

COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. _____

CHO HYUN SHIN AND KISUK SHIN, INDIVIDUALLY AND AS
ADMINISTRATORS OF THE ESTATE OF ELIZABETH H. SHIN,
PLAINTIFFS/APPELLEES,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY, ET AL.,
DEFENDANTS/APPELLANTS.

ON APPEAL FROM AN INTERLOCUTORY ORDER OF
THE SUPERIOR COURT, MIDDLESEX COUNTY

**Memorandum in Support of Petition for Relief
Under G.L. c. 231, § 118 (First Paragraph) by MIT
Administrators Arnold Henderson and Nina Davis-Millis**

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Nature of the Case

This case arises from the alleged suicide of Elizabeth Shin, a sophomore at the Massachusetts Institute of Technology ("MIT"), in April 2000. Elizabeth died from burns she suffered when her clothes were ignited by a candle in her dormitory room.

Elizabeth's parents are pursuing wrongful death claims against four MIT psychiatrists who had varying degrees of involvement with Elizabeth as a patient of MIT Mental Health Services, and two non-clinician MIT administrators: Arnold Henderson, an associate dean within the office of the Dean for Student Life, whose role is to assist students with academic and other personal problems, to refer students who may have significant mental health problems to the MIT Medical Department's Mental Health Service, and to serve as a liaison between student life or other non-clinical departments of the university and the expert clinicians who are treating a student; and Nina Davis-Millis, a MIT librarian and housemaster of Elizabeth's dormitory, who offered personal support to Elizabeth and conveyed relevant information about her to the clinicians, either directly or through Dean Henderson.

Elizabeth's psychiatric issues first became apparent at MIT in February 1999, during her freshman year, when she took an overdose of medication and was admitted to McLean Hospital for a one-week psychiatric hospitalization. Elizabeth was in treatment with a MIT psychiatrist for the balance of that semester. Memorandum and Order, Addendum to Single Justice Petition ("Add."), 2-3.

Elizabeth resumed treatment with a different MIT psychiatrist in mid-March 2000, following an incident in which she was distraught and was admitted to the MIT infirmary overnight for observation. From mid-March until the fire on April 10, 2000, Elizabeth was in regular treatment, which included psychotherapy and medications for depression and anxiety.¹ Add. 5-6.

At approximately midnight on April 9, 2000, the night before the fire, two students told Ms. Davis-Millis that Elizabeth had threatened to commit suicide the following day. Ms. Davis-Millis immediately reported this information to the psychiatrist-on-call at MIT Mental Health Services, Dr. Anthony Van Niel.

¹ Her parents were aware of both hospitalizations. Add. 2, 5. It is undisputed that they also were aware in March and April 2000 that Elizabeth had resumed psychiatric treatment and was taking psychiatric medications, and that they visited her at MIT the day before the fire.

He told Ms. Davis-Millis that he was familiar with Elizabeth, and that it was not necessary to bring Elizabeth in to MIT Medical for evaluation because he had evaluated her the night before, and she was not acutely suicidal. Add. 9. He also told Ms. Davis-Millis that he would inform his colleagues of the developments over the weekend, so that they could discuss the treatment plan for her. Van Niel Dep., 129-31, 144-46 (attached at Tab A).²

In the morning, Dr. Van Niel presented the events of the weekend involving Elizabeth to a meeting of the clinical staff at MIT Mental Health Services. Id., 138-41; Dr. Peter Reich Dep., 15-16, 19-26 (attached at Tab B). The discussion of those events, including Elizabeth's suicide threat, continued at a meeting attended by student life deans, including Dean Henderson, and MIT psychiatrists. Add. 9.³ The psychiatrists concluded that instead of hospitalizing Elizabeth, or otherwise continually monitoring her, they would maintain her existing treatment plan, which called for her to begin an intensive outpatient

² All record citations, other than to Judge McEvoy's decision itself, refer to materials that are part of the summary judgment submissions below.

³ It is undisputed that housemasters such as Ms. Davis-Millis do not attend such meetings, and that she did not attend this one.

therapy program at an off-campus treatment center the following morning. It also was determined that the Chief of MIT Mental Health Services, who was at the meeting, would be in contact with Elizabeth. Add. 9-10; Reich Dep., 42-46, 49, 52-53 (Tab B).

The plaintiffs, in addition to their claims against the psychiatrists, assert that Dean Henderson and Ms. Davis-Millis were negligent in failing to take additional steps to protect Elizabeth, including ensuring that she received a further psychiatric assessment, continually monitoring her, and notifying her parents of her condition.

The Summary Judgment Proceedings and Decision.

The MIT Administrators moved for summary judgment on the grounds that they did not have a duty to prevent Elizabeth's suicide as a matter of law. In Massachusetts, like other jurisdictions, a non-clinician has a duty to prevent suicide only in two limited circumstances not present here: if the defendant either caused the suicidal condition itself or had the decedent in physical custody, such as a psychiatric hospital or prison. In her memorandum and order, Judge McEvoy agreed that Massachusetts recognizes a duty to prevent suicide only in these two

limited circumstances, and thus that the Administrators "owed no duty to prevent Elizabeth's suicide." Add. 20-21. However, she went on to say that the Administrators could have a duty to protect Elizabeth from foreseeable harm based on a "special relationship," because the Administrators were "well aware" of her problems and "could reasonably foresee that Elizabeth would hurt herself without proper supervision." Add. 23-24. Judge McEvoy denied the plaintiffs' cross-motion for partial summary judgment, which asked the Court to rule affirmatively that the Administrators owed Elizabeth a duty. Add. 28.

The MIT Administrators timely moved the Court to reconsider and reverse or clarify its summary judgment decisions, or in the alternative to report the matter for appellate review pursuant to Mass. R. Civ. P. 64. Judge McEvoy denied the motion without opinion in an order docketed January 25, 2006. Add. 29.

Argument

I. THE SUPERIOR COURT FAILED TO FOLLOW CLEAR MASSACHUSETTS LAW THAT NARROWLY LIMITS A NON-CLINICIAN'S DUTY TO PREVENT SUICIDE.

In Nelson v. Mass. Port Auth., 55 Mass. App. Ct. 433 (2002), this Court explained that liability of a non-clinician for a decedent's suicide arises only in

"two distinct fact patterns" - where "either (1) the defendant's negligence was the cause of the decedent's uncontrollable suicidal impulse; or (2) the decedent was in the defendant's custody and the defendant had knowledge of the decedent's suicidal ideation." *Id.* at 435-36 (citing Supreme Judicial Court cases). Because neither circumstance was present, the Court affirmed summary judgment for the defendant, flatly "declin[ing] to impute to the defendant a greater duty than currently exists." *Id.* at 436.

Judge McEvoy, citing Nelson, stated that the Administrators "correctly assert that neither of these two situations occurred in this case and therefore, they owed no duty to prevent Elizabeth's suicide." *Id.* at 20-21. The Court should have granted summary judgment to the Administrators on this basis, and its failure to do so was clear error requiring reversal. Instead, the Court went on to find that the Administrators could have a duty to protect Elizabeth against the foreseeable risk that she "would hurt herself." *Id.* at 24. In doing so, Judge McEvoy did precisely what this Court recognized in Nelson would be error - namely, "to impute to the defendant a greater duty [to prevent suicide] than currently

exists" under Massachusetts law as articulated by the Supreme Judicial Court. In sum, because controlling authority holds that there are only two situations in which a duty to prevent suicide may exist and neither of them is present here, the Court had no authority to discover additional situations and instead should have granted summary judgment.

II. THE COURT'S "SPECIAL RELATIONSHIP" ANALYSIS IS CONTRARY TO CLEAR MASSACHUSETTS LAW IN ANY EVENT.

Even beyond that binding precedent, the Superior Court clearly erred in holding that the Administrators could have a duty based on § 314A of the Restatement (Second) of Torts (1965), which the Court cited for the proposition that a "special relationship" can "give rise to a duty to act or protect a person where otherwise no duty would exist." Add. 21. The Court found that a "special relationship" could exist because the Administrators, who were actively involved in helping Elizabeth in their student life roles, and "well aware" of her problems, could "reasonably foresee the risk that Elizabeth would hurt herself without proper supervision." Add. 23-24.⁴ That

⁴ While Judge McEvoy at one point refers to the Administrators as part of Elizabeth's "treatment team," Add. 24, it is undisputed that they have no clinical qualifications and provided no psychiatric "treatment" to her.

reasoning is directly contrary to settled law in multiple respects.

First, Massachusetts law concerning liability for suicide already takes account of Restatement § 314A. Specifically, § 314A is the basis for one of the two limited grounds for liability - namely, where the defendant "takes custody of another under circumstances such as to deprive the other of his normal opportunities for protection." Slaven v. City of Salem, 386 Mass. 885, 887 (1982) (quoting Restatement § 314A). Because the "two distinct fact patterns" recognized in Nelson thus already take account of § 314A, Judge McEvoy plainly erred in concluding that § 314A could be invoked to create a third ground for such liability.

Second, the Court's conclusion that a "special relationship" could exist in this case was premised overwhelmingly, if not entirely, on its view that the Administrators "could reasonably foresee that Elizabeth would hurt herself without proper supervision." Add. 23-24. That conclusion is directly contrary to the established principle that

foreseeability alone never creates a duty,⁵ and to established Massachusetts law on "special relationships." A "special relationship" is an exception to the general rule that ordinarily "we do not owe others a duty to take action to rescue or protect them from conditions we have not created," Cremins v. Clancy, 415 Mass. 289, 296-97 (1993), and it exists only when the plaintiff is deprived of the opportunity for self protection or otherwise depends on the defendant for protection. See, e.g., Kavanagh v. Trustees of Boston Univ., 440 Mass. 195, 202-03(2003) (no special relationship existed between university and student athlete from another school, because athlete "did not depend on the university" for protection, and university did not "affect [his] ability or motive to protect himself"). Those circumstances do not exist in this case, where Elizabeth was in the care of expert psychiatrists and thus did not depend on the MIT Administrators for protection, and where the Administrators did nothing

⁵ This principle is set forth in Restatement § 314 ("The fact that [an] actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."), which is to be "read together" with the sections that follow, including § 314A. See § 314, comment a.

to interfere with her ability to seek care from her clinicians or others, or otherwise to protect herself.

This case thus is indistinguishable from Jain v. State, 617 N.W.2d 293 (Iowa 2000), which was based on principles fully consistent with Massachusetts law, and which Judge McEvoy ignored in her decision. The Iowa Supreme Court held that a university had no duty to prevent a student's suicide because the university-student relationship was not custodial, and because university administrators did not impair the student's opportunities for protection, such as pursuing counseling through the university or on his own. Id. at 299-300.⁶

Other courts similarly hold that non-clinicians, acting in non-custodial circumstances, have no duty to prevent suicide based on a "special relationship." E.g., Bogust v. Iverson, 102 N.W.2d 228, 230 (Wis. 1960) (college counseling dean had no duty to prevent student's suicide because he "could not be charged with the same degree of care ... as a person trained in

⁶ See also Mahoney v. Allegheny College, slip op. at 22-23 (Pa. Ct. Common Pleas Dec. 22, 2005) (attached at Tab C) (citing Jain as the "legally persuasive authority" on a college administrator's duty to prevent suicide, and criticizing Judge McEvoy's "special relationship" analysis as being "steeped in 'hindsight' as compared to a careful and precise legal analysis required [to find] a duty of due care").

medicine or psychiatry"); see also Lee v. Corregedore, 925 P.2d 324, 336 (Haw. 1996); Nally v. Grace Cmty. Church, 763 P.2d 948, 956-57 (Cal. 1988); McLaughlin v. Sullivan, 461 A.2d 123, 124-26 (N.H. 1983).

None of the cases on which Judge McEvoy relied supports a special relationship here. First, she mistakenly relied on Mullins v. Pine Manor College, 389 Mass. 47 (1983), which she said "held that [a] college and [its] administrator owed a duty to exercise care to protect the well-being of their resident students." Add. 21. Mullins, however, recognized only the limited duty to "protect ... resident students against the criminal acts of third parties" where the college was uniquely positioned to implement security measures to protect its dormitories from intruders. 389 Mass. at 54. Mullins in no way suggests that college administrators have a duty to protect students against self-inflicted harm, especially where a student is in the care of expert psychiatrists and it is undisputed the administrators have not deprived the student of any opportunity to seek expert treatment or other protection.⁷

⁷ Nor does Mullins support the proposition that the college-student relationship generally is a "special relationship" giving rise to a duty to protect students from foreseeable harm, a

Judge McEvoy also relied on Irwin v. Town of Ware, 392 Mass. 745 (1984), which found a "special relationship" existed "between a police officer who negligently fails to remove an intoxicated motorist from the highway, and a member of the public who suffers injury as a result." Id. at 762. That was based on specific statutes establishing affirmative responsibilities for police. Id. Here, the MIT Administrators had no statutory mandate.⁸

Judge McEvoy also mistakenly relied on Schieszler v. Ferrum College, 236 F. Supp. 2d 602 (W.D. Va. 2002), denying a motion to dismiss where college administrators knew of an imminent risk of suicide but effectively did nothing, and where the student was not in the care of expert clinicians. Schieszler is not only factually inapposite, but also flatly contrary to Massachusetts law. The court found that a duty of care could be based on foreseeability alone, id. at

broader issue that need not be resolved to decide the issue of duty to prevent suicide. See id. at 52 (noting the decline of the doctrine of *in loco parentis*); Erickson v. Tsutsumi, 2000 WL 1299515 at *2-3 (Mass. Super. 2000) (distinguishing Mullins and finding no special relationship between college and student). See also Freeman v. Busch, 349 F.3d 582, 587-88 (8th Cir. 2003) ("the general rule is that no special relationship exists between a college and its ... students") (collecting cases).

⁸ They are not covered by G.L. c. 123, §§ 12, 22, which authorizes only clinicians and police to restrain someone for psychiatric evaluation, and provides immunity from liability if they do so in compliance with the statute.

609, and mistakenly relied on Mullins for the proposition that colleges generally must exercise reasonable care "to protect resident students from foreseeable harm." Id. at 610. See supra note 8.

III. INTERLOCUTORY REVIEW IS NEEDED BECAUSE THE ORDER ALREADY IS CAUSING SEVERELY HARMFUL CONSEQUENCES.

The Court's ruling already is causing severely harmful consequences for the large number of college students with significant mental health problems. Those consequences will be exacerbated if the case goes to trial without appellate review.

Judge McEvoy's ruling provides the wrong incentives and is already affecting students, as the national associations of higher education and other *amici* attest. It discourages some university administrators to become informed about the nature or extent of students' mental health needs. If a duty can be found because a student life administrator is "well aware" of a student's problems, and "could reasonably foresee that [she might] hurt herself without proper supervision," some administrators reluctantly will avoid becoming so "well aware." Most importantly, they are afraid that the duty to second-guess the judgment of mental-health experts and to

substitute their own inexperienced judgment may harm students; at the same time, they worry about liability because they lack the expertise to prevent suicide.⁹ Other dedicated administrators will feel they have no choice but to take the most extreme approach by trying to force students who appear to be at risk to be hospitalized or to withdraw from the university, even though such steps may be contrary to, and disrupt or terminate altogether, any expert treatment the student may have been receiving. Some administrators also may feel compelled to involve a student's parents even when - as in this case - expert clinicians determine that is not advisable.¹⁰ The decision will cause some dedicated administrators to conclude they can no longer serve in student support roles, leaving all students with less support.

⁹ These implications of Judge McEvoy's decision recently were demonstrated in Mahoney, supra note 7, which distinguished her decision on the facts and granted summary judgment to two college administrators because they were not aware of a student's risk of suicide - although more attentive administrators might well have found themselves in that position. Slip. op. at 23. The discussion in Mahoney fully supports the MIT Administrators' legal and policy arguments.

¹⁰ Creating the incentive to take such actions is harmful not only to the students who are impacted directly, but also to other students on campus with significant mental health needs. Students who understand the risk that they will be removed from campus or hospitalized if they disclose suicidal ideation will be more likely to suffer alone and in silence, rather than to seek help from non-clinical counselors, academic advisors, residential life staff or others, who could refer them to expert care.

**IV. THE ORDER DENYING THE MOTION FOR RECONSIDERATION
ALSO WARRANTS INTERLOCUTORY REVIEW.**

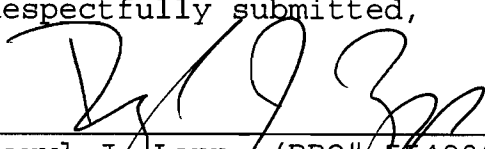
Judge McEvoy stated that the MIT Administrators had no duty to prevent suicide under established law, but then said that they could have a duty to protect Elizabeth from the foreseeable risk that she would hurt herself. Her order also says at one point that the Administrators had a duty of care, Add. 24, but she denied the plaintiffs' cross-motion for partial summary judgment, which asked the Court to hold that a duty exists. Add. 28. The motion for reconsideration asked Judge McEvoy to address both inconsistencies.

Judge McEvoy denied the motion without opinion. This also warrants interlocutory review. The Court's erroneous and inconsistent rulings on duty must be corrected before the case is tried.

Conclusion

The Single Justice petition should be allowed.

Respectfully submitted,

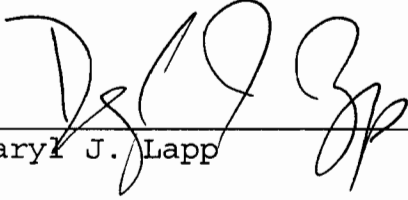


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February 24, 2006

PROOF OF SERVICE

I certify under the penalties of perjury that I caused a true copy of the above document to be served by first-class mail, postage prepaid, on February 24, 2006, upon David A. DeLuca, Esq., Murphy, Hesse, Toomey & Lehane LLP, 300 Crown Colony Drive, Ste. 410, Quincy, MA 02269-9146, James P. Donohue, Jr., Esq., Sloane & Walsh LLP, 3 Center Plaza, Boston, MA 02108, and Curtis R. Diedrich, Esq., Sloane & Walsh LLP, 3 Center Plaza, Boston, MA 02108.



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