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Case Number 446,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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.,	:	No.: 446, 2014
Plaintiffs Below, Appellants,	:	On Appeal from the Superior Court of the State of Delaware, in and for New Castle County, C.A. No. N09C-10-202-EMD
v.	:	
COUNSELING RESOURCE ASSOCIATES, INC., a Delaware Corporation, J. ROY CANNON, LPCMH, ARLEN STONE, M.D., individually and Doing business as Abby Family Practice,	:	
Defendants Below, Appellees / Cross Appellants,	:	
and	:	
THE FAMILY PRACTICE CENTER OF NEW CASTLE, P.A., a Delaware Professional Association, individually and doing business as Abby Family Practice,	:	
Defendants Below, Appellees.	:	

ANSWERING BRIEF OF APPELLEES
COUNSELING RESOURCE ASSOCIATES, INC.
and J. ROY CANNON, LPCMH

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Dated: November 5, 2014

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NATURE & STAGE OF PROCEEDINGS

Plaintiffs filed a medical negligence/wrongful death suit against J. Roy Cannon, LPCMH and his practice, Counseling Resource Associates, Inc., ("defendant Cannon") on October 20, 2009. That suit was later consolidated with plaintiffs' suit against Arlen Stone, M.D. and his practice, The Family Practice Center of New Castle, P.A. d/b/a Abby Family Practice ("defendant Stone"). Both suits allege that defendants committed medical negligence upon decedent Bruce Christian by failing to take action to prevent his January 8, 2008 suicide attempt.

On June 28, 2011, Judge Ableman precluded plaintiffs' experts from testifying and dismissed the consolidated case. Plaintiffs' motion for re-argument was denied and plaintiffs appealed to this Court. On March 26, 2013, this Court reversed and remanded and discovery resumed. After the conclusion of discovery, defendants moved for summary judgment on two grounds:

- That once the trial court excluded the causation testimony of plaintiffs' experts, plaintiffs' claims would fail as a matter of law for the lack of expert testimony alleging the requisite element of causation; and
- That plaintiffs' claims are contrary to the common law rule that the deliberate, intentional intervening act of suicide blocks a cause of action for negligence in the absence of one (of two) exceptions to that rule; neither of which presented here.[1]

[1] *See* May 14, 2014 *Motion for Summary Judgment* at A2763-A2936. Filed concurrently with that motion were *Motions in Limine* to exclude the causation testimony of plaintiffs' experts Baker and Romirowsky. Those *Motions* appear at A1314-A1769 and A2404-A2493.

On June 13, 2014, Judge Davis granted defendant Cannon's motion to exclude plaintiffs' expert, Samuel Romirowsky, Ph.D., from offering causation testimony and subsequently denied plaintiffs' motion for re-argument on that exclusion. No other expert proffered causation opinions against defendant Cannon.

On July 16, 2014, Judge Davis granted defendants' motion for summary judgment and plaintiffs appealed to this Court. Plaintiffs filed their *Opening Brief* on October 3, 2014.[2]

This is defendant Cannon's Answering Brief.

[2] And filed substituted *Opening Briefs* on October 16th and 31st. This Brief tracks the Oct. 31st version.

SUMMARY OF ARGUMENTS

1. Denied. The trial court did not commit legal error when it granted summary judgment to both defendants. Denied. Plaintiffs have taken defendant Cannon's chart notation (regarding the likelihood that decedent's risk of suicide would increase) out of context to support their argument that defendant Cannon was nonfeasant to decedent. Defendant Cannon adopts by reference the response of defendant Stone to these arguments. In addition, appellants' argument that the ethical tenets of defendants' respective professional associations, and as to appellee Cannon the supposed codification of those tenets, was not raised below and is barred by Rule 8. Regardless, this argument has no relevance to the threshold determination of whether either defendant had a duty to decedent on the facts presented here.

2. Denied. The trial court did not commit legal error when it correctly concluded that neither defendant owed a duty to decedent. Furthermore, without the finding of a special relationship between decedent and either defendant giving rise to a duty, any question as to the foreseeability of decedent's harm is not reached and is thus irrelevant. Defendant Cannon adopts by reference the response of defendant Stone to these arguments.

3. Denied. The trial court did not commit legal error when it correctly concluded that defendant Stone did not owe a duty to decedent. Defendant Cannon adopts by reference the response of defendant Stone to this argument.

4. Denied. Plaintiffs misstate the holding below; plaintiffs' expert Samuel Romirowsky, Ph.D. was *not* excluded because he "did not properly verbalize the 'but for' rule."[3] The trial court's ruling was legally correct and well within its discretion to determine from the record that Dr. Romirowsky did not understand the "but for" proximate cause standard, did not give *any* opinions to that standard, and did not give his putative causation opinions to the requisite evidentiary standard of reasonable medical probability or certainty.

[3] *See* Oct. 31, 2014 substituted *Opening Brief* at p.5 line 11.

COUNTERSTATEMENT OF THE FACTS

Appellee Cannon adopts herein by reference the Statement of Facts set forth in Appellee Stone's *Answering Brief* and adds the following facts pertaining to issues as they relate to the causation opinions of plaintiffs' expert Dr. Romirowsky.

On May 4, 2011, plaintiffs identified Dr. Romirowsky as their (sole) expert who would testify that defendant Cannon breached the standard of care as to decedent and that those breaches "increased the risk of injury and caused injury" to decedent.[4]

Defendants moved to preclude all of plaintiffs' expert testimony on grounds that are unrelated to this appeal. That motion was granted and the case was dismissed. Plaintiffs moved for re-argument.

Plaintiffs got their first "warning" as to causation deficiencies in defendant Cannon's August 10, 2011 response to the re-argument motion, which stated that the expert disclosures offered no acceptable causation opinions.[5] Re-argument was denied and on August 25, 2011, plaintiffs appealed to this Court.

Plaintiffs got their second "warning" as to causation proofs and the insufficiency of their expert causation opinions from appellee Cannon's December 19, 2011 *Answering Brief.* Cannon argued at two places in that *Brief* that plaintiffs'

[4] *See* May 4, 2011 *Expert Disclosure* at A982-A986.
[5] *See* Aug. 10, 2011 *Response* to plaintiffs' motion for re-argument at ¶10 at B52.

expert disclosures failed as a matter of law to meet the Delaware causation standard.[6]

This Court reversed and remanded the case on March 26, 2013, without reaching the insufficiency of plaintiffs' expert opinions. Discovery resumed, and Dr. Romirowsky was deposed on March 14, 2014. Prior to that deposition, plaintiffs did nothing to amend or augment the disclosure or the opinions of Dr. Romirowsky or seek out another expert to offer correct causation opinions so that either would be consistent with the Delaware standard.

Dr. Romirowsky's causation opinion testimony approximated the (deficient) "increased risk" causation opinions set forth in the 2-year 10-month-old *Expert Disclosure*. For example, Dr. Romirowsky could not state with any certainty what was different for decedent from the time of his January 3, 2008 interview with defendant Cannon up to when he shot himself on January 8th, testifying that he had "no information" about decedent's suicide risk factors during that time.[7] Dr. Romirowsky testified contrary to *U.S. v. Cumberbatch*[8] that doing nothing increased the probability that "bad things were going to happen," but could not

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[6] *See* Dec. 19, 2011 *Answering Brief* at p.26, last paragraph at B82 and p.27 last sentence beginning "...and filed...." at B83.

[7] *See* Mar. 14, 2014 Samuel Romirowsky, Ph.D deposition transcript at 50:13-19 at A276 and 64:1-6 at A279.

[8] 647 A.2d 1098 (Del. 1994).

quantify this increased probability that decedent would shoot himself on January 8th.[9]

Dr. Romirowsky testified that he *did not even understand* the requisite "but for" causation standard or the requirement that he testify to a reasonable medical probability or certainty.[10]

When asked if the standard of care had been followed whether decedent would have shot himself, Dr. Romirowsky testified that he had "no way of knowing with certainty that it would have been avoided. It would have been mitigated." He testified that there were actions that could have *reduced the probability* that decedent would shoot himself.[11] As to one of those actions, recommending that decedent go to an emergency department, Dr. Romirowsky had *no idea* what would have happened had decedent done that[12] and had *no idea* what a psychiatrist at the ED would have done had decedent gone to the ED."[13]

As to whether decedent even had any suicidal ideation at the time of his visit to defendant Cannon, Dr. Romirowsky testified that "*it's only in hindsight that we know some of the things that [decedent] shared [with defendant Cannon] were either incomplete or untruthful.*" For example, when decedent told defendant about his guns at home, "*turn[ed] [up] only in retrospect -- and [was] probably not*

[9] *See* Mar. 14, 2014 Samuel Romirowsky, Ph.D deposition transcript at 51:18-53:4 at A276.
[10] *Id.* at 53:5-7 at A276 and 18:22-24 at A268.
[11] *Id.* at 18:19-19:8 at A268 (emphasis added).
[12] *Id.* at 27:9-13 at A270 (emphasis added).
[13] *Id.* at 27:17-29:2 at A270 (emphasis added).

something that Mr. Cannon could have known -- but that was also incomplete information."[14]

As to whether decedent's wife had confronted him about suicide and guns, Dr. Romirowsky had *no idea* whether decedent would have been truthful with her either.[15] As to the prognosis for decedent's risk factors, all Dr. Romirowsky could say was that the risks existed and defendant Cannon did nothing to *reduce the probability of self-harm.*[16]

As a result of his inability to express a legally sufficient opinion to the requisite testimonial standard, the trial court excluded Dr. Romirowsky from testifying as to causation and denied plaintiffs' motion for re-argument on the issue.[17]

[14] *Id.* at 32:12-33:20 at A271 (emphasis added).
[15] *Id.* at 35:12-23 at A272 (emphasis added).
[16] *Id.* at 40:16-23 at A273 (emphasis added).
[17] *See* June 12, 2014 Romirowsky *Limine Order* at A2548-A2549.

ARGUMENT

I. DENIED. THE TRIAL COURT NEITHER ERRED NOR ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS FOR PLAINTIFFS' FAILURE TO PROVIDE SUFFICIENT FACTUAL OR LEGAL SUPPORT OF THE ESSENTIAL ELEMENT OF DUTY TO DECEDENT IN THIS MEDICAL NEGLIGENCE/WRONGFUL DEATH NONFEASANCE CASE.

A. Denied. Appellee Cannon adopts herein by reference the arguments set forth in Appellee Stone's *Answering Brief* pertaining to the trial court's application of the *Restatement (Second) Torts* to the facts of this case.

B. Denied. Appellee Cannon adopts herein by reference the arguments set forth in Appellee Stone's *Answering Brief* pertaining to the trial court's decision not to apply *Naidu v. Laird* to the threshold question here of whether a special relationship existed between decedent and either defendant that would have given rise to a duty.

C. Denied. Appellee Cannon adopts herein by reference the arguments set forth in Appellee Stone's *Answering Brief* that *Murphy v. Godwin* has no relevance to the necessary determination of whether defendants had a duty to decedent on the facts presented here.

D. Denied. Appellee Cannon adopts herein by reference the arguments set forth in Appellee Stone's *Answering Brief* that Delaware's Medical Negligence Statute has no relevance on the threshold determination of whether either defendant had a duty to decedent on the facts presented here.

E. Denied. Appellants' argument that the ethical tenets of defendants' respective professional associations, and as to appellee Cannon the codification of those tenets, was not raised below and is barred by Rule 8. Regardless, this argument has no relevance to the threshold determination of whether either defendant had a duty to decedent on the facts presented here.

1. Question Presented Stated Affirmatively

This question of first impression is whether a family physician and a mental health counselor can be held liable by an out-patient who attempted suicide while at home with his family. Appellee Cannon adopts herein by reference the arguments set forth in Appellee Stone's *Answering Brief* on this question.

2. Standard of Review

This Court reviews *de novo* the trial court's grant of summary judgment to determine whether the court correctly determined that plaintiffs could not proceed under any reasonably conceivable set of circumstances susceptible of proof under the Complaint.[18] Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case."[19]

3. Merits of Argument

Appellee Cannon adopts herein by reference the arguments set forth in Appellee Stone's *Answering Brief* and adds the following pertaining specifically to appellee Cannon.

[18] *Kofron v. Amoco Chemicals Corp.*, 441 A.2d 226, 227 (Del. 1982).
[19] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

The existence of a duty is not determined by the aspirational statements of ethics espoused by defendants' respective professions.

This argument is barred by Supreme Court Rule 8 as it was raised for the first time in appellants' *Opening Brief*. However, appellee responds as follows in the alternative.

What appellants seek to do here is create "a large and new field of tort liability beyond what exist[s] at common law"[20] which, at least as to defendant Cannon, is "without clear legislative direction to do so."[21] Appellants offer no support for the argument that these aspirational ethical professional standards define a duty owed to decedent,[22] even as to defendant Cannon whose professional aspirational ethical goals were seemingly codified.[23] The analysis in *Bradley II* is instructive on this issue:

> [A] statement of aspirational goals that an organization's members will strive to uphold does not meet the prerequisites for even the most minimal of the recognized undertakings—a mere promise. Many volunteer organizations provide a statement of aspirational goals to their members, none of which are understood as undertakings to provide specific services to specific persons that would subject the organization to liability. In fact, the principles adopted by the Medical Society and identified by class plaintiffs are "not laws, but *standards of conduct* which define the essentials of honorable behavior for the

[20] *Doe v. Bradley ("Bradley I")*, 2011 WL 290829 at *17 (Del.Super. 2011) (internal cite omitted).
[21] *Id. Cf.* 24 *Del.C.* §3032.
[22] *See* Oct. 31, 2014 substituted *Opening Brief* at p.24 line 10 and p.27 line 1.
[23] *Id.* at p.26 line 12. *Cf.* 24 *Del.C.* §3032.

> physician." No legal duty arises from these statements that would be owing to anyone, including class plaintiffs.[24]

In support of this proposition, the *Bradley II* court cited to *In re Walt Disney Co. Derivative Litig.*,[25] which quoted *Brehm v. Eisner*[26] to hold that:

> Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal legal requirements of the corporation law are highly desirable.... But they are not required by the corporation law and do not define standards of liability.

The *Bradley II* court also cited *Tackes v. Milwaukee Carpenters Dist. Council Health Fund*,[27] which noted that the code of ethics of an association of insurance agents is "merely ... an exhortatory expression of common ideals" and does not establish a standard of care; and *Hamon Contractors Inc. v. Carter & Burgess, Inc.*,[28] which explained that an opinion as to engineering ethics does not establish standard of care. Not only do these cases not support appellants' argument as to the creation of a duty, they are not even persuasive on the creation of a standard of care.

> The adoption of the ethical standards of the National Board of Certified Counselors by the Delaware licensing board also does not define a duty.

Beyond what has been set forth above, *Bradley I* is also instructive here. The *Bradley* plaintiffs alleged defendants had both a common law and statutory duty to

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[24] *Doe 30's Mother v. Bradley ("Bradley II")*, 58 A.3d 429, 455 (Del.Super. 2012) (emphasis added).
[25] 907 A.2d 693, 745, n.399 (Del.Ch. 2005).
[26] 746 A.2d 244, 256 (Del. 2000), *aff'd*, 906 A.2d 27 (Del. 2006).
[27] 476 N.W.2d 311, 314–15 (Wis.App. 1991).
[28] 229 P.3d 282, 296–97 (Colo.App. 2009).

report what they knew or should have known about Bradley's unprofessional conduct;[29] and also alleged negligence *per se.*[30] The defendants argued that neither statute created a private right of action for failure to report.[31]

The *Bradley I* court concluded that statutory obligations to report did not create a common law duty to act, noting that while *Restatement (Third) Torts* §38 may well impose such a duty, that provision is a more "'expansive approach for creating duties' than has been recognized in Delaware:"[32]

> Without *Restatement (Third) Torts* §38, plaintiffs can point to no authority that would support their contention that the Court can employ a statutory violation as the sole basis for imposing a common law duty of care upon a tort defendant.... Something more than a statutory violation is required.[33]

Bradley I held that "the *statutory obligation* to report [suspected child abuse] does not equate to a common law duty to act."[34] *Bradley II* declined to apply the *Restatement (Third)* and held that[35] the "applicable provision" of the *Restatement (Second)* is §874A, but also noted that the *Restatement (Third)* states that §874A

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[29] *Bradley I,* 2011 WL 290829 at *1.

[30] *Id.* arguing liability under either the *Medical Practice Act* or the *Child Abuse Prevention Act.* The upshot of *Bradley I* was that plaintiffs were allowed to amend their *Complaint* to allege negligence *per se*. Here plaintiffs filed their Complaint on October 20, 2009. In spite of the tortuous and lengthy procedural history of this case, plaintiffs have never (until now) raised a negligence *per se* allegation or argument and should not be granted leave to do so at this late hour.

[31] *Id.* at *3.

[32] *Id.* at *3 quoting *Riedel v. ICI Americas Inc.,* 968 A.2d 17, 21 (Del. 2009).

[33] *Id.* at *9.

[34] *Id.* at *8 (emphasis added).

[35] *Id.* at n.119.

"provided that statutes might play a role in the creation of new claims, but §874A was directed to statutes that *proscribed misfeasance*."[36]

At issue here are *not* violations of a statute or a professional guideline, i.e. acts of misfeasance or malfeasance; rather the allegations are of *nonfeasance*. *Bradley II* noted that §874A:[37]

> [D]oes not speak specifically to the creation of a new duty *to act* but rather speaks to the creation of a 'right of action,' a concept that leads directly back to *Bradley I* and its extensive discussion of our Supreme Court's reluctance to legislate 'rights of action' when such rights have not been recognized by our General Assembly.[38]

In sum, the Superior Court correctly concluded that neither defendant Cannon nor defendant Stone owed any duty to decedent Bruce Christian.

[36] *Restatement (Third) Torts* §38 cmt. a. (2010) (emphasis added).
[37] *Restatement (Second) Torts* § 874A (1965).
[38] 58 A.3d at 452.

II. DENIED. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO HOLD THAT PLAINTIFFS' EXPERT SAMUEL ROMIROWSKY Ph.D. FAILED TO OFFER ANY TESTIMONIAL EVIDENCE THAT WAS SUFFICIENT AS A MATTER OF LAW ON THE ELEMENT OF CAUSATION, OR THAT DR. ROMIROWSKY'S PUTATIVE CAUSATION OPINIONS WERE NOT EXPRESSED TO THE REQUISITE EVIDENTIARY STANDARD OF REASONABLE MEDICAL PROBABILITY OR CERTAINTY.

1. Question Presented Stated Affirmatively

The trial court did not abuse its discretion by holding that plaintiffs' expert Dr. Romirowsky failed to give testimonial evidence that was sufficient as a matter of law on the element of causation; or that Dr. Romirowsky's causation opinions, such as they were, were not expressed to the requisite evidentiary standard of reasonable medical probability. Without that expert evidence, plaintiffs could not as a matter of law support the allegations against defendant Cannon.

2. Standard of Review

The standard of review applicable to a trial court's holding *in limine* is abuse of discretion.[39]

3. Merits of Argument

Dr. Romirowsky's purported causation testimony and evidence failed as a matter of law in two respects. First, he was unable to articulate his putative proximate cause opinions to the requisite Delaware "but for" or *sine qua non*

[39] *Tumlinson v. Advanced Micro Devices, Inc.*, 81 A.3d 1264, 1268 (Del. 2013).

standard, stating that he was not familiar with that standard.[40] Second, Dr. Romirowsky's causation testimony, such as it was, was not stated in terms of reasonable medical probability or certainty.[41]

In Delaware, a medical expert must state his opinions to a reasonable medical probability or certainty;[42] opinions stated in terms of possibilities are legally insufficient and cannot get to the jury.[43] Furthermore, his testimony has to support the causal link by adhering to the Delaware "but for" or *sine qua non* proximate cause test, not the "substantial factor" test used elsewhere;[44] and in a wrongful death case such as this one, not the legally barred "increased harm" standard either.[45]

On May 4, 2011, plaintiffs identified Dr. Romirowsky as the expert who would testify that defendant Cannon breached the standard of care as to decedent and that those breaches "increased the risk of injury and caused injury" to

[40] *See* March 14, 2014 Samuel Romirowsky, Ph.D deposition transcript at 53:5-7 at A276.
[41] *Id.* at 18:22-34 at A268.
[42] 18 *Del.C.* §6853; *Kardos v. Harrison*, 980 A.2d 1014, 1017-18 (Del. 2009); *Mammarella v. Evantash*, 93 A.3d 629, 635 (Del. 2014).
[43] *Mammarella,* 93 A.3d at 635, quoting *O'Riley v. Rogers,* 69 A.3d 1007, 1011 (Del. 2013) citing to *Floray v. State,* 720 A.2d 1132, 1136 (Del. 1998) ("'A doctor cannot base his expert medical opinion on speculation or conjecture.' As a result, '[a] doctor's opinion about what is possible is no more valid than the jury's own speculation as to what is or is not possible.'").
[44] *Culver v. Bennett,* 588 A.2d 1094, 1097 (Del. 1991).
[45] *See U.S. v. Cumberbatch,* 647 A.2d at 1098.

decedent.[46] The sum total of Dr. Romirowsky's disclosed opinions on causation were:

He is also expected to testify that the failures to comply with the standard of care *increased the risk of injury* and caused injury to [decedent];[47]

> Cannon ... breached the applicable professional standard of care, *increasing the risk that [decedent] would attempt to take his own life*;[48]
> ...
> Cannon's failure ... fell below the standard of care, and ... *increased the risk that [decedent] would harm himself*;[49]
> ...
> These failures to comply with the standard of care likewise *increased the risk that [decedent] would harm himself*;[50] and
> ...
> These failures of [Cannon's practice] to meet the standard of care *also increased the risk that [decedent] would harm himself, contributing to the cause of his death.*[51]

On June 22, 2011, defendants moved to preclude plaintiffs from offering expert testimony at trial for reasons that are not relevant here.[52] On July 8, 2011, the trial court ruled in defendants' favor during a teleconference with counsel.[53] On July 28, 2011, the court issued a written opinion on the preclusion of plaintiffs'

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[46] *See* May 4, 2011 *Expert Disclosure* at p.1 line 10 at A982-A986. *Also see* Plaintiffs' April 28, 2010 *Motion to Supplement,* attached at B1-B2, which stated at p.2 line 1 that a copy of the *Affidavit* had been produced to the defense.

[47] *See* May 4, 2011 *Expert Disclosure* at p.1. Lines 9-11 at A982-A986 (emphasis added).

[48] *Id.* at p.3 lines 18-20 (emphasis added).

[49] *Id.* at p.3 lines 24-25 (emphasis added).

[50] *Id.* at p.3 lines 41-42 (emphasis added).

[51] *Id.* at p.4. lines 18-19 (emphasis added).

[52] *See* June 22, 2011 *Motion* to preclude expert testimony filed jointly by defendants at B3-B6.

[53] *See* July 8, 2011 Superior Court teleconference transcript at 4:4-7 at B9 and 11:9-10 at B11.

experts and dismissal,[54] and plaintiffs moved for re-argument. Then on August 10, 2011, plaintiffs got their first "warning" as to proof of causation and the insufficiency of their expert causations opinions from defendant Cannon's *Response* to plaintiffs' motion for re-argument:

> However, consistent with the Court's statement that plaintiffs' case lacked the element of causation, the Preliminary Disclosures *fail to state causation under Delaware law.*[55]

Re-argument was denied and on August 25, 2011, plaintiffs appealed to this Court.[56] On December 19, 2011, appellee Cannon filed his *Answering Brief.*[57] Critical to this Court's present analysis are the final paragraphs on pages 26 and 27 of that *Brief:*

> As discussed above, the expert disclosures provided by Plaintiffs failed to state a claim under Delaware's Wrongful Death Act and also failed to meet the Delaware standard to establish causation.
> ...
> The Court's statements such that he was out of his element were particularly true, where local counsel approved and filed expert disclosures which did not state claims in Delaware and did not meet the standard for causation in Delaware but in all likelihood would have been sufficient in Pennsylvania.[58]

This was plaintiffs' second "warning" as to proof of causation and the insufficiency of their expert causation opinions.

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[54] *See* July 28, 2011 *Order* attached at B17-B48.
[55] *See* August 10, 2011 *Response* to plaintiffs' motion for re-argument from defendant Cannon at p.4 first paragraph at B52 (emphasis added).
[56] *Christian I*, 60 A.3d 1083 (Del. 2013).
[57] Attached at B53-B84.
[58] *Id.* at p.26 line 22 at B82 and p.27 line 23 at B83.

On March 26, 2013, this Court reversed and remanded but without reaching the issue of the sufficiency of plaintiffs' expert opinions.[59] Discovery resumed, but plaintiffs did nothing to amend or augment the disclosure or opinions of Dr. Romirowsky as to causation or seek additional (or replacement) causation opinion evidence from another expert so that their expert causation opinion was consistent with Delaware law. Instead, plaintiffs proceeded with Dr. Romirowsky's unchanged opinions. Dr. Romirowsky was deposed on March 14, 2014. In that deposition, Dr. Romirowsky's causation opinions were not expressed in accordance with the Delaware standard.[60]

For example, in spite of the fact that he thought defendant Cannon should have somehow have gleaned from decedent during his single, brief intake interview that decedent would shoot himself five days later, whereas decedent's family who lived with him had not, Dr. Romirowsky could not state with any certainty what was different for decedent from the January 3rd interview up to the January 8th shooting:

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[59] *Christian I*, 60 A.3d 1083 (Del. 2013).

[60] *See* March 14, 2014 Samuel Romirowsky, Ph.D deposition transcript at 50:22-51:15 at A276. However, at one point Dr. Romirowsky's testimony almost appears to describe decedent's suicide attempt as an "impulsive act," yet plaintiffs are not pleading this potential "suicide no duty" rule exception:

> A. Yes. So that's a protective factor. Also having children is a protective factor. Being married is a protective factor. But all of these factors don't always trump the pain -- the psychic or physical pain that a person is in when they make a possibly completely irrational decision. Someone who is depressed can become psychotic. Someone who has panic disorder can behave impulsively.

Q. Was there a trigger?

...

A. I don't know what happened on the 8th. That was different from what his status was or what life was like for Bruce Christian on the 7th.[61]

...

Q. To your knowledge, were there any changes in any of those risk factors as they applied to Mr. Christian on the 4th, 5th, 6th or 7th?

A. I have no information about anything about those risk factors as they may have changed. I'm silent about it because I have no information about it.[62]

Dr. Romirowsky then testified contrary to *Cumberbatch* as to the "increased probability" of harm:

Q. Are you saying that -?

A. Reduce the probability of his killing himself on January 8th.

Q. From what to what? I mean, I don't mean to be flip, again. Probability from, you know, 90 to 80? From 90 to 10? From 54 to 45? Or don't you know?

A. I don't know it in the numbers in the way you're asking the question.

Q. Okay.

A. But 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.[63]

Notable after Dr. Romirowsky's almost three year involvement in this case was his candid testimony that he *did not understand* the requisite "but for" causation standard or the requirement that he testify to a reasonable medical

[61] *Id.* at 50:13-19 at A276.
[62] *Id.* at 64:1-6 at A279.
[63] *Id.* at 52:13-53:4 at A276.

probability or certainty because this was the first time he had ever rendered opinions in a medical negligence case.[64] Perhaps his testimony could support substantial factor or increased risk, but neither are the Delaware standard. Dr. Romirowsky failed completely to offer *any* "but for" causation opinion; an understandable failure in light of his ignorance of that standard.

Ironically, in the instances where Dr. Romirowsky came closest to expressing a causation option to the requisite "but for" standard, his testimony was actually that he could *not* render such an opinion:

> Q. Will it be your opinion that had the standard of care been followed the suicide of Mr. Christian would have been avoided?
> A. *I have no way of knowing with certainty that it would have been avoided. It would have been mitigated.*
> Q. Explain that a little bit.
> A. There's no crystal ball to know what would have happened had Mr. Cannon done other things. But what is clear is that, given the information that Mr. Cannon had available to him, there were actions that a trained and reasonable mental health professional should and would have taken in order to *reduce the probability* that Mr. Christian would have injured himself.[65]
> ...
> Q. As I understood you, one of the potential areas that could have been done was to recommend to Mr. Christian to go to an emergency department.
> A. Yes.
> Q. Will you be offering any opinion as to what would have happened at the emergency department had Mr. Christian presented himself there?
> A. *I have no idea.*[66]

[64] *Id.* at 53:5-7 at A276, 18:22-24 at A268, and at 6:3-7 at A265.
[65] *Id.* at 18:19-19:8 at A268 (emphasis added).
[66] *Id.* at 27:5-12 at A270 (emphasis added).

...

A. [R]ather than just sending him off to an emergency room, [I] would have called [the ED]... And I'll make myself available so that I can talk to that psychiatrist....

Q. Assuming that was done and assuming Mr. Cannon was contacted by the psychiatrist, will you be offering [an] opinion what the psychiatrist would have done upon talking to Mr. Christian, talking to Mr. Cannon, performing his or her own evaluation?

A. ... *I have no idea what the psychiatrist would have done.*"[67]

...

Q. Understood.... [W]ill you be offering [an] opinion of what a psychiatrist at an emergency department would have done?

A. *No.*[68]

...

Q. At the time that Mr. Cannon saw Mr. Christian, are you of the opinion that ... Mr. Christian did not have any present suicidal ideation -- or are you of the opinion that Mr. Christian was not being truthful with Mr. Cannon?

A. Well, we know in retrospect that there were things about what Mr. Christian said that weren't truthful. So at the risk of sounding glib, which I don't mean to be -- but on autopsy you know a lot more than you know at the time that the person is still living about what was true and what wasn't true about their condition. And to use that analogy, *it's only in hindsight that we know some of the things that Mr. Christian shared were -- was either incomplete or untruthful.* We do know that, when first asked about whether or not he owned any guns, Mr. Christian denied any gun ownership.... It's my understanding that at some point later in their conversation Mr. Christian volunteers that he owns a rifle but didn't have ammunition -- something to that effect -- *which turns out only in retrospect -- and probably not something that Mr. Cannon could have known -- but that was also incomplete information.*[69]

...

Q. If [decedent] was untruthful with [Cannon], assuming his wife were to, quote/unquote, confront him -- and I use that not in a

[67] *Id.* at 27:17-29:2 at A270 (emphasis added).
[68] *Id.* at 29:9-20 at A270 (emphasis added).
[69] *Id.* at 32:12-33:12 at A271 (emphasis added).

medical term but in a husband/wife relationship term -- confront him, do you have any opinion whether he would have been truthful with her?

A. *I have no idea.*[70]

...

Q. Will you be expressing an opinion at trial that if Mr. Cannon had made the approach and had been as persistent as you have discussed what you do that Mr. Christian would have given permission?

A. I don't know.[71]

...

Q. Will you be offering any opinions as to whether or not [decedent] met the criteria for involuntary inpatient psychiatric admission to a hospital?

A. I will not. *I will not be offering an opinion about that because I don't know enough about whether a psychiatrist on January 3rd would have regarded him as being a danger to himself or others on that particular day.*[72]

...

Q. So I think you're saying we don't know whether the risk factors would or would not have stayed or would or would not have gone away or would or would not have increased. We just don't know.

A. In the long term, we don't know. In the immediate short term, we know ... Mr. Cannon did nothing to *reduce the probability of self-harm.*[73]

It is unknown why this testimony went as it did after plaintiffs had so much time in which to prepare Dr. Romirowsky; odd, considering plaintiffs argued in *Christian I* that defendants would not have been prejudiced by having just two months to prepare experts before trial.[74] Also unknown is why plaintiffs decided

[70] *Id.* at 35:12-23 at A272 (emphasis added).
[71] *Id.* at 44:19-23 at A274 (emphasis added).
[72] *Id.* at 51:18-52:1 at A276 (emphasis added).
[73] *Id.* at 40:16-23 at A273 (emphasis added).
[74] *See* July 8, 2011 Superior Court teleconference transcript at 14:6-8 at B11.

not to "rehabilitate" any of Dr. Romirowsky's testimony at deposition, apparently in the mistaken belief that it was sufficient.[75]

As to Dr. Romirowsky himself, his testimonial experience has been in the Family Court, where he frequently renders opinions to the "increased risk of harm" standard.[76] That standard, however, has no applicability here pursuant to *U.S. v. Cumberbatch.*[77]

Additionally, appellants' argument that the trial court's holding was based upon Dr. Romirowsky's failure to invoke "magic words" describing causation misinterprets the record below.[78] Dr. Romirowsky's failure was not of semantics or the incorrect invocation of a formulaic incantation. Dr. Romirowsky's causation testimony was excluded because of his failure to first understand, and then express, the requisite legal standard for the essential element of proximate cause;[79] in this case, as an expert who had benefit of almost three years to polish his opinions, or at the very least to learn what standard those opinions must adhere to.

Causation cannot reach the jury without a requisite *prima facie* showing that the proffered expert can render legally sufficient opinions. That is impossible when

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[75] *See* March 14, 2014 Samuel Romirowsky, Ph.D deposition transcript at 72:21 at A281 (Plaintiffs' counsel: "And I have no questions.").

[76] *See* May 14, 2014 *Motion in Limine* at A2404-A2493. *Cf. A-F.R v. T-L.R*, 2013 WL 8181502 (Del.Fam.Ct. 2013) *rearg. denied*, 2013 WL 8181623 (Del.Fam.Ct. 2013); *RL v. JL*, 1999 WL 33100145 (Del.Fam.Ct. 1999).

[77] 647 A.2d 1098.

[78] *See* Oct. 31, 2014 substituted *Opening Brief* at p.5 line 11.

[79] *Cf. Culver*, 588 A.2d at 1097, citing to *Chudnofsky v. Edwards,* 208 A.2d 516, 518 (Del. 1965).

the expert testifies that he does not even *understand* the requisite standard.[80] Appellee disagreed with but did not question the legal sufficiency of Dr. Romirowsky's standard of care opinions.

Appellants also misstate the holding below to make an unsupported argument that the trial court "misunderstood" the relationship of Delaware's medical negligence causation statement to mental health.[81] The fact that this case pertains to "mental health" is of no relevance whatsoever to what the expert in this *medical negligence / wrongful death* case must say and how he must say it.

Even if Dr. Romirowsky had been allowed to testify, once he testified that he "does not know" what would have happened if defendant Cannon had treated decedent in the manner he suggested, the jury would have been left to speculate as to causation. And it is well-settled Delaware law that jury verdicts cannot be based on speculation.[82]

Lastly, the trial court did not abuse its discretion by denying plaintiffs' motion for re-argument. Appellants offer no authority to support their allegations below (or here) that the trial court overlooked controlling precedent or legal principle, or misapprehended the law or the facts.

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[80] *See* March 14, 2014 Samuel Romirowsky, Ph.D deposition transcript at 53:5-7 at A276.
[81] *See* Oct. 31, 2014 substituted *Opening Brief* at p.31 line 7.
[82] *McGuire v. McCollum*, 116 A.2d 897, 900 (Del.Super. 1955), *Wagner v. Olmedo*, 365 A.2d 643, 647 (Del. 1976).

CONCLUSION

Appellants failed to establish that the trial court committed legal error by granting summary judgment to defendants. All of appellants' arguments in opposition are unavailing.

Appellants also failed to establish that the trial court abused its discretion by excluding expert Dr. Romirowsky from offering testimonial evidence on the essential element of causation. The trial court was well within its discretion to find that Dr. Romirowsky failed to understand the requisite causation standard, failed to express any opinions to that standard, and failed to express his putative causation opinions to the requisite testimonial standard.

The Superior Court correctly excluded expert Dr. Romirowsky and correctly dismissed this case. Its judgment should be AFFIRMED.

[SIGNATURES ON NEXT PAGE]

Respectfully submitted,

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