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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 18-2603

WENDELL TANG, M.D., AS REPRESENTATIVE OF THE ESTATE OF LUKE TANG

vs.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, CATHERINE R. SHAPIRO, CAITLIN CASEY, PH.D., MELANIE NORTHROP, MSW, LICSW, AND DAVID ABRAMSON, MD

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Plaintiff Wendell Tang brings this action as the representative of the estate of his son, Luke Tang, who committed suicide at and while attending Harvard University as an undergraduate. The defendants, the President and Fellows of Harvard College and its employees Catherine Shapiro and Caitlin Casey (collectively, "Harvard") and David Abramson ("Abramson") move to dismiss the negligence claims on the grounds that the complaint fails to state a claim. Harvard also moves to dismiss the punitive damages claims.

In consideration of the parties' memoranda of law and oral arguments, and for the reasons that follow, Defendants' motions to dismiss are **DENIED**.

DISCUSSION

Because it is evaluating the legal sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the Court will accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. See, e.g., Berish v. Bornstein, 437 Mass. 252, 267 (2002); Nader v. Citron, 372 Mass. 96, 98 (1977).

As of April, 2015, Luke Tang ("Luke") was an undergraduate freshman at Harvard. On or about April 11, 2015, Luke attempted suicide in a dormitory at Harvard. Harvard became aware of the attempt, and on or about April 22, 2015, Harvard transferred Luke to McLean Hospital ("McLean") for in-patient care. Luke remained as an in-patient at McLean for approximately seven days. While at McLean, it was noted that Luke believed philosophically that suicide can make sense. Clinicians at McLean described Luke as immature, a contrarian, stubborn and lacking full insight.

On or about April 29, 2015, Luke was discharged from McLean. On the same day, Luke met with Melanie Northrop, a Harvard employee. Professionals at McLean had recommended that Luke undergo weekly therapy "with someone who can appreciate his intellectualization, and can monitor him closely because he has a nonchalant and suboptimal appreciation for the gravity of his suicide attempt." Northrop discussed with Luke how he might make use of such treatment. Luke told Northrop that he planned on going on a week-long retreat on May 17, 2015 and would then leave for China and thereafter return to Harvard. Northrop told Luke that he would need to speak with his therapist about a support plan in China and that he would be expected to continue his treatment when he returned to Harvard.

On or about May 1, 2015, Luke entered into a contract ("the Contract") with Harvard and defendant Catherine Shapiro, Harvard's Resident Dean of Freshmen. Luke's acceptance of the Contract was as a condition of his continued enrollment at the university. The Contract was prepared by Northrop, Shapiro, and defendant David Abramson, a Harvard employee working in Harvard University Health Services. The Contract[1] states, in relevant part:

[1] Although the Court's evaluation of a motion to dismiss is generally controlled by the allegations within the complaint, the Court may consider a contract referenced by the plaintiff in the complaint, as is the case here. See Maram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 & n.4 (2004) (Rule 12(b)(6) motion considers facts alleged in complaint and "uncontested documents of record").

> I'm so very glad you are well enough to be back on campus. As we have discussed, the events that resulted in your hospitalization in McLean caused a great deal of sincere concern about your safety and/or well-being and the appropriateness of your continued residence and enrollment at the College. After considering all of the issues presented, and in consultation with Melanie Northrop, MA, MSW, LICSW, and Dr. David Abramson at Harvard University Health Services ("HUHS"), the College had decided to permit you to reside on campus and remain enrolled in the College under the terms and conditions set forth in this letter, which will serve as a contract between us... [W]e need to be sure that you are taking appropriate steps to address the problems that you have been experiencing ...
>
> You are expected to follow the recommendations of your treatment team. These include attending sessions regularly and actively participating in your treatment...
>
> You hereby agree that all members of your treatment team have permission to communicate with each other ... and your ... Dean [Caitlyn Casey] if concerns arise....
>
> If any House Master, House Dean, Freshmen Dean or other College official asks you to be evaluated, you will comply with that request immediately...you may decline to pursue the treatment plan recommended to you...If you cannot meet these conditions, then the College will need to re-evaluate whether you may continue to be enrolled in residence...
>
> [A]s a matter of your safety, the College will contact your parents if you fail to meet the conditions set forth in this letter, including, for example, if you stop attending appointments with your treatment team...

As of May 1, 2015, Harvard sought to ensure that Luke took appropriate steps to address the problems related to his attempted suicide and suicidal ideation, and that he followed the recommendations of his treatment team, including regularly attending sessions and actively participating in treatment.

On May 8, 2015, Luke met with Northrop and reported that he had met with one of the members of his treatment team for an in-take but that he declined to schedule a follow-up appointment. Northrop discussed with Luke that he was "essentially not in treatment" and that Harvard expected him to be in treatment. Luke expressed a desire for a new therapist. Northrop

explained that with five business days left before Luke left campus, it might be challenging to find a new person but that it was very important for him to be engaged in ongoing treatment.

Luke met with Northrop again on May 15, 2015. Luke was still skeptical of the value of treatment. Northrop urged Luke to follow-up with his house dean on his return to Harvard in September. In addition, Northrop reported that as of then, another Harvard employee, defendant Shapiro, had expressed a concern that Luke had no plan for ongoing therapy over the summer and that Shapiro intended to contact Luke's parents about this.

On May 16, 2015, Luke left Harvard.

In August 2015, Luke returned to Harvard and moved into Lowell House on the campus at Harvard. Defendant Caitlin Casey was the dean of Lowell House.

On September 12, 2015, Luke committed suicide in Lowell House.

Luke underwent no mental health counseling between May 16, 2015 and September 12, 2015.

The complaint alleges that defendants Shapiro, Casey and Abramson had a special relationship with Luke and voluntarily assumed a duty of care by designing the Contract and taking other steps. The complaint further contends, among other things, that Harvard owed a duty of reasonable care and/or voluntarily assumed a duty to Luke to take reasonable measures to protect Luke from self-harm, and breached their duty of care and/or assumed duty of care by "[f]ailing to initiate suicide prevention protocols", "[d]esigning a contract ...which failed to provide reasonable safety for Luke" and "[f]ailing to ensure that Luke ...complied with the terms and conditions of the Contract" and failed to "ensure that all applicable policies, practices, procedures and/or protocols of Harvard which related to Luke's situation were reasonably and

appropriately followed and enforced." In the counts for punitive damages, no further facts are alleged to support Plaintiff's claims of gross negligence and recklessness.

ANALYSIS

A motion to dismiss for failure to state a claim upon which relief may be granted under Mass.R.Civ.P. 12(b) (6) permits "prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." Harvard Crimson, Inc. v. President & Fellows of Harvard Coll., 445 Mass. 745, 748 (2006). To survive a motion to dismiss, a complaint must set forth the basis for the plaintiff's entitlement to relief with "more than labels and conclusions." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

Even though it was decided after the events at issue in this case, the parties agree that the Supreme Judicial Court's decision in Dzung Duy Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436 (2018), sets out the relevant standards against which the present motions must be measured. Nguyen involved a suicide of a student at a university, and established the circumstances under which a university has a duty of care to prevent a student from committing suicide and the steps that should be taken when that duty is implicated:

> [W]e conclude that a university has a special relationship with a student and a corresponding duty to take reasonable measures to prevent his or her suicide in the following circumstances. Where a university has actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide, the university has a duty to take reasonable measures under the circumstances to protect the student from self-harm. ...
>
> It is important to understand the limited circumstances creating the duty. It is definitely not a generalized duty to prevent suicide. Nonclinicians are also not expected to discern suicidal tendencies where the student has not stated his or her plans or intentions to commit suicide. Even a student's generalized statements about suicidal thoughts or ideation are not enough, given their prevalence in the university community. The duty is not triggered merely by a university's

> knowledge of a student's suicidal ideation without any stated plans or intentions to act on such thoughts.
> ...
>
> Reasonable measures by the university to satisfy a triggered duty will include initiating its suicide prevention protocol if the university has developed such a protocol. In the absence of such a protocol, reasonable measures will require the university employee who learns of the student's suicide attempt or stated plans or intentions to commit suicide to contact the appropriate officials at the university empowered to assist the student in obtaining clinical care from medical professionals or, if the student refuses such care, to notify the student's emergency contact. In emergency situations, reasonable measures obviously would include contacting police, fire, or emergency medical personnel. By taking the reasonable measures under the circumstances presented, a university satisfies its duty.
>
> We stress that the duty here, at least for nonclinicians, is limited. It is created only by actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide. It also is limited to initiating the university's suicide prevention protocol, and if the school has no such protocol, arranging for clinical care by trained medical professionals or, if such care is refused, alerting the student's emergency contact. Finally, the duty is time-bound. Medical professionals may, for example, conclude that the student is no longer a suicide risk and no further care or counselling is required.

Nguyen, 479 Mass. at 453, 455, 456-57. Nguyen also recognized that a plaintiff could also state claims based on a defendant's voluntary assumption of a duty of care as well as for reckless or grossly negligent conduct. Id. at 460.

The parties agree that in April, Harvard became aware of Luke's suicide attempt, and that Harvard then had a duty under Nguyen to take appropriate action. Harvard argues, however, that Nguyen requires nothing more of it than to show that it took one of the three steps outlined in the case: (1) "initiating the university's suicide prevention protocol," or (2) "if the school has no such protocol, arranging for clinical care by trained medical professionals", or (3) "if such care is

refused, alerting the student's emergency contact." Harvard's simplistic interpretation of Nguyen is erroneous.[2]

In the first place, while Nguyen establishes and defines a university's circumscribed duty in a case such as this, it does not insulate a university from potential liability for failing to properly discharge the limited duties it imposes. Put simply, Harvard's argument to dismiss this case reduces Nguyen to a check-box, and that once a university checks one of the three boxes – a protocol, or if there is none, clinical care, or if that is refused, reaching an emergency contact – its duty ends regardless of how well or poorly the university fulfils its duty. That interpretation cannot be correct. Nguyen allows universities to satisfy its responsibility to suicidal students by "initiating the university's suicide prevention protocol," but inherent in any such response is that the protocol is appropriate. If that were not so, all that a university would have to do to avoid liability under Harvard's theory is to draft something – anything – it can label a "protocol" and "initiate" it under appropriate circumstances (whatever initiation may mean), and thereby not only completely eliminate liability, but foreclose any discovery concerning the appropriateness of the protocol or even any questions about whether it was properly followed. This reading would undermine Nguyen's intent to create some avenue for relief, limited though it may be, in cases involving student suicide.

In the second place, the alleged facts here are not as clear as Harvard would have them. Nguyen sets out a set of sequential, not alternative, steps: if there is a protocol, it must be triggered, and if not, clinical care must be provided, and if that care is refused, an emergency

[2] Harvard asserted in its memorandum, but did not press at argument, that Luke no longer posed a suicide risk in September, after he returned from China, and that Harvard's duty under Nguyen had ceased by then. See Nguyen, 479 Mass. at 457 ("the duty is time-bound. Medical professionals may, for example, conclude that the student is no longer a suicide risk and no further care or counseling is required"). The Court thus does not separately analyze this argument, but notes that it is inherently fact-bound.

contact must be contacted. The Complaint alleges that Harvard "[f]ail[ed] to initiate suicide prevention protocols," which read generously means that there was a protocol in place but that it was not triggered, which would potentially describe a violation of Nguyen even if Harvard offered in-patient mental health care, as it allegedly did. The complaint also alleges that the contract between Luke and the school reflected a voluntary assumption of care, another theory that Nguyen does not preclude.

As to Abramson's motion to dismiss, he contends that the complaint does not allege a physician-patient relationship, but one is unnecessary under Nguyen. He also contends that there is no special relationship between himself and Luke since they never met, but the Contract shows that Abramson was aware of Luke's suicide attempt and was involved in taking steps through the Contract to address it. Cf. Nguyen, 479 Mass. at 147 (finding no special relationship with two university employees because "[t][here was no evidence that [the employees] had actual knowledge of Nguyen's plans or intentions to commit suicide"). At this point, the complaint cannot be said to have failed to allege a plausible theory against Abramson.

Harvard also moves to dismiss the reckless or grossly negligent claims. These theories allege wrongs of a higher magnitude than simple negligence. Gross negligence is "very great negligence, or the absence of slight diligence, or the want of even scant care." Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17, 19–20 (1997), quoting Altman v. Aronson, 231 Mass. 588, 591–592 (1919). As Altman explained:

> Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability

> which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence.... It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injury.

Id. Reckless conduct involves "a failure to act, if there is a duty to act.... Reckless failure to act involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another. The risk of death or grave bodily injury must be known or reasonably apparent, and the harm must be a probable consequence of the defendant's election to run that risk or of his failure reasonably to recognize it." Sandler v. Commonwealth, 419 Mass. 334, 336–337 (1995) (citations omitted).

In his opposition to the instant motions, Plaintiff does not argue those elements of the complaint that support these theories, but instead contends that he should be allowed discovery to support them. Plaintiff has it backwards – before discovery commences, the complaint must outline a plausible theory, taking all of its factual allegations as true. See Iannaccino v. Ford Motor Co., 451 Mass. 623, 636 (2008) (complaint must set forth allegations "plausibly suggesting (not merely consistent with) an entitlement to relief"). Here the complaint alleges negligence – that Harvard failed to take reasonable steps in light of Luke's suicide attempt – not that Harvard failed to take any steps, intentionally ignored Luke's plight, or was indifferent to the risks posed by Luke's suicide attempt. However, because "[t]he line between gross negligence and ordinary negligence is often difficult to draw," Belina v. Pelczarski, 333 Mass. 730, 733 (1956), cited in Williamson-Green v. Equipment 4 Rent, Inc., 89 Mass. App Ct. 153, 158 (2016), and in an abundance of caution, the Court rejects Harvard's motion to dismiss these counts.

ORDER

For the foregoing reasons, Defendants' motions to dismiss are **DENIED**.

MDRicciuti J

MICHAEL D. RICCIUTI
Justice of the Superior Court

Date: September 9, 2019