger to their patient. As counselor Cannon's own records reflect, Mr. Christian had suicidal thoughts only a week earlier, had a suicide plan, a gun to kill himself and "while not suicidal during his clinical interview, without significant progress in achieving identified treatment goals, his level of risk is likely to increase significantly." A1259. It is clear that counselor Cannon's own code of ethics mandated he take action in this particular circumstance, yet the Trial Court held that as a matter of law, he did not have a special relationship with Mr. Christian and thus, he had no duty to help prevent Mr. Christian's suicide.

Such a view of the control exerted by a licensed medical provider over their patient, especially when treating patients suffering from mental illness, is inappropriate. Physicians and mental health counselors can control their patients through medications, recommendations for voluntary commitments, by alerting family members and/or authorities of an impending danger to the patient. Ultimately, the Trial Court concluded that a physician and/or mental health counselor in an outpatient setting owes no duty to safeguard their patient from their own suicidal and/or destructive tendencies because they do not exercise physical dominion over them. Such a finding stands in stark contrast to the broad duty mental health providers owe their patients as set forth by this Court in *Naidu*, and by the AMA and the NBCC. In essence, the Trial Court's ruling that a "special relationship" does not exist between a mentally ill patient and his mental health counselor or physician is contrary to the American Medical Association's

standards and the standards of the National Board for Certified Counselors, which have been adopted by the State of Delaware. As such, the Trial Court's ruling was an abuse of discretion, should properly be reversed and the matter remanded to the Superior Court for disposition on the merits.

B. The Trial Court Abused Its Discretion and Erred as a Matter of Law by Precluding Plaintiffs' Experts, Samuel Romirowsky, Ph.D. and Terrance L. Baker, M.D.'s From Offering Causation Testimony Against Defendants, Dr. Stone and Counselor Cannon

B.1 Question Presented

Whether the Trial Court abused its discretion by precluding Plaintiffs' experts, Samuel Romirowsky, Ph.D. and Terrance L. Baker, M.D. from testifying regarding the causation of Mr. Christian's suicide because they did not use the term "but for" in their opinions, and by denying Plaintiffs' Motion for re-argument of the decision precluding Dr. Romirowsky's testimony. Question Preserved at: A2494-A2507; A1771-A1788; A3054-3060; A3064-A3067.

B.2 Scope of Review

The standard of review of a Trial Court's decision to limit expert testimony as a result of a Motion *in Limine* is one of abuse of discretion. *Potter v. Blackburn*, 850 A.2d 294, 297 (Del. 2004).

B.3 Merits of Argument

The Trial Court's decision to preclude Dr. Romirowsky and Dr. Baker's causation testimony was contrary to Delaware law and the Trial Court's statements during oral argument. The Court's decision to preclude Dr. Romirowsky and Dr. Baker's testimony was based on Delaware's "but for" rule on proximate cause in suicide cases and whether Plaintiffs' experts had to use "magic words" when describing the causation element of Defendants' negligence.

During argument session on June 2, 2014 and in its June 12, 2014 Order, the Trial Court relied upon two cases, *Culver v. Bennett,* 588 A.2d 1094, 1097 (Del. 1991) and *Chudnofiky v. Edwards,* 208 A.2d 516, 518 (Del. 1965) to hold that the "but for" standard was applicable to this claim. During oral argument, the Trial Court found that the *Culver* decision was based on the *Chudnofsky* decision. Importantly, neither *Culver* nor *Chudnofsky* are medical malpractice cases. Rather both *Culver* and *Chudnofsky* are car accident cases with absolutely no relation to the issues involved in this claim. During oral argument, the Trial Court stated "I think magic words that have to be testified to throughout - there's no requirement that legalese be used by experts when they testify." A3050. Yet, the Trial Court contradicted itself by ruling that the expert "does have to be reasonable degree of medical probability and but for that there wouldn't had been an injury. That's the standard in Delaware. So I'm denying this." A3050. Pursuant to Delaware law, the standard for an expert's medical opinion should be stated in terms of reasonable medical probability or a reasonable medical certainty. *Floray v. State*, 720 A.2d 1132, 1136 (Del. 1998). This standard clearly applies to expert medical opinion as to the cause of injury. *Perkins v. State*, 920 A.2d 391, 394-95 (Del. 2007). "Semantics must give way in the search for a fair and just result; and distinction between words like "possible", "probable", "reasonable certainty", and the like may not be over-emphasized." *Barriocanal v. Gibbs*, 697 A.2d 1169, 1172-1173 (Del. 1997). Therefore, although the standard is expressed in legal terms, medical experts are not required to express their opinions in "perfect legalese" or to utter "magic words." Rather, the Trial Court was expected to evaluate the substance of the proffered

testimony of Dr. Romirowsky and Dr. Baker as a whole. An answer of a medical witness, such as we have here, may not be isolated and considered alone. Rather, a medical expert's testimony must be viewed in conjunction, and totality, with all of the other evidence in the case. *AirMod Corporation v. Newton*, 215 A.2d 434, 438 (Del. 1965). Proximate cause is a question of fact to be submitted to the jury to determine upon proper instruction from the Court, not from the medical expert. *Culver v. Bennet,* 588 A.2d at 1098.

The Trial Court's decision that Plaintiffs' experts insufficiently expressed their opinions by failing to use the term "but for" exemplifies a misunderstanding of mental health and its relationship with the "but for" rule. Mental illness and suicide may not be limited to one moment, like a car accident, which is why the "but for" rule does not prohibit the plaintiff from proceeding against more than one defendant, or more than one claim of negligence. *Del. PJI.* 21.1 & 21.2. As the Trial Court stated, "we all know that having a gun in a house with someone that's suicidal will increase the risk that they commit suicide." A3055. Despite this statement, the Court found that "Delaware do[es] not seem to relax the "but for" standard to me… but it's almost as if the negligence has to create a situation where the person has an involuntary – they have no choice but to commit suicide. In other words, they're under an involuntary impulse to commit the suicide." A3055. The Court's understanding of suicide, elicited above, illustrates that the Trial Court decided an issue of fact and used that decision to find that Plaintiffs' experts could not testify in accordance with the "but for" and were therefore precluded from offering causation testimony. By clutching onto a legal standard from 1965 to examine mental illness

resulting in a 2008 suicide, the Trial Court failed to appreciate fifty years of mental health treatment, understanding and research. Simply because a mental health patient may find other means of committing suicide does not obviate a mental health professional or primary health care provider's responsibility to safeguard their patient from known dangers, especially when the patient has expressed a specific suicide plan, previously attempted suicide and had a long history of mental illness.

As addressed in Dr. Romirowsky's Preliminary Disclosure of Opinions, Dr. Romirowsky opined that Counselor Cannon breached the applicable standards of care and increased the risk of Bruce Christian's suicide by failing to formulate and implement a plan of care with immediate intervention, failure to refer Mr. Christian for a psychiatric evaluation, failure to seek assistance from Mr. Christian's spouse and failure to contact Mr. Christian's spouse to remove firearms from the home. A299-A303. Further, Dr. Romirowsky testified at his deposition that in his professional opinion, there were actions that could have been taken by Counselor Cannon that would have "increased probability of protecting Mr. Christian from himself." A273. Counselor Cannon's failure to refer Mr. Christian to an emergency department fell below the standard of care, "because that subsequent evaluation by a psychiatrist could have led to a modification or a change in medication regimen, could have led to an appointment with a therapist, and certainly would have activated the higher likelihood of Mr. Christian's wife and/or others closely monitoring Mr. Christian's behavior." A276. However, "doing nothing increased the probability to some higher number that bad things were going to happen – could

happen, whereas doing certain – some things – I don't think I have to go over them again – would have produced it from a higher number to a lower number with regard to the probability that he would hurt himself." A276. Such opinions are strikingly similar to those that were addressed by the plaintiffs' experts in *Naidu v. Laird*, and were previously permitted by the Supreme Court. Despite the Trial Court's statement that Dr. Romirowsky did not need to use magic words or perfect legalese, the court granted Defendants' Motion *in Limine* specifically because he did not use the words "but for."

Seemingly in contradiction, the Court additionally precluded Dr. Baker's causation testimony for failing to testify using the "but for" standard. However, during Dr. Baker's deposition, defense counsel defined proximate cause as "the direct cause but for which the injury would not have occurred. So direct cause but for which Mr. Christian's suicide would not have occurred and necessary to that result." A184. Utilizing Defendants' own definition, Dr. Baker testified, in accordance with his Initial Expert Disclosures, that Dr. Stone deviated from the appropriate standards of care by failing to obtain and document the history of present illness, failing to implement an appropriate patient care plan, failing to accurately medicate and monitor Mr. Christian, failing to obtain necessary consultations and/or transfer Mr. Christian's care. A250. Although Dr. Romirowsky may not have used the words "but for", he clearly expressed his expert opinion in terms of possibilities, probabilities and reasonable certainty. Further, when Dr. Baker testified at his deposition, he used Delaware's definition of proximate cause, as provided to him by defense counsel. It is respectfully submitted that the Trial Court

abused its discretion by ruling as a matter of law that Dr. Romirowsky and Dr. Baker could not give causation testimony based on the "but for" rule. The Trial Court additionally abused its discretion by denying Plaintiffs' Motion for Re-argument of its decision precluding Dr. Romirowsky's expert testimony. Re-argument is appropriate where the Court has overlooked controlling precedent or legal principles, or the Court has misapprehended the law or facts, such as would affect the outcome of the underlying decision. *Kennedy v. Invacare Corp.*, 2006 Del. Super. LEXIS 56, 2006 WL 488590 (Del. Super. 2006).

The Trial Court acknowledged that expert witnesses need not express their opinions in "magic words" but then overlooked the controlling precedents announced in *Green v. Weiner*, 766 A.2d 492, 495 (Del. 2001) when precluding Dr. Romirowsky's testimony. The Trial Court additionally did not consider and/or acknowledge that Dr. Romirowsky's proposed testimony described opinions meeting the standards for causation expressed to a reasonable degree of professional probability. Further, the Trial Court abused its discretion by concluding that an expert must express an opinion on causation strictly in terms of "but for." In *Culver v. Bennett*, the Delaware Supreme Court held that proximate cause is a question of fact to be determined by a jury using the Court's instructions applying a "but for" standard as opposed to a "substantial factor" standard. The *Culver* Court did <u>not</u> require that an expert's opinion on causation had to be presented precisely using the term "but for."

V. CONCLUSION

Based on the authority and reasoning set forth above, Appellants respectfully request this Honorable Court reverse the Trial Court's July 16, 2014 Order Granting Defendants' Motion for Summary Judgment, the Trial Court's June 12, 2014 Order Precluding Dr. Romirowsky's causation testimony, the Trial Court's July 1, 2014 Order Denying Re-argument of the June 12, 2014 Order, and the Trial Court's June 2, 2014 Order Precluding Dr. Baker from offering causation testimony. Appellants additionally request that the Court remand this matter to the Superior Court for reinstatement, reassignment to a different Superior Court Judge, and to proceed to disposition on the merits.

Respectfully submitted by:

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