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NO. KNL CV 08-5007342-S	:	SUPERIOR COURT
ALLISON PATTERSON, ADMX. OF THE ESTATE OF BRUCE J. PATTERSON	:	J.D. OF NEW LONDON
VS.	:	AT NEW LONDON
ANDREW FOLEY, ET AL	:	DECEMBER 12, 2008

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE

BACKGROUND

The plaintiff Allison Patterson, administratrix of the estate of Bruce J. Patterson, has filed an Amended Complaint dated November 24, 2008 seeking damages arising out of the death of Bruce Patterson. The defendants named in the Amended Complaint are Andrew Foley and Georgine Didato.

The Amended Complaint contains certain allegations common to all four counts. The plaintiff alleges that on June 22, 2007 at approximately 7:00pm, Bruce Patterson was outside his home having a get-together with friends and family when Andrew Foley, who lived a few streets away, rode by the gathering on his bicycle shouting profanities. Amended Complaint ¶¶14-15. According to the plaintiff, Andrew Foley had previously been observed in the area on his bicycle shouting profanities and otherwise acting in a menacing and inappropriate way. Amended Complaint ¶16.

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Bruce Patterson allegedly approached Andrew Foley and told him to leave the area, at which time Andrew Foley threw down his bicycle, challenged Bruce Patterson to a fight and before Bruce Patterson could even react, threw Bruce Patterson to the ground with great force. Amended Complaint ¶¶ 17-18. According to the complaint, Bruce Patterson suffered a broken hip and other injuries, leading to a complicated and extended course of medical treatment ultimately resulting in his death five months later. Amended Complaint ¶¶21-24.

The plaintiff alleges that Andrew Foley was 18 years old at the time of the events recited in the complaint. Amended Complaint ¶20. Although the plaintiff alleges that Georgine Didato is the mother of Andrew Foley; Amended Complaint ¶4; there is no allegation that Georgine Didato was the legal guardian of Andrew Foley as of the time of the incident. To the contrary, the plaintiff alleges that Andrew Foley was adjudged incompetent on December 21, 2007, months after the subject incident. Amended Complaint ¶15.

Nevertheless, the Amended Complaint alleges Andrew Foley was legally incompetent at all relevant times, with a mental condition like that of a child, mild mental retardation, behavioral and emotional issues and an anxiety disorder; Amended

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Complaint ¶¶5-7; and that Andrew Foley has been prescribed a drug regimen that included a mood stabilizer, an antidepresant and an anti-anxiety medication. Amended Complaint ¶8. The plaintiff further alleges that Georgine Didato was at all relevant times aware of Andrew Foley's mental retardation, childlike mental condition, anxiety disorder and behavioral history, including behavioral and emotional issues such as a propensity to engage in verbal confrontations, a propensity toward violence, a history of anxiety resulting in panic and/or the loss of behavioral self control and a history of causing disruptions in the neighborhood including incidents involving the Patterson household. Amended Complaint ¶¶11 & 12.

The plaintiff alleges that Georgine Didato had assumed responsibility for Andrew Foley's day-to-day needs and care, including but not limited to providing for his shelter, food, clothing, financial needs, disciplinary needs, transportation, medical and psychological care, and administering and regulating his prescription drug regimen. Amended Complaint ¶¶9 & 10. The plaintiff alleges that Georgine Didato had the ability to control Andrew Foley's behavior and to restrain him as necessary by supervising or

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monitoring his activities, by properly administering his medications and by restricting his ability to roam the neighborhood alone. Amended Complaint ¶13.

On the basis of these common allegations, the plaintiff pleads three counts against Georgine Didato, in addition to the First Count alleging negligence on the part of Andrew Foley. The Fourth Count alleges that Georgine Didato had a duty to protect foreseeable third persons from Andrew Foley's aggressive behavior and that she breached that duty of care in a number of ways, by failing to supervise, monitor and control Andrew Foley's conduct and medications.

In the Second Count, the plaintiff alleges that Georgine Didato had the opportunity and ability to control and supervise Andrew Foley and that she had a duty to do so by virtue of a special relationship between them premised on her control and influence over nearly every aspect of his life. The existence of a duty of reasonable care on her part is premised on the Restatement (Second) of Torts §316. The plaintiff alleges that Georgine Didato breached that duty in a number of ways. In the Third Count, the plaintiff alleges that Georgine Didato had taken charge of Andrew Foley and was his custodian. The existence of a duty of reasonable care on her part is premised on Restatement (Second) of Torts §319. Again, the plaintiff alleges that Georgine

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Didato breached that duty in a number of ways.

The defendant Georgene Didato respectfully moves to strike the Second, Third and Fourth Counts of the plaintiff's Amended Complaint for the reason that said Counts fail to state a claim upon which relief may be granted in that Georgine Didato is not legally responsible to protect the plaintiff's decedent against the alleged conduct of her adult son, Andrew Foley.

ARGUMENT

A motion to strike tests the sufficiency of the factual allegations to state a viable claim as a matter of law.

> "The purpose of a motion to strike is to 'contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted.' In ruling on a motion to strike, the court is limited to the facts alleged in the complaint. The court must construe the facts in the complaint most favorably to the plaintiff." (Citations omitted.) Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 170, 544 A.2d 1185 (1988). A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged. Cavallo v. Derby Savings Bank, 188 Conn. 281, 285, 449 A.2d 986 (1982); Mora v. Aetna Life & Casualty Ins. Co., 13 Conn.App. 208, 211, 535 A.2d 390 (1988).

Novametrix Medical Systems, Inc. v. BOC Group, Inc, 224 Conn. 210, 214-5 (1992).

"For purposes of ruling on a motion to strike, the facts alleged in the complaint, though

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not the legal conclusions it may contain, are deemed to be admitted." Murillo v. Seymour Ambulance Ass'n, Inc., 264 Conn. 474, 476 (2003) (citation omitted).

Moreover, the existence of a legal duty, without which liability in tort cannot be sustained, is a question of law for the court.

> The existence of a duty of care is a prerequisite to a finding of negligence. *E.g.*, Maffucci v. Royal Park Ltd. Partnership, 243 Conn. 552, 566, 707 A.2d 15 (1998) ("[t]he essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury" [internal quotation marks omitted]). "The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand." (Internal quotation marks omitted.) Mendillo v. Board of Education, 246 Conn. 456, 483, 717 A.2d 1177 (1998). "If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant." RK Constructors, Inc. v. Fusco Corp., 231 Conn. 381, 384-85, 650 A.2d 153 (1994).

Gomes v. Commercial Union Insurance Co., 258 Conn. 603, 614-15 (2001).

Under these standards, Georgine Didato maintains that each count of the plaintiff's complaint against her is legally insufficient and must be stricken.

A. The Fourth Count - General Common Law Rule

In the Fourth Count, the plaintiff simply asserts that Georgine Didato had a common law duty to protect foreseeable third parties from Andrew Foley's aggressive

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behavior because she had the ability to do so. This allegation is contrary to established law in Connecticut.

The Connecticut Supreme Court has repeatedly recognized that the existence of a duty is not alone determined by the foreseeability of harm, but rather is limited by "a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or a particular plaintiff in the case." Gazo v. Stamford, 255 Conn. 245, 250 (2001) (citations omitted). The Supreme Court has articulated the standards for determining the existence of a legal duty as follows:

> We have stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would "anticipate that harm of the general nature of that suffered was likely to result," and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case.

Zamstein v. Marvasti, 240 Conn. 549, 558 (1997). As more fully explained In RK Constructors, Inc. v. Fusco Corp., 231 Conn. 381 (1994),

> Duty is a "legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined

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> by the circumstances surrounding the conduct of the individual." 2 D. Pope, Connecticut Actions and Remedies, Tort Law (1993) § 25:05, p. 25-7. Although it has been said that "no universal test for [duty] ever has been formulated"; W. Prosser & W. Keeton, *supra*, § 53, p. 358; our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant.
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> * * * * *
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> A simple conclusion that the harm to the plaintiff was foreseeable, however, cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally "foreseeable," yet for pragmatic reasons, no recovery is allowed. *See, e.g.,* Maloney v. Conroy, 208 Conn. 392, 400-401, 545 A.2d 1059 (1988) (looking beyond foreseeability, this court imposed limitations on the right of a bystander to recover for emotional distress that allegedly resulted from medical malpractice of doctors in their treatment of the plaintiff's deceased mother). A further inquiry must be made, for we recognize "that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." W. Prosser & W. Keeton, *supra*, § 53, p. 358. "While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree." (Internal quotation marks omitted.) Maloney v. Conroy, *supra*, at 401-402, 545 A.2d 1059. The final step in the duty inquiry, then, is to make a determination of "the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." W. Prosser & W. Keeton, *supra*, § 43, p. 281.

RK Constructors, 231 Conn. at 385-86. No duty can exist unless both elements of the test are satisfied. *See* Zamstein v. Marvasti, 240 Conn. at 564 n.7 (1997); McAuley v.

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Southington Savings Bank, 69 Conn. App. 813, 819-20, *cert. denied*, 261 Conn. 903 (2002).

Our Supreme Court has also addressed the question of whether this policy analysis supports the existence of a duty on the part of one person (such as Georgine Didato) to act to protect another from harm caused by a third person (such as Andrew Foley).

> "With respect to the . . . policy analysis, there generally is no duty that obligates one party to aid or to protect another party. See 2 Restatement (Second), Torts § 314, p. 116 (1965). One exception to this general rule arises when a definite relationship between the parties is of such a character that public policy justifies the imposition of a duty to aid or to protect another. *See* W. Prosser & W. Keeton, Torts (5th Ed.1984) § 56, pp. 373-74; see also 2 Restatement (Second), supra, §§ 314A, 315 .... In delineating more precisely the parameters of this limited exception to the general rule, this court has concluded that, [in the absence of] a *special relationship of custody or control*, there is no duty to protect a third person from the conduct of another.... Fraser v. United States, 236 Conn. 625, 632, 674 A.2d 811 (1996)" (Citations omitted; emphasis in original; internal quotation marks omitted.) Ryan Transportation, Inc. v. M & G Associates, 266 Conn. 520, 525-26, 832 A.2d 1180 (2003).

Murdock v. Croughwell, 268 Conn. 559, 566 (2004).

The Connecticut Supreme Court has thus adopted Restatement (Second), Torts §§ 314 and 315, which provide as follows:

Restatement (Second), Torts §314: The fact that the actor realizes or

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> 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.

> Restatement (Second), Torts §315: There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

The sections of the Restatement (Second), Torts immediately following §315 delineate the special relations that satisfy the exception to the rule of no duty.

Although the plaintiff attempts to plead certain of those exceptions in the Second and Third Counts, the Fourth Count simply alleges a duty on the part of Georgine Didato to protect foreseeable third persons from the foreseeable conduct of Andrew Foley. The common law imposes no such duty.

B. The Second Count - Restatement (Second) Torts §316

The Second Count of the Complaint is expressly based on Restatement (Second), Torts §316. That Section, which defines one of the relations that provides an exception to the general rule of no duty to protect a third person from harm by another, states as follows:

> A parent is under a duty to exercise reasonable care so to control **his minor child** as to prevent it from intentionally harming others or from so

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> conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
> (b) knows or should know of the necessity and opportunity for exercising such control.

(emphasis added). Andrew Foley was not a "minor child" and, by its express terms, the exception stated by §316 has no application to this case.

Connecticut courts have repeatedly recognized that the mere existence of a parent-child relationship does not create a duty on the part of a parent to control the conduct of an adult child. *See* Kaminski v. Fairfield, 216 Conn. 29 (1990); Bebry v. Zanauskas, 81 Conn. App. 586 (2004); Rhea v. Uhry, 2005 WL 3215961 (D.Conn. 11/28/05). Indeed, where a parent has no legal right to control the conduct of an adult child, it makes no sense to create a duty on the part of a parent to exercise control the parent has no right to exercise. Carney v. Gambel, 751 So.2d 653, 654 (Fla. App. 1999).

Under General Statutes §1-1d, Andrew Foley was no longer a minor from the time that he reached the age of 18, at which point Connecticut law deemed him "an adult for all purposes whatsoever." His parents were his legal guardians only while he

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was a minor. General Statutes §45a-606. The "age of majority" defined by §1-1d is chronological, not developmental, and cannot be adjusted based on circumstances. *See, e.g.*, Staub v. Staub, 2003 WL 22205932, 35 Conn. L. Rptr. 446 (Conn. Super. FA 990550082 9/9/03) (rejecting effort to extend support for autistic child requiring support but over the age of majority). The plaintiff seeks to bend this rule of law in reliance upon "a special relationship between [Andrew Foley and Georgine Didato] premised on her control and influence over nearly every aspect of his life." In other words, the plaintiff wants this court to substitute the legal determination of majority established by the legislature with a case-by-case factual inquiry into the extent that one person exercises "control and influence" over another.

The plaintiff's proposed rule is fraught with peril. Many parents, particularly in this era of "helicopter parents,[1]" exercise control and influence over the lives of their children

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[1] "The term 'helicopter parents' is a pejorative expression for parents that has been widely used in the media; however, there has been little academic research into the phenomenon. Foster W. Cline, M.D. and Jim Fay defined "helicopter parents" very precisely in a section on "ineffective parenting styles" in their 1990 book Parenting with Love and Logic: Teaching Children Responsibility. It gained wide currency when American college administrators began using it in the early 2000s as the millennial generation began reaching college age. Their late-wave baby-boomer parents in turn earned notoriety for practices such as calling their children each morning to wake them up for class and complaining to their professors about grades the children had received.

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well past the age of majority. Yet to involve a court in an analysis of the internal workings of these families is wrong. An adult child is not legally obligated to accept a parent's control and influence over him and a parent is not legally entitled to exercise such control and influence over an adult child; the court should not try to look behind the legal relationship between the parties to recognize some extra-legal relationship that would impose liability on one adult for the conduct of another.

The plaintiff's claim cannot be recognized without an extension of the common law. The Connecticut Supreme Court has provided the following framework for considering whether the fundamental policy of the law supports such an extension:

> We previously have recognized four factors to be considered in determining the extent of a legal duty as a matter of public policy: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging continued vigorous participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions. Perodeau v. City of Hartford, 259 Conn. 729, 756-57, 792 A.2d 752 (2002). Jaworski v. Kiernan, 241 Conn. 339, 407, 696 A.2d 332 (1997).

Murillo v. Seymour Ambulance Ass'n, Inc., 264 Conn. 474, 480 (2003).

Some of these parents had, in fact, chosen the child's college, and hired consultants to help fine-tune the application process." www.wickipedia.org/wiki/helicopter_parent (footnotes omitted).

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From the time Andrew Foley reached the age of majority, it cannot be said that the normal expectation would be that his mother would be subject to legally liability for his conduct that harms others. Certainly, once he was adjudicated legally incompetent, his appointed guardian would normally be expected to assume legal responsibility for him. In essence, the plaintiff seeks to create a new classification, a constructive guardianship in fact as opposed to a duly recognized legal guardianship, that applied to Georgine Didato because of Andrew Foley's mental and emotional limitations and created legal responsibility on her part. Connecticut law does not recognize liability based on a hybrid status and should not be expanded to do so. *Compare* Shirdon v. Houston, 2006 WL 2522394 (Ohio App. 9/1/06) (finding possibility of liability based on "de facto" guardianship) *with* In re Guardianship of Hollis, 2006 WL 825389 (Ohio App. 3/30/06) ("Ohio law does not recognize 'de facto' guardianships").

But even if such a classification of de facto guardianship supporting legal liability were recognized in Connecticut, the imposition of tort liability in negligence as alleged in the Amended Complaint could not fairly be expected. Under Connecticut law, the legal guardian of a mentally retarded person is not liable on the basis of the type of negligence alleged in the Amended Complaint; General Statutes § 45a-683 provides

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that such a guardian "who acts in good faith . . . shall be immune from civil liability, except that such immunity shall not extend to gross negligence." It makes absolutely no sense to manufacture out of thin air a status of de facto guardianship, yet refuse to provide the de facto guardian with at least the same protection from tort liability that a true legal guardian would have.

The second factor, the public policy of encouraging continued vigorous participation in the activity while weighing the safety of the participants, also counsels against expanding the liability of a custodial parent who has not been formally appointed legal guardian of an adult child alleged to be incompetent. It is the declared policy of this State to place mentally retarded individuals in "the least restrictive environment available" and not to place them at all within the power of the Department of Mental Retardation unless the individual "has no family or guardian to care for him or his family or guardian can no longer provide adequate care for him." General Statutes §17a-274(a). The imposition of civil liability upon family members who provide homes and care for disadvantaged members of our society conflicts with the public policy of maximizing the mainstreaming of mentally retarded persons. If liability is imposed as sought by the plaintiff here, family members would be discouraged from doing the very

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thing we want them to do, provide loving homes for the less fortunate members of their families who would otherwise become the financial burden of the State.

Against these concerns must be weighed the community's interest in safety. It should be noted that despite the other allegations made by the plaintiff, there is no allegation in the Amended Complaint that Andrew Foley had ever harmed anyone before; to the contrary, the allegations are that he was living at home under medical and psychological care and had been prescribed a drug regimen. Indeed, there is no allegation that the plaintiff would have sustained any significant injury in this instance at all but for his decision to approach and confront Andrew Foley in a then-existing frail physical condition. Amended Complaint ¶¶17 & 19. Rather, the Amended Complaint alleges only that the plaintiff, had he not instituted a physical confrontation, would have had to endure Andrew Foley riding by the plaintiff's family gathering shouting profanities and otherwise acting inappropriately (at least until the plaintiff could summon the police or other appropriate authority). Amended Complaint ¶15-16. While that imposition on one's peaceful enjoyment of his property is not insubstantial, it does not rise to a sufficient safety concern to warrant the imposition of civil liability on Georgine Didato for providing a home and care for her adult son.

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The third factor, the concern about increased litigation, weighs heavily in favor of granting this motion to strike. If the court unloosens civil liability for the actions of a child from the tether of minority as provided in the Restatement (Second), permitting liability to be imposed on a parent based merely on the exercise of "control and influence" over an adult child, there is no stop along the slippery slope. All parents could be exposed to claims based on allegations of control and influence over their adult children. Moreover, the court will be promoting difficult inquiry into and making liability decisions based on evidence of family relationships in a wide variety of personal settings. Existing theories, of aiding and abetting or conspiracy, would permit the imposition of liability based on recognized wrongful conduct by a parent of an adult child, without the unwarranted extension of the law sought by the plaintiff in this case. If the plaintiff could have pled such theories, she surely would have done so. Given existing theories sufficient to reach truly wrongful conduct on the part of the parent of an adult child, a further duty should not be recognized where the limited benefits of increased liability do not demonstrably outweigh the societal costs imposed by the new rule. *See* Lodge v. Arett Sales Corp., 246 Conn. 563, 578-86 (1998); Maloney v. Conroy, 208 Conn. 392, 403-4 (1988).

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The final factor is the decisions of other jurisdictions. Most jurisdictions adhere to the Restatement (Second)'s limitation of §316 to minor children. There are isolated decisions in other jurisdictions that recognize the possibility of liability on a parent for the conduct of an adult child, but they can hardly be considered a trend. To the contrary, courts in those cases seem uncomfortable with their own rulings, to the extent that each decision should be considered limited to its facts. *See, e.g.*, Mathes v. Ireland, 419 N.E.2d 782, 784 (1981) (the plaintiff "is grasping at the finest of threads to produce an acceptable legal ground for liability, and it is only under the most unusual set of circumstances that any of his arguments may prove successful"). The cases recognizing a duty in this area seem to support the adage that hard cases make bad law; this court should resist the temptation to do likewise.

C. The Third Count - Restatement (Second) Torts §319

The remaining Count of the plaintiff's Amended Complaint is based on Restatement (Second), Torts §319. This section reads as follows:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

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The plaintiff alleges that Georgine Didato had taken control of Andrew Foley and was his custodian. However, these legal conclusions must be tested against the facts alleged.

The Illustrations to Restatement (Second), Torts §319 provide two examples of the types of relationships that constitute taking charge of a third person. The Illustrations refer to a private hospital holding a contagious patient and a private sanitarium for the insane. The plaintiff seeks to expand the class of entities subject to this rule to include a parent who provides a home for a mentally retarded adult. The Connecticut courts have repeatedly rejected such attempts.

In Kaminski v. Fairfield, 216 Conn. 29 (1990), the plaintiff sought to impose a duty on the parents of an adult schizophrenic who lived with them to protect him from harm when their child attacked him with an axe. As here, the plaintiff relied on Restatement (Second), Torts §319 as the foundation for the claim based on the argument that the parents had undertaken a custodial relationship of their adult son within the meaning of §319. The Court rejected that claim:

> The circumstances under which § 319 has been held to impose a duty to control the conduct of another are far removed from the facts of this case. Both of the official illustrations to § 319 deal with the liability of institutions, such as hospitals, that have formal custodial responsibility for those in

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> their charge. Similarly, the reported cases that have recognized a duty to control have generally done so in the context of professional custodians with special competence to control the behavior of those in their charge. Citing § 319, courts have found that third parties have stated a cause of action in negligence against: a prison warden; Frett v. Government of Virgin Islands, 839 F.2d 968, 975 (3d Cir.1988); security guards; Karbel v. Francis, 103 N.Mex. 468, 471, 709 P.2d 190 (1985); a mental hospital and its personnel; White v. United States, 780 F.2d 97, 103 (D.C.Cir.1986); Johnson v. Village of Libertyville, 146 Ill.App.3d 834, 839, 100 Ill.Dec. 154, 496 N.E.2d 1219 (1986); Allentown State Hospital v. Gill, 88 Pa.Commw. 331, 488 A.2d 1211, 1213 (1985); a children's center; Nova University, Inc. v. Wagner, 491 So.2d 1116, 1118 (Fla.1986); and a retirement home. Garrison Retirement Home Corporation v. Hancock, 484 So.2d 1257, 1261 (Fla.App.1985).
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> The present circumstances are, however, markedly different. Neither the defendant nor our own research has disclosed any case in which a parent, merely by making a home for an adult child who is a mental patient, has been held to be "[o]ne who takes charge of a third person" for the purposes of § 319.

Kaminski, 216 Conn. 34-36.

In Bebry v. Zanauskas, 81 Conn. App. 586, 591 (2004), the Connecticut Appellate Court interpreted the holding in Kaminski to mean "that § 319 imposes no duty to control the conduct of another in any relationships other than those involving professional custodians with special competence to control those in their charge, including those relationships arising in institutions, and in other relationships involving

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legally designated custodians." The Court refused to impose a duty on parents who, with knowledge of their son's prior of driving while intoxicated problem, nevertheless signed him out of an institution and allowed him live with them, giving him the opportunity to drive drunk and injure the plaintiff. *Accord* Rhea v. Uhry, 2005 WL 3215961 (D.Conn. 11/28/05) ("Under Connecticut law, parents have no duty to protect others from the conduct of their adult children in the absence of 'a special relationship of custody or control.' Kaminski v. Town of Fairfield, 216 Conn. 29, 33, 578 A.2d 1048 (1990) (citing Restatement (Second) of Torts § 315 (1965)). Such a special relationship does not exist unless a person assumes 'guardianship or some other form of legal custody.' Bebry v. Zanauskas, 81 Conn.App. 586, 591, 841 A.2d 282 (2004).").

The many cases similarly holding that a spouse owes no duty to protect a third person from known dangerous qualities of her husband further support the absence of the type of special relationship of custody or control that will support a duty in this instance. *See* Benoit v. Edington, 2008 WL 4150267 (Conn. Super. CV07-5010327 8/14/08) (husband shot neighbor after wife told him neighbor abused child; no duty on wife); Wilderman v. Powers, 2007 WL 1470477 (Conn. Super. CV 06-5001065S 5/4/07) (husband was sexual predator; no duty on wife); Nuzzo v. Hitchcock, 2001 WL 267620

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(Conn. Super. CV99-0428801 2/28/01) (husband made harassing phone calls; no duty on wife).

Some cases in other jurisdictions have blurred the lines as to the relationship of custody or control necessary to support the existence of a duty. In Kaminski itself, the Court distinguishes the case of Mathes v. Ireland, 419 N.E.2d 782 (Ind. App. 1981). In Mathes, the divided appellate court did not state the facts that supported its decision to hold that the trial court had prematurely dismissed an action against a custodial parent based on the allegation that she had the responsibility to control and supervise an adult son she knew to be insanely violent; to the contrary, the court noted that the facts alleged were omitted intentionally because Indiana is a notice pleading state and the only question was whether there was any set of facts under which the pleading could be sustained. Mathes, 419 N.E.2d at 784 n. 3. Mathes is not of much assistance here, except for the observation that the dissent is more persuasive than the majority. Other cases from other jurisdictions are similarly distinguishable or unpersuasive.

Restatement (Second), Torts §319 does not reach the facts alleged in the Amended Complaint.

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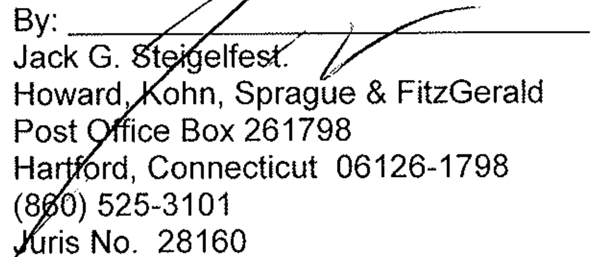
CONCLUSION

For the foregoing reasons, the defendant Georgine Didato respectfully maintains that the Second, Third and Fourth Counts of the Amended Complaint are legally insufficient to state a claim upon which relief may be granted. The defendant's Motion to Strike those Counts should therefore be granted.

DEFENDANT,
GEORGENE DIDATO



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CERTIFICATION

I hereby certify that a copy of the foregoing was mailed, postage prepaid, to the following counsel of record on December 12, 2008:

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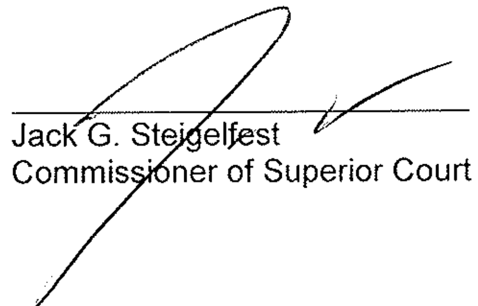

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Commissioner of Superior Court