

IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY, PENNSYLVANIA
CIVIL DIVISION

Charles F. Mahoney, III and Deborah Mahoney, :
Administrators of the Estate of Charles F. :
Mahoney, IV, Deceased; and Charles F. :
Mahoney, III and Deborah Mahoney, :
in their own right, :
Plaintiffs :

Vs. : AD 892-2003

Allegheny College; Allegheny College Board :
Of Trustees; John D. Wheeler; Richard J. :
Cook; Joseph J. DiChristina; Terrence :
Mitchell; Jacquelyn S. Kondrot, C.A.G.S., :
L.P.C., N.C.C.; Gregory L. Richards, M.D. and :
Sigma Alpha Epsilon Fraternity, :
Defendants :

*William D. Phillips, Esquire and
Kathleen Smith-Delach, Esquire for Plaintiffs*

*Kerry A. Kearney, Esquire and Joseph F. Rodkey, Esquire, for Allegheny
College, Allegheny College Board of Trustees, John D. Wheeler, Richard J.
Cook, Joseph J. DiChristina, Terrence Mitchell and Jacquelyn Kondrot,
C.A.G.S., L.P.C., N.C.C.*

*Diane Barr Quinlin, Esquire, for Defendant,
Sigma Alpha Epsilon Fraternity*

Joel M. Snavelly, Esquire, for Gregory L. Richards, M.D.

MEMORANDUM AND ORDER

Barry F. Feudale, Senior Judge, Specially Presiding

I. PROCEDURAL HISTORY.

This medical malpractice, negligence and breach of contract case arises from a tragic incident in which a student in his junior year at Allegheny College in

Meadville, Pennsylvania took his own life on February 11, 2002 by hanging himself at his off-campus fraternity house.

Before the Court are motions for summary judgment filed by Allegheny College who are affiliated with seven (7) of the defendants. Plaintiffs, the students parents, allege inter alia, that the College defendants: (1) breached a "duty of care" to prevent the student's suicide; (2) had a duty to notify the parents about their son's mental health problems; (3) failed to involuntarily hospitalize their son under the Pennsylvania Mental Health Procedures Act (50 P.S. § 7302); (4) failed to require their son take a leave of absence for health reasons; and (5) that the College and its agents breached a written and/or oral agreement to provide medical, mental health and other services to their son while enrolled in Allegheny College.

At the time of argument, the parents admitted that since it is not a legal entity, no cause of action existed against the Allegheny College Board of Trustees. They also acknowledged that no evidence existed against the Chair of the Board of Trustees, John Wheeler, or College President Dr. Richard Cook. In consideration of the foregoing, they stipulated that all of the above could be dismissed from the cause of action. In addition, plaintiffs conceded that with regard to the wrongful death action, punitive damages are not allowed, and agreed that Count V should also be dismissed. Finally, Allegheny College, while denying liability as to Jacquelyn Kondrot (Charles' longtime counselor who was the head of the Allegheny College Counseling Center) does not seek summary judgment as to the said cause of action in consideration of plaintiffs' expert reports alleging negligence on the part of Kondrot. Allegheny College in effect asserts that this is simply a medical malpractice claim against the treating counselor and her employer.

We would also note the claim against the Sigma Alpha Epsilon Fraternity was previously dismissed. The claim against Gregory L. Richards, M.D. is not the subject of any motion for summary judgment. In consideration of the foregoing, still pending are the motions for summary judgment seeking dismissal of all claims against two of the lay college deans sued as individuals, all of the contract claims, and the punitive damages claim against the licensed mental health treating counselor, Jacquelyn Kondrot.

In addition to the parents' assertion that Allegheny College Deans Joseph DiChristina and Terrence Mitchell should have a duty to prevent this suicide of their son and/or a duty to take affirmative action such as an involuntary commitment under the Mental Health Procedures Act and/or to notify them of his allegedly exigent mental health problems; there are also legal issues involving an adult off campus student's right to privacy, the therapist/patient privilege, as well as ethical and public policy issues implicated in determining foreseeability, causation and duty of care.

II. BACKGROUND.

Sadly, Charles Mahoney's time at Allegheny College reflected a history of pre-existing and ongoing mental health issues. Since the record must be viewed in the light most favorable to the non-moving party in consideration of all the pleadings, depositions, admissions and affidavits, the following relevant background information, which falls within the ambit of the foregoing, is provided.

A. *SUMMARY OF PAST TREATMENT.*

- Chuck was first seen at The Allegheny College Counseling Center in August of 1999, referred by his mother following an episode of anxiety/panic during Allegheny College football camp. He was subsequently evaluated by Dr. Besner and diagnosed with major depression, single episode. His initial report is attached. Chuck did not play football that year, but did return and participate in Spring training later that year. He acquired a serious girlfriend, Kristen, during Fall semester. It is significant that Chuck referred her to me for counseling for an eating disorder in Spring of 2000.

- Chuck participated in regular counseling with me for depression throughout his freshman year and also received medication therapy at Allegheny College by Dr. Besner. He was referred for continuity of care to a hometown therapist and hometown doctor during Summer of 2000. No written report is available from that treatment.

- Chuck returned to Allegheny College for football camp in Fall of 2000, during which time his girlfriend, Kristen, brought him to see me because he told her he was feeling suicidal. He was assessed by me and immediately referred to Meadville Mobile Crisis, who assessed and

recommended hospitalization. Admission was denied that same day at Meadville Medical Center Inpatient Unit, so Chuck was subsequently hospitalized in Erie at St. Vincent Health Center and treated there by Dr. Besner. His parents were notified at that time and assisted with the hospitalization. Stabilized on medication, Chuck returned to college on time to begin the semester. He participated in regular counseling for depression and anxiety with me and received ongoing medication therapy from Dr. Besner at Allegheny College. Chuck's relationship with his girlfriend, Kristen, continued throughout that year.

- Chuck expressed resistance to treatment elsewhere for the summer of 2001, stating that it had not helped the prior summer and he was reluctant to try it again. He continued medication therapy with Dr. Besner over the summer of 2001, and agreed to meet with me at least twice over the summer. We had one scheduled appointment which Chuck missed and later apologized for, stating that he had gotten delayed on the road and could not arrive on time. We were not able to meet again that summer.

- Chuck returned to Allegheny College for football camp in August of 2001, but decided to quit the team, which is significant. He continued in treatment with Dr. Besner in Erie and also with me in counseling for depression and anxiety. He was seen 9 times by me last semester. In November of 2001, he broke up with his girlfriend for the reason that he believed he was ruining her life and would continue to ruin it because of his depressive disorder. She did not want to break up, but he insisted despite repeated attempts on her part to reconcile. They have remained friendly.

Relevant family history (OMITTED)

Chuck has been a member of a fraternity since his freshman year and currently resides there in a single room. Until recently, he had continuously denied the use of alcohol or drugs. It is significant that at the beginning of this semester, he confessed to me that he believes he has a problem with alcohol, and that he has been drinking secretly for years. He now reports that he feels he needs alcohol and that this is a very bad thing. He has been trying to stop drinking altogether. When asked why he never told me before he replied, "I wasn't ready."

He is an English/Political Science double major. His cumulative g.p.a. is 3.32; last semester's g.p.a. was 3.67.

Chuck has begun dating another girl, but describes this relationship as "just dating." He states that he has fun with her and their relationship is very different than the one he had with Kristen. He has remained close and friendly with Kristen, and has continued to tell me and her that he still loves her but just can't be with her because he is bad for her.

Present concerns and reason for referral

It is felt at this time that Chuck has deteriorated somewhat since his final decision to quit football in September of 2001 and his breakup with Kristen in November of 2001, and that he is a high risk for suicide. Kristen has met with me frequently since November to describe her intense concern for Chuck and his frequent references to wishing he were dead. She has considered calling his parents but to date has not done so. On Monday, January 28, 2001, he told Kirsten that "If anything happens to me, I want you or Adam (one of Chuck's closer friends at the fraternity) to have Gracie." Gracie is Chuck's dog who lives at the fraternity house, and of whom Chuck is extremely fond. At that time, Kristen threatened to call his parents but did not. Also on Monday, Adam and another friend came to see me to share their concern about Chuck. He was described as spending a lot of time alone in his room, drinking regularly and it is believed heavily (empty bottles of hard liquor were taken by them from his room), and being intensely private about his problems. In fact, Adam stated that until four weeks ago when Kristen made them aware of it, no one in the fraternity had any idea about Chuck's depression. Several options for intervention were discussed, and Adam attempted to convince Chuck to come that day to see me at The Counseling Center. Chuck refused, so other ideas were considered, including asking the frat Advisor to check in with him and calling his parents. After several consultations, it was determined that neither of those options was optimal because of concern that Chuck would feel pressured or uncomfortable with all the unusual attention, and because of his stated desire for his parents not to know. In the end, I decided to make a telephone outreach to Chuck at about 9:30 p.m. and reached him in his room. He told me that he was ok, and agreed to meet with me the following day, Tuesday, January 29, 2002. He also told me that he was willing to meet with Dr. Richards on Friday for medication review. He told me that he hates that Kristen has told other people at the fraternity what she told them, but he can't be mad at her because he loves her.

Chuck has admitted to me that at times he knows he is irrational. He has shared with me at one time or another that most people are bad in his view, that the world is in trouble because of "man," that people who really care about anything are a minority, that most people are self-serving. Further, he has shared that he believe it is unfair that things have turned out for him the way they have with respect to football and being at Allegheny College. He would rather have gone somewhere else. He wrote me in a recent e-mail that he is losing trust for nearly everyone. He has few close friends. He has told me that he hates that he needs another person to feel good (i.e., a girlfriend) and that he believes he is weak for this reason and also because he has a problem with alcohol. He admits to frequent thoughts of suicide. He

does not wish for me to call his parents, he says, because they have had enough problems to deal with in his older sister, and they are good people. He stated that he believes they have put his prior hospitalization in the past and have not mentioned it; he has not shared with them recently how he is really feeling. On Tuesday, January 29, 2002, he told me that every day is a struggle and that he is tired from it. He stated that he cannot imagine living beyond the age of 25 because he cannot imagine having to fight that long just to get through every day. In the same meeting, he told me that he wants to live and that he just wants to go to law school.

He has denied any history of abuse.

He was last seen on 12/31/01 by Dr. Besner and prescribed 300 mg. Effexor, 75 mg. Desipramine, Xanax .5 mg bid and Zyprexa 2.5 -5 mg at bedtime. By self-report, Chuck has reduced the amount of medication he is taking and currently is only taking the Effexor. He missed his appointment on 1-17-02 with Dr. Besner, who subsequently called in a prescription to last until today. Chuck reported that he only had the prescription for Effexor filled and told the pharmacist not to fill the other prescriptions. Chuck reports that the medications are too expensive, that he and his parents would like to have him off medication entirely, and that his family doctor in early January 2002 recommended that the medication therapy be reviewed. This was because Chuck was experiencing sexual problems and also because Chuck has exercised induced asthma. The sexual problems have improved to date.

Chuck occasionally "no-shows" for appointments and has told me that when he feels the worst, he does not like to come in. He has stated that he is fearful of being returned to "that terrible mental ward," which was described as a traumatic experience for him. He does not want to return there. When last seen on Tuesday, January 29, 2002, he reported that he was having a good day but stated that his mood can change quickly, without warning and for no reason. He denied the intent to harm himself on Tuesday, but admitted that "I know how I will do it." He stated that he would take sleeping pills. He denied possessing any sleeping pills on Tuesday January 29, 2002.

Chuck is referred today for psychiatric evaluation/diagnosis, review of medication therapy, and to assess for suicide risk. I am also wondering whether or not to call his parents to inform them of Chuck's current functioning, and would value your recommendation on this issue.

Please note that Chuck is very good at hiding his real feelings and occasionally may not be truthful about them or his behavior. He told

me that he is so used to lying that it is second nature to him and sometimes he does not even realize that he is doing it. ¹"

Jacquelyn S. Kondrot, C.A.G.S., N.C.C."

B. *CHARLES' LAST E-MAIL TO COUNSELOR KONDROT AND RESPONSE.*

"Reply - To: "Charles Mahoney" <mahonec@allegheny.edu>
From: "Charles Mahoney" <mahonec@allegheny.edu>
To: "Jacquie Kondrot" <jkondrot@alleg.edu>
Subject: Re: Saturday
Date: Mon, 11 Feb 2002 12:39:10-0500
X-Mailer: Microsoft Outlook Express 4.72.3110.1

well, jacquie,

he is in the house right not. i am trying to stay cool. the brothers seem to accept him back into their circle. i am alone now more than ever. complacency is a crime to me. i am now on the outside fringe. i have no real friends. i have no one up here. everyone voices discontent but no one will rally when it counts. i am sad and angry and alone, alone, alone, alone. i don't need anyone though, but I think I am going to leave the fraternity. i do not want to fraternize with people who are not real; who are a façade. the one person I always turned to in times like this will not talk to me. i am doing my best, but the amount of rage that is pulsating through my body right now is incredible.

Chuck

-Original Message-

From: Jacquie Kondrot <jkondrot@alleg.edu>
To: Charles Mahoney <mahonec@allegheny.edu>
Date: Monday, February 11, 2002 9:04 AM
Subject: Re: Saturday

Hi, Chuck-

Thank you for writing. It is really hard for me to hear how bad you are feeling. I want to offer you some time to come in to see me today (Monday) if you are willing. If you just let me know some possible times you could come, I will adjust my calendar as best I can -What do you think?

¹ Brief report prepared by Jacquelyn Kondrot Re: Charles F. (Chuck) Mahoney D.O.B. 5-7-81 for Dr. Richards M.D. dated February 1, 2002 (10 days before Charles' death) marked as Exhibit 11. We would note we have omitted the first paragraph on the second page of Kondrot's report regarding family history deeming such to be an unnecessary invasion of the privacy of the parties' identified and believe such was not relevant to the issues under consideration.

Jacquie

At 03:18 AM 2/11/02 -0500, you wrote:

hi jacquie,

well, tonight I am in the mood to write and give you a glimpse of what is going on in my mind. you were right about losing faith and hope. i guess I am. i am sad and have been sad really since I guess Kristen and I broke up. she is out of my life now and it seems forever. she was my best friend. she refuses to talk to me. my focus is nonexistent and I do not sleep or find joy in anything it seems. i am lonlier now more than ever it seems. i just do not like life anymore. i am both bored and disinterested and coping with the loss of Kristen is harder than i thought. i was thinking of the nice memories we had and wonder if they were as great for her as they were for me. sometimes my heart hurts because i miss her. I am ashamed at that fact. i still love her even after everything she did to me. pile this stuff upon what i already feel and sometimes i doubt i can even make it. nothing helps. i am tired and all i want to do is sleep. i don't study anymore and just living is a struggle. i know now that i am meant to be alone; i was going to marry Kristen and be with her. i feel pathetic. i am just really sad, that is the only way to describe anything; i am just sad. i feel like i am dying everyday. i hate living. sometimes i wish i would die. sometimes i wonder if i am going to make it. it seems like no one cares. i knew Kristen cared, or i thought she did until recently. there really is nothing more to say. i do not trust anyone and i have distanced myself consciously from everyone. i just hate living and i hate the prospect of going through another day. i don't know why. i just hate living so much. the first time i saw Kristen i thought to myself that this is the girl i am going to marry; i was never so sure of anything in all my life. now, i am shaken to the core. she was the girl i wanted to marry and was so sure she was it. but i will never take her back and now i am going to go to bed. i am tired and want to sleep. boy, time sure moves slow.

chuck

Original Message-

From: Jacquie Kondrot <jkondrot@alleg.edu>

To: Charles Mahoney <mahonec@alleggheny.edu>

Date: Saturday, February 09, 2002 3:58 PM

Subject: Re: Saturday

Hi Chuck -

Just wanted you to know that I came in to the office for a brief time today and checked e-mail . . . won't be checking against until Monday.

I hope to hear from you. If not, I'll see you Tuesday at 11 - I hope you are having a good weekend.
Jacquie²"

C. *NOTES OF DICTATION OF JACQUELYN KONDROT OF 2/11/02 THERAPY SESSION WITH CHUCK MAHONEY.*

"I saw Chuck walking on East College Street at approximately 12:55 p.m. on my way back from lunch. He was dressed neatly and was well groomed. He appeared sad. I asked him if I could walk with him and he said yes. I asked him if he had gotten my e-mail and he said yes; I asked if there was a time he could meet with me and he said, "I could meet with you right now," so we walked together toward Reis Hall. I told him that I was glad that I had run into him and to wait for me in the hall lobby and I would meet him in a few minutes. I told him this because he had recently revealed to me that he hated waiting in The Counseling Center waiting room and we had previously agreed that he could wait in the hall lobby for appointments.

Once in my office, Chuck asked me if I had received his e-mail, which I had not, so I opened it and skimmed over it quickly in his presence. We discussed this at some length and Chuck stated that he was upset because they (the fraternity) did not stand up for him. He stated that no one spoke up for him and he could not believe it. He stated that they are not what they say they are and that he was very seriously thinking of leaving the fraternity. He stated that the only reason he wouldn't leave - that he liked living there was because he could have Gracie (his dog).

We discussed briefly his meeting at the Dean of Student's office last Friday and he shared that he had been upset about getting called in to talk to the Dean.

We also discussed his ex-girlfriend, Kristen, and he stated, "she won't talk to me." He expressed anger at her and stated he hated her. He had tears in his eyes and when I asked him why he was crying, he replied, "I'm not crying. I don't cry." He stated that he was so mad at her because she knew how important respect was to him and she disrespected him. I asked him if he could try to soften his heart toward her and toward himself, and to consider that people make mistakes but they can be forgiven; things can change and get better, that things with Kristen could get better and work out. I told him that I did not think she meant to hurt him and that I felt sure that she still cared about him very much. I told him that there were always options for the way things could go or the way things could work out.

² Charles' e-mail to Jacquelyn Kondrot dated 2/11/02 at 03:18 a.m. with Kondrot's response dated 2/11/02 at 9:04 a.m. Exhibit 11.

I expressed my concern about him. I asked about his drinking and he denied that he had anything to drink but "fruity drinks" on Friday night and over the last 5 days. I told him that I was concerned for his sadness, his safety and for his well-being. I asked him when he had last talked with his parents and he said, "Saturday." I asked him if he had told them all that was going on up to then and he said that he had. I told him that I would also like to speak with them and he said, "Don't do that." I told him that normally in a situation like this when I felt this concerned about someone that I would talk to parents and that I would also normally talk with the Dean of Students to express my concern and discuss options about how best to help the student. He stated that he did not want me to do that and that the more people who got involved, the tighter the box became around him. He said, "See, you want me to tell you how I feel and then this is what you do."

I explained again that I was very concerned about him and that I just wanted to do all that I could to help him and to be sure he was going to be ok. He stated, "You're going to put me in that mental ward again." I told Chuck that I was not necessarily talking about the "mental ward" but that I wanted to consider and discuss with him all options, including getting away from campus for awhile. He was firm about not going to the hospital. I asked him if he would consider taking some time away from campus and he replied emphatically, "The mental ward or Burgettstown!" I replied that another option might be that he could remain here, but that he might have to have additional help in order to stay here and be ok. At this point, I had tears in my eyes and felt concerned and frustrated with Chuck's resistance. He said that he knew I had my responsibilities.

At one point in the session we were interrupted by a phone call from the Counseling Center secretary who wanted me to know that Chuck's ex-girlfriend, Kristen, was meeting at the same time with another counselor in the office and due to finish at 2 p.m. I thanked her and asked her to reschedule my 2:00 appointment so that I could continue with Chuck. He became anxious and stated that he had to go to class at 3:00 and I assured him that we would be finished by then. Again, I asked Chuck if he would consider taking a Leave of Absence or just taking some time away for while. He said no. He said, "Just let me get through it. I'll get through it." He stated that he just wants to graduate and go to law school and start over. I told him that I was glad he was thinking that way and affirmed that this was a rational choice. He stated again that he would get through it, "I always have." I asked him how he would get through it and he said, "By myself, just like I always have." I told Chuck that he did not have to feel that way and that I felt concerned when he expressed an attitude that he was alone in dealing with things. I told him that there were many options and many people and ways to get help. I told him that I wanted him to have the best treatment and that I would do all I could to provide that for

him but that I may need some help. I told him that I feel I have been helpful to him, but that I was not confident that by myself I could continue to provide the best help for him to ensure that he would get better. I told him that I knew there was a lot of help out there and maybe he could benefit from more help. I asked him if he would consider meeting with someone else in addition to me for a while and he asked me who I wanted him to meet with. I told him at this point that I was not sure, but that I would like to think about it and discuss it with him some more tomorrow and he said ok.

Chuck stated that he had to go - that he had work to do and that he had to go to class. I asked him to stay and assessed for his safety. I asked him if he was ok and he assured me he was ok. I specifically asked him if he had any sleeping pills and he said no. I believed he was safe and that he was leaving to go to class and that he would return for our appointment the next day. He was also scheduled to meet with Dr. Richards again on Friday. I told him that I looked forward to seeing him tomorrow so we could continue our discussion and assured him that I believed there were a lot of options. I asked him if he had considered where else he might go if he left the fraternity and he said he didn't know where he could go. I stressed that I felt sure there were options and that something could be worked out. We exchanged greetings and confirmed that we would talk again tomorrow morning³."

*D. OVERVIEW OF DEPOSITION TESTIMONY OF DEANS
DICHRESTINA AND MITCHELL.*

At the time of the incident Mr. DiChristina had been the Dean of Students at Allegheny College since May of 2001. He and Associate Dean Terrence Mitchell were responsible for general oversight of thirteen departments outside the classroom including security, housing, food services and counseling services. He was the administrative supervisor of Jacquelyn Kondrot. He did not consider himself her clinical supervisor since he did not have any training or expertise in mental health counseling or medicine.

Dean DiChristina indicated on January 28th Ms. Kondrot spoke to him about an unnamed student (Mahoney) she was involved with in a counseling relationship who she indicated was seeing Dr. Richards (a psychiatrist utilized by students in terms of medications). He and Dean Mitchell's next involvement regarding Mahoney occurred on February 8, 2002 when a student from the fraternity house (SAE) came to his

³ Notes of dictation dated 2/11/02 marked as Exhibit 13. It is unclear when such was dictated.

office regarding concerns about past conflict and a potential fight between Mahoney and another student. According to Dean DiChristina it was later that same day when he first learned that the unnamed student that was the subject of the January 28th discussion with Kondrot was Mahoney. Having determined in consultation with Dean Mitchell and Kondrot (apparently based on assurances from the students) that there would not be any fight or conflict, it was decided there was no need to take any formal kind of judicial/administrative disciplinary actions. Apparently, the conflict and subject of discussion centered around tensions and concerns involving the impact of Mahoney's earlier breakup with a female student who recently began to date one of his fraternity brothers.

The next contact Dean DiChristina received was an email sent on Sunday, February 10th (which he received on February 11th) from one of the students at the fraternity. In addition to other unrelated matters the email again discussed concerns about potential conflict between Mahoney and a fraternity brother who was dating Mahoney's former girlfriend. The email made no references to Mahoney's potential suicide, use/misuse of alcohol, giving away his dog, or any other possessions. However, there were general expressions of concern about Mahoney's emotional health. Shortly thereafter, that same day Dean DiChristina met with Kondrot who expressed concern about the 2/11 early morning email she had received from Mahoney. While Dean DiChristina did not see (nor did he ask to see) the email, apparently based on such Kondrot indicated to DiChristina she was making efforts to "reach out" to Mahoney. They also had a discussion about Kondrot discussing with Mahoney that day the subject of a leave of absence for Mahoney for health reasons related to what was described to DiChristina as Mahoney's "severe depression." DiChristina denied any knowledge from Kondrot that Mahoney was considering hurting himself, killing himself or suicide.

In effect DiChristina indicated he deferred to and relied upon Kondrot "to make decisions about what she's doing" noting he didn't "have privy to that kind of information that students share with her, and so it is not something we ask of ourselves to see those kinds of things." (Summary of Deposition of Joseph DiChristina).

DEAN MITCHELL

Dean Mitchell has been the Associate Dean of Students for experiential learning since 1996. Dean Mitchell indicated that the discussion regarding Mahoney contemporaneous to his death involved a possible involuntary leave of absence for behavioral and discipline reasons as compared to mental health issues. He reiterated that up to the date of Mahoney's death Kondrot was not ready to make a recommendation for a leave of absence for health reasons. He indicated that since he (Mitchell) "decided there wasn't going to be a leave of absence for disciplinary purposes, there was no recommendation for a leave of absence for health reasons, so there was nothing to consider." While he was aware "there was a disturbing email from Chuck over the weekend," he did not know the content of such before he died. When asked if he inquired about the content of the email he responded with some equivocation "I asked her - I don't know if I asked her about the email because she felt it was confidential." He was aware of her intent to meet with Mahoney and follow up on same. In his follow up they discussed his calling Mahoney's parent, noting that while her therapeutic relationship precluded her from making such a call (and her client, Mahoney specifically reiterating he did not wish her to make such a call), he was not bound by such. However, ultimately he deferred to Kondrot's concern that such (calling the parents) would imperil the "therapeutic relationship" she had with Mahoney, as well as concern about the potential impact of such a call. He indicated "the feeling was from a therapeutic standpoint Jacquie didn't feel that calling the parents was going to support Chuck in his therapy, it didn't matter who called."

Ultimately, when asked why he didn't call he stated "because we have to follow the advice of the mental health professional working with the student" and in his view based on the information he had "it wasn't an immediate threat." (Summary of Deposition of Terrence Mitchell).

IV. RELEVANT LAW.

A. *MOTION FOR SUMMARY JUDGMENT.*

Under Pa.R.C.P.1035.2, summary judgment is appropriate:

“(1) Whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report; or

(2) If, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

The standard of review in deciding a Motion for Summary Judgment is as follows:

“Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that a moving party is entitled to judgment as a matter of law.” Pa.R.C.P. 1035(b).”

“The record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. . . . Summary judgment may be entered only in those cases where the right is clear and free from doubt.” *Pennsylvania State University v. County of Centre*, 615 A.2d 303, 304 (Pa. 1992).

B. *DUTY.*

1. *DUTY OF CARE - GENERAL DISCUSSION.*

To determine whether the defendant owes a duty of care for purposes of establishing a negligence claim, the courts must weigh:

1. The relationship between the parties,
2. The social utility of defendant’s conduct,
3. The nature of risk imposed and foreseeability of harm

incurred,

4. The consequences of imposing a duty upon the defendant, and

5. The overall public interest in a proposed solution.

None of these five factors is dispositive, but rather a duty will be found to exist where the balance of factors weighs in favor of placing such a burden on the defendant. *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003).

In *Sinn v. Burd*, 404 A.2d 672, 681 (Pa. 1979) Justice Nix wrote:

“In determining the existence of a duty of care, it must be remembered that the concept of duty amounts to no more than ‘the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection’ from the harm suffered . . . To give it any greater mystique would unduly hamper our system of jurisprudence in adjusting to the changing times. The late Dean Prosser expressed this view as follows:

These are shifting sands, and no fit foundation. There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. When we find a duty, breach and damage, everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the law should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, ‘always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.’”

2. PENNSYLVANIA LAW - LIMITED DUTY TO PREVENT SUICIDE.

As indicated previously this is a case of first impression and neither counsel nor this court were able to find any Pennsylvania cases imposing a duty to prevent suicide on a college or its employees. The only Pennsylvania case which discussed the issue of a duty to prevent suicide is *McPeak v. William T. Cannon, Esquire, P.C.*, 553 A.2d 439, 440 (Pa. Super. 1989) which held:

Generally suicide has not been recognized in wrongful death cases. This is so because suicide constitutes an independent intervening act so extraordinary as not to have been reasonably foreseeable by the original tortfeasor. . . . There are, however, limited exceptions to this rule. For example, Pennsylvania has recognized suicide as a legitimate basis for wrongful death claims involving hospitals, mental health institutions and mental health professionals, where there is a custodial relationship and the defendant has a recognized duty of care towards the decedent. . . . In other cases, where the defendant was not associated with a hospital or mental health institution, courts have required both a clear showing of a duty to prevent the decedent's suicide and a direct causal connection between the alleged negligence and the suicide.

3. DUTY TO PREVENT SUICIDE WHERE THERE IS A "SPECIAL RELATIONSHIP" AND HARM IS "REASONABLY FORSEEABLE."

On June 27, 2000 Judge Christine M. McEvoy of the Middlesex (Trial) Superior Court ruled that the parents of Elizabeth H. Shin, an MIT student who committed suicide on the campus in 2000, can proceed with their claims against MIT administrators and staff members for failing to prevent her death, although the plaintiffs were precluded from seeking damages against the University itself.

In *Shin*, the trial court was asked to determine whether or not various lay individuals and the University, had a duty to prevent the suicide of a student, Elizabeth Shin. In that case, Ms. Shin had been treating at the college facilities for mental health issues. At approximately 12:30 a.m. on Monday, April 10, 2000 two students notified Ms. Davis-Miller, Elizabeth's housemaster, that Elizabeth had told them she planned to kill herself that day. As such, the housemaster called the MIT Health Center and talked to the on-call psychiatrist, Dr. Van Niel, who instructed the housemaster to check on Elizabeth. He also asked that the housemaster convey to Dean Henderson her assessment on Elizabeth as there was going to be a "deans and psyches meeting" as of that morning. That meeting convened at 11:30 a.m. with Dean Henderson, as well as other deans present. They discussed Elizabeth's case and it was contested what, if any, treatment options were discussed. At the conclusion of the meeting, an appointment was made for Elizabeth to go to a nearby treatment facility off campus, and a voice message was left on Elizabeth's answering machine

notifying her of the appointment. That night, however, Elizabeth set fire to herself in her room and was later pronounced dead due to self-inflicted thermal burns.

In her ruling Judge McEvoy held that Ms. Shin's parents had presented sufficient evidence to try two administrators and four medical employees for negligence in her death. The judge ruled that two administrators Dean A. Henderson and Nina Davis-Mills had a "special relationship" with Ms. Shin, allowing them to "reasonably foresee" that she would harm herself unless they intervened. In her ruling Judge McEvoy noted that the MIT officials had a duty to Ms. Shin because they knew of her mental-health problems and threats to kill herself. The plaintiffs, the judge wrote, had provided sufficient evidence that MIT officials "failed to secure Elizabeth's short-term safety . . . by not formulating and enacting an immediate plan" in response to those threats on the day she died.

In her decision Judge McEvoy relied on the case of *Schieszler v. Ferrum College*, 236 F.Supp. 2d 602 (W.D. Va 2002). In that case a federal court in Virginia found that Ferrum officials had a legal duty to insure the safety of the deceased student, Michael Frentzel, because they knew of the "imminent probability" that he would try to harm himself. In that case the campus police and a resident assistant responded to a domestic disturbance between the decedent and his girlfriend. Shortly thereafter, the decedent sent a note to his girlfriend indicating that he intended to harm himself. The resident assistant and campus police were shown the note and went to the decedent's room. They found the decedent with bruises on his head that he admitted were self-inflicted. The campus police notified the Dean of Student Affairs. Days later, the decedent wrote to a friend stating "tell Crystal (his girlfriend) that I love her." The decedent's girlfriend told the defendants, but they took no action. Soon thereafter, the decedent wrote another note stating "only God can help me now," which his girlfriend again passed on to the defendants. When the defendant's visited the decedent's dorm room, they found that he had hung himself with his belt.

The estate filed a wrongful death suit against the college and the administrators, which included the dormitory resident assistant and Dean of Student Affairs. "Under the special relationship" analysis the Federal Court concluded that

the defendants owed a duty to the decedent because of a special relationship between them.

Utilizing that same analysis, the trial court in *Shin* noted that the administrators, Henderson and Davis-Mills, were well aware of Elizabeth's mental problems. They had received numerous reports, including the report that Elizabeth was planning to commit suicide. Additionally at least one administrator, Dean Henderson, had attended the weekly "deans and psych meetings" including the meeting on April 10, where Elizabeth's mental problems were discussed with other MIT medical professionals. The trial court believed that, based upon this evidence, the plaintiff had provided sufficient proof that the administrators could reasonably foresee that Elizabeth would hurt herself without proper supervision. Accordingly, the court recognized a special relationship between the administrators and the student imposing a duty on the administrators to exercise reasonable care to protect Elizabeth from harm.

4. DUTY TO NOTIFY FAMILY OF POTENTIAL DANGER - PRIVACY ISSUES.

The Family Educational Rights and Privacy Act (FERPA) 20 U.S.C. § 1232g (2000) protects the privacy of student educational records, which include most university records maintained about enrolled students. Under FERPA, such records should not be released to anyone, including a student's parent or guardian, unless the student consents or unless the disclosure falls within a recognized FERPA exception. In addition to restricting the disclosure of academic and conduct records FERPA also restricts the disclosure of records of informal counseling or educational sessions between the student and campus officials.

FERPA does provide an express exception, however, for disclosures made in a health or safety emergency. *Id.* § 1232(g)(b)(1)(i). However, FERPA permits, but does not require, educational institutions to disclose information in connection with an emergency, (to the appropriate persons) if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

In addition to the student's privacy interest as to university records there are also other legal and ethical obligations of confidentiality that arise in the context of professional relationships, such as with a counselor, psychologists, psychiatrists, or physician. *In the Matter of Adoption Embich*, 506 A.2d 455, 460 (Pa. Super 1986), appeal denied 520 A.2d 1385 (Pa. 1987) the Superior Court explained the rationale for such a privilege by stating:

“There can be no doubt that the purpose of the psychologist-client privilege is to encourage people to seek professional help for their mental or emotional problems, and that purpose is best accomplished when people in need of psychotherapeutic treatment know that what they tell their therapist during treatment will not be disclosed to anyone.”

V. DISCUSSION - DUTY TO PREVENT SUICIDE/NOTIFY OF POTENTIAL DANGER.

Suicide is the third leading cause of death among college-aged (18 to 24 year olds) students⁴.). Another study published in the *Journal of American College Health* demonstrates that suicidal ideation is a continuum and can be linked to unintentional injury and homicide, the first - and second - leading causes of death among the college-age group⁵. The study points out that suicide has been described as the end point of a continuum that begins with suicide ideation (consideration of suicide), followed by planning and preparation for suicide and finally by threatening, attempting, and completing suicide.

The American Legal System is reluctant to find civil liability arising out of a failure to prevent suicide. Suicide is considered an illegal, deliberate, and intentional act, that is an independent intervening proximate cause that generally precludes liability.

However, the courts no longer construe suicide as an intervening act that automatically cuts off the chain of liability. The New Hampshire Superior Court stated in *McLaughlin v. Sullivan*, 461 A.2d 123(N.H. 1983):

⁴ Donnah L. Hoyert, Kenneth D. Kochanek and Sherry L. Murphy, deaths: final data for 1997, National Vital Statistics Report, U.S.Dept. Health & Human Services (June 30, 1999)

⁵ Lisa C. Barrios et al., Suicide Ideation among U.S. College Students: Associations with Other Injury Risks Behaviors, 48 J.Am. College Health 229 (2000).

“In recent years, however, tort actions seeking damages for the suicide of another have been recorded under two exceptions to the general rule, namely, where the defendant is found to have actually caused the suicide, or where the defendant is found to have had a duty to prevent the suicide from occurring.”

We find fundamentally characteristic of these two types of defendants a pre-existing duty of care and protection which is imposed either because an institution has actual physical custody of, and substantial or total control over and individual . . . or because the institution is a hospital or the individual is a specially trained medical or mental health professional, who has the precise duty and the control necessary to care for the physical and/or mental well-being of a patient

As reflected in the *MIT* and *Ferrum College* cases, rather than relying on the rules of proximate causation to resolve cases involving students’ suicides, courts are increasingly looking at duty within the ambit of the existence of a “special relationship” and whether an event is “reasonably foreseeable” or “imminently probable.”

Concomitant to the evolving legal standards for a “duty of care” to prevent suicide, are the legal issues and risks associated with violations of the therapist - patient privilege, student right of privacy and the impact of “mandatory medical withdrawal “policies” regarding civil rights of students with mental disability. In effect, now that proximate causation is no longer outcome determinative, courts are facing a multiplicity of public policy issues involving the legal and ethical dilemmas of student privacy and welfare concerns within the context of causes of action involving the best interest and rights of students, parents, and the University.

In consideration of the foregoing, we turn to the most recent appellate court decision that has addressed the responsibility of a university to prevent and/or share information in a potential suicide situation. The most recent and leading case is *Jain v. Iowa*, 617 N.W. 2d 293 (Iowa 2000). Given the analogous factual scenario and legal issues we believe that a thorough overview of the facts and legal analysis is instructive.

JAIN FACTS

Sanjay Jain, a freshman at the University of Iowa, killed himself in his dormitory room. His father sued the university for wrongful death. He argued that the university failed to exercise reasonable care for his son's safety, particularly in failing to notify his parents of serious indications of their son's self-destructive behavior. Sanjay Jain came from a close-knit family and had been successful in high school, planning to major in bio-medical engineering. His first semester proved difficult as his academic performance diminished, he was moody, and he missed classes. He began experimenting with drugs and alcohol and was disciplined for smoking marijuana. Under its policy protecting the privacy of student records, the University did not inform his parents about these problems. In addition, the evidence suggested that Jain's communications with his parents painted a very different and more promising portrait of his university experience. Late in the fall, resident assistants in his dormitory were called to resolve a dispute between Jain and his girlfriend over the keys to his Moped. Jain's girlfriend reported that he was attempting to commit suicide by inhaling exhaust fumes from the Moped. When interviewed independently, Jain cooperated that he was indeed trying to commit suicide. After discussing this incident with the resident assistants, Jain offered assurances that he would seek counseling. After several discussions with Jain, the resident assistant reported the problems to the Assistant Director for Resident Life. The Assistant Director took no action to contact Jain's parents, but instead agreed with the resident assistant's decision to continue encouraging Jain to seek counseling. Jain also commented to his roommate that he would kill himself with his Moped. Later, Jain turned on the Moped and asphyxiated himself through carbon monoxide poisoning. The University apparently had an unwritten policy that permitted the Dean of Students to notify parents in case of a suicide attempt. However, no relevant information about Jain was shared with the Dean until after the student's death.

LEGAL ANALYSIS

The Iowa Supreme Court affirmed a lower court ruling dismissing the case for lack of legal duty. The Supreme Court refused to find a special relationship between Jain and the University sufficient to raise a duty to notify Jain's parents of impending danger. In a lengthy analysis of affirmative duty the court noted: no affirmative action by the defendant's employees, however, increased that risk of self-harm. To the contrary, it is undisputed that the (resident assistants) appropriately intervened in an emotionally charged situation, offering Sanjay Jain support and encouragement, and referred him to counseling. A school counselor likewise counseled Sanjay Jain to talk things over with his parents, seek professional help, and call her at any time, even

when she was not at work. She sought Sanjay Jain's permission to contact his parents but he refused. In short, no action by University personnel prevented Sanjay Jain from taking advantage of the help and encouragement being offered, nor did they do anything to prevent him from seeking help on his own accord. *Id.* at 299.

See also *Nally v. Grace Church*, 763 P.2d 948 (Cal 1988) wherein the California Supreme Court concluded that a clergy member owed no duty to prevent a suicide. See also *Adams v. City of Fremont*, 80 CAL. Rptr. 2d 196, 217-218 (App. 1st Dist. 1998) which also held along with Jain that non-therapist counselors are not required to provide suicide prevention unless they cause the risk of suicide.

In consideration of all of the foregoing, we make the following legal and uncontested factual findings with regard to whether Deans DiChristina and Mitchell had a duty to prevent the suicide of Mahoney and/or whether they had a duty to notify his parents or others of any "impending danger" to himself as compared to others:

1. There is no controlling Pennsylvania case law imposing a duty to prevent suicide or notification of impending danger on a college or its non-mental health professional employees.
2. There is no Pennsylvania case law imposing a personal duty on lay non-mental health professional college employees to prevent suicide or notification of impending danger.
3. Allegheny College did not have a custodial relationship with Mahoney who was an adult who lived in an off campus fraternity house.
4. The *Jain* case is factually and legally persuasive that there was no "special relationship" nor "reasonably foreseeable" events that would justify creating a duty to prevent suicide or notify Mahoney's parents of any impending danger in consideration of:
 - a. The deans' "relationship with Mahoney only existed for a period of 3-4 days prior to his death and was primarily limited in its nature and scope to a disciplinary proceeding.
 - b. The deans' reliance on the advice of Kondrot, Mahoney's long time professionally trained mental health counselor who had ongoing and contemporaneous contact with him cannot and should not be construed as affirmative acts or omissions that increased the risk of self-harm.
 - c. The deans engaged in no actions that would have precluded Mahoney from seeking professional help from Kondrot or notifying his parents or others.

5. The *MIT* and *Ferrum* cases are factually distinctive in their neither precedential, nor non-persuasive finding of a “special relationship” and “imminent probability” of self-harm in consideration of the student’s assertions that they were going to kill themselves as well as their past and contemporaneous attempts to do so; such was within the knowledge of said college employees, as compared to Mahoney who despite a progressively deepening depression, had neither engaged in nor threatened any specific acts of self-harm.

6. The appellation/determination of “special relationship” outside the context of custody and/or control is subjective in nature and could be construed as an elevation of form over substance that could lend itself to reactive rather than reflective results steeped in “hindsight” as compared to a careful and precise legal analysis required in a duty of due care. It is in effect an attenuated and unarticulated form of “in loco parentis.”

7. The “duty of nonprofessionally trained persons to notify” of “impending danger,” while arguably less burdensome than the “duty to prevent suicide,” implicates issues of foreseeability for nonprofessional lay persons as well as issues involving the disruption of a professional confidential clinical relationship and lesser issues of a student’s right to privacy and expressed wishes involving notification.

8. There was no authority to involuntarily hospitalize Mr. Mahoney under the Mental Health Procedures Act, 50 P.S. §7302, which provides that only physicians, peace officers or others authorized by the County Administrator have legal authority to arrest someone for psychiatric evaluation or involuntary psychiatric hospitalization. While the arguable failure to facilitate such may be relevant as to Counselor Kondrot, again based on our earlier analysis, neither lay Dean would or should be implicated.

VI CONTRACTS AND MISREPRESENTATION COUNTS

As to these causes of actions parents essentially assert that the catalogue and handbook, which all families receive, created the contract which the college and the employee defendants allegedly breached. The parents rely on general language from the catalogue and handbook in which the college promised to provide mental health services in a “private, confidential “ manner to all students.

In 12 and 13 of the Amended Complaint, the parents rely on the following language from the catalogue and handbook:

12. ... In the catalogue, Defendants represented as to the counseling center that “(t)he professional staff of the counseling center provides a private, confidential relationship in which students may discuss any concern

[W]hen appropriate, the staff refers students to other campus offices as well as to human service agencies in the community.” . . . (A)s to the health center it was represented that it “provide(s) prompt treatment of medical problems as they occur. . . .[W]hen necessary, students are referred to specialists in Meadville “

13. . . . “Parent’s Handbook” . . . represented that there was a counseling center where students could come to “discuss concerns, sort out feelings, and get help making choices . . . {With a staff} dedicated to helping students address personal . . . issues, adjust to the residential college experience, and prepare for life after college.” The handbook represented as to the health center that it “provide(es) prompt treatment for medical problems . . . [And] when cases warrant, students are referred to specialists in Meadville or to the Meadville Medical Center”

While we believe the aforementioned claims were pled to essentially buttress their negligence and medical malpractice claims, we concur with defendants that such (both oral and written contract and misrepresentations) should be dismissed summarily. We note the “confidential relationship in which students may discuss any concern” is in contradiction to parents’ assertions. Also, given our ruling regarding the lack of duty (i.e. negligence) of the lay Deans and the fact that suicide is in some instances considered an illegal, deliberate and usually an independent, intentional and intervening act; the suggestion that the duty to prevent such (even in a custodial setting) is attenuated. There is no case law supporting plaintiffs cause of action.

In addition we find defendants are entitled to summary judgment because:

1. Under Pennsylvania law, no contract was formed to provide specific mental health or medical service from the two general documents or from the oral statements relied on by parents.
2. Pennsylvania law does not permit a medical malpractice claim under the guise of a contract claim.
3. The employee defendants are not parties to any contract upon which the parents rely and are disclosed agents whom, the parents admit, were “acting at all times as agents of the college” and not in their individual capacities.
4. The employee defendants received no consideration since parents admit that the only consideration is tuition paid to the college.

5. Pennsylvania law does not permit contract claims to be included in a Wrongful Death Action. As such, Count II must be dismissed.

Finally, the college is entitled to summary judgment on the misrepresentation claims because under Pennsylvania law there can be no misrepresentation as to a future promise, there is no evidence of record that parents or decedent relied on any future promise, the purported misrepresentation arises from general documents which make no specific promises about future health care and because the Board does not exist as a separate entity.

In conclusion, as noted previously, this is a sad case. The suicide of Charles Mahoney, who notwithstanding his history of severe depression, was able to excel academically and articulate plans for a future, was a tragic loss. It impacted his loving parents, former girlfriend, fraternity brothers, friends and the professional and nonprofessional staff at Allegheny College.

Clearly the increasing incidents of suicide on campuses throughout the United States is cause for grave concern. In the view of some commentators, suicide is a confession, actually multiple confessions of failure, and like most failures, it is shrouded in blame and rationalizations. However, incurring or creating a new duty of care in such cases is not the answer. Nevertheless, "failure" to create a duty is not an invitation to avoid action. We believe the "University" has a responsibility to adopt prevention programs and protocols regarding students self-inflicted injury and suicide that address risk management from a humanistic and therapeutic as compared to just a liability or risk avoiding perspective. In our view, the likelihood of a liability determination (even where a duty is established) is remote, when the issue of proximate causation (to be liable the university's act/omissions would have to be shown to be substantial) is considered. By way of illustration, even as to the issues of the lesser duty of notification of parents/others, there is always the possibility that such may make matters worse and increase the pressure on the student to commit the act. Rather than create an ill-defined duty of due care the University and mental health community have a more realistic duty to make strides towards prevention. In that regard, the University must not do less than it ought, unless it does all that it can.

In consideration of all of the foregoing we enter the following:

IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY, PENNSYLVANIA
CIVIL DIVISION

Charles F. Mahoney, III and Deborah Mahoney, :
Administrators of the Estate of Charles F. :
Mahoney, IV, Deceased; and Charles F. :
Mahoney, III and Deborah Mahoney, :
in their own right, :
Plaintiffs :
Vs. : AD 892-2003
Allegheny College; Allegheny College Board :
Of Trustees; John D. Wheeler; Richard J. :
Cook; Joseph J. DiChristina; Terrence :
Mitchell; Jacquelyn S. Kondrot, C.A.G.S., :
L.P.C., N.C.C.; Gregory L. Richards, M.D. and :
Sigma Alpha Epsilon Fraternity, :
Defendants :

ORDER

Barry F. Feudale, Senior Judge, Specially Presiding

AND NOW, this 22nd day of December, 2005 it is ordered and directed that the Defendants' Motion for Summary Judgment is granted as to the counts of negligence against Dean DiChristina and Mitchell on Counts III and IV and such are hereby dismissed.

It is further ordered and directed that the contract and misrepresentation claims in Counts I, II and VII as to all the Allegheny College Defendants are also dismissed.

Also, the count of punitive damages as to Allegheny College is dismissed and the count as to Defendant Kondrot is deferred until further order of Court.

BY THE COURT


Barry F. Feudale,
Senior Judge
Specially Presiding