COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. _____

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

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY, et al.,
DEFENDANTS/APPELLANTS.

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

Brief of *Amici Curiae* Brown University, Cornell University, Dartmouth College, Emory University, Rice University, Stanford University, the University of Chicago, and the University of Southern California in Support of Petition for Relief Under G.L. c. 231, § 118 (First Paragraph) by MIT Administrators Arnold Henderson and Nina Davis-Millis

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STATEMENT OF INTERESTS OF AMICI CURIAE

Amici Curiae Brown University, Cornell University, Dartmouth College, Emory University, Rice University, Stanford University, the University of Chicago, and the University of Southern California (collectively, "Amici") submit this brief in support of the position of petitioners Massachusetts Institute of Technology administrators Arnold Henderson and Nina Davis-Millis.

Amici are eight nationally known universities which, in total, have a student enrollment of over 115,000. Collectively, they employ several thousands of individuals in different roles and capacities who, by reason of their accessibility to and interactions with students, help create a caring and supportive college community. These so-called "student-life" staff include, for example:

- Counselors or advisors in student-life or student-affairs departments, who are available to meet with students to provide guidance on academic and personal issues;[1]
- Faculty members, college staff, and student residential assistants (graduate and undergraduate), who live in student residences and provide guidance and oversight of a varied nature;[2]
- Other faculty members, as well as research assistants and teaching assistants (most of whom are graduate or

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[1] One of the defendants here, for example, Arnold Henderson, was an Associate Dean of Student Life at Massachusetts Institute of Technology ("MIT"), a "counseling dean," meaning that he counseled students on academic and personal matters. He is not a licensed mental-health professional, however, and he did not provide mental-health treatment.

[2] Defendant Nina Davis-Millis is an MIT librarian who lived in and was housemaster in Elizabeth Shin's dormitory.

undergraduate students), who interact with students while providing academic help and advice;

- Faculty members who serve as advisors to student organizations, teams, student advisory boards, and committees;
- Athletic coaches and trainers; and
- Administrative staff in various academic and administrative departments of the college who have close and frequent contacts with students.[3]

By providing support to students in various capacities, student-life staff members help students with a multitude of issues. Although they are not mental-health clinicians, student-life staff members are, by reason of their contacts with students, potentially in a position to become aware of students' mental problems.

Amici are concerned that the Superior Court's summary judgment ruling may have detrimental effects on these extensive student support systems, which are important and beneficial both for those students who need mental health care and those who do not. The Superior Court's ruling appears to hold that student-life staff members who are not

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[3] A number of the amici have more than 1,000 individuals who are not mental-health clinicians filling student-life roles of the sorts described above.

mental-health practitioners have a duty to prevent a student's suicide if they are "aware" of the student's mental problems and can "reasonably foresee" that the student might harm himself or herself.

This ruling turns settled tort law on its head. It also creates the specter of wide-reaching and indeterminate liability for large numbers of student-life staff members who do not have, nor purport to have, the expert medical and psychological skills to provide the clinical help that mentally troubled students need. Where these non-clinician staff members play a vital role at colleges, and one from which all students can potentially benefit, it is unwise and unfair to saddle them with a duty to prevent suicide because, in performing that role, they may become aware of a student's mental problems. Indeed, the ruling puts these caring staff members in a quandary that threatens their ability to continue offering the level of support they are dedicated to providing.

Due to the ruling's in terrorem effect on colleges across the nation, and the fact that, absent interlocutory review, the ruling will continue to cast an unwarranted pall on the broader university community for years to come,

Amici urge this Court to accept immediate interlocutory review of, and to reverse, the Superior Court's erroneous ruling.

ARGUMENT

I. THE SUPERIOR COURT'S RULING IS WRONG AS A MATTER OF LAW AND CONTRARY TO SOUND PUBLIC POLICY.

A. The Ruling Departs from Settled Precedents Relating to the Duty to Prevent Suicide.

The Superior Court held that two student-life staff members at MIT, neither of whom was a mental-health clinician, had a duty to prevent the suicide of Elizabeth Shin, a sophomore at MIT. The Court, however, expressly acknowledged that these staff members did not have physical custody of Elizabeth, nor did they cause her mental illness or deprive her of the ability to seek help for her illness, which are the only elements on which Massachusetts law has recognized a duty to prevent suicide for a non-clinician. Memorandum of Decision ("MOD") at 20, citing Nelson v. Mass. Port Auth., 55 Mass. App. Ct. 433, 435-36 (2002).

Particularly where the determination of a defendant's duty requires the weighing of complex, subtle, and competing policy interests, as is the case with the duty to prevent suicide, there is no tenable justification for the Superior Court's imposition of a duty in circumstances where no Massachusetts court has ever held a duty to exist.

See also, e.g., Jain v. State of Iowa, 617 N.W.2d 293, 299-300 (2000) (university personnel who were not mental-health clinicians had no duty to prevent student's suicide where they did not prevent him from seeking help).

B. Public Policy Considerations Counsel Strongly Against Imposing a Duty to Prevent Suicide Based Solely on Foreseeability.

The Superior Court also erred in holding that student-life staff members who are not mental-health clinicians should be held to a duty to prevent suicide on a finding that they were "aware" of a student's mental problems and could "reasonably foresee that she would hurt herself without proper supervision." MOD at 24. As detailed below, this ruling conflicts with accepted principles of tort law and is unsound as a matter of public policy.

1. The Ruling Threatens Indeterminate and Unwarranted Liability.

In suggesting that a student-life staff member who is not a mental-health clinician has a duty to prevent a student's suicide if he or she is aware of a student's mental problems and if the risk of harm is foreseeable, the Superior Court's ruling has the potential to impose unwarranted liability on vast and indeterminate categories of persons. If the extent of "foreseeability" were in fact the determining factor in deciding who owes a duty,

liability would be defined by nothing more than an after-the-fact assessment of what was "foreseeable," and to whom. Such an outcome is plainly untenable; indeed, accepted tort law flatly rejects the notion that mere foreseeability of harm is sufficient to create a duty. See, e.g., Restatement (Second) of Torts, §314 ("[t]he actor's realization 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"). Because the Superior Court's ruling is wrong as a matter of law, and because it casts far too wide and indiscriminate a net of potential liability, it should be reviewed and reversed.

2. Imposing a Duty to Prevent Suicide on Student-Life Staff Members Who Are Not Expert Mental-Health Clinicians Will Make It More Difficult for Colleges to Support Their Students.

The Superior Court's imposition of a duty to prevent suicide based on awareness of a student's mental problem and foreseeability of harm is also undesirable as a matter of public policy, for a number of reasons. Perhaps most significantly, the summary judgment ruling ignores the fact that predicting the likelihood of suicide involves complex psychological assessments, and, as such, is extraordinarily difficult even for mental health professionals, much less lay persons who do not have the mental health expertise to

discharge the duty the ruling appears to impose on them. Thus, the ruling not only imposes an untenable burden on non-clinicians, it also creates incentives for non-clinicians to act in ways that may be inconsistent with the judgment of treating clinicians, and that may not be in the ultimate best interests of troubled students (or others).

a. The Ruling Is Likely to Adversely Affect Colleges' Relationships with Troubled Students.

If student-life staff members who are not mental-health clinicians believe that they may be held liable for failing to prevent a student's suicide, even if that student is under the care of a psychiatrist, as in Shin, they will likely feel pressure to act in ways that may not necessarily be to the best advantage of troubled students, and that may even conflict with the judgment of treating mental-health professionals. Thus, for example, a mental-health clinician who is treating a troubled student who has expressed suicidal thoughts may determine that hospitalization is not needed, and, indeed, may even be detrimental. In view of the Superior Court's ruling, however, a non-clinician student-life staff member may be more likely to press for the student's involuntary hospitalization. Similarly, a psychiatrist who is treating a student of majority age may determine that her parents

contribute significantly to those problems and should not be notified for fear that their intervention and reactions may exacerbate her condition and make her more likely to carry out a suicide threat. Again, however, consideration of the Superior Court's ruling may lead a student-life staff member who is not a mental-health clinician to feel pressure to inform the parents. A ruling that creates incentives for non-clinicians to second-guess the treating decisions of mental-health professionals makes no sense at all.

In view of the ruling, student-life staff members who are not mental-health clinicians may also be more inclined to seek to separate a student from the university if he or she threatens suicide.[4] Such separation, however, may disrupt the student's treatment, and thus may make it more likely that the student will actually commit suicide. Separation would make it difficult or impossible for the student to continue receiving treatment from the mental-health clinicians who are familiar with his condition and

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[4] College disciplinary policies generally allow the separation of a student who engages in conduct that creates a danger to himself or others. Plainly suicide threats, particularly ones that involve instrumentalities such as knives, guns, or fire, fall into this category of conduct, as they indicate a possibility of harm not only to the troubled student but potentially to others.

who can best evaluate, assess, and respond to his risk of suicide. Separation would also be likely to render the student ineligible to receive college mental-health services, which, in many instances, may be the only such resources available to him.[5]

The ruling may also affect the actions of mental-health clinicians in dealing with troubled students. Thus, mental-health clinicians who are treating a troubled student may hesitate to coordinate their treatment with non-clinical student-life staff members (as, for example, approaching a student-life staff member to act as a liaison in helping the student obtain relief from or extensions of academic requirements) due to concern that the student-life staff members will feel pressure to take action on their own.

Additionally, the ruling may result in the identification of fewer troubled students who could benefit from professional mental health care. If students believe

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[5] That troubled students benefit from remaining in college is suggested by statistics which have shown that, for the past 40 years, and matched for age and sex, individuals who are enrolled in college commit suicide at one-half the rate of individuals who are not enrolled in college. The National Survey of Counseling Center Directors (National Survey) conducted by Robert Gallagher, Ed.D., at the University of Pittsburgh under the auspices of the International Association of Counseling Services.

that college staff may notify their parents or seek to hospitalize them if they disclose their mental problems or suicidal thoughts, they may decline to provide important information about their mental-health history; they may entirely avoid seeking help for their problems, whether from mental-health clinicians or from student-life staff members who are not clinicians; or, if they do make an effort to get help, they may not be fully honest.

By the same token, if student-life staff members who are not mental-health clinicians believe they may be held to a duty to prevent suicide if they are "aware" of a student's mental problems, they may be reluctant to become involved with the problems of a troubled student out of concern that they do not have the mental-health expertise that is needed to address those students' mental problems. Indeed, such a result appears particularly likely in view of a Pennsylvania court's decision in Mahoney v. Allegheny College, No. AD 892-2003 (Penn. Comm. Pl. Dec. 22, 2005). In Allegheny, the court declined to hold non-professional, student-life staff members liable for a student's suicide, based in part on the court's determination that a contrary ruling would have undesirable public policy implications similar to those outlined above. See, e.g., Allegheny, slip op. at 23 (noting that the notion of a "'duty of

nonprofessionally trained persons to notify … 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"); id. at 20 ("[c]oncomitant 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 [and] student right of privacy"; "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").

The Allegheny court deemed the Superior Court's ruling in this case (Shin) to be "non-persuasive," and noted that its test for a "'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." Id. at 23. Notwithstanding its evident disapproval of the Shin summary judgment ruling, however, the Allegheny court

did not reject Shin's approach outright, but instead distinguished the ruling on its facts. Specifically, the Allegheny court held that the non-professional staff members in Allegheny, unlike here, did not have knowledge of "the student[']s assertions that [she was] going to kill [herself] as well as [her] past and contemporaneous attempts to do so." Id. at 23 (emphasis added).

Any prudent reader of the summary judgment rulings in Allegheny and Shin would have to conclude that, given the current state of the law, the better course for a staff member who is not a mental-health clinician would be to not become involved with a student's mental problems. This likely response, however, would serve no beneficial function at all. Rather than avoiding such involvement, it would be far preferable for a college's student-life staff to learn of a student's mental problems, including suicidal thoughts, and encourage him to see an expert mental-health clinician to address those problems.[6]

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[6] The benefits of community engagement of troubled students is suggested by a United States Air Force study which found that, in providing psychological support for a population of young adults, it is important for the surrounding community to strive to identify individuals in distress and refer them to mental-health professionals. See Knox, K.L., Litts, D., Talcott G.W. Feig, J.C., Caine,, E.D., "Reduced risk for suicide and related adverse outcomes following exposure to a suicide prevention program

b. The Ruling Will Interfere with Colleges' Ability to Support Their Students as a Whole.

Imposing a duty to prevent student suicides on student-life staff members who are not mental-health clinicians may also affect colleges' ability to support their students as a whole. If non-clinician student-life staff members, who include faculty, students, administrators, and other college staff, believe that they may be held responsible for student suicides, colleges will have more difficulties in enlisting, assigning, and retaining capable staff for residential and student-life positions. The summary judgment ruling is therefore likely to reduce the number of student-life staff who could otherwise provide students with needed support and guidance, not to mention affect the willingness of other members of the academic community to engage with students. As a result, less support will be available for students with the more routine variety of problems, as well as for mentally troubled students.

In short, the ruling is plainly unsound and undesirable as a matter of public policy because it creates incentives that are counterproductive to the identification

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in the United States Air Force." British Medical Journal 2003; 327:1376-1380.

and treatment of mentally ill students, as well as to the support of college students in general.

II. THE DETRIMENTAL EFFECTS OF THE SUPERIOR COURT'S RULING ARE NOT ONLY THEORETICAL BUT HIGHLY LIKELY.

The public policy problems created by the Superior Court's opinion are not merely theoretical, but highly likely. The Shin case has been widely publicized in the national media, both print and broadcast.[7] The Shin summary judgment ruling has been the subject of a number of articles in the Chronicle of Higher Education, an influential journal that covers issues relevant to colleges and universities, as well as other journals. Due to the ruling's startling and unsettling outcome, it has had strong and continued repercussions in the university community since it was issued. Virtually every college and university in the country is aware of the decision, and concerns about the case have been discussed at multiple

[7] Among other publicity, the Shin case was the subject of the cover article in the New York Times Sunday Magazine on April 28, 2002, and the Shin plaintiffs appeared on national television about the case.

university conferences.[8] Thus, the decision does not exist in a vacuum, but is actually affecting the thinking, and ineluctably the actions, of the members of the university community.[9]

At the same time, the issues on which the ruling touches - the emotional and mental problems of today's college students, and colleges' attempts to address those problems - are issues of significant proportions. A 2005 survey of more than 50,000 American college students found that substantial numbers suffer from significant psychological distress. Some 11% of women surveyed, and 9% of men, reported having seriously considered attempting suicide. American College Health Association, National

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[8] For example, the National Association of Student Personnel Administrators ("NASPA") held a web conference on October 12, 2005, that dealt in depth with the summary judgment ruling in Shin. The National Association of College and University Attorneys ("NACUA") held a web seminar on October 14, 2005, that addressed the legal and policy issues involved in connection with distressed and suicidal students, and which included discussion of the Shin ruling. A NASPA meeting in January 2006 relating to student mental health issues likewise addressed the Shin ruling.

[9] See also Katharine A. Kaplan, Troubled Students Feel College Nudges Them Off Campus, Harvard Crimson, Jan. 23, 2004, at 6 (voicing concerns that colleges are seeking to protect themselves from liability by trying to push students with more serious mental health problems off campus, and that, according to a commentator, the Shin case "holds 'major significance' for universities' legal responsibilities for mentally ill students").

College Health Assessment, Updated September 2005 (available at http://www.acha.org/projects_programs/ncha_sampledata.cfm.2005).

Colleges make considerable efforts to meet the emotional and mental-health needs of their students, including making provisions for mental-health services for their students. For example, Ivy League universities provide psychological support services to some 12% to 18% of their student populations annually.[10] The number of students in need of psychological services is likely even higher than this figure indicates, as cultural barriers among some groups, as well as individual tendencies, lead some populations of students to underutilize counseling services. Thus, it is clear that, by creating the incentives and pressures that are outlined above, Shin's imposition of a duty on non-clinician student-life staff members to take action with respect to students' perceived mental problems may potentially affect large numbers of students who are either currently receiving psychiatric or psychological help, or who, if identified, could benefit from such help.

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[10] Personal Correspondence, Gregory Eells, Ph.D., Director of Counseling & Psychological Services, Cornell University, 2005.

As noted above, colleges also endeavor to provide a support network for all of their students, not merely those who have mental or psychological problems. Student-life staff members who are not mental clinicians are critical elements in this support network. However, the Superior Court's ruling puts these caring student-life staff members to an impossible choice: either assuming a duty they are not qualified to fulfill (i.e., preventing suicide), or not offering the level of support they are committed to providing. That this is no theoretical quandary is evident in the fact that student-life deans at colleges have begun questioning whether they can remain in student-life roles, under a potential duty to prevent student suicides, when they do not have mental-health expertise. Accordingly, by its tendency to limit and interfere with the support network that colleges provide for their students, the Superior Court's ruling also threatens to have adverse effects on significant numbers of students who may experience some degree of emotional or other problems at college (as many students do) but who will never even attempt suicide.

CONCLUSION

In short, the Superior Court's ruling is wrong, as a matter of law and of public policy. By creating

motivations for clinicians, non-clinician staff, and troubled students to act in ways that may not ultimately be conducive to the well-being of troubled students (or others), the ruling has an unsettling effect on colleges and their efforts to maintain beneficial support relationships with their students. Given that the trial in this action is scheduled for May 2006, the Superior Court's ruling, in the ordinary course, might not be reviewed for several more years. To end the needless disruption and confusion attendant to the Superior Court's ruling, the Amici respectfully urge this Court to take interlocutory review of that ruling and reverse it.

Respectfully submitted,

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Dated: February 24, 2006

PROOF OF SERVICE

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

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