In the
Supreme Judicial Court
of the
Commonwealth of Massachusetts

Case No.: SJC-12329

DZUNG DUY NGUYEN, as Administrator of
the Estate of HAN DUY NGUYEN,

Plaintiff/Appellant,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
BIRGER WERNERFELT, DRAZEN PRELEC
and DAVID W. RANDALL,

Defendants/Appellees.

Appeal From the Middlesex County Superior Court

Brief of the Plaintiff-Appellant

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II. Issues Presented for Review

A. Whether MIT and its responsible employees, who knew that MIT student, Han Duy Nguyen, was at serious risk of suicide, owed a duty to use reasonable care in relation to that known risk of death?

B. Whether the Superior Court erred when it determined, as matter of law, that the Defendants' conduct, in light of the known risk of Han's suicide, could not be properly found by a jury to constitute gross negligence or recklessness?

C. Whether the Superior Court erred when it determined on the factual record presented that the Plaintiff would be unable to prove: (1) a breach of contract between Han and MIT; and, (2) that Han suffered conscious pain and suffering before and during his suicide?

D. Discovery revealed that former MIT Chancellor Phillip Clay was the MIT employee responsible for ensuring properly coordinated student support services including those designed to address the foreseeable and foreseen risk of student suicide. Where MIT is asserting a charitable immunity defense, was it reversible error for the Superior Court to deny the Plaintiff's motion to amend his Complaint to assert claims against Clay on futility grounds?

III. Statement of Prior Proceedings

This punitive damages/wrongful death case arises out of the foreseeable, preventable and tragic June 2, 2009, death of MIT student, Han Duy Nguyen. *See* III, 349 (operative amended complaint and attachments).[1]

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[1] References to the 9-volume Record Appendix will be in the form of "Volume #, Tab # (if appropriate), Pg. #."

On January 6, 2015, the Superior Court (Henry, J.) denied cross-motions for summary judgment relating to the MIT-Defendants' effort to convert this wrongful death case into a worker's compensation claim. II, 555. On July 10, 2015, another Justice (Salinger, J.), without hearing, denied the Plaintiff's motion to amend his complaint to assert claims against Phillip Clay, the former Chancellor of MIT, reasoning that the motion to amend would be futile given its conclusion that Clay owed no duty of care to the decedent. III, 485.

The parties next filed cross-motions for summary judgment focused on the issue of the duty of care owed to Han by the Defendants. IV, 5, 43, 76, 96. On October 18, 2016, the Court (Henry, J.), allowed the Defendants' motion for summary judgment and simultaneously denied Plaintiff's cross-motion, ruling that the Defendants owed the decedent no duty of care. IX, 130.

Final judgment dismissing all of the Plaintiff's claims was docketed on October 18, 2016. I, 31. On November 10, 2016, the Plaintiff filed a timely Notice of Appeal. I, 32; IX, 168. The MIT Defendants have cross-appealed. I, 32; IX, 171.

IV. Facts Relevant to the Plaintiff's Appeal

A. Introduction

Suicide is the second leading cause of death among the college-aged demographic and it is the cause of approximately 1,100 college student deaths each year. IV, 187, SMF¶138; VIII, Tab 189A, 158; VIII, Tab 189B, 243. As of 2017, 106 Massachusetts colleges and universities [Institution of Higher Education or IHE] provide services to 343,284 students.[2] MIT is internationally recognized as one of the world's best and most academically challenging IHEs. The academic rigors and atmosphere at MIT have, over the years, resulted in extreme stress for its students and MIT has been plagued by student suicides. IV, 187, SMF¶138. At least 23 documented MIT student suicides occurred between 1990 and 2015. *Id.;* III, 127 (chart); VIII, Tab 189B, 244. For decades, a rough average of one MIT student a year commits suicide. *See id.* This is a higher suicide rate than other IHEs, *see id.*, and its Asian-American suicide rate has been noted to be "four times the national average."[3]

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[2] *See* http://www.collegesimply.com/colleges/massachusetts/ (Last visited March 28, 2017).

[3] http://www.globaltimes.cn/content/981604.shtml (Last visited April 14, 2017); *see* Patrick Healy, *11 Years, 11 Suicides*, The Boston Globe, Feb. 5, 2001, at A1 ("Of the 12 schools that made data available, MIT had the highest suicide rate: 10.2 per 100,000 undergraduate and graduate students" where at all colleges, experts

All of the above was known to MIT and its senior leadership. IV, 187, SMF¶138. Indeed, in the wake of the suicide of MIT student, Elizabeth Shin, MIT's former Senior Associate Dean Robert Randolph, who was intimately involved in MIT's response to student suicides, was quoted in 2002 as saying "[t]here are those who take a quiet pride in the fact that M.I.T. is so tough that students are driven to their death[.]" VII, Tab 172, 493; VIII, Tab 193, 314.

B. MIT's Response to the Risk of Student Suicide

Six years before Han arrived on campus, MIT formed an in-house Mental Health Task Force [MHTF] to address known inadequacies and failings with its mental health and student support services and its frequent student suicides. IV, 190-92, SMF¶139. The MHTF's 2001 final report, VII, Tab 175, 523-45, included the following recommendations:

- Increase the Staffing of MIT Mental Health by 11-15 Full-Time Equivalents [FTEs], *see id.* at 529-30;
- Shift student mental health care in house, see *id.* at 529;
- Create a position of Administrative Coordinator of Campus Support Services, responsible for, among other things, coordinating MIT support services, the creation of communication channels between the various

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estimate that "7 undergraduates per 100,000 kill themselves.") VII, Tab 166, 367; https://www.boston globe.com/metro/2015/03/16/suicide-rate-mit-higher-than-national-average/1aGWr7lRjiEyhoD1WIT78I/story.html

support services, training and serving as a resource for students, departmental liaisons, faculty and staff, *see id.* at 531;

- Create a Standing Committee on Mental Health Drawing Directly on Presidential Level Support, *see id.*;
- Hold Annual Strategy Sessions for Improving Student Support Services, *see id.* at 532;
- Clarify Communication Protocols Around Critical Incidents (such as suicidal behavior) including: (1) defining communication standards for students; and, (2) clarifying the chain of communication for key personnel who will be informed in the case of a critical incident; *see id.*;
- Provide Yearly Training Sessions for Faculty members on how to recognize depression and other mental health problems, what to do when they are worried about a student, and what support services are available on campus, *see id.* at 535.

Phillip Clay [Clay], MIT's Chancellor from 2001-11, was responsible for implementing the MHTF's recommendations, *see* VI, Tab 134, 307, and, on multiple occasions, he and MIT issued statements indicating that they would do so. Clay "fully embraced" the MHTF recommendations, that were "supportive of our graduate and undergraduate students[,]" *see* VII, Tab 167, 376. The November 28, 2001, edition of *MIT News*, quoted Clay as saying the MHTF recommendations:

> in the areas of improving and expanding services, coordinating services, and increasing and improving education and outreach are very well framed. [] Their suggestions for a process, including a campus coordinator and a committee to monitor implementation, <u>are appropriate and will be implemented</u>.

VIII, Tab 179, 81 (emphasis added). Clay further stated that MIT was searching for a Coordinator of Support Services, that he would "appoint an advisory group" to "assist in the implementation of these proposals[,]" *see id.* at 82, and that he "will appoint MIT's first high level advisor on student mental health issues." *See* VII, Tab 167, 376. In 2006, following the settlement of three other MIT student suicide cases including *Shin v. MIT*, MIT issued a press release, in which Clay touted MIT's "suicide prevention initiatives with presidential level support[,]" and "training programs for those involved in [] identifying students at risk." VII, Tab 177, 558. Clay's reference to such initiatives meant the implementation of the MHTF recommendations. *See* VI, Tab 134, 506-08 (Clay Dep. Tr. 252:13-254:7). Thus, MIT publicly and repeatedly represented that it had identified areas where improvement was necessary and was making, or had made, required changes.

Contrary to these public declarations, Clay, MIT's 30(b)(6) designee, testified here that he and MIT chose not to implement many of the MHTF recommendations including the: (1) implementation of a hand off policy,[4]

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[4] Kristine Girard, M.D., the Associate Chief of MIT Mental Health, was the primary author of the MHTF report. Her recommendations for a handoff policy arose out of the MHTF. VII, Tab 176, 549-51. Dr. Girard left

see VI, Tab 134, 427-28, 447-48; and, (2) annual training of MIT's faculty so they could recognize mental health issues and understand how to properly refer students to on-campus supports. *See id.* at 483-84.[5]

In 2006, the publicly-made MHTF recommendations were echoed by fifteen (15) Massachusetts IHEs that filed an *amicus* brief, in support of MIT in *Shin v. MIT*. VIII, Tab 181, 94-97. The industry standard, as early as 2000, according to the *amici* IHEs, called for non-clinicians to refer students known to be at risk of suicide to mental health professionals. IV, 196,

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MIT in 2010 after 14 years. In 2012, she was the primary author, along with Peter Reich, M.D., the former Chief of MIT Mental Health, et al., of *The Challenge of Mental Health Crises in College Settings*, published by the Harvard Health Policy Review. *See* VIII, Tab 180. Drawing on experiences at MIT, *see* VII, Tab 176, 552-53, the article described handoff policies, as:

> Established and well publicized institutional policies and procedures to facilitate handoffs by faculty to appropriate support personnel are essential for prevention of crises and to contain the anxiety that faculty experience when encountering students of concern.

VIII, Tab 180, 90.

[5] MIT and Clay also chose not to: (1) move all student mental health in house, *see* VI, Tab 134, 451-52; (2) create an Administrative Coordinator of Campus Support Services, *see id.* at 458-59; (3) hire all of the recommended additional staffing at MIT mental health, *see id.* at 460-61; (4) form a standing committee on mental health drawing directly on presidential level support, *see id.* at 469-70; and, (5) hold annual strategy sessions for improving Student Services, *see id.* at 471-73.

SMF¶145. This standard was established and clearly known to MIT as of 2006-09. Clay's 30(b)(6) testimony confirmed as much when he testified that it was well-known that some students at MIT struggled with mental health issues.[6] *See* VI, Tab 134, 426-27. Clay explained that when "anybody at MIT[,]" including faculty, "felt that a student was at risk, they are under an obligation" to seek advice from MIT Medical or Student Support Services [S^3], or even walk the student to Medical. *See id.* at 324-26 (emphasis supplied). Clay further admitted that the bundle of services MIT provides to its students – *including its Ph.D. students* – includes a coordinated Mental Health/S^3 group of services that MIT advertises. *See id.* at 426-27.

Student suicide *is preventable* and prevention programs are ubiquitous in the industry. *See* VIII, Tab 188; Tab 189A, 163-64, 168; Tab 189B, 244-46. Well-established programs like that at the University of Illinois, which was implemented in 1984, have cut student suicide incidence rates by more than half (55.4%) at a cost of $1.35/student. VIII, Tab 188, 117, 135, 142. MIT's incidence of student suicides, however, has remained disturbingly high. *See supra* n.3; VII, Tab

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6 Han was one of at least 10 MIT student suicides during Chancellor Clay's 11 years in office. *See* III, 127 (chart); VII, Tabs 173-74 (death certificates).

173, Tab 174; VIII, Tab 189B, 244. Despite identified problems and hollow claims of progress, MIT's broadly-viewed student support services have been plagued with ineffective communications, a lack of coordination of services and the failure to provide its employees with the tools, resources and training necessary to effectively address student suicidality. This has resulted in preventable student suicides that are directly attributable to MIT's failure to exercise reasonable care in the face of *known* risks of student death.

C. Han's Life and Death at MIT

On March 1, 2006, Birger Wernerfelt, the faculty head of the MIT Sloan Ph.D. program, offered admission to the "Doctoral Program of the Sloan School of Management for September 2006" to Han Duy Nguyen. VI, Tab 130, 167-68; VIII, Tab 190. Following his graduation from Stanford, Han entered MIT's Ph.D. program in September of 2006 with Wernerfelt as his faculty advisor. VI, Tab 130, 86; Tab 131, 229; VIII, Tab 190, 303.

By May 25, 2007, MIT knew Han was having serious problems and he accepted a referral to MIT's Disabilities Services Office [DSO]. *See* V, Tab 86, 389-91. By July 9, 2007, Han was referred to MIT Mental

Health, where he met with Celene Barnes, Psy.D. V, Tab 91, 415-16. On July 25, 2007, Han returned to MIT Mental Health seeking further help. *See id.* at 417-21. Dr. Barnes conducted a suicide risk assessment, during which Han reported a long history of Major Depressive Disorder [MDD] with two suicide attempts during college. *See id.* Dr. Barnes found Han to be a "moderate" suicide risk,[7] presenting with several suicide risk

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[7] As explained by Plaintiff's experts, Han's treating mental health providers, and other prominent figures in the higher education and mental health fields, labels related to imminence of suicide risk are of limited value, *see* VIII, Tab 189A, 163, Tab 189B, 249-52; VII, Tab 139, 126 (Dr. Worthington Dep. Tr. 29:15-24) ("none of it's good"), and such a focus is a "shortcoming that exists" in responses that rely on the "presence of imminent risk of harm to self." *See* VIII, Tab 188, 128-29. Paul Joffe, Ph.D., the architect of the University of Illinois' successful suicide prevention program, explained in 2003:

> The leverage afforded the [IHE] community when the threshold of imminent risk has been reached is well developed at colleges and universities. Unfortunately, only a small percentage of students displaying suicidal intent reach this threshold. Also the leverage afforded by imminent risk persists for only a short period of time immediately surrounding the suicidal crisis and vanishes as soon as it is over.

Id. at 129. Thus, the focus should be on "proximal risk" which refers to "the increased risk of suicide associated with displays of a wide range of suicidal intent in the year following that display. *Id.* It was estimated that a student who threatened or attempted suicide was 543 times more likely to commit suicide in the following year than [students] who had not threatened or attempted." *Id.*

The adoption of an imminence requirement by this Court would eviscerate decades of effort to save

factors including: (a) the presence of MDD; (b) a history of previous suicide attempts; and, (c) few, if any, social supports at MIT. See *id.* No one from MIT Mental Health ever saw Han again.

Instead, in September of 2007, Han took another referral and met with Dean David W. Randall, Ph.D. [Randall], a licensed psychologist, at MIT's S^3. V, Tab 95, 446.[8] Randall noted safety concerns arising out of Han's suicidality (reported depression, two past suicide attempts and Han's frequent suicidal thoughts), V, Tab 96, 448, and was so alarmed that without Han's permission he spoke with Han's MGH-affiliated, outside treating mental health provider, Dr. John Worthington,

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students by dramatically undercutting what is already known, and done, by reasonably prudent IHEs.

[8] S^3 is different than MIT Mental Health. S^3 "Counseling Deans" like Randall do not establish a clinician-patient relationship with students. *See* IV, 108-10, SMF¶4. Rather, they provide students information and are expected to coordinate services to be provided to students by MIT's "Institute-wide network of support services[.]" *Id.* The MHTF described that network as including:

> MIT Medical Mental Health Service, Counseling & Support Services (CSS) [renamed S^3 during Han's time], Health Educators, the Office of Disabilities Services (DSO), the chaplaincy, housemasters, graduate resident tutors (GRTs), residential advisors (Ras), residential life associates (RLAs), the Office of the Dean for Student Life, Nightline, MedLINKS, faculty advisors, the Obbuds Office, the Campus Police, and informal contacts with other staff, faculty and peers.

See VII, Tab 175 at 524-25.

as well as Dr. Barnes at MIT Mental Health. *See* V, Tab 97, 450; Tab 98, 452; Tab 99, 454-55. Dr. Worthington's notes of his contact with Dean Randall demonstrate that Han's psychiatric decompensation was patently apparent at MIT. Worthington wrote that Randall:

> said that in multiple offices at MIT the student/patient has presented as agitated and paranoid, and has talked about having "consistent suicidal ideation for a long time" though not having a plan. The dean said he was going to try to get a full Release of Information form signed by his student and I told him that until then I could listen to his concerns, especially about safety.

See V, Tab 97, 450. Thereafter, on September 28, 2007, after Han's last contact with him, Randall emailed Dr. Barnes at MIT Mental Health to share Dr. Worthington's warning that the safety concerns "should be taken seriously." V, Tab 101, 459. Randall ended this email to Dr. Barnes with "Let's keep in touch about this student." *Id.* Dr. Barnes replied: "I agree, let's definitely keep in touch about him." *Id.*

Dean Randall and Dr. Barnes never communicated again about Han nor followed up in any manner regarding their serious safety concerns about Han's risk of suicide. IV, 200, SMF¶150. As a result, Han fell through gaps in MIT's publicly-touted student support services and his faculty advisors were left to address Han's suicidality without the coordinated supports that

MIT's in-house student support specialists were supposed to provide.[9]

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[9] The Superior Court erred in adopting as fact a defendant-friendly view of the conflicting evidence, blaming Han for this lack of follow through. *See* IX, 156, at n.17 (finding Han rejected assistance from MIT Mental Health); *id.* at 158-59 (noting Han "expressly rejected assistance from MIT Mental Health"). Fairly viewed, in accord with the required standard of review, the record reveals facts to the contrary. Han accepted referrals to, and received services from, DSO, MIT Mental Health and S^3. Han's last email to Dr. Barnes at Mental Health ended by thanking her for "all of her effort thus far." V, Tab 91, 423. His last email to Dean Randall at S^3 indicated a willingness to continue services with S^3 if they could offer a certain type of help. IV, 199, SMF¶149; V, Tab 98, 452. Han willingly disclosed his MDD, suicidal ideation and prior suicide attempts. Han's treating mental health providers, including Dr. Fortgang, Dr. Amira and Ms. Murphy, all testified Han was motivated to get effective treatment and wanted to get better. *See* VII, Tab 151, 281 (Fortgang Dep. Tr. 226:18-227:8); Tab 144, 189 (Amira Dep. Tr. 145:4-8); Tab 141, 149, 151-52 (Murphy Dep. Tr. 133:10-21, 137:21-23, 138:1-7). In short, Han's actions were a far cry from the wholly non-cooperative attributes with which the Defendants - who were not suffering psychiatric illness - attempt to tar him. As detailed for the Court below, student reticence in such situations is commonplace. *See* VIII, Tab 189A, 164; Tab 189B, 249-50; Tab 189C, 276. MIT's employees were responsible to follow through regardless. *See id.*; V, Tab 92, 439 (Barnes Dep. Tr., 111:9-14). On this record, such contested factual issues are properly left to the jury, and cannot properly form the foundation of a no duty finding. *Compare Carman v. Shaffer*, Civil No. 03-05154, slip op., (Middlesex Super. Ct. Aug. 6, 2009) (Henry, J.) (Superior Court, under duty analysis, effectively making a causation or comparative negligence finding as a matter of law) *with Commerce Ins. Co. v. Ultimate Livery, Inc.*, 452 Mass. 639, 650-51 (2008) ["Ultimate Livery"] (victim's conduct is factor for jury to consider in connection with breach and causation analysis rather than "Neanderthal" view of causation that blames the victim only).

In May of 2008, MIT administrative assistant, Drew Kresman, approached Assistant Marketing Professor Michael Braun with Kresman's concerns about Han being in "danger of committing suicide" based on Kresman's observations. IV, 164-66, SMF¶103. On May 9, Braun emailed Han's other faculty advisor, Professor Drazen Prelec [Prelec], with these concerns about Han's "overall mental state and well-being" that were "big enough for us not to ignore[.]" *Id.*, 200-03, SMF¶¶151-56. Confirming the untrained status of MIT's employees, Braun continued: "beyond that[,] I have no idea what to do[.]" *Id.*, 164-66, 201-02, SMF¶¶103, 151-52. Prelec replied that he and Wernerfelt were aware of the issues and were working with MIT resources to deal with them. *Id.*, 164-66, 201-02, 203, SMF¶¶ 103, 152, 154. Prelec reiterated this when Braun checked a week later regarding concerns with Han. *Id.*, 203-04, SMF¶¶156-57.

Later that month, on May 26, 2008, yet another MIT faculty member, Bengt Holmstrom, emailed Wernerfelt to express his concerns about Han. IV, 204, SMF¶158; V, Tab 105, 21. Han, who was a student in Holmstrom's economics class, told Holmstrom that he "has had medical problems that have prevented him from focusing on classes." *See id.* Holmstrom emailed Wernerfelt that "[a]n unusual feature of the case is that no one from

the graduate school has written me to let me know that Han has been ill." *Id.* Wernerfelt, despite viewing Han's performance in Holmstrom's class as "not a particularly serious situation for Han[,]" and "not a big deal" *see* VI, Tab 130, 194, replied that Han:

> is a Sloan PhD student and yes, **he is having serious problems. Some of his issues seem to peak at exam time, but there is much more to it tha[n] that.** He has been seeing a psychiatrist at MGH (not MIT) as long as he has been here. I thus have no official information, **but I do believe that he is at risk.** He is taking generals in August and we have changed the nature of the exam to reduce the pressure on him. In addition, we have pretty much decided to pass him no matter what.

IV, 170-71, 204, SMF¶¶108 (emphasis supplied), 158. Wernerfelt requested that accommodations be made. *Id.* Holmstrom agreed to be lenient. *Id.*

On June 2, 2008, one year before Han's death, Wernerfelt emailed Han's Sloan Professors that, "[f]or reasons we would be happy to discuss, Drazen [Prelec] and I have decided to reduce the pressure on Han by spreading out his generals over several weeks." IV, 170, SMF¶107; VII, Tab 160, 345. Contemporaneous emails confirm that modifications and accommodations were made to "lower the stress level Han's facing, which had threatened his mental health." *Id.*; VII, Tab 161, 348. Wernerfelt ultimately admitted at his deposition that the changes were made because he was concerned about

the chance of the "very great harm" of Han hurting himself if he did not pass his exams. IV, 170-71, SMF¶108; *see* VI, Tab 130, 203-04, 217-18.

Han's mental status continued to decline. About four (4) months before Han's death, on January 27, 2009, V, Tab 103, 476-77, at a Marketing Group faculty meeting following Han's oral general exams, Wernerfelt warned his colleagues that Han was at serious risk of suicide, IV, 176, SMF¶117, and repeatedly indicated that he did not want Han's blood on his hands.[10] *See id.* Han was conditionally passed. IV, 176-77, SMF¶118.

Han continued to decompensate during the Spring of 2009. According to his mental health providers, during the last months of Han's life, Han's sole stressors

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[10] The Superior Court's treatment of the evidence related to this "blood on their hands" warning is particularly troubling. *See* IX, 159-60. First, the Court elongated the time between this meeting and Han's death on June 2, 2009, from about four (4) months to six (6) months. *See id.* Second, the Court disregarded the testimony of multiple witnesses who were present when Wernerfelt warned of Han's "serious risk of suicide" *see* IV, 176, SMF¶117; 207, SMF¶165, while crediting Wernerfelt's explanation by way of *interrogatory responses* that were, of course, prepared by counsel years after the events in the context of litigation. *Compare* IV, 176, SMF¶117 *with* IX, 159. *See* VIII, Tab 189B, 250 (in light of such warning, MIT's student support services should have been brought to bear, which would have been in accord with good and accepted practices); *see also Foley v. Polaroid Corp.*, 400 Mass. 82, 83 (1987) (court "should not invade the province of the jury by substituting its judgment on questions of fact.").

were related to MIT where he felt unsupported and unliked. IV, 142-45, SMF¶¶57, 61. In an email dated March 22, 2009, addressed to Prelec and copied to Wernerfelt, Han noted his frustration with being unable to speak with Prelec, questioned Prelec's commitment to him in his role as Han's "graduate advisor" and notified the Defendants that:

> I've been thinking about what you and Birger told me about my performance in the PhD program after my generals. I didn't realize it at the time, but I realize now that when he said that my funding after my 4th year was not guaranteed for me [redacted] that meant that the department was threatening to cut off my funding after my 4th year in order to try to force me to leave the program. That would explain why he at that point tried to talk me into writing up our deception project as a thesis with which I could graduate at the end of this semester with a masters.
>
> ***
>
> **It hurt me very deeply to learn after my generals that the entire faculty thinks that I would not be a good professor, because to be a professor is what I want more than anything.**
>
> ***
>
> I'm not convinced that anyone has really taken my health issues into consideration in coming to their conclusion. But apparently, I don't have the support of the faculty in continuing with the PhD program.

See VII, 353-54 (emphasis supplied).[11]

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[11] The Superior Court, again reading the record through a defendant-friendly lens, erred in finding that Han's suicide was not reasonably foreseeable contrary to the Defendants' contemporaneous declarations and their written records. *See* IV, 154-77, 183-84, 197-214, SMF¶¶85-118, 131-32, 146-78. By way of other example, in addition to the factors at n.9-10, the Court took this email, sent by an at risk student two (2) months before his death, warning the defendants that "to be a professor is what [Han] wanted more than anything[,]"

Although Prelec previously agreed to write Han a recommendation for a UCLA summer program, VIII, Tab 199, 360, the day after Han questioned Prelec's commitment as his graduate advisor in the above email, Prelec emailed Wernerfelt that "[I] am getting fed up with his tone. Am considering not writing a letter for UCLA." *Id.*, Tab 200, 352. Wernerfelt responded: "I agree." *Id.* Han learned of this significant breach of higher education protocol on May 11, 2009, three weeks before his death, when he was rejected from the UCLA program and found out, by email, that Prelec had betrayed his promise and "never got around to submitting a letter." *Id.*, Tab 201, 355.

In late May, however, a possible summer position was found for Han at MIT's Department of Brain and

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as Han's "vow" to finish his Ph.D. *See* IX, 159. It dismissed Han's two prior suicide attempts as not requiring hospitalization, *id.*, despite uncontroverted evidence that "prior suicide attempts are the single biggest indicator of future attempts." VIII, Tab 189B, 247; Tab 189A, 163. It relied on Han's acceptance of a TA position for the fall of 2009, IX, 159, even though there is no indication in the record that Wernerfelt or Prelec knew about these plans. *See* VI, 56-57 (email between Han and M. Ritson). It took Han's excitement about getting a summer position, in addition to his having a Fall TA position, as undercutting foreseeability, IX at 159, rather than supporting the conclusion that Han's suicide was the result of an uncontrollable suicidal impulse. *See* VIII, Tab 189A, 170; Tab 189B, 252; Tab 189D, 298. Such findings are properly made by a jury.

Cognitive Sciences [BCS] with Trey Hedden, Prelec's colleague. At 7:17 a.m. the day Han died, Han emailed Hedden with various concerns about the position. *See* VI, Tab 124, 113-14. Prelec, who was copied on the email, again took offense to Han's "tone." IV, 181, 216, SMF¶¶127, 181. Thirty-eight (38) minutes later, Prelec emailed Wernerfelt with the subject line "trouble . . .[,]"

> Birger,
>
> I just got this below - I am wondering if you could talk to Han as a somewhat neutral party. Trey is a very good guy, I am sure Han is misreading things. Even so, the tone of reply is totally out of line
>
> Drazen

IV, 216, SMF¶181; VI, Tab 124, 113-14. Wernerfelt replied: "I am so sorry[.] I will talk to Han and let you know what he says." VI, Tab 122, 101.[12]

That morning Han was continuing research on the so-called "lie detection project," in a lab at MIT's building E19 located at 400 Main Street, Cambridge. IV, 183, SMF¶130. From 10:50 until 10:58 a.m., Wernerfelt spoke to Han by phone. IV, 216, SMF¶183. Shortly before

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[12] At the time, Wernerfelt was serving as the head of the Marketing Group Ph.D. program. VI, Tab 131, 242-43 (Wernerfelt Dep. Tr. 313:14-314:2).

11:00 a.m., the lab supervisor noted a commotion[13] and saw Han leave the room. IV, 183, SMF ¶130; *id.*, Tab 12, 366. Within four [4] minutes after the call with Wernerfelt, IV, 216-17, SMF¶¶183-84, Han made his way to the roof of the six (6) story building and leapt to his death at 11:02 a.m. IV, 185, 217, SMF ¶¶ 133, 184. At 11:04 a.m., Wernerfelt emailed Prelec a summation of his telephone conversation with Han, IV, 184, SMF¶132.

> I read him the riot act
> Explained what is wrong about the e-mail
> Told him you or I would look over future e-mails he send to BCS people
> I said that we know that he is not out to offend anyone but that he seems poor at navigating the academe
> Said that this is an example of why we all recommended that he take a MS and go out to get a job
> I talked about some papers he could turn into MS thesis and volunteered to supervise it
> Said that he made you look bad vs BCS and that some patching up was necessary
> He will call you about what to do

VI, Tab 124, 113-14. Later that day, Professor Glen Urban emailed Wernerfelt: "I know you were worried about suicide . . ." IV, 186-87, SMF¶136.[14]

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[13] The Superior Court accepted the defendant's assertion that Han's demeanor was "pretty normal." *Compare* IV, 183, SMF¶130 (MIT's assertion) *and* IX, 145 (Superior Court repeating MIT's version of events) *with* IV, 183, SMF¶130 (Plaintiff's response noting lab supervisor's contemporaneous report of a phone call, "some commotion" and Han leaving the room).

[14] Wernerfelt never responded to this email with a denial nor did he disclose to Han's grieving parents or

V. SUMMARY OF ARGUMENT

The defendants owed Han a duty of reasonable care: (1) under general negligence principles, *infra* at 22-36; (2) because of the special relationship between Han and them, *id.* at 36-43; and, (3) because they assumed a duty of care on which Han relied. *Id.* at 43-46. In addition, the record supports the Plaintiff's claims for punitive damages, *id.* at 46-49; breach of contract and conscious pain and suffering. *Id.* at 49-51. Lastly, given the overwhelming evidence, the Plaintiff's motion to amend to add former MIT Chancellor Clay as a defendant should have been allowed. *Id.* at 51-54.

VI. ARGUMENT

A. The Defendants Owed a Duty of Reasonable Care

1. Liability for Causing Suicide

Historically, recovery under negligence principles was permitted for a decedent's suicide when the defendant's negligence caused the decedent's uncontrollable suicidal impulse. *See Daniels v. New*

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investigating MIT police officers the "riot act" tenor of the final conversation or the existence of the related email. These actions, of course, are competent evidence of Wernerfelt's "consciousness of liability" for Han's death. *See* Mass. Guide to Evid. §1110, at 365-69 (2012). Indeed, during MIT's investigation, one of its own employees noted on a form, with contact information for Wernerfelt, an "8 min conversation w/Han before He Jumped. 'Smoking Gun'" VIII, Tab 192, 307 (emphasis in original).

York, N.H. & H.R.R., 183 Mass. 393, 397-400 (1903); *Freyermuth v. Lufty*, 376 Mass. 612, 619 n.6 (1978) (*citing* Restatement (Second) of Torts § 455 (1965)). Here, unlike any prior IHE student suicide case,[15] and as confirmed by the substantial and unrebutted expert evidence, Wernerfelt affirmatively precipitated Han's uncontrollable suicidal impulse when he "read him the riot act," triggering the "very serious harm" he had warned about for more than a year. *See* VIII, Tab 189A-D, 151-301.[16] The Plaintiff's claims arising out of Wernerfelt's conduct, that properly could be found by a jury to be negligent, grossly negligent or reckless, and those against MIT for vicarious liability, should go to a jury.[17]

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Ann MacLean Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 Marq. L. Rev. 625, 669 (2008) [*Suicide on Campus*] (Professor Massie noting that as of 2008, there was no known case where IHE actually caused student's suicidal impulse).

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The Superior Court makes no mention, whatsoever, of the Plaintiff's substantial expert disclosures. *See* VIII, Tabs 189A-D.

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See Simon v. Solomon, 385 Mass. 91, 95-97 (1982) (recovery can be had for emotional distress inflicted recklessly); *Rodriguez v. Cambridge Hous.* Auth., 443 Mass. 697, 700-05 (2005) (rejecting claim based on suicidal thoughts and other indications of emotional distress would not comport with this Court's jurisprudence); *Gutierrez v. MBTA*, 437 Mass. 396, 411-13 (2002); *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 327,

Recognition of a duty of care in this case, however, should not be restricted by a proximate causation rule enunciated more than a century ago that arose out of the Court's struggle with "very difficult" proximate causation questions caused by outdated thinking about mental illness.[18] *See Daniels*, 183 Mass. at 397. Indeed, the most recent Massachusetts appellate case relating to liability in cases of self-harm, which went unmentioned by the Court below, rejected the argument that there is no duty in suicide cases subject to limited historic exceptions. *Delaney v. Reynolds*, 63 Mass. App. Ct. 239, 241-45 (2004). Specifically, *Delaney* rejected the view that suicide is a superseding cause as a matter of law and held that assuming that

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338 (1983); *Payton v. Abbott Labs*, 366 Mass 540, 549-50, 552-55 (1982); *North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting*, 491 F. Supp. 2d 111, 134 (D. Mass. 2007) ("The fact that a party committed suicide does not alter the jury's role."); *Clift v. Narragansett Television, L.P.*, 688 A.2d 805, 812 (R.I. 1996); *Mayer v. Town of Hampton*, 497 A.2d 1206, 1209-10 (N.H. 1985); *Rowe v. Marder*, 750 F. Supp. 718, 723-24 (W.D. Pa. 1990); Restatement (Third) of Torts §§ 46-47.

[18] Requiring "delirium" or "insanity" or "inability of the decedent to control himself as a basis for the tortfeasor's liability for the victim's suicide[,]" is misplaced. 4 *Harper, James and Gray on Torts*, § 20.5 at 196, n. 45 (2007). This rule "reflects both a misunderstanding of the implications of mental illness and a distortion of principles of causation." *Id.*

the Plaintiff intended to harm or kill herself, she was entitled to present her claims to a jury. *Id.* at 245. This Court should reach the same conclusion.

2. General Negligence Principles

> The concept of 'duty' . . . 'is not sacrosanct in itself, but is only an expression of the sum total of . . . considerations of policy which lead the law to say that the plaintiff is entitled to protection. [] No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.'

Jupin v. Kask, 447 Mass. 141, 146 (2006). "[A] duty finds its 'source in existing social values and customs,'" *Mullins v. Pine Manor College,* 389 Mass. 47, 51 (1983), and thus "imposition of a duty generally responds to changed social conditions." *See Jupin,* 447 Mass. at 147. "Duty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed." *Vaughan v. Eastern Edison Co.,* 48 Mass. App. Ct. 225, 229 (1999) (*quoting White v. Southern Cal. Edison Co.,* 25 Cal. App. 4th 442, 447 (1994)).

> As a general principle of tort law, every actor [] has a duty to exercise reasonable care to avoid physical harm to others. [] A precondition to this duty is, of course, that the risk of harm to another be recognizable or foreseeable to the actor. [] Consequently, with some important exceptions, 'a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably

> dangerous.' [] *Id.* To the extent that a legal standard does exist for determining the existence of a tort duty . . ., it is a test of the 'reasonable foreseeability' of the harm.

Jupin, 447 Mass. at 146-47 (citations omitted); Restatement (Third) of Torts § 7.[19]

a. Foreseeability

Reasonable foreseeability under tort law does not require that the precise sequence of events or manner of injury be foreseeable.[20] *See, e.g., Moose v. MIT*, 43

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19 As noted by leading commentators in this area:

> Traditional tort law also says that whenever the university *acts* it is responsible to use care. [] Some Courts and commentators confuse this a bit and assume that because special relationships are a feature of business/college law, duty is owed only under special circumstances. Let us make this perfectly clear: *Universities can owe duties to their students on and off campus irrespective of whether there is a special relationship of any kind. Legal special relationships only potentially enhance responsibility to include affirmative duties to proactively prevent harm even when caused by third parties, non-negligent forces, and/or students themselves. Special relations are not prerequisites to duty, per se, but only prerequisites to certain kinds of duty to take affirmative action. Custodial relations are only a subset of special relationships.* This is basic tort law.

Robert D. Bickel & Peter F. Lake, The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life? 179-80 (1999) (emphasis in original).

20 *See Luz v. Stop & Shop*, 348 Mass. 198, 204 (1964) ("To be held liable the defendant need not have foreseen the precise manner in which the injuries occurred."); Restatement (Second) of Torts § 435(1) (1965): ("If the

Mass. App. Ct. 420, 425 (1997). It is sufficient that the same general kind of harm was a foreseeable consequence of the defendant's risk-creating conduct. *See id.*[21]

As detailed above and in the Statement of Material Facts,[22] a jury would be warranted finding that MIT, and the individual Defendants, were well-aware of the general risk of MIT student suicide and actually foresaw Han's particular risk of suicide. *Cf. Ultimate Livery*, 452 Mass. at 649 (no need to reach special relationship test). As a private research institution,

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actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable").

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At the Defendants' request, the Superior Court implicitly adopted a requirement that the Defendants foresee an "imminent probability" of harm in order for there to be a duty of care. *See* IX, 159, n.19. Nothing in *Jupin, Mullins, Delaney* or *Shin v. MIT*, 19 Mass. L. Rptr. 570, 2005 WL 1869101 (2005) (McEvoy, J.), suggests such an imminence requirement, and it is simply not the law. *See, e.g., Moose*, 43 Mass. App. Ct. at 425 ("The defendants appear to have misinterpreted the law pertaining to reasonable foreseeability. It is only the risk which results in the harm that must be reasonably foreseeable, not the precise manner of the accident or the extent of the harm."); *see also* 4 Harper, James & Gray on Torts, § 20.5, at 203.

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See IV, 154-214, SMF ¶¶ 85-86, 88, 91-93, 98-100, 103-10, 117-18, 136-38, 146-78.

MIT could implement whatever policies it chose. IV, 214-16, SMF ¶¶179-80; VIII, Tabs 189A-C. MIT responded to the known overall risk of student suicide by enacting *some* policies, practices and procedures designed to bring its student support services to bear. *See* VIII, Tab 189A, 164-65; Tab 189B, 246-47; Tab 189C, 274-75; IV, 190-91 SMF¶139; *cf. Mullins*, 389 Mass. at 55 (MIT's half-measure precautions make little sense unless risk was foreseen). All such services require good training and communication flow to work properly and effectively. *See* VIII, Tab 189B, 244. MIT and Clay chose not to ensure that MIT's programs met these needs through, for example, recommended training or a handoff policy, despite its history of student suicides and the certainty of yet another suicidal student. IV, 187-90, SMF ¶ 138 (detailing MIT student suicides); IV, 194-95, SMF¶143; VIII, Tab 189B, 244. This choice left MIT's gatekeeper employees (e.g., faculty advisors and department heads) unequipped to safely aid students at risk of suicide. Having repeatedly declared that they were going to rectify *known* problems with MIT's student support services, a jury could properly find that MIT and Clay were negligent or, given the gravity of the known risk, grossly so, when they chose not to do so.

Unequivocally, Dean Randall's contemporaneous notes and writings establish that he knew of Han's risk of suicide. *See supra* 11-13; IV, 197-200, SMF¶¶146-50. Randall communicated with Dr. Barnes at MIT Mental Health, reached out to others at MIT and communicated with Han's outside, treating mental health providers who warned that MIT's safety concerns should be taken seriously. Then, despite his documented intention to stay in touch with Dr. Barnes at Mental Health, and his obligation to coordinate the response of MIT's student support services, Randall did nothing. Given Dean Randall's specific knowledge of the risk facing Han, a jury should be permitted to find that his actions were negligent or grossly negligent. *See* VIII, Tab 189A, 165-66, 168-69; Tab 189B, 249-50; Tab 189C, 271-75.

Wernerfelt and Prelec served as Ph.D. faculty advisors to this young man and had abundant contact with him over years. IV, 104-08, SMF ¶¶ 2-3. Pursuant to written MIT policy their responsibilities included Han's general welfare and personal counseling, as well as the affirmative responsibility to "take care that their [] own conduct [was] conducive to the safe pursuit of work and study" by everyone at MIT. *Id.; see Jean W. v. Commonwealth*, 414 Mass. 496, 508 (1993)

(affirmative duties arise from employment). Wernerfelt was the head of Han's Ph.D. program and had significant control over this student. *See* IV, 104-08, SMF ¶¶ 2-3; VI, Tab 112, 54; Tabs 132-33, 245-53 (policies regarding duties of faculty and advisors); VIII, Tabs 189A-C; Tab 190, 303 (offer letter imposing conditions of Ph.D. program). Indeed, many Courts have noted that the relationship between a graduate student and his faculty advisors is *fiduciary* in nature.[23] Both Wernerfelt and Prelec were well-aware of Han's fragility and risk of suicide. *See supra* at 14-21; IV, 164-73, 176, SMF ¶¶ 103-11, 117. Both knew that Han was hurt by the lack of faculty support and he wanted "more than anything" to be a Professor. *See* IV, 176-77, SMF¶118. Both knew - or certainly should have known in light of their repeated warnings to others - that mishandling this fragile student would foreseeably precipitate his suicide. On this record, a jury properly could conclude that Prelec was negligent or grossly so, and that Wernerfelt precipitated Han's death in a reckless or grossly negligent manner when he

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[23] *E.g.*, Johnson v. *Walden Univ.*, Inc., 839 F. Supp. 2d 518, 527-29 (D. Conn. 2011); Johnson *v. Schnitz*, 119 F. Supp. 2d 90, 97-98 (D. Conn. 2000); *Chou v. Univ. of Chicago*, 254 F.3d 1347, 1362-63 (Fed. Cir.(Fla.) 2001).

disregarded his own multiple warnings of the known risk of Han's suicide, to read Han the "riot act[.]"

b. Public Policy

Public policy supports the imposition of a duty of reasonable care which will enhance the safety of all IHE students and would be in accord with "current standards of concern for the personal safety and well being of each individual." *See, e.g., Pridgen v. Boston Hous. Auth.*, 364 Mass. 696, 711 (1974); *Commonwealth v. Carter*, 474 Mass. 624, 636 n.17 (2016) ("the Commonwealth has a compelling interest in deterring speech that has a direct, causal link to a specific victim's suicide."). Student suicide is recognized as a serious public health problem by both the Federal and State governments.[24] Contrary to the Superior Court's view, statutory provisions pertaining to rights and protections afforded students with recognized

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See https://www.cdc.gov/healthcommunication/toolstemplates/entertainmented/tips/suicideyouth.html (Last visited April 26, 2017); G.L. c. 3, §67 (2014) (establishing commission to work with Department of Education and Department of Public Health to create school-based and community programs focusing on suicide prevention); *see also* Peter F. Lake, *Still Waiting: The Slow Evolution of the Law in Light of the Ongoing Student Suicide Crisis*, 34 J.C. & U.L. 253 (2008) ["*Still Waiting*"] (risks associated with student suicide (including attendant risk of homicide) "have become signature risks in an ongoing [IHE] student mental health crisis.").

disabilities are entwined with the issues in this case. Section 504 of the Rehabilitation Act of 1973 and Titles II and III of the Americans with Disabilities Act, 29 U.S.C. § 794 (2012),

> protect individuals who have a physical or mental disorder, who have a record of such a disorder, or who are regarded as disabled. The disorder must "substantially interfere" with one or more "major life activities," such as sleeping, caring for oneself, concentrating or learning.[25]

Under such provisions, IHEs must address the rights and responsibilities of students with mental and emotional disabilities. Prudent IHEs do so with reasonable care. *See* VIII, Tabs 189A-C.

Accordingly, MIT's claim below that recognizing a duty of care would "completely transform" the relationship between a professor and a student, is transparently disingenuous. Three years before Han's death a leading commentator in this area wrote:

> Colleges across the country are intensifying suicide prevention efforts and creating protocols requiring that students who threaten or attempt suicide be referred for prompt professional assessment.
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> ***
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> [I]nstitutions of higher education face heightened risk of liability for suicide when they ignore or mishandle *known suicide threats or attempts*. The

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Barbara A. Lee, *Dealing with Students with Psychiatric Disorders on Campus: Legal Compliance and Prevention Strategies*, 40 J.C. & U.L. 425, 428-29 (2014) (footnote omitted) [*Psychiatric Disorders on Campus*] (citing 42 U.S.C. § 12102(2) (2012)).

> immediate practical lesson for campus administrators (especially those supervising 'gatekeepers' like resident advisors) is to refrain from treating suicide threats or attempts as temporary episode of depression or disorientation, likely to 'go away' on their own.[26] What the courts may hold is what many college administrators already see: The main obstacle to better suicide prevention on campus is *underreaction*, especially the failure to provide (perhaps even require) prompt professional evaluation and treatment for any student who threatens or attempts suicide.[27]

MIT's own policies already define the responsibilities of the employees/Advisors here. IV, 104-07, SMF ¶¶ 2-3. There can be little dispute that they had the responsibility to "take care" in accord with the "general welfare" of students. *See id.* This required the minimally burdensome steps of re-engaging MIT's in-house student support services with a single phone call,[28] while refraining from angrily lashing out and

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26 "Nor should staff members accept student assurances that they're 'feeling better.' Kay Redfield Jamison [the author of *Night Falls Fast: Understanding Suicide*, (Knoph 1999)] found that 'more than half the patients who killed themselves in psychiatric hospitals had been described by nursing or medical staff, just before their suicides, as 'clinically improved' or 'improving[.]'" *See* Gary Pavela, *Questions and Answers on College Student Suicide: A Law and Policy Perspective* (College Admin. Pubs., Inc. 2006) ["*Questions and Answers*"] at 34 n.37.

27 *Questions and Answers* at 8-9 (emphasis in original).

28 *See Wyke v. Polk Co. Sch. Bd.*, 129 F.3d 560, 574 (11th Cir. 1997) ("The risk of [] death substantially outweighs the burden of making a phone call.").

"read[ing] the riot act" to a student known to be at risk of suicide.[29]

Recognizing a duty of reasonable care in connection with a known risk of death would provide IHE's an incentive to employ best practices, plug holes in systems with recognized, necessary and common sense policies (e.g., train faculty as recommended by its own MHTF, implement a handoff policy as advocated for years by Dr. Girard) and properly fund such services.[30]

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Nor do student privacy concerns require MIT, or the courts, to stand idly by as students kill themselves. Han, like virtually every college/university student signed multiple authorizations so that his parents could be contacted in case of emergency. VIII, Tabs 195-96. Here, MIT chose not to advise Han's parents: (1) that MIT had identified Han as a suicide risk; (2) of the suicide related concerns in 2008 that resulted in the restructuring of Han's exams; and, (3) of the known serious risk of suicide in January of 2009 when Wernerfelt was warning his colleagues of having blood on their hands. Indeed, HIPAA contains exceptions for notifications to those who could reasonably prevent or lessen a serious threat to health or safety, 45 C.F.R. §164.512(j). Having deprived Han's parents of the chance to intercede as to the risk known to the Defendants, surely it is not too much to ask that the Defendants ensure proper internal communications such that their readily-available support systems could respond appropriately to Han's known suicide risk.

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Questions and Answers at 21-35 (describing best industry practices and successful, comprehensive University of Illinois suicide prevention program); Robert D. Bickel and Peter F. Lake, *The Rights and Responsibilities of the Modern University – Who Assumes the Risks of College Life*, Carolina Academic Press at 218 (1999) (if boards of trustees and college presidents believe there's no duty regarding many

Eleven years after the resolution of *Shin* v. *MIT*, and MIT's hollow announcement of "suicide prevention initiatives with presidential level support[,]" *see* VII, Tab 177, 558, this Court should not tolerate a student support services system that drops known, at risk, students like Han through cracks while supplanting trained on campus mental health providers with untrained, non-clinicians who manage such students

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student safety issues, there will be a tendency to allocate resources away from departments that impact safety); James S. Tederman, *Advice from the Dean*, National Association of Student Personnel Administrators, Inc. at 20-21 (1997) ("Any type of suicidal behavior must be taken seriously with immediate intervention."); *Psychiatric Disorders on Campus*, 40 J.C. & U.L. 425 (in 2012, 21% of IHE students sought treatment for mental health issues); Kelley Kalchthaler, *Wake-Up Call: Striking a Balance Between Privacy Rights and Institutional Liability in the Student Suicide Crisis*, 29 Rev. Litig. 895, 924 (Summer 2010) (proactive plans by colleges greatly mitigate the likelihood a student will commit suicide); *Suicide on Campus*, 91 Marq. L. Rev. at 686 (states should follow the lead of the judges in *Schieszler* and *Shin* in recognizing "special relationship" pursuant to Restatement of Torts (Second) § 314A or Restatement (Third) § 40, triggering a duty, when a college administrator has actual knowledge of circumstances that the student is seriously suicidal, to take reasonable steps to protect that student's health and safety); Peter Lake, *The Emerging Crisis of College Student Suicide: Law and Policy Responses To Serious Forms of Self-Inflicted Injury*, 32 Stetson L. Rev. 125, 157 (Fall 2002) (IHEs should coordinate resources to educate the campus and implement effective referral and treatment protocols whenever a potential for suicide is suspected).

with predictably tragic results.[31] The MIT defendants obtained judicially-granted immunity from liability despite blatant mishandling of a known risk of death. Contrary to the Superior Court's ultimate ruling, "[p]ublic policy does not condone what occurred here, but instead strongly supports the imposition of a duty."[32] *Ultimate Livery*, 452 Mass. at 651. In accord with the safety-increasing goal of tort law,[33] and given the demonstrated efficacy of well-designed and implemented student suicide prevention programs, *see* VIII, Tabs 189A-C, a decision by this Court that a duty of reasonable care was owed under these facts would

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See Peter F. Lake, *The Rise of Duty and the Fall or In Loco Parentis*, 64 Mo. L. Rev. 1, 26 (1999) ["The Rise of Duty"] (liability rules should be particularly sensitive to setting up proper incentives to prevent future harm while dissuading IHE attempts to limit liability by distancing themselves from student life which creates greater risk).

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See The Rise of Duty, 64 Mo. L. Rev. at 1-6 (historically, *in loco parentis* was "an immunity [] that a college could assert against certain kinds of student claims". However, since the 1960s, it has been displaced, with tort law becoming applicable to IHEs).

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See Prosser and Keeton on Torts, § 4 at 25 (5th ed. 1984) (preventing future harm important in field of torts); *Dartt v. Browning-Ferris Indus.*, 427 Mass. 1, 17 (1998).

promote sound public policy goals and save student lives.[34]

3. The Defendants had a Special Relationship with Han Such that they Owed a Duty of Care

In 1983, this Court recognized a special relationship between an IHE and its students, holding that IHEs (and responsible administrators) have a duty to protect students from foreseeable harm. *Mullins*, 389 Mass. at 51-52. The *Mullins* court, relying on Restatement (Second) of Torts § 314A, rejected the identical argument made below - i.e., that as a matter of law IHEs and their employees do not owe a duty of care to a student. *Mullins* stated that IHEs of "ordinary prudence customarily exercise care to protect the well-being of their [] students[,]" and that it is a reasonable expectation "that reasonable care will be exercised to protect [] students from foreseeable harm." *Id.* at 51-52; *Whittaker v. Saraceno*, 418 Mass. 196, 197 (1994) (*citing Mullins*, 389 Mass. at 54-55 (duty arose out of "the distinctive relationship

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[34] In every type of IHE, "administrators make life and death decisions with imprecise and incomplete guidance from the law." *Still Waiting*, 34 J.C. & U.L. at 254. "Legal inactivism in the context of college and university student suicide is dangerous, and played a role, along with misperceptions of law, in events at Virginia Tech." *Id.*

between colleges and their students.")). *Mullins* demonstrated that Massachusetts negligence law is fluid, evolving as society matures "toward a duty to aid and protect in any relation of dependence." *Compare* Restatement (Second) of Torts § 314A cmt. b (1965) *with* Restatement (Third) of Torts § 40 (2012)[35] (expanding listed special relationships while preserving non-exclusivity of list at cmt. o). Based on the relationship at issue, this Court held that IHEs "must, therefore, act 'to use reasonable care to prevent injury' to their students." *Mullins*, 389 Mass. at 54.

The court below has now twice disregarded this controlling precedent. *See Carman*, Civil No. 03-05154 (Middlesex Super. Ct. Aug. 6, 2009) (Henry, J.). Similarly, while unmentioned by the Court below, Section 40 of the Restatement (Third) of Torts

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[35] Restatement (Third) of Torts § 40 provides, in relevant part:

> (a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.
>
> (b) Special relationships giving rise to the duty provided in Subsection (a) include:
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> ***
>
> (5) a school with its students[.]

specifically provides that there is a special relationship[36] between a school and its students.

Mullins and § 40 are not aberrations. In *Irwin v. Town of Ware*, this Court held that police officers owed a duty of care to those unknown (but foreseeable) persons who were injured by an intoxicated driver who the officers stopped but failed to detain.

> A duty to act with reasonable care to prevent harm to the plaintiff which, if violated, may give rise to tort liability is based on a special relationship between the plaintiff and the defendant. See W. Prosser, Torts, § 56 (4th ed. 1971). While several different categories of such special relationships are recognized in the common law, they are based to a large extent on a uniform set of considerations. Foremost among these is whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so. [citations omitted]. [] As the

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[36] "Regardless of whether the actor played any role in the creation of the risk, a special relationship with others imposes a duty of reasonable care." Restatement (Third) of Torts § 40 cmt. c (2012). The duty imposed by this Section applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional. If the actor's conduct plays a role in creating the risk of harm, § 7 is also a source of a duty[]. *Id.* at cmt. g. The term "special relationship" has no independent significance. *Id.* at cmt. h. "It merely signifies that courts recognize an affirmative duty arising out of the relationship[]." *Id.* "The affirmative duty imposed on schools in section 40 is in addition to the ordinary duty of a school to exercise reasonable care in its operations for the safety of its students[.]" *Id.* at cmt 1. Moreover, the § 40 duty explicitly applies to colleges. *See id.*

> harm which safely may be considered foreseeable to the defendant changes with the evolving expectations of a maturing society, so change the special relationships upon which the common law will base tort liability for the failure to take affirmative action with reasonable care. *See Mullins v. Pine Manor*, 389 Mass. 47, 51 (1983); *Pridgen v. Boston Hous. Auth.*, [364 Mass. 696, 711 (1974)].

Irwin v. Town of Ware, 392 Mass. 745, 756-57 (1984). The *Irwin* court relied primarily on foreseeability of harm under the circumstances, "the most crucial factor[,]" to find a special relationship warranting the imposition of a duty of care. *Irwin*, 392 Mass. at 762; *see Jean W.*, 414 Mass. at 508; *Whittaker*, 418 Mass. at 199.

Given this bedrock Massachusetts law, in *Shin v. Massachusetts Ins. of Tech.*, 2005 WL 186101 (Mass. Super. Ct. June 27, 2005) (McEvoy, J.), the Court not surprisingly found that the Plaintiff had provided sufficient evidence that a S^3 Dean (Henderson) and a Housemaster (Davis-Millis) could reasonably foresee that Shin would hurt herself without proper supervision. Upon finding that a "special relationship" existed between the MIT employees and the student, the Court imposed a duty of reasonable care. *See id.* at 13. In reaching this conclusion, the Court relied on *Mullins*, *Irwin*, *Schieszler v. Ferrum College*, 236 F.

Supp. 2d 602 (W.D. Va. 2002) and the Restatement (Second) of Torts § 314A. *See id.* at 11-13.

Focusing primarily on the timing of the events in the *Shin* case,[37] and while conflating "special relationship" analysis with whether the Defendants voluntarily assumed a duty of care, the court below ironically found *Shin* to be persuasive support for its no duty finding. *See* IX at 156-60. In doing so, the Court misconstrued the record in this case as detailed *supra* n.9-11, 13, 16, 21, and relied on an inapposite case provided to it by MIT shortly before the summary judgment hearing in which there was *no indication* that the decedent "showed signs of suicidal ideation, reported that he was suicidal, or had a previous suicide attempt known to" the college. *See* IX, 156, n.16 (*citing Sacchetti v. Gallaudet Univ.*, 2016 U.S. Dist LEXIS 52560, *29 (D.D.C. Apr. 20, 2016).

In contrast to *Sacchetti* where there was no evidence of foreseeability, the actual record in this case, properly viewed under the standard of review, establishes that Han's suicide was not just

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[37] *See* Prosser and Keeton on Torts § 43 at 282-83 (5th ed. 1984) (it is not easy to discover any merit whatever in the contention that remoteness in itself should bar recovery).

foreseeable, but was in fact foreseen.[38] The record demonstrates that each of the Defendants, who had repeated and varying contact with Han over the years, were well-aware of Han's risk. *See supra* at 3-21; IV, 164-67, SMF¶¶103-04; 197-214, SMF¶¶146-78. Indeed, contrary to the Superior Court's finding, *see* IX, 158-59, the documented record reflects that the defendants understood they were expected to take action to protect Han, *see* IV, 187-214, SMF¶¶ 137-78,[39] did so on some occasions, *see, e.g.*, IV, 170-71, SMF¶108; 200-07, ¶¶151-65; 210-13, SMF¶¶171-77; 197-200, SMF¶¶146-50; acted because "very serious harm" to Han was a foreseeable consequence of their failure to do so, IV, 201, SMF¶152; 204, SMF¶158; 206-07, SMF¶¶164-65, and that Han relied on such efforts. *See* VI, Tabs 109, 100, 112; V, Tab 86, 386-91; VII, Tabs 160, 161, 163, 164. *Cf. Irwin*, 392 Mass. at 756-57.[40] *Mullins, Delaney,*

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[38] For this reason the Plaintiff cross-moved for summary judgment on the pivotal issue of foreseeability, the most important factor in duty analysis.

[39] *See also* V, Tab 86, 388 (Cayley email to Han advising that Wernerfelt must be told of Han's problems because he was the academic head of the Ph.D. program, was more likely to see Han on daily basis and that neither she nor Wernerfelt had "option of not being involved.").

[40] *See Robert Williams, Inc. v. Ferris*, 355 Mass. 288, 294 n.7 (1969) (that one under a duty fails to discharge it

Irwin, Jean W., Whittaker, Ultimate Livery, the Restatement (Third) of Torts § 40 and other authorities[41] support the conclusion that the fact-

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does not lessen the duty; on the contrary, it tends to show a breach).

[41] *See, e.g., Schieszler,* 236 F. Supp. 2d at 608-12 (W.D. Va. 2002) (recognizing duty of care in student suicide case); *Wyke,* 129 F.3d at 574 (recognizing duty of care and noting that Court did "not believe (and neither did the jury) that a prudent person would have needed a crystal ball" to foresee suicide); *Doe v. Yale Univ.,* 252 Conn. 641, 663 (2000) (recognizing claim because it falls within the traditionally recognized duty not to cause physical harm by negligent conduct and educational setting is not sufficient to remove claim from traditional rule); *Furek v. Univ. of Del.,* 594 A. 2d 506, 519-20 (Del. 1991) (when college knows of danger students, it has duty to aid or protect them); *Eisel v. Bd. of Educ.,* 324 Md. 376, 597 A. 2d 447, 453-54 (1991) (when risk of death is balanced against the burden of making phone call, scales tip overwhelmingly in favor of duty); *Turner v. Rush Medical College,* 182 Ill. App. 3d 448, 459, 537 N.E.2d 890, 897 (1989) (Pincham, J., dissenting) ("There is nothing unique, new or unusual in the requirement that teachers, schools, and school personnel exercise reasonable care to students"); *Shin,* 19 Mass. L. Rprt. 570, 2005 WL 1869101, at *13 (2005) (McEvoy, J.) (recognizing special relationship between MIT administrators and student imposing duty to exercise reasonable care to protect student from harm); *Leary v. Wesleyan Univ.,* 2009 WL 865679 (Conn. Super. 2009) (denying summary judgment in student suicide case); *McClure v. Fairfield Univ.,* 2003 WL 21524786 (Conn. Super. 2003) (reviewing case law recognizing duty of care owed by IHEs in various settings). *See also* 4 Harper, James and Gray on Torts §20.5, n.45 at 195-98 (2007) ("Liability has been imposed both where the foreseeable danger of suicide was the principal risk that made the defendant's conduct negligent, and where it was considered within the scope of a more obvious risk the foreseeability of which made the defendant's conduct negligent.") (collecting suicide cases)); *Stehn v. Bernarr McFadden Foundations, Inc.,* 434 F.2d 811, 814-15(6th Cir. 1970) (private school must as a matter

intensive fault inquiry should have gone to a jury given the special relationship between Han, MIT and its employees.[42] *See* Restatement (Third) of Torts §8.

4. Voluntary Assumption of a Duty of Care

MIT, through its employees including Dean Randall and Chancellor Clay, took *some* steps to protect its students from the foreseeable risk of suicide.[43] *See Mullins*, 389 Mass. at 51; IV, 187-96, SMF ¶¶ 137-45; VIII, Tab 189A-C. Such efforts are ubiquitous in higher education, and there is *nothing* in the summary judgment record to the contrary. *See* VIII, Tabs 189A-C; *Mullins*,

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of law assume duty of exercising reasonable care in providing supervision, instruction and in the conducting of its activities); *Delbridge v. Maricopa County Community College District*, 182 Ariz. 55, 59 (1994) (teacher-student relationship is a special one, affording the student protection from unreasonable risk of harm; obligation includes the duty not to subject students, through acts, omissions or school policy, to a foreseeable and unreasonable risk of harm).

[42] "When a defendant owes a duty of ordinary care . . . because of the special relationship between the parties, and the plaintiff's claim is that the defendant was negligent in . . . creating a stimulus for the plaintiff's own act that intervened and caused him harm, it cannot be said that the intervening act is a superceding cause of his injury. Thus, by negligently enhancing the likelihood of [] suicide, and failing to protect [the victim] from the very risk [the Defendant] created, [the Defendant] cannot be relieved from liability because the risk [he] created actually came to fruition." *Hickey v. Zekula*, 439 Mich. 408, 439-40 (1992).

[43] *See, e.g.*, IV, 161-62, SMF¶98; 187-96, SMF¶¶ 137-45.

389 Mass. at 51 (IHE's recognition of obligation to protect students "indicates that the imposition of duty of care is firmly embedded in community consensus"). As early as 2008, Wernerfelt and Prelec were warning of Han's risk of suicide while modifying Han's exams with the admitted intent of reducing that very risk. IV, 164-71, SMF¶¶103-08; *cf. Mullins*, 389 Mass. at 54-55. About four (4) months before Han's death, Wernerfelt was warning of the risk of having blood on their hands because of the serious risk of Han's suicide. IV, 167-68, 207-08, SMF¶¶105, 165.[44] Despite the admitted responsibility of MIT employees to contact MIT Mental Health or S^3 when dealing with a student at risk of suicide, *see supra* at 8, neither Wernerfelt nor Prelec re-engaged MIT's student support services professionals who by education, training and experience were the

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[44] Plaintiff's experts would testify, *inter alia*, that by managing Han's suicide risk Wernerfelt and Prelec affirmatively thwarted the proper functioning of MIT's support services thereby depriving Han of well-known protective benefits that are recognized to reduce one's risk of suicide to 1/6 of what it would otherwise be. VIII, Tab 189A, 163-64; Tab 189B, 250; Restatement (Third) of Torts §42, cmt. f. Thus, contrary to the Superior Court's analysis, in percentage terms, Wernerfelt and Prelec increased Han's risk of suicide by roughly 83% and that was before Wernerfelt read the riot act to a suicidal student causing his death.

people best-equipped on MIT's campus to help Han.[45] IV, 205-06, 208, 213-14; SMF¶¶160-63, 166, 177-78.

Regardless of the defendants' failure to discharge their duties to Han, the record establishes that Han relied on their efforts to his detriment. He obtained ineffectual and uncoordinated services from DSO, MIT Mental Health and S^3. *See supra* at 10-13. Thereafter, he relied on MIT's broader student support services, including the ill-advised efforts of Wernerfelt and Prelec, by taking advantage of the various accommodations and modifications they provided. *See* IV, 168-71, 173-78, SMF¶¶ 107-08, 111-19.

Here, the reasons for finding that the defendants undertook a duty of reasonable care to Han, whose specific risk was well known to the defendants, far exceed those in *Mullins*.[46] *Cf. Mullins*, 389 Mass. at 50-62; Restatement (Third) of Torts § 42. A jury should decide whether the defendants breached their duties.

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45 Wernerfelt refused to concede that it is safer for mental health professionals to address a student's mental health issues than a layperson. VI, Tab 130, 211 (Wernerfelt Dep. Tr. 174:9-19).

46 "It is an odd situation indeed when an actor or institution takes many steps to protect or assist an individual, and later asserts those efforts did not, as a matter of law, require reasonable care." *Still Waiting*, 34 J.C. & U.L. at 276.

B. A Jury Could Properly Find the Defendants' Conduct to be Grossly Negligent or Reckless.

"Summary judgment is seldom granted" in cases "alleging reckless conduct." *Boyd v. National R.R. Passenger Corp.*, 446 Mass. 540, 545 (2006). The lower court's dismissal of these claims was premised on its erroneous factual conclusion that Han alone was responsible for his death. *Compare* IX, 162-63 ("Han sought only academic assistance from the defendants and refused any mental-health-related assistance") *with supra* n.9. Viewed properly under the standard of review, the evidence is that Wernerfelt repeatedly warned his colleagues of a "serious risk of suicide[,]" VII, 330, which he admitted was a "very great harm[,]" VI, 217-18, if Han was mishandled. IV, 167-69, 176, 204, 206-08, SMF ¶¶ 105, 107-08, 117, 158, 164-65. In light of Wernerfelt's specific knowledge of the serious risk of Han's suicide, his June 2, 2009, conduct toward Han either subjectively or objectively could properly be found by a jury to present a textbook case of recklessness. *See Boyd*, 446 Mass. at 547; *Commonwealth v. Levesque*, 436 Mass. 443, 451-52 (2002); Sandler *v. Commonwealth*, 419 Mass. 334, 335-37 (1995); *Commonwealth v. Welansky*, 316 Mass. 383, 398 (1944). For the same reasons, a jury could properly find that

Wernerfelt's conduct was grossly negligent evincing a "want of even scant care" as to Han's safety. *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398, 411 (2013). The punitive damages claims as to Wernerfelt, and MIT under respondeat superior, should go to a jury.

Gross negligence claims are also supported against MIT and the other individual Defendants (including Clay). MIT knew of the foreseeable risk of student suicide. IV, 187-96, SMF¶¶137-44. Its MHTF had analyzed its "Institute-wide network of support services" and found it wanting regarding the training of various gatekeepers, *see* VII, Tab 175, 524-36, explicitly including counseling Deans at S^3 (Dean Randall), staff, faculty and faculty advisors (Wernerfelt and Prelec). *Id.* at 524-25. The MHTF specifically recognized the need for training in this area, but MIT and Clay chose not to implement such training. IV, 192-95, SMF ¶¶ 140-43; VI, Tab 134 (Clay Depo.), 484. Similarly, the need for a hand off policy was explicitly recognized by MIT and its employees, IV, 195, SMF¶144, but again, MIT and Clay chose not to implement this protocol. *Id.* MIT chose not to implement such policies despite the representation by 15 *amici* Massachusetts IHEs to the Appeals Court in *Shin v. MIT* that such steps were the standard of care for addressing student suicidality, a

position echoed by Chancellor Clay. IV, 104-07, 108-10, 196, 214-16, SMF ¶¶ 2, 4, 145, 179-80.

The defendants' liabilities derive from two unfortunate and parallel scenarios involving both institutional and personal fault. First, the failures of MIT, Dean Randall and Clay to: (1) take steps to implement and follow through on such policies; (2) ensure the proper flow of information between MIT's protective student services and faculty in day-to-day contact with Han; and, (3) properly coordinate MIT's response to Han's known risk of suicide, can be properly viewed as reckless or at least as grossly negligent. Second, evidence of Wernerfelt and Prelec's failure to engage MIT's support services while substituting their own ill-considered judgment to affirmatively mismanage a known at risk student could properly be found to be, at a minimum, grossly negligent. *See* VIII, Tab 189A-C, 169-70, 250-52, 275-77.[47] A jury should consider these claims.

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[47] *See Aleo*, 466 Mass. at 410 (*quoting Altman v. Aronson*, 231 Mass. 588, 591-92 (1919) ("Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence.")).

C. **The Superior Court Committed Reversible Error when it Determined that the Plaintiff Would be Unable to Prove: (1) a Breach of Contract Between Han and MIT; and, (2) Conscious Pain and Suffering.**

An "estate may bring multiple causes of action where death results from challenged conduct." *Klairmont v. Gainsboro Rest.*, 465 Mass. 165, 177-78 (2013). Administrators may bring *both* a claim under the wrongful death act to recover damages on behalf of the decedent's survivors *and* a separate claim on behalf of the deceased plaintiff that survives the plaintiff's death. *Id.* Contract actions survive death and the survival statute is "sufficiently dynamic to allow for a change in judicial conceptions of what types of harm constitute legally redressable 'damage to the person.'" *Harrison v. Loyal Protective Life Ins.*, 379 Mass. 212 , 215 (1979). Claims for emotional distress damages survive a Plaintiff's death under G.L. c. 228, §1,[48]

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[48] For this reason, the claims for conscious mental pain and suffering should also be allowed to proceed. *See* VIII, Tab 189A-D (detailing conduct and resultant extreme emotional distress leading to suicide). It took at least 11 minutes from the beginning Wernerfelt's "riot act" telephone call until Han's suffering was ended by his death. IV, 216-17, SMF¶¶183-84. *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 92 (1878) ("It may be true, as an abstract proposition of law, that if a man is precipitated from a height by the negligence of another, and he is injured, he may recover, as one element of his damages, for any mental suffering he may prove he endured during his fall.").

see Harrison, 379 Mass. at 216, and such damages arising from a breach of contract are recoverable "when there exists a special relationship between the contracting parties[.]"[49]

Here, MIT admitted that coordinated Mental Health and Student Support Services were part of the contract or "deal" between MIT and Han. IV, 193, SMF¶141. Han was offered admission which included such a bundle of services. *Id.*; VIII, Tab 190, 303 (offer letter including MIT medical insurance and facilities). He accepted that offer, and attended MIT. The record overflows with evidence of MIT's breach of that contract and resultant harm. Nothing further is necessary to advance a breach of contract claim. It should be allowed to proceed.

D. <u>The Motion to Amend to Assert Claims Against Phillip Clay Should Have Been Allowed</u>.

Plaintiff's motion to amend to assert claims against former MIT Chancellor Phillip Clay was denied on futility grounds when the Court concluded there was

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[49] *See Palano v. Bellagio Corp.*, 2009 Mass. App. Div. 125, *4 (2009) (*citing McLean v. University Club*, 327 Mass. 68, 71 (1951)). "[T]here is no general rule barring [recovery of emotional distress damages] in actions for breach of contract. It is all a question of the subject matter and background of the contract . . ." *St. Charles v. Kender*, 38 Mass. App. Ct. 155, 159 (1995); *Sullivan v. O'Connor*, 363 Mass. 579, 587 (1973).

no duty of care. III, 342. While appellate courts generally review Rule 15(a) rulings for abuse of discretion, *Ouch v. Fed. Nat'l Mortg. Ass'n*, 799 F.3d 62, 65 (1st Cir. 2015), a futility ruling means the amended complaint would fail to state a claim upon which relief could be granted. *D'Agostino v. EV3*, 845 F.3d 1, 6 (1st Cir. 2016). "[A] material error of law constitutes [] an abuse [of discretion,]" and whether a motion to amend is futile because the amended complaint fails to state a claim upon which relief can be granted is a question of law. *Id.* Thus, the proper standard of review is *de novo*. *Id.*

Justice cannot possibly be done in *any* case involving claims of charitable immunity unless the Plaintiff is freely allowed to advance claims against responsible corporate employees.[50] In such cases, it is

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See LaClair v. Silberline Mfg. Co., 379 Mass. 21, 29 (1979); *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 181 (1979); Restatement (Second) of Agency § 343 (1958); *Onofrio v. Dep't of Mental Health*, 408 Mass. 605, 610 (1990) ("by taking action that exposed [plaintiff] to risk [employees] were bound, as any other person would be, to act reasonably"); *Jean W.*, 414 Mass. at 496 (employees have "duties arising from their employment[.]");*Colby v. Carney*, 356 Mass. 527 (1969) (noting SJC's intention to abrogate out-dated and unfair charitable immunity doctrine); *Keene v. Brigham & Women's Hosp.*, 439 Mass. 223, 242-43 (2003) (Ireland, J., dissenting) ("charitable immunity cap is unfair, obsolete, and fails to properly balance the interest of the innocent victim and that of the

particularly important that Courts adhere to Rule 15's admonition that leave to amend "shall be freely given when justice so requires." Mass. R. Civ. P. 15(a). That did not happen here.

Clay was intimately involved with MIT's response to the risk of student suicide. *Cf. Santos*, 429 Mass. at 135-39 (Defendant's involvement with laboratory care and routines was sufficiently personal to support liability). Clay:(1) was involved with MIT's student suicide prevention efforts and was "charged with leading the effort to implement the [MHTF] report"; III, 60; (2) approved a limited pilot of aspects of the Air Force's suicide prevention program; *id.*, 74; (3) *personally* fulfilled the role of Administrative Coordinator of Campus Support Services, *id.*, 88-90; (4) personally "engineered" conversations between S^3 and MIT Medical in furtherance of the MHTF recommendation regarding Creating Communication Channels between the various support services; *id.*, 92; (5) involved himself with principle deans and principle people in strategy

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negligent charitable organization."); *Mullins*, 389 Mass. at 63-64 (no charitable immunity for responsible individual employee of organizational Defendant); *Santos v. Kim*, 429 Mass. 130, 135 (1999) ("[I]t is important" that Courts "not [] announce a rule in terms of which no human being is ever responsible for failures in the system[.]").

sessions related to improving MIT's Student Support Services as recommended by the MHTF, *id.*, 101-02; (6) was involved with related "planning, hiring, reassigning[,]" *id.*, 103; and (7) checked to make sure that at least one staff member of each academic department was trained to be a departmental liaison as recommended by the MHTF, *id.*, 111-13.[51]

Clay's personal and extensive involvement with MIT's student suicide prevention efforts was materially different than the uninvolved figureheads in *Lyon v. Morphew*, 424 Mass. 828 (1997), or cases cited therein. Fairly viewed, Clay's involvement was "at least as personal as that of the official of a college who 'designed and supervised the installation of the security system . . . [and] was responsible for the

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[51] Former MIT President Susan Hockfield confirmed Clay's pivotal role in connection with MIT's student suicide prevention efforts. *See* III, 458-59 (Clay responsible for student affairs and he was to do everything possible to improve MIT's services for student mental health and well being); *id.*, 460 (Clay had President's full support in connection with changes he thought should be made to student mental health and support services); *id.*, 465-67 (Clay was point person in connection with student suicide prevention programs and efforts); *id.*, 469 (considering and implementing MHTF recommendations "would certainly be within the responsibilities of the chancellor"); *id.*, 481 (MIT's institutional response to student suicide "was in the hands of the Chancellor to oversee whatever the process, procedures were").

patrol pattern and the network of locks' which proved insufficient to prevent the rape of student there." *See Santos*, 429 Mass. at 138.[52]

Duty analysis is based on the facts of the case. In this case, MIT and Clay admittedly knew of the risk of student suicide and were on notice of various analyses that suggested that MIT's incidence of student suicide was persistently and materially higher than it should be. MIT's own blue ribbon MHTF identified shortcomings in its systems and made recommendations intended to address them. Clay was responsible for implementing them and repeatedly claimed that they had been - or would be - implemented. Nonetheless, MIT and Clay chose not to implement material provisions of MIT's own MHTF report such that MIT students, including Han, were needlessly endangered. As a result, Han fell through known gaps in MIT's student support services that Clay was supposed to close, *before* he fell from the roof of an MIT building right after being read the

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[52] That Clay never knew Han at MIT is not dispositive as to whether Clay owed a duty of care to MIT students, including Han. Nothing in *Mullins* or *Irwin* suggests that the individual defendants knew or interacted with injured parties. A rule that requires a Defendant to have personal knowledge that a particular Plaintiff will suffer harm violates the basic tenet that the precise sequence of events or manner of injury need not be foreseeable. *See Jupin*, 447 Mass. at 149, n.8; *Carey v. New Yorker of Worcester*, 355 Mass. 450, 454 (1969).

"riot act" by an untrained and unsupported MIT employee who *knew* that Han was at serious risk of suicide.

The Plaintiff made an overwhelming showing that Clay was intimately involved with MIT's student suicide prevention efforts and the failure of them. *Cf. Jean W.*, 414 Mass. at 508; *see* III, 1-248, 437-491. This Court should reverse the lower court's ruling and allow the addition of Clay as a defendant.

VII. CONCLUSION

Accordingly, the Plaintiff respectfully requests that this Honorable Court reverse the Superior Court's:

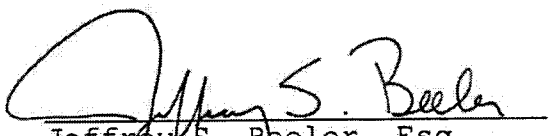
(1) judgment of dismissal;

(2) grant of summary judgment as to Counts 1-9 and 11-14 and enter a ruling that the Defendants owed a duty of reasonable care to the Plaintiff's decedent;

(3) grant of summary judgment as to Counts 3, 6, 9 and 13 related to the Plaintiff's punitive damages claims, Count 10 related to breach of contract and Counts 2, 5, 8 and 12 related to conscious pain and suffering claims; and,

(4) denial of the Plaintiff's motion to amend his Complaint and order that it be granted.

Respectfully submitted,
The Plaintiff-Appellant,
By his attorney,



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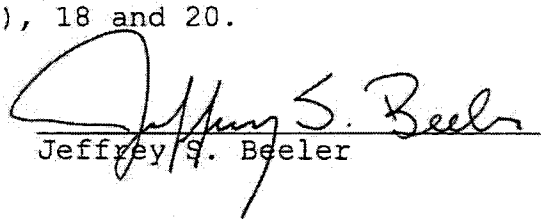
Certification Pursuant to Mass. R. App. P. 16(k)

I, Jeffrey S. Beeler, certify that this brief complies with the requirements of the Mass. R. App. P. that pertain to the filing of briefs including, but not limited to, Mass. R. App. P. 16(a)(6) (as modified by this Court's order allowing a brief of 55 pages), 16(e), 16(f), 16(h), 18 and 20.



Jeffrey S. Beeler

Addendum Index

Tab A

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT.
1181CV03152

DZUNG DUY NGUYEN, as Administrator of the Estate of HAN DUY NGUYEN

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
BRIGER WERNERFELT, DRAZEN PRELEC, and DAVID W. DANDALL

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION TO AMEND HIS COMPLAINT (doc. no. 98)

Han Nguyen was the son of plaintiff Dzung Duy Nguyen. Han committed suicide in 2009 when he was a Ph.D. student at the Massachusetts Institute of Technology's Sloan School of Business. Plaintiff brought this action in an attempt to hold MIT, the professor who oversaw Han's Ph.D. program, Han's faculty advisor, and the head of MIT's Student Support Services responsible for Han's death.

Plaintiff now seeks leave to amend his complaint to assert additional claims of negligence against a new defendant, Phillip Clay, who served as the Chancellor of MIT from 2001 through 2011. The proposed amended complaint would also add more factual detail to the complaint and break several existing claims into separate counts. The Court will deny the motion to amend to the extent that Plaintiff seeks to add Chancellor Clay[1] as a defendant because it concludes that the claims against Dr. Clay would be futile. However, the Court will permit Plaintiff to file a revised amended complaint that conforms the complaint to the evidence obtained through discovery and to break some existing claims into separate counts.

1. Proposed New Claims Against Chancellor Clay. The primary reason for the motion to amend is that Plaintiff seeks to add Chancellor Clay as a defendant. The proposed amended complaint would assert three related claims against Dr. Clay. Count Ten would allege that Dr. Clay negligently failed to ensure that MIT implemented recommendations made in 2001 by its Mental Health Task Force with regard to faculty training and the hiring of certain staff, and that this purported

[1] Both sides refer to Dr. Clay as "Chancellor Clay," even though he now longer serves in that position at MIT.

negligence was a proximate cause of Han's suicide. Count Eleven would rely on the same allegations but seeks compensation for Han's conscious pain and suffering. Count Twelve would allege that Dr. Clay's negligence rose to the level of recklessness or gross negligence and that he should therefore be subjected to punitive damages.

The Court concludes that the proposed new claims against Chancellor Clay could not survive a motion to dismiss and thus would be futile. It will therefore exercise its discretion to deny the motion to amend. *Mancuso* v. *Kinchla*, 60 Mass. App. Ct. 558, 572 (2004) (affirming denial of motion to amend where proposed claims "would have been futilely raised" because they could not survive motion to dismiss). "Courts are not required to grant motions to amend prior complaints where 'the proposed amendment ... is futile.' " *Johnston* v. *Box*, 453 Mass. 569, 583 (2009), quoting *All Seasons Servs., Inc.* v. *Commissioner of Health & Hosps. of Boston*, 416 Mass. 269, 272 (1993).

The proposed amendment would be futile because, as explained below, it does not allege any facts plausibly suggesting that Chancellor Clay owed any duty of care to Han Nguyen. Cf. *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012) (To survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint must allege facts that, if true, would "plausibly suggest[] ... an entitlement to relief.") (quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007)). "Whether a duty of care exists is a question of law" and is therefore "an appropriate subject of a motion to dismiss pursuant to rule 12(b)(6)." *Leavitt* v. *Brockton Hosp., Inc.*, 454 Mass. 37, 40 (2009) (affirming dismissal of negligence claim because defendant owed no duty of care to plaintiff as a matter of law); accord *O'Meara* v. *New England Life Flight, Inc.*, 65 Mass. App. Ct. 543, 544 (2006) (same). It is therefore similarly appropriate to resolve the issue in evaluating whether the proposed amended complaint could survive a motion to dismiss. "If a defendant does not owe a legal duty to a plaintiff, then there can be no actionable negligence." *Lev* v. *Beverly Enterprises-Massachusetts, Inc.*, 457 Mass. 234, 240 (2010) (citation omitted).

1.1. Factual Allegations as to Chancellor Clay. In relevant part, the proposed amended complaint would make the following factual allegations regarding Chancellor Clay's purported negligence. The Court assumes that these allegations and any inferences that might be drawn from them are true in determining whether the proposed new claims against Dr. Clay could survive a motion to dismiss. See *Golchin* v. *Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011).

In February 2001, the Boston Globe published an article regarding the history of student suicides at MIT. In response, MIT President Charles Vest established a Mental Health Task Force to examine the manner in which MIT provides support and treatment to students who may be at risk of killing or harming themselves. This Task Force made a variety of recommendations, including that (a) faculty members be given annual training on how to recognize mental health problems in students and on what to do when they are worried about a student, and (b) MIT hire additional staffers to provide mental health services and also hire a new administrator to coordinate the support services provided by MIT to students at risk for suicide.

As Chancellor of MIT, Dr. Clay was directed to ensure that all of the Task Force's recommendations were implemented. By the time of Han's death eight years later, however, several key recommendations had not yet been implemented. MIT was still not providing annual training for faculty on how to recognize that a student may be suffering from depression or other mental health problems, and on what to do if they became worried about a student's mental health. In addition, MIT had not hired all of the recommended new staff, and as a result was still not adequately coordinating care for students at risk of suicide.

Plaintiff alleges that Prof. Wernerfelt (the head of Han's program), Prof. Prelec (Han's faculty advisor), and Dean Randall (the head of MIT's student support services) all knew that Han was at risk for committing suicide.

The proposed amended complaint would allege that, because MIT and Chancellor Clay had failed to ensure that all of the Task Force's recommendations were fully implemented, Han "was deprived of properly coordinated student support services and was left in the hands of untrained and unqualified faculty members

who did not know how to properly address a student with Han's needs." The amended complaint would allege that Han would probably not have succumbed to his suicidal impulses if only MIT had fully implemented the Task Force's recommendations.

The proposed claims against Chancellor Clay are based entirely on his alleged failure to ensure that MIT implemented all of the Task Force's recommendations. The amended complaint would make no allegations that Dr. Clay had any personal knowledge of Han's mental health problems or that he was personally involved with Han in any other way. To the contrary, Plaintiff concedes in his motion to amend that "[t]here has been no indication to date that Chancellor Clay had any involvement with Han prior to his death."

1.2. Futility of New Claims. The Court concludes that Chancellor Clay had not duty to protect Han against his own suicidal impulses. The proposed new claims against Dr. Clay would be futile because, assuming that the facts to be alleged in the proposed amended complaint are true, Dr. Clay did not owe Han any duty of care as a matter of law,. See *Leavitt*, 454 Mass. at 40; *O'Meara*, 65 Mass. App. Ct. at 544.

Under Massachusetts law, a duty to protect another person from committing suicide will only arise where: (1) "the defendant's negligence was the case of the decedent's uncontrollable suicidal impulse;" or (2) the defendant had actual "knowledge of the decedent's suicidal ideation," and the defendant and the decedent were in a special relationship under which the defendant had a duty of reasonable care to protect the decedent from self-inflicted harm, for example because "the decedent was in the defendant's custody." *Nelson* v. *Massachusetts Port Authority*, 55 Mass. App. Ct. 433, 435-436, rev. denied, 437 Mass. 1109 (2002); see generally *Lev*, 457 Mass. at 243-244 (special relationships that give rise to duty of care include "one in charge of a person with dangerous propensities, and one having custody over another").

Plaintiff's amended complaint would allege no facts plausibly suggesting either that Chancellor Clay did anything to cause Han's suicidal impulse or that he had any personal knowledge that Han was at risk for suicide. As a matter of law,

therefore, Dr. Clay owed no duty of care to Han that was implicated in the circumstances of this case. *Id.*

For purposes of this motion to amend, the Court assumes without deciding that MIT as an institution had a duty to take reasonable steps to keep Han from harming himself that arose from the special relationship between the Institute and its students. Cf. *Mullins* v. *Pine Manor College*, 389 Mass. 47, 51-52 (1983) (college had duty of care to protect students against violent crime by third persons, because students must necessarily rely on college to provide such security); see generally *Luoni* v. *Berube*, 431 Mass. 729, 731-732 (2000) (duty of care arising from "[a] special relationship ... is predicated on a plaintiff's reasonable expectations and reliance that a defendant will anticipate harmful acts of third persons and take appropriate measures to protect the plaintiff from harm").

It does not follow, however, the Chancellor Clay personally owed such a duty of care to Han merely because Dr. Clay was a senior administrator at MIT and had overall responsibility for implementing the Task Force's recommendations. The "special relationship" between a college or university and its students does not impose a duty of care on individual senior administrators and faculty members. "Officers and employees of a corporation do not incur personal liability for torts committed by their employer merely by virtue of the position they hold in the corporation," but instead are only "liable for torts in which they personally participated." *Lyon* v. *Morphew*, 424 Mass. 828, 831-832 (1997). And the mere fact that a senior administrator has "a general supervisory role ... is not enough to support a finding that she personally participated in acts causing harm to the plaintiff." *Id.* at 833 (affirming summary judgment in favor of hospital's chief operating officer on claim that hospital's negligence caused plaintiff to fall from hospital's roof).

Plaintiff's reliance on the individual liability aspect of *Mullins* is misplaced. In that case, a college student who had been raped by an intruder in her dorm room sued the college and its vice president for operations. The Supreme Judicial Court upheld the jury verdict against the individual defendant on the ground that he had personally "designed and supervised the installation of the security system," and

the jury could reasonably have found that he was negligent in doing so. *Mullins*, 389 Mass. at 56-57. The vice president had a duty of care based on the "established principle that a duty voluntarily assumed must be performed with due care," at least where defendant has rendered services under circumstances where some other person relies upon a reasonable expectation that the defendant will exercise due care in providing those services. *Id.* at 52-54. The SJC held there was sufficient evidence for the jury to find that Mullins reasonably relied on the willingness of the defendants to exercise due care to protect her against criminal acts of third parties. *Id.* at 54-55.

The proposed allegations against Chancellor Cray are readily distinguishable. Plaintiff alleges no facts plausibly suggesting that Dr. Cray personally helped design or implement faculty training about the risk of student suicide, or that he was personally involved in deciding how to staff the mental health services or student support services functions at MIT. Instead, Plaintiff seeks to allege that Dr. Cray should be held liable solely because he had overall responsibility, as Chancellor, for implementing the 2001 Task Force recommendations. The proposed new claims against Dr. Cray are therefore barred by *Lyon*.

2. **Other Grounds for Amendment**. Separate and apart from his attempt to add new claims against Chancellor Clay, Plaintiff also seeks leave to make several other changes to the complaint that would add new factual allegations in order to conform the complaint to evidence obtained through discovery and that would "make structural changes to the complaint to clarify the claims that are being advanced in this case." It does not appear that Defendants oppose the proposed revisions to the complaint that do not involve adding Dr. Clay as a defendant.

Plaintiff is entitled to revise the factual allegations of his complaint based on additional information learned during discovery. Amendments to conform a pleading to the evidence are permissible at any time, so long as they will not unfairly prejudice the other side. See Mass. R. Civ. P. 15(b) ("Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after

judgment[.]"). The burden of having to answer an amended complaint is not the kind of prejudice that will bar an amendment to conform a complaint to the evidence. Only prejudice in the sense of "an inability by the opposing party to prepare an adequate case or defense" would justify denying leave to amend a complaint in this manner. See *Reilly* v. *Massachusetts Bay Transp. Auth.*, 32 Mass. App. Ct. 410, 415, rev. denied, 412 Mass. 1105 (1992). Since Defendants have not shown that they will be unfairly prejudiced by this aspect of the proposed amendment, the Court will grant leave to revise the factual allegations in the complaint so long as no claims are added against Dr. Clay. See *Vakil* v. *Vakil*, 450 Mass. 411, 418-420 (2008) (reversing denial of motion to amend answer, holding it was abuse of discretion to deny motion where delay did not unfairly prejudice opposing party).

Similarly, Defendants have not shown any reason why Plaintiff should not be allowed to restructure his existing claims against the existing Defendants by separating some of them into separately numbered counts. The Court will therefore allow Plaintiff to make these changes to his complaint as well.

ORDER

Plaintiff's motion to amend the complaint is DENIED IN PART and ALLOWED IN PART. The motion is denied to the extent that Plaintiff seeks to add Phillip Clay, MIT's former Chancellor, as a defendant and to assert claims against Dr. Clay. The motion is allowed to the extent that Plaintiff seeks to conform the complaint to the evidence and to restructure the claims against existing defendants into separate counts. Plaintiff shall serve and file a revised amended complaint consistent with this decision by July 31, 2015.

Kenneth W. Salinger
Justice of the Superior Court

July 10, 2015

Entered: 7/16/15

Tab B

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1181CV3152

DZUNG DUY NGUYEN, as administrator[1]

vs.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY & others[2]

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

On June 2, 2009, twenty-five-year-old Han Nguyen ("Han") committed suicide by jumping off of a building at the Massachusetts Institute of Technology ("MIT") where he was a graduate student at the time. Arguing that the school and certain of its faculty caused Han's suicide, Han's father, Dzung Duy Nguyen ("plaintiff") commenced this action against MIT, Birger Wernerfelt ("Wernerfelt"), Drazen Prelec ("Prelec"), and David W. Randall ("Randall") (collectively, "defendants"). This action is before the court on the defendants' and the plaintiff's cross motions for summary judgment. For the following reasons, the defendants' motion for summary judgment is **ALLOWED** and the plaintiff's cross motion is **DENIED**.

BACKGROUND

The summary judgment record reveals the following undisputed facts and disputed facts viewed in the light most favorable to the plaintiff as the non-moving party. See Epstein v. Board of Appeal of Boston, 77 Mass. App. Ct. 752, 756 (2010). The court reserves additional facts for discussion.

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[1]Of the estate of Han Duy Nguyen

[2]Birger Wernerfelt, Drazen Prelec, and David W. Randall

I. **Massachusetts Institute of Technology**

MIT is located in Cambridge, Massachusetts. Its mission "is to advance knowledge and educate students in science, technology and other areas of scholarship that will best serve the nation and the world in the 21st century . . . ." Exhibit 2.[3]

MIT informs faculty that they "should consider it a duty to keep themselves informed regarding both the academic progress and general welfare of their students. In addition, [faculty] should aim to exert a helpful influence on student life by taking an interest in extracurricular activities as well as by counseling individual students regarding their studies." Exhibit 132, at 2 ("Faculty Rights and Responsibilities" section of MIT's Policies and Procedures). In fact, MIT considers that "[a]n essential obligation of the academic staff is to counsel students not only in relationship to their academic program but also concerning their professional standards and goals and their general welfare. . . . In this sense, all members of the Faculty become advisors and counselors to each of their students. . . . [although] each student is assigned to an advisor who participates in one or more of the formal advisory programs." Exhibit 133, at 1 ("Relations and Responsibilities within the MIT Community" section of MIT's Policies and Procedures). With respect to graduate students specifically, MIT assigns them a research advisor with whom "a close relationship develops" and, as a consequence, who "assumes an important role in both personal counseling and academic advising." Exhibit 133, at 2.

Student Support Services ("S^3") at MIT serves as "a hub of resources, referrals and information across" MIT, that will "help with any concern [a student may] have, whether it is

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[3]During Han's enrollment at MIT, Phillip Clay was the Chancellor of MIT. Exhibit 134, at 32; see Exhibit 134, at 39-43 (Phillip Clay's deposition testimony describing his duties as chancellor).

academic or personal. Besides providing support and advice, [S^3] can provide advocacy and consultation with faculty, administration, housing, financial services, and various institute offices on [a student's] behalf." Exhibit 9, at 1. MIT encourages students to visit S^3 if they have fallen behind in their work, in order to explore the options available to them; if they are concerned about a friend, in order to obtain support and suggestions about ways to approach the situation; if they have been too sick to take an exam or complete other work, in order to receive assistance in working with their professors to postpone the work or make other arrangements; if they need to take a leave of absence from MIT, in order to set up a plan for their time away as well as for their readmission; and if they are dealing with personal issues that are interfering with their work, in order to obtain assistance in discussing the issues with their professors or in order to have S^3 consult with their professors on their behalf. Exhibit 9, at 1-2.

S^3 is different from MIT Mental Health and Counseling Service ("MIT Mental Health"). Exhibit 9, at 1. MIT Mental Health's staff consists of psychologists, psychiatrists, social workers and nurses who "provide[] individual counseling and psychotherapy, group counseling, evaluations, consultations, and neuropsychology consults." Id. MIT Mental Health "do[es] not provide advocacy on behalf of students to the academic world for confidentiality reasons." Id. In contrast, the staff of S^3 "is comprised of academic administrators from a variety of backgrounds" who "do[] not provide treatment or therapy." Id. Instead, as detailed above, S^3 "help[s] students dealing with academic and personal issues by providing support, guidance, advice, advocacy, and referrals. Most often, the students [S^3] see[s] are dealing with a combination of academic and personal problems and [S^3] work[s] together with [students] to sort everything out." Id. If a student does not know which office to visit, he should visit either, and he will receive a referral if necessary. Id.

At all times relevant to this matter, David W. Randall was the assistant dean[4] of S[3]. Exhibit 8, at 2. The duties of this position include counseling and advising "students about their personal, academic and social concerns which may involve interactions with faculty, staff, physicians, family and friends[;]" assisting "students with personal difficulties concerning relationships, family issues, loss, self-esteem, and other matters[;] making referrals as appropriate[;]" working "closely with MIT Mental Health to support students experiencing personal crises or difficulties[;]" and acting "as resource to students who have academic difficulty, acting as a liaison to faculty advisors, administrators and departments as appropriate." Exhibit 136, at MIT000192-MIT000193.

II. **Han Nguyen and MIT**

After graduating from Stanford University in May 2006 with a bachelor's degree in economics and a master's degree in psychology, Han moved to Cambridge, Massachusetts, and became a Ph.D. student in the Marketing Group of the Management Science Division[5] of MIT's Sloan School of Management ("Sloan"). See Exhibit 11. At the time of Han's enrollment, Birger Wernerfelt was a professor in and the faculty head of Sloan's Ph.D. program; his responsibilities included advising students, including Han, on what courses to take. See id.; Exhibit 130, at 47; Exhibit 131, at 220. At the time of Han's death, Wernerfelt was the faculty head of the Marketing Group's Ph.D. program.[6] Exhibit 131, at 313. Drazen Prelec was a professor in the Marketing Group and served as Han's research advisor. Exhibit 135, at 29; see Exhibit 133, at 2.

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[4]Randall became an associate dean of S[3] in August 2010. Exhibit 8, at 2.

[5]The Management Science Division consists of three programs: marketing; behavioral and policy sciences; and economic finance and accounting. Exhibit 130, at 48-49.

[6]Wernerfelt served as the head of the Marketing Group's Ph.D. program on a rotating basis with other professors. See Exhibit 4, at 4; Exhibit 11; Exhibit 130, at 49.

On May 24, 2007, Han emailed Sharon Cayley ("Cayley"), the Ph.D. Program Coordinator, to obtain test-taking assistance, writing, "I am failing all of my classes because I don't know how to take exams. I know the course material, but it just won't happen for me on exams. My undergrad institution offered a service that helped students with this sort of thing, so I'm assuming that so does MIT . . . . Where may I find them? I need to get this fixed." Exhibit 86, at MIT000144; see Exhibit 90 (email trail showing Cayley forwarded Han's request for services to Wernerfelt and Prelec). Cayley referred Han to MIT's Disabilities Services Office ("DSO") which Han visited but found to be unhelpful as he was not seeking disability accommodations. Exhibit 86, at MIT000144; see Exhibit 88 (notes from Han's second visit to DSO). Han met with Kathleen Monagle ("Monagle"), the DSO coordinator, on two occasions. Exhibit 87 (Monagle's notes from June 13, 2007, meeting);[7] Exhibit 88 (Monagle's notes from June 21, 2007 meeting).

In June 2007, Cayley referred Han to MIT Mental Health, Exhibit 86, at MIT000134, where Han met with Dr. Celene Barnes ("Dr. Barnes") on three occasions in July and August 2007. Exhibit 91, at MIT 009641-009671. At their first meeting, on July 9, 2007, Han was resistant to receiving services from MIT Mental Health because his "'issues have nothing to do with [mental health]'" and he wanted to avoid "the stigma associated with" receiving mental health services. Exhibit 91, at MIT009643. Dr. Barnes did not take Han's psychiatric history at that first meeting. Id. Han then emailed Dr. Barnes for a second appointment in order "to further explore treatment for his test anxiety" and to obtain a "referral for . . . [an interpersonal therapy ('IPT')] therapist." Exhibit 91, at MIT009648. At this meeting on July 25, 2007, Han reported to Dr. Barnes his "long history of

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[7]Han had a seizure at the June 13th meeting, and emergency personnel responded. Exhibit 87. On June 21st, Han apologized for the seizure and said that he had '[n]o idea where it came from.'" Exhibit 88, at MIT010244.

major depression with 2 suicide attempts during college. In the first attempt he tried to strangle [him]self with bath[robe] belt. In second attempt he scratched up his arms. . . . He state[d], 'I didn't try very hard either time.'" Id. He denied any suicidal ideation at that time. Exhibit 91, at MIT009649-MIT009651; see Exhibit 86, at MIT000134 (July 29, 2007, email from Han to Cayley describing meeting with Dr. Barnes to be "a completely useless waste of time").

At their August 9, 2007, meeting, Dr. Barnes informed Han that she had been unsuccessful in locating an IPT specialist in the Boston area, but that she would continue to consult with her colleagues. Exhibit 91, at MIT009671. In response to Dr. Barnes' expression of concern that Han "had not been in regular therapy since his move to Cambridge over one year ago[,]" Han informed her that he had been receiving treatment from Dr. John Worthington ("Dr. Worthington"), a psychiatrist at Massachusetts General Hospital ("MGH"). Id. Han declined to permit Dr. Barnes to consult with Dr. Worthington. Id. Dr. Barnes contacted Han by email on September 18, 2007, to inform him that she had been unable to find him an IPT therapist, and to recommend that he work with Dr. Worthington on this issue. Exhibit 91, at MIT009672. Han responded that he had been "able to make other arrangements for treatment . . . ." Id.

Meanwhile, on July 2, 2007, Monagle emailed Han to recommend that he contact S^3, where the staff could help him with his test-taking skills. Exhibit 94. Monagle also suggested that, if he found "that the existing resources (such as meeting with [his] faculty, and the Academic Resource Center) [did] not meet [his] needs for improved test-taking performance," he should consider "hiring someone privately to assist [him] in the way" he needed. Id. Monagle also "strongly encourage[d]" Han to connect with MIT Mental Health. Id. On August 6, 2007, Han contacted S^3 by email, explaining that he had "difficulty with taking exams, to the extent that" he was failing his classes,

and inquiring about "any kind of counseling service that teaches study skills or that helps with matters such as this[.]" Exhibit 93.

As a result of sending this email, Han met with Randall on September 6, 2007. Exhibit 95. At this meeting, Han told Randall that he did not want his exam difficulties to be "seen as a 'problem'" and that he was "looking for a quick fix." Id. Han also revealed to Randall that he had "a long history of mental health issues and depression[,]" that he was taking "a smorgasbord of medications" at that time, and that he was being treated by Dr. Worthington with whom he had not discussed his exam difficulties. Id. Han met with Randall again on September 24, 2007, at which time he acknowledged his two suicide attempts "and frequent suicidal thoughts. However, [Han] did not identify a specific plan and said it himself that he [was] not imminently suicidal." Exhibit 96. Randall "strongly encouraged him to visit" MIT Mental Health, but Han was resistant, and Randall felt that, as Han "was not an imminent threat[,] . . . [he] did not have much leverage in getting him over to" MIT Mental Health, especially given that Dr. Worthington "was aware of [Han's] suicidal ideation." Id.

At this second meeting, Han agreed to allow Randall speak with Dr. Worthington, id., but he then revoked his permission by email to Randall that same day, writing that he wanted "to keep the fact of [his] depression separate from [his] academic problem" and that he preferred that his "academic problems . . . be framed in terms of a deficit in study skills instead." Exhibit 98. In response, Randall wrote to Han that he "would still like to met with [Han]" and encouraged him to schedule another appointment. Exhibit 99. After consulting with Dr. Barnes about Han, Randall contacted Dr. Worthington merely to inform him of their "safety concerns." Exhibit 100. To that end, Randall telephoned Dr. Worthington on September 27, 2007, and "informed him that [Han] has

been agitated, a little suspicious, and anxious," and told him about the suicidal thoughts and previous suicide attempts. Id.; Exhibit 101. "Dr. Worthington would not discuss the case further . . ., but agreed the information should be taken seriously." Exhibit 100. Randall and Dr. Barnes agreed to keep in touch about Han. Exhibit 101; see Exhibit 137, at 173-174 (Randall's deposition testimony that he did not recall having any further communication with Dr. Barnes about Han, and that by agreeing to keep in touch, he likely meant that they would contact each other "should there be something of significance in the future").

On May 9, 2008, Michael Braun ("Braun"), a Sloan faculty member, emailed Prelec to inform him that an administrative assistant in MIT's Marketing Department had "expressed concern about Han's overall mental health and well-being. 'Out of it' and 'despondent' are two words [the administrative assistant] used. Han has always been very low-key, so it's hard . . . to tell if there has been a change in his behavior, although . . . he has been having trouble sleeping of late." Exhibit 102 MIT010147-MIT010148; see Exhibit 156, at 23-24, 31-35 (Braun's deposition testimony describing conversation about Han and Prelec's response to Braun); see also Exhibit 156, at 36-38 (Braun's deposition testimony that he followed up in person with Prelec about one week later). Prelec met with Han on May 12, 2008, and learned that Han was "sleep deprived . . ., and . . . taking something on prescription to help him sleep. He [was] seeing a psychiatrist regularly at [MGH] (not MIT)[.] Same person he has been seeing since he got here." Exhibit 102, at MIT010147. The following day, Prelec emailed this information to Wernerfelt, who agreed that Han "had some serious issues with exam anxiety," and suggested that they administer Han's general exams[8] "in a less concentrated

[8]General exams, or "generals," are held the summer of the student's second year. Exhibit 5, at 145; see Exhibit 5, at 146 (explaining format of generals); Exhibit 108, at 68-69 (same).

form. . . . [in order to enable him to] get a good grade under his belt before taking the next one[.]" Id.

One of Han's professors, Bengt Holmstrom contacted Wernerfelt about Han by email on May 26, 2008, writing:

> "Towards the end of the term [Han] told me that he has had medical problems that have prevented him from focusing on his classes. I said I would be happy to give him a make up once his health returns, but he said he couldn't wait and had to take the final exactly on the scheduled date. . . . Instead he asked me to consider his weakened health when he takes the final. He didn't do well and now I'm wondering what to do. An unusual feature of the case is that no one from the graduate school has written me to let me know that Han has been ill. . . ."

Exhibit 105, at 2. The professor requested assistance from Wernerfelt. Wernerfelt responded by explaining that Han was

> "having serious problems. Some of his issues seem to peak at exam time, but there is much more to it than that. He has been seeing a psychiatrist at MGH (not MIT) as long as he has been here. I thus have no official information but I do believe that he is at risk. He is taking generals in August and we have changed the nature of the exam to reduce the pressure on him. In addition, we have pretty much decided to pass him no matter what. I do not know if he can write a dissertation, but we are working on a lot of small confidence boosting . . . assignments. Since he is in his early twenties, there is a chance he could outgrow it in the next few years. If not, he could not hold a teaching job."

Exhibit 105, at 1-2.

On June 2, 2008, Han emailed Wernerfelt a list of professors in "the order in which" he wanted to take his general exams. Exhibit 109, at MIT000154. Wernerfelt assigned dates to those nine professors and relayed the information to them, explaining that he and Prelec "decided to reduce pressure on Han by spreading out his generals over several weeks. The idea is that he takes [the] exams one by one, with perhaps a week in between. That way he can get feedback etc [sic] with lower stakes." Exhibit 109, at MIT000153. Wernerfelt amended his plan a few days later, writing

to Han's professors that he had offered Han "an even better deal" in order "to reduce the pressure on Han as much as possible . . . . The idea is that I hold all the exams, that he tells me when he is ready and for what. . . . I apologize for this, but believe that it is the right thing to do." Id. Wernerfelt anticipated that the process would begin in mid-July and continue into the fall semester. Id.

In the midst of this scheduling, in June 2008, Han himself filled out a Management Science Area Ph.D. Student Self-Evaluation Form for the 2007-2008 school year ("Self-Evaluation Form").[9] He responded, "Everything" to the question asking what he would like to improve about his performance. Exhibit 106, at MIT000190. In response to the question, "Discuss how your progress compares to that of an 'average' PhD student at your stage in the program[,]" Han wrote:

> "Below average, due to my medical condition. Right now, my medical condition is horrendously bad. It has been that way since November [2007], and definitely affected my academic performance, especially over the last semester. The primary nature of this illness is insomnia. Very frequently over the last semester, I would not be able to sleep at night for nights on end, and therefore not be able to function. There were days during which I was so completely debilitated for the entire day that I was unable to get out of bed at all, much less function properly. At one point, in late April, I had to be hospitalized because I was so delirious and incoherent at not being able to sleep for over 72 hours. . . . I would not be surprised if I have to be hospitalized again in the near future. Over this entire course of this episode of insomnia, I have been seeing a team of doctors at [MGH] and elsewhere who have been trying to help me. I've gone through 8 different sleeping pills, and I am on my 9th right now. Each one would either work only for a little while (about a week or two) and then suddenly stop working, or would put me to sleep but severely affect my daytime functioning, so in both cases I'd have to switch to another. I'm still consulting with my doctors about the next steps, but I believe that the prognosis right now is not in the least optimistic. I am not functioning well. During last semester, all the work I had was to TA [i.e., serve as a teaching assistant] for one class . . . and retake a class that I had failed during my first year. I was barely able to execute my duties as a TA, but the morning of the exam [for the class he was retaking], and for

[9]The plaintiff notes that the Self-Evaluation Form is unsigned, but does not dispute that Han actually filled out the document. See Plaintiff's Response to Statement of Fact par. 109.

> the weekend prior to the exam, I was feeling so horrible that I again failed [that class]. And as of right now, I continue to struggle, with my condition deteriorating rapidly."

Exhibit 106, at MIT000189.

Han emailed the Self-Evaluation Form to Wernerfelt on June 11, 2008. Exhibit 107. Wernerfelt responded that day, writing:

> "If you want, I can get you a leave from the program?
>
> "This would allow you to stop the clock on the fellowship etc [sic] such that you could return to a good situation once the [doctors] lick your sleeping problems.
>
> "There is no need to let me know now. You can send me an e-mail any time before (or even after) the start of the fall semester."

Id. In an email to Prelec, dated June 16, 2008, Han wrote:

> "My medical condition, since I last emailed you,[10] has worsened dramatically. My daily functioning has gone completely, my intellectual capacity has been reduced to that of a towel, all capacity for coherent thought of any kind is entirely absent, and for reasons mysterious to me, my doctor wants to keep it that way for longer. It requires massive effort for me just to write this email. Therefore, I believe I will have a very difficult time making that meeting with you . . ., so I'd like to postpone our meeting to later that week until I can see my doctors. . . . I will beg, however, that it be an afternoon slot because I have extreme difficulty getting out of bed in the morning if I'm able to get up at all."

Exhibit 183, at MIT014741.

By July 24, 2008, Wernerfelt reported by email to Han's professors and Cayley that "Han has not started taking generals this summer. My guess is that he will not. There is some chance that he will take them in January and some chance that he will take the fall off." Exhibit 109, at MIT000152. Cayley responded to Wernerfelt that same day, writing, "As you recall last year I made

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[10]On May 21, 2008, Han emailed Prelec that, "for the last couple days [he had] been feeling a little better, so hopefully the vacation time will speed [his] recovery." Exhibit 183, at MIT014742.

several attempts to help him with this, none of which were acceptable to him (including two different persons in [S^3]). If the arrangements by the Marketing [G]roup don't resolve the test difficulties, I'm unsure that you (or we for that matter) can do anything further." Id.

Han ultimately took his general exams in January 2009. See Exhibit 110; Exhibit 112. At a Marketing Group faculty meeting after Han's generals, Han's professors discussed Han's performance. Exhibit 111, at 2-3. Wernerfelt recommended that they pass Han and counsel him to pursue a master's degree instead of a Ph.D., and he "asked [his] colleagues to consider that in failing [Han] they might end up with 'blood on their hands.'" Exhibit 111, at 3; Exhibit 103, at 216-217 (Wernerfelt's deposition testimony explaining that he "felt that there was a very small chance that he could cause harm to himself or others, . . . maybe one percent, but again a bad outcome, a small chance" and that he "tried to state the case as strongly as [he] could to win [his] argument"); see Exhibit 5, at 198-199 (Wernerfelt's deposition testimony denying that he used the word "suicide" at meeting); Exhibit 131, at 267 (Wernerfelt's deposition testimony that Han did not "give an indication that he was at risk of . . . hurting himself"); Exhibit 156, at 55 (Braun's testimony that he interpreted Wernerfelt's "blood on our hands" comment to mean that if they "kick[ed] Han out of the program, Han could commit suicide"); Exhibit 158, at 70, 121-122 (MIT professor and Sloan dean Glen Urban's testimony that Wernerfelt commented at meeting that he did not "want to have blood on [his] hands[,]" but that Wernerfelt "didn't actually say suicide. He said serious consequences, which . . . most of the people interpreted as a risk for suicide"); see also Exhibit 131, at 266 (Wernerfelt's deposition testimony that a student who fails his generals "is typically asked to leave" MIT). The faculty decided to pass Han. See Exhibit 158, at 70.

Thereafter, Wernerfelt met with Han and informed him that he had passed his general exams,

but he had to take at least three more courses for his Ph.D. Exhibit 112. Wernerfelt also "laid out the path to a [master's degree] (just needs to write a paper)" and told him "that all members of the faculty felt that he would be unhappy in a professorial job[.]" Id. Han told Wernerfelt that he wanted to pursue a Ph.D. Exhibit 103, at 264.

In a March 2009 email, Han addressed his academic situation with Prelec, writing:

> "I've been thinking about what you and [Wernerfelt] told me about my performance in the PhD program after my generals. I didn't realize at the time, but I realize now that when he said that my funding after my 4th year was not guaranteed for me . . ., that meant that the department was threatening to cut off my funding after my 4th year in order to try to force me to leave the program. That would explain why he at that point tried to talk me into writing up our . . . project as a thesis with which I could graduate at the end of this semester with a masters [sic]. I recall asking you in our subsequent meeting if there was any possibility that I could get funding from you through your apparently vast reserves of grant money to see me through the program. You equivocated on this point, but I was too much of a wilting flower to push for a more forthcoming answer. However, your equivocation leads me to believe that you would prefer that I leave the PhD program sooner rather than later.
>
> ". . . . It hurt me very deeply to learn after my generals that the entire faculty thinks that I would not be a good professor, because to be a professor is what I want more than anything. Although you assuaged me of your opinion of this, [Wernerfelt], at least, apparently thinks that one reason that I wouldn't be a good professor [is] because of my personality. But apparently, the entire faculty agree that it is because I haven't been performing well enough in my classes. I rebutted that my health was in far from prime condition the entire time that I have been in the program that led to this. (Subjectively the situation has improved compared to a few months ago . . . .) I'm not convinced that anyone has really taken my health issues into consideration in coming to their conclusion. But apparently, I don't have the support of the faculty in continuing with the PhD program.
>
> "Despite all this, will still do everything in my power to ensure that I will finish the PhD. But I really need to know: To what extent can I rely on your support? . . . ."

Exhibit 163, at MIT014407, MIT009971. Prelec forwarded this email to Wernerfelt. Exhibit 163, at MIT014407. Prelec responded to Han that same day, writing, in part, that he would prefer to "talk over [Han's issues] in person . . . ." Exhibit 164. At his deposition, Prelec testified that, while he

and Han "did touch upon these general issues in some of [their] later meetings, . . . [they] never did it in a way that [they] were responding directly to the very specifics" in Han's email. Exhibit 135, at 269.

In May 2009, Han accepted the offer of visiting professor Mark Ritson to serve as one of his teaching assistants for the Fall 2009 semester. Exhibit 113, at MIT008224. Also in May 2009, based on Prelec's recommendation, see Exhibit 114, at 27, 35, 49; Exhibit 115, Dr. Trey Hedden ("Dr. Hedden") offered Han a research assistant position at the Department of Brain and Cognitive Sciences ("BCS") for Summer 2009. Exhibit 116. In anticipation of beginning his research assistant work, Han wrote to Dr. Hedden on May 27, 2009, copying Prelec:

> ". . . . I've become very excited about this project. Given that I have less on my plate at the moment and that I anticipate having more on my plate later in the summer due to other things that I'm working on, I think it would be a pity if due to formalities I lost too much time that could be spent working on this project; therefore I would be eager to begin very soon. If you can be reasonably confident at this time that the logistics of the position will eventually be resolved favorably in due course (by which I mean I can have a check deposited in my bank account by the end of June, which gives the involved parties plenty of time), I see no reason to delay starting my work on this project. I'm ready when you are. . . . Also, not that it's very urgent, as soon as you could update me on the status of the logistics, I'd appreciate that as well. ([Prelec] told me it was just a matter of John Gabrieli approving it? I'm sure he replies to your emails in a very timely manner even though he didn't for the ones that I sent him as an undergrad, so is it a question of availability of funds? I always thought his coffers were bottomless.) . . . ."

Id. Prelec forwarded this email to Wernerfelt, stating that he did not know "what to make of" Han's email to Dr. Hedden, and that he was "mildly nervous about recommending him at BCS." Id. He asked Wernerfelt if he thought it was a "reasonable" message. Id. Wernerfelt responded, "I like his eagerness and by now I am used to his abrasive e-mails[,]" and he suggested that Prelec tell him "that he is low on social skills but qualified to do the work" and that "perhaps someone should talk to him

about sending more respectful e-mails (I can do it if [you] think that is better[])." Id. Shortly thereafter, Prelec wrote that he was "sure that it is not on purpose – [Han] just does not understand" and Prelec suggested that he and Wernerfelt "should offer to prescreen [Han's] e-mails to [BCS] – after two or three he might get the idea[.]" Id.

Dr. Hedden met with Han on June 1, 2009, and made arrangements for his database access and workspace. See Exhibit 114, at 90-93 (Dr. Hedden's deposition testimony regarding his June 1st meeting with Han); Exhibit 117; Exhibit 118, at MIT011655. The following day, June 2, 2009, Han sent Dr. Hedden an email at 7:17 a.m., in which he wrote, in pertinent part:

> "If we can quickly follow up on the conversation that we had yesterday, if you'll forgive me, I'd like to be honest with you about something. [Prelec] recommended me for this position; John Gabrieli himself knows me and was one of my recommenders to the graduate program that I'm currently in. And I'm not an undergrad anymore; I'm a grad student now. For those reasons, it was disturbing, as well as a little insulting, to me that yesterday you took pains to express your expectations of me in a manner that presumed that I would give you anything less than this project deserved, that you would 'give me a signal' if you didn't think that my contribution amounted to something deserving of authorship credit, that 'there would be a problem' if it turned out that '[you] could do [the work] faster [your]self,' that you threatened me that you could tell by visual inspection whether my work was up to par. I like to feel like I've earned the right not to have my effectiveness or my integrity questioned anymore, and to hear you do that yesterday was kind of hurtful. I'm not sure that if you continue to do this that I'll be able to work as effectively as I'd like to be able to. Although I keep asking about it, I'm not just doing this for the money. I want to learn something and make a meaningful contribution, and I thought I had conveyed that adequately in my previous emails as well as in the initial meeting that we had with Sue Gabrieli. Would it be possible that we could move forward with an understanding of good faith on my part?
>
> "One more thing to remove awkwardness: Because I didn't previously know you, I assumed that I should address you as 'Dr Hedden,' and I was kind of hoping that you would catch me when I did that and ask me that I address you by your first name, since it seems that everyone else does. Shall I, too, or would you prefer that I address you as 'Dr Hedden'?"

Exhibit 121 (first alteration added). Han blind copied Prelec to this email. Id.

In response to receiving Han's email to Dr. Hedden, Prelec contacted Dr. Hedden and Wernerfelt, and attempted to contact Han. See Exhibit 114, at 102, 106, 107-108. First, Prelec spoke with Dr. Hedden about his June 1st meeting with Han, and Dr. Hedden stated that Han had "misinterpret[ed] [Dr. Hedden's] intentions and the tone of the meeting . . . [and] he was taking things out of context . . . ." Exhibit 114, at 107. Second, Prelec forwarded Han's email to Wernerfelt. Exhibit 122, at MIT009861. He asked Wernerfelt to speak with Han "as a somewhat neutral party" and stated that he was "sure Han is misreading things. Even so, the tone of reply is totally out of line." Id. Wernerfelt responded that he would "talk to Han and let [Prelec] know what he says[.]" Id. In his responding email, Prelec speculated that Han "just obsesses over the minutia of the conversation, and then gets worked up." Id.

Han arrived at the BCS lab on June 2, 2009, at around 9:00 a.m. See Exhibit 123, at 29. The lab coordinator, Stephanie Carpenter, described his demeanor that morning as "pretty normal." Exhibit 123, at 32. Han and Wernerfelt exchanged missed calls, then Han reached Wernerfelt at 10:51 a.m., and the call lasted seven minutes, fifty-two seconds. Exhibit 186 (Han's cellular phone records); Exhibit 130, at 190. Han left the lab to take this telephone call. Exhibit 12, at MIT009722. At 11:04 a.m., Wernerfelt emailed the following description of their telephone call to Prelec:

> "I read him the riot act[.]
>
> "Explained what is wrong about the e-mail[.]
>
> "Told him that you or I would look over future e-mails he send [sic] to the BCS people[.]
>
> "I said that we know that he is not out to offend anyone but that he seems poor at navigating the academe[.]
>
> "Said that this is an example of why we all recommended that he take a [master's]

and go out to get a job[.]

"I talked about some papers he could turn into [master's] theses and volunteered to supervise it[.]

"Said that he made you look bad vs BCS and that some patching up was necessary[.]

"He will call you about what to do[.]"

Exhibit 124.

Meanwhile, at the end of his telephone call with Wernerfelt, Han went up to the roof of the building he was in and jumped off the building. Exhibit 12, at MIT009718. At 11:02 a.m., MIT police were dispatched to that building after receiving notification that an individual had jumped from it. Id.

When MIT police arrived at the scene at 11:03 a.m., Jamie Mehringer ("Mehringer") was administering first aid to Han. Id. Mehringer had been walking by the building when he heard a "pop." Exhibit 126, at 12. He turned his head and saw Han "lying on the ground." Id. After realizing that Han was not moving, he ran over and observed Han lying on his back with a pool of blood forming under his head. Exhibit 126, at 24-25. Mehringer saw no visible signs that Han was breathing, and he saw no eye movement. Exhibit 126, at 26. "The fact that he was not breathing, was not moving and there was no pulse" caused Mehringer to administer chest compressions to Han. Exhibit 126, at 26-27. Han was declared dead at the scene at 11:08 a.m. Exhibit 12, at MIT009718. The medical examiner determined that Han's death had occurred within "seconds" and listed the cause of Han's death as "blunt trauma with head, skull, torso and extremity injuries." Exhibit 127 (capitalization omitted).

Prelec relayed the news about Han's death to Han's professors by email at 1:47 p.m. on June

2, 2009. Exhibit 128. In response, also on June 2, 2009, Sloan dean Glen Urban ("Urban") emailed Wernerfelt, writing that he was concerned about Wernerfelt and Prelec "who tried so hard to help Han." Exhibit 128. In a subsequent email that same day, Urban wrote, "Glad to hear you are OK. I know you were worried about suicide, but you can feel positive that we tried very hard to help Han (and especially you did so much to help him)." Id.; see Exhibit 158, at 121 (Urban's deposition testimony that with this reference to Wernerfelt's worry about suicide, he was alluding to January 2009 meeting concerning Han's performance on his general exams).

At some point after Han's death, Wernerfelt met with Han's parents in an office at MIT. Exhibit 131, at 309. Among other things, Wernerfelt told Han's parents about the email Han had sent to Dr. Heddon on June 2, 2009, and about Wernerfelt's telephone conversation with Han about that email. Exhibit 131, at 310, 311, 313.

III. Han's Mental Health History

A. Prior to Attending MIT

Although Han's parents do not recall the timing of the diagnosis, e.g., Exhibit 14, at 50; Exhibit 19, at 139-140; Exhibit 138, at 69,[11] Han informed his various doctors that he had been suffering from depression at least since high school.[12] E.g., Exhibit 13, at SU000037; Exhibit 25,

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[11]At his deposition, the plaintiff did testify that he first learned Han was suffering from depression "maybe in his last year of high school" because he was "complaining" that "he wasn't happy and that sort of thing." Exhibit 138, at 67-68. He did not know, however, if Han reported those feelings to his doctor that time. Exhibit 138, at 68-69.

[12]Han was also fairly consistent in telling his doctors that his maternal aunt mentally abused him when he was a child. See, e.g., Exhibit 13, at SU000039; Exhibit 17, at SU000186; Exhibit 19, at 137-138; Exhibit 20, at 1; Exhibit 25, at SU000059; Exhibit 27, at SU000081; Exhibit 30, at SU000063; Exhibit 46, at 27-28; Exhibit 50; Exhibit 59, at 46, 64-67; Exhibit 68; Exhibit 69; Exhibit 70, at 8.

at SU000058; Exhibit 46, at 27, 46; Exhibit 50; Exhibit 75; Exhibit 139, at 16; see Exhibit 22 (Dr. Bibi Das' note that Han reported having suffered from depression since the age of ten).

Han came to the attention of Stanford Mental Health in December 2002 after his roommate observed Han "standing on [the] edge of [the] bed with [a] bathrobe tie around his neck attached to [the] closet door, looking like he was about to hang himself." Exhibit 17, at SU000187. At that time, Han explained that he was not trying to kill himself but that he was trying to get a crick out of his neck. Exhibit 14, at 33-34, 48-49; Exhibit 17, at SU000187, SU000185, SU000183; see Exhibit 14, at 60-61 (testimony from Han's mother that, while she believed his explanation, she encouraged him to seek treatment after this incident "as a precaution"). But see Exhibit 50 (notes from Han's March 2009 appointment with Dr. Jeffrey Fortgang when he characterized bathrobe incident as "suic[idal] gesture[]").

Between June 2004 and June 2006, Han received mental health treatment through the Stanford clinic. Exhibit 21 (document titled "Stanford Physician Billing Record"). Specifically, he saw Dr. Laraine Zappert ("Dr. Zappert"), Dr. Bibi Das ("Dr. Das"), Dr. Charles DeBattista ("Dr. DeBattista"), and Dr. Katherine Eisen ("Dr. Eisen"). Han did not report any suicidal ideation to Dr. Zappert or Dr. Das, according to the doctors' notes from their appointments. Exhibit 22, at SU000093-SU000094; Exhibit 23, SU000095; Exhibit 24, at SU000084.

Dr. DeBattista's notes from his July 18, 2005, appointment with Han indicate that Han informed him that "he has had frequent suicidal thoughts, though . . . these [thoughts] are chronic and not new. He assures safety and says he does have reasons to live. He reports his biggest reason to live is his parents." Exhibit 13, at SU000037. Han told Dr. DeBattista that six months prior to their appointment, he had attempted suicide by cutting his arm, but "he knew he would not do

enough damage to kill himself. Nevertheless, he states that he wished he would have died." Exhibit 13, at SU000038. Dr. Eisen's notes from a September 2005 appointment with Han reflect similar comments: Han informed Dr. Eisen that he had "chronic suicidal ideation, but . . . that he would not kill himself while his parents are alive[;]" and that he had attempted suicide in April 2005 "when he began 'clawing at his wrist.' This incident was not severe enough to require medical attention." Exhibit 25, at SU000058.

B. While Attending MIT

According to an email Han sent in June 2006, Dr. DeBattista referred Han to Dr. Maurizio Fava in the Boston area "for further treatment of treatment-resistant" major depressive disorder. Exhibit 32, at 2. Through that contact, Han was referred to psychiatrist Dr. John Worthington at MGH. Exhibit 32, at 1. Dr. Worthington treated Han over the course of forty-three appointments from July 2006 to November 2008. Exhibit 33. Consistent with Dr. DeBattista's and Dr. Eisen's notes, Dr. Worthington testified at his deposition that he considered Han "sort of as chronically suicidal ideation, at times wishing he was dead, and . . . . there's a lot of patients sadly who sort of live with that . . . . I wasn't going to admit [Han] the very first day he said the S word, and I was going to live with that and then try to help give him some relief from his . . . bad depression." Exhibit 139, at 30. Han also reported to Dr. Worthington that he had "no suicidal attempts besides scratching his wrists." Exhibit 139, at 14 (Dr. Worthington's deposition testimony reading own handwritten notes). Accord Exhibit 33, at 000003 (Dr. Worthington's handwritten notes).

While Dr. Worthington was treating Han, Han also saw other practitioners. First, at Han's request, in July 2006, Dr. Worthington referred Han to Dr. Charles Welch ("Dr. Welch") at MGH for Electroconvulsive Therapy ("ECT"). Exhibit 36. Han underwent ECT on six occasions between

August 23, 2006, and September 6, 2006. Exhibit 38. After the sixth occasion, Dr. Welch wrote in his notes that Han "reports that there has been absolutely no change in his depressive symptoms. He has also had no observable change in his affect, mood, or behavior. He maintains that he is still severely depressed." Id. Dr. Welch further wrote that Han's "behavior during the course of ECT has been unusual. He has treated the nursing staff in a hostile, demanding, critical, angry manner. He has lashed out at them verbally on each occasion he has been here for ECT, even when they have been trying to help him." Id. Finally, Dr. Welch speculated in his notes that Han's "lack of response to an adequate trial of ECT, and his inappropriately rageful interpersonal relations, point towards the possibility of a serious misdiagnosis. It appears quite possible that he was misdiagnosed during his workup at Stanford, and treated pharmacologically for what appears to be character disorder, probably borderline spectrum." Id.

Second, also at Han's request, in September 2006, Dr. Worthington referred Han to Carol Murphy ("Murphy"), a social worker at MGH, for IPT. Exhibit 33, at 000005; Exhibit 45, at 1; Exhibit 46, at 10; Exhibit 139, at 20. Han reported to Murphy that he occasionally "had suicidal thoughts, but no intent or plan." Exhibit 46, at 48. Murphy testified at her deposition that she did not "see [Han] as at risk for suicide when he was with" her. Exhibit 46, at 141. Han ended his treatment with Murphy by an email dated December 14, 2006, in which he wrote that their "time together has not resulted in a single inch of progress." Exhibit 48.

Third, Han saw Dr. Stephen Bishop, a clinical psychologist located in Providence, Rhode Island, six times between October 2007 and April 2008. Exhibit 49; Exhibit 142. Fourth, in order to treat his insomnia, Han went to Sleep Health*Centers* where he saw saw Dr. Anjali Ahn ("Dr.

Ahn")[13] on five occasions from April 2008 through March 2009, Exhibit 58 (April 21, 2008); Exhibit 60 (May 13, 2008); Exhibit 61 (July 15, 2008); Exhibit 63 (March 30, 2009), and Dr. Stephen Amira ("Dr. Amira") on five occasions from August 2008 through November 2008. Exhibit 66 (August 12, 2008); Exhibit 68 (September 23, 2008); Exhibit 69 (October 28, 2008); Exhibit 72 (November 18, 2008); Exhibit 73 (November 11, 2008); see Exhibit 67 (email dated February 3, 2009, from Han to Dr. Amira canceling all upcoming appointments because his "sleep patterns are beginning to converge on nonpathology").

Finally, Dr. Worthington referred Han to Dr. Marcel Fajnzylber ("Dr. Fajnzylber") "for a psychological evaluation to assess: 1) cognitive and affective functioning, and 2) salient personality traits and psychodynamics." Exhibit 70, at 1.[14] Dr. Fajnzylber conducted this testing over two sessions on November 5, and November 11, 2008. Id. During the sessions, Han acknowledged that he was not "'imminently suicidal'" but that he had had plans in the past. Exhibit 70, at 8. Dr. Fajnzylber wrote in his report that these comments "reveal[ed] an ongoing potential for taking his life. Hence the risk of acting on suicidal thoughts remains a presenting problem." Id. The diagnostic impressions that Dr. Fajnzylber reached after this two-session evaluation was that Han had recurrent major depression and post-traumatic stress disorder; he ruled out "bipolar II[.]" Exhibit 70, at 13; see Exhibit 71, at 54-56 (testimony from Dr. Fajnzylber explaining his diagnostic impressions); see also Exhibit 72 (Dr. Amira's notes from November 18, 2008, appointment during which Han indicated his disagreement with Dr. Fajnzylber's report).

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[13]On some records, Dr. Ahn appears under her maiden name, Dr. Patwardhan. Exhibit 58, at 4; Exhibit 60, at 3.

[14]Han added footnotes to Dr. Fajnzylber's report "for the benefit of other people reading this." Exhibit 77.

Han had his final appointment with Dr. Worthington on November 6, 2008. See Exhibit 35. Their relationship had "soured[,]" Exhibit 140, at 392, and Han was frustrated with Dr. Worthington's recommendation of certain medications. See Exhibit 35. At this final appointment, Dr. Worthington provided Han with the contact information for Dr. Michael Marcus ("Dr. Marcus"), whose practice was located at 82 Marlborough Street, Boston, a building that housed several psychiatrists and psychotherapists. Id.; see Exhibit 140, at 391 (Dr. Worthington's deposition testimony that "everybody in psychiatry" understood significance of 82 Marlborough Street).

Han saw Dr. Marcus approximately once a month from November 2008, to May 2009. Exhibit 75 (billing information); Exhibit 76, at 17. At his first appointment on November 26, 2008, Han denied suicidal ideation, although he admitted to having half-heartedly attempted suicide on two occasions. Exhibit 75. Each time he saw Han, Dr. Marcus asked him whether he had any self-destructive thoughts and felt like giving up, and Han always answered in the negative. Exhibit 76, at 39-40 (Dr. Marcus' deposition testimony that his notes would have reflected if Han's answer had "been anything but no"). At the time of his April 2009[15] appointment, Han's daily medication regime was three doses of Geodon (80 mg. each), two doses of Adderall (30 mg. each), one dose of Lexapro (20 mg.), and one dose of Xanax (0.5 mg.). Exhibit 75.

Dr. Marcus referred Han to Dr. Jeffrey Fortgang ("Dr. Fortgang"), whom Han began seeing for psychotherapy in March 2009. Exhibit 50. At his first appointment on March 12, 2009, Han denied current suicidal ideation, but he stated that he had a history of "2 suic[idal] gestures: freshman year [of] college he loosely tied bathrobe belt around [neck]; [junior] year he scratched

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[15]Dr. Marcus' notes from Han's final appointment with him on May 4, 2009, are not in the summary judgment record. See Exhibit 76, at 17-18 (Dr. Marcus' deposition testimony explaining that there is no record of that appointment).

wrist, did not draw blood." Id. By the time of Han's final appointment on May 28, 2009, Dr. Fortgang recorded that Han remained depressed, and that he was frustrated with his lack of progress. Id. They discussed "potential ways to place himself in position to be less isolated [and] derive more pleasure[,]" but Han did not see any "of the options as workable." Id. They planned for Han to return for his next appointment in three weeks. Id.

DISCUSSION

Summary judgment is granted where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 808-809 (1991); Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989); see Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Where the parties have cross-moved for summary judgment, the court "assesses the factual material in the light most favorable to the unsuccessful opposing party" and "draw[s] all permissible inferences and resolve[s] any evidentiary conflicts in that party's favor." Epstein, 77 Mass. App. Ct. 756; see Premier Capital, LLC v. KMZ, Inc., 464 Mass. 467, 474-475 (2013). The non-moving party, however, cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. LaLonde v. Eissner, 405 Mass. 207, 209 (1989). "[B]are assertions and conclusions . . . are not enough to withstand a well-pleaded motion for summary judgment." Polaroid Corp. v. Rollins Envtl. Servs., Inc., 416 Mass. 684, 696 (1993).

The plaintiff has alleged wrongful death claims of negligence, conscious pain and

suffering, and punitive damages against all of the defendants, and, against MIT alone, claims of breach of contract and respondeat superior.

I. **Duty of Care**

In moving for summary judgment, the parties focus on the duty element, disagreeing over whether the defendants owed Han a duty of care to prevent him from committing suicide. The defendants argue that they owed Han no duty of care; the plaintiff argues that the defendants owed Han a duty of care as a matter of law. Alternatively, the plaintiff argues that the court should deny both summary judgment motions because genuine issues of material fact preclude a determination as to whether the defendants owed Han a duty.

In the context of suicide, Massachusetts "permit[s] recovery under negligence principles" in two distinct situations: "either (1) the defendant's negligence was the cause of the decedent's uncontrollable suicidal impulse, . . .; or (2) the decedent was in the defendant's custody and the defendant had knowledge of the decedent's suicidal ideation." Nelson v. Massachusetts Port Auth., 55 Mass. App. Ct. 437, 435-436 (2002) (internal citations omitted); see Eisel v. Board of Educ. of Montgomery Cnty., 324 Md. 376, 381 (1991) (setting forth two similar "broad categories of cases in which a person may be held liable for the suicide of another"). As Han was not in the defendants' custody at any point, the plaintiff must proceed under the first situation, that the defendants' negligence caused Han's suicide. See Nelson, 55 Mass. App. Ct. at 435.

"An essential element of every negligence claim is the existence of a legal duty, which is the determinative issue in this case" with respect to the plaintiff's wrongful death claims against the defendants. Afarian v. Massachusetts Elec. Co., 449 Mass. 257, 261 (2007). "If no such duty exists, a claim of negligence cannot be brought." Remy v. MacDonald, 440 Mass. 675, 677 (2004);

Coughlin v. Titus & Bean Graphics, Inc., 54 Mass. App. Ct. 633, 638 (2002) ("[A] person is not negligent toward another unless he owes the other a duty to be careful."); see Davis v. Westwood Grp., 420 Mass. 739, 742-743 (1995) ("Before liability for negligence can be imposed, there must first be a legal duty owed by the defendant to the plaintiff, and a breach of that duty proximately resulting in the injury."). "The existence of a legal duty is a question of law appropriate for resolution by summary judgment." Afarian, 449 Mass. at 261. Compare Mullins v. Pine Manor Coll., 389 Mass. 47, 56 (1983) ("Usually 'the question of negligence is one of fact for the jury.'" (citation omitted)).

"[G]enerally speaking, a person has no legal duty 'to prevent the harmful consequences of a condition or situation he or she did not create,'" O'Meara v. New England Life Flight, Inc., 65 Mass. App. Ct. 543, 544 (2006), "unless a 'special relationship' exists between the party posing a risk to others and the party who can prevent that harm from occurring by taking action." Roe No. 1 v. Children's Hosp. Med. Ctr., 469 Mass. 710, 714 (2014). "[A]ll common-law special relationships are based largely upon a uniform set of considerations, which evolve with social values and customs." O'Meara, 65 Mass. App. Ct. at 545. "Foremost among the considerations in ascertaining the existence of a special relationship that would give rise to a duty of care is 'whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so.'" Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 243 (2010), quoting Irwin v. Ware, 392 Mass. 745, 756 (1984); O'Meara, 65 Mass. App. Ct. at 545; see Afarian, 449 Mass. at 262 ("'To the extent that a legal standard does exist for determining the existence of a tort duty . . ., it is a test of the "reasonable foreseeability" of the harm.'" (internal quotations omitted) (quoting Jupin v. Kask, 447 Mass. 141,

147 (2006))). "[S]uch foreseeability can be based on [1] reasonable reliance by the plaintiff, [2] impeding other persons who might seek to render aid, [3] statutory duties, [4] property ownership, or [5] some other basis." Irwin, 392 Mass. at 756.

Here, the plaintiff argues that the defendants had a special relationship with Han such that they reasonably should have foreseen Han's suicide. The plaintiff appears to rely on "some other basis" as the source for the defendants' special relationship,[16] see id., arguing that, given their positions at MIT and their awareness of Han's mental health issues, they voluntarily assumed the duty to protect Han from suicide.[17] The plaintiff has not demonstrated that he will be able to make this showing at trial. The court finds persuasive support for this conclusion in Shin v. Massachusetts Ins. of Tech., 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005) (McEvoy, J.),[18] although it is

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[16]The other sources of foreseeability are not present here: the defendants did not prevent Han from receiving assistance from other persons; they owed Han no statutory duties; property ownership is not at issue; and Han was expressly, through his statements, and impliedly, through his actions, not relying on the defendants for assistance with his mental health issues as he made it clear that he only sought academic services from the defendants, that he wanted to keep his mental health problems separate, and that he was receiving mental health treatment outside of MIT. See, e.g., Sacchetti v. Gallaudet Univ., 2016 WL 1589814, *8 (D.D.C. 2016) (noting that defendant university's mental health center offered treatment to student who committed suicide "which he refused" because he "harbored distrust for the effectiveness of [defendant's] mental health services[,]" and finding this fact significant in concluding that student did not rely on defendant university to his detriment); Jain v. State, 617 N.W.2d 293, 299-300 (Iowa 2000) (holding that student who committed suicide did not rely "on the services gratuitously offered by" defendant university where "he failed to follow up on recommended counseling or seek the guidance of his parents, as he assured the staff he would do").

[17]The mere existence of MIT Mental Health, which provides individualized and group counseling and evaluations, does not create a special relationship between MIT and Han as Han rejected assistance from that office. See supra n.16; see, e.g., Carman v. Shaffer, Civil No. 03-05154, slip op. at 20 (Middlesex Super. Ct. Aug. 6, 2009) (Henry, J.) (concluding that Tufts University did not have special relationship with student who died in fire caused by smoking in bed while intoxicated where university "was not able to compel [student] to continue counseling").

[18]Both the plaintiff and the defendants rely on Shin in support of their positions.

distinguishable on its facts and its ultimate conclusion.

There, an MIT sophomore ("decedent") committed suicide by lighting herself on fire in her dormitory room in the spring semester of her sophomore year. Id. at **5-6. The court determined that the decedent's housemaster and the dean of Counseling and Support Services ("CSS dean") had a duty to prevent the decedent's suicide because they had a "'special relationship'" with the decedent. Id. at *13. Relevant to the court's analysis was a consideration of whether the decedent's mental state was such that a defendant in the position of the housemaster and the CSS dean "could reasonably foresee that [the decedent] would hurt herself without proper supervision." Id.; see, e.g., Sacchetti v. Gallaudet Univ., 2016 WL 1589814, *8 (D.D.C. 2016) (concluding that there was no "'special relationship' that imposed an obligation upon the university to prevent a student's suicide" where there were no facts that student "showed signs of suicidal ideation, reported that he was suicidal, or had a previous suicide attempt that was known to [the university]").

First, the decedent had attempted suicide in her dormitory by overdosing during her freshman year. Shin, 2005 WL 1869101, at *1. Second, when the CSS dean met with the decedent during the fall semester of her sophomore year, she "told him that she had been cutting herself intentionally" and he "[o]bserved the self-inflicted scratches . . . ." Id. at *2. Third, one month later, the CSS dean received an email from one of the decedent's instructors "stating that [the decedent] had told a teaching assistant she bought a bottle of sleeping pills with the intention to take them, but had decided not to." Id.

Fourth, less than one month before the decedent's suicide, a student notified the housemaster that the decedent "was cutting herself and extremely upset." Id. at *3. Fifth, in the weeks before the decedent's suicide, the housemaster "began receiving frequent reports" from MIT students and tutors

that the decedent's "mental health was deteriorating." Id. Sixth, the housemaster and other residents of the decedent's dormitory were concerned that the decedent might harm herself, and the housemaster relayed that concern to the CSS dean. Id. In fact, the housemaster had reported each of these incidents either to MIT Mental Health or to the CSS dean with whom she "had several conversations . . . discussing [the decedent's] fragile state." Id. at **3-5, 13.

Seventh, four days before the decedent's suicide, one of the decedent's professors contacted the housemaster "to express her concerns about" the decedent. Id. Eighth, on the day of the decedent's suicide, two students notified the housemaster that the decedent "had told them that she planned to kill herself that day[,]" and the housemaster believed that the decedent "intended to carry out her suicide plan." Id. at *5. Finally, later that morning, the housemaster spoke with the decedent who "told her, 'You won't have to worry about me any more,' or words to that effect." Id. This "disturbing conversation" caused the housemaster to be "[c]oncerned more than ever . . . ." Id.

The court concluded that the plaintiffs provided "sufficient evidence" that the decedent's mental state was such that a defendant in the position of the housemaster and CSS dean "could reasonably foresee that [the decedent] would hurt herself without proper supervision. Accordingly, there was a 'special relationship' between" them and the decedent, imposing a duty on them "to exercise reasonable care to protect [the decedent] from harm." Id. at *13.

Here, the plaintiff has not demonstrated that he can make a similarly sufficient showing. First, prior to attending MIT, Han attempted suicide on two occasions, neither of which necessitated hospitalization. Second, Han was proactive in seeking assistance from MIT for his difficulty with taking exams, and although he openly discussed with the defendants his history with depression and chronic insomnia, he sought treatment for his mental health from providers outside of MIT and

expressly rejected assistance from MIT Mental Health. Third, in March 2009, Han wrote to Prelec and Wernerfelt that, although it "hurt" him "very deeply to learn . . . that the entire faculty thinks that [he] would not be a good professor" and that he should focus on obtaining a master's degree rather than a Ph.D, Han vowed to "do everything in [his] power to ensure that [he] will finish the PhD." Fourth, Han accepted a teaching assistant position for the Fall 2009 semester. Fifth, as of May 27, 2009, Han was "very excited" about the research assistant position he had for Summer 2009. Based on these facts, the defendants[19] "reasonably could [not] foresee that [they] would be expected to take affirmative action to protect [Han] and could [not] anticipate harm to [Han] from the failure to do so." Irwin, 392 Mass. at 756.

Wernerfelt's statement in January 2009 that if Han failed his general exams, Wernerfelt and the faculty "might end up with 'blood on their hands'" does not alter this conclusion. Not only did Wernerfelt make that statement six months prior to Han's suicide, but he also made it in order to convince the faculty to pass Han on his general exams. Further, the faculty *did* pass Han, and, thereafter, Han expressed his intent to "do everything in [his] power to ensure that" he obtained his Ph.D. Wernerfelt's "riot act" telephone conversation with Han just prior to Han's suicide also does not alter this conclusion for similar reasons. Han had accepted a research assistant position for Summer 2009, and Han had made arrangements for a Fall 2009 teaching position. An individual in

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[19]Randall stands in a slightly different position than Wernerfelt and Prelec. Randall met with Han in September 2007, over a year and a half before Han's suicide, and, although Han admitted to previous suicide attempts, Randall did not feel that there was "an imminent threat" of suicide. Randall could therefore not have reasonably foreseen that he would be expected to take affirmative action to protect Han from suicide in September 2007. It follows, then, that he could not have reasonably foreseen that he would be expected to take action to prevent Han's suicide in June 2009, even if the plaintiff could prove that suicide was reasonably foreseeable to Wernerfelt and Prelec. That notwithstanding, the court continues to refer to the defendants collectively for purposes of simplicity.

Wernerfelt's position "reasonably could [not] . . . anticipate harm to" Han from reading Han "the riot act" in reference to an email that Wernerfelt and Prelec deemed inappropriate.

Accordingly, as a matter of law, as the defendants did not have a special relationship with Han, they did not have a duty to prevent Han's suicide. See Eisel, 324 Md. at 382, and cases cited ("[A]ttempts to extend the duty to prevent suicide beyond custodial or therapist-patient relationships have failed."); see, e.g., Schieszler v. Ferrum Coll., 263 F. Supp. 2d 602, 609 (W.D. Va. 2002) (denying motion to dismiss wrongful death claim against college for student's suicide where complaint alleged facts constituting special relationship, including, inter alia, that student lived in on-campus dormitory, that "defendants knew that, within days of his death," student had been found with self-inflicted bruises and "had sent a message to his girlfriend, in which he stated that he intended to kill himself[,]" and that he "had sent other communications, to his girlfriend and to another friend, suggesting that he intended to kill himself").

"[R]eference to existing social values, customs, and considerations of policy" also supports this conclusion. See Luoni v. Berube, 431 Mass. 729, 730 (2000); Bash v. Clark Univ., 2006 WL 4114297, *4 (Worcester Super. Ct. Nov. 20, 2006) (Agnes, J.) ("[T]he foreseeability of physical harm is not the linchpin for determining the existence of a common-law duty . . . . Instead, the question of duty is determined by a consideration of 'existing social values, customs, and considerations of policy.'"); see, e.g., Jupin, 447 Mass. at 150-151 (considering public policy implications after determining that harm "was reasonably foreseeable or even actually foreseen"). MIT does instruct its faculty "to keep themselves informed regarding both the academic progress and general welfare of their students. . . . and to counsel students not only in relationship to their academic program but also concerning their professional standards and goals and their general

welfare." There is, however, a "general decline of the theory that a college stands in loco parentis to its students . . . ." Mullins, 389 Mass. at 52. It follows, then, that a graduate school is even more detached from its students. Compare id. (concerning colleges), with Murray v. Hudson, 472 Mass. 376, 381 n.8 (2015) (noting that "'duty that secondary schools owe to minor children is . . . supported by the special protections that both the courts and the Legislature have long accorded to minors, and by the doctrine of in loco parentis'" (citation omitted)).

Interpreting this involvement in their students' "general welfare" as imposing a duty on faculty to prevent their students' suicide "could force resident advisors, deans, and other administrators to monitor students' behavior in a manner inconsistent with the current trend" away from in loco parentis at the university level. Susanna G. Dyer, Is there a duty? Limiting College and University Liability for Student Suicide, 106 Mich. L. Rev. 1379, 1395-1396 (May 2008). Further, imposing this duty of care may cause the faculty "to overreact to student mental health problems or paradoxically discontinue efforts to reach out to troubled students. . . . To avoid severe liability [nonclinicians] may forcibly hospitalize students, mandate that students take a leave of absence, or discontinue outreach services altogether so suicides would no longer be foreseeable." Id. at 1397.

Han's suicide "was a terrible tragedy. However, "[t]here must be limits to the scope or definition of reasonable foreseeability based on considerations of policy and pragmatic judgment.'" Coughlin, 54 Mass. App. Ct. at 641, quoting Griffiths v. Campbell, 425 Mass. 31, 35-36 (1997). Public policy therefore militates against imposing this duty on the defendants.

Consequently, the defendants' motion for summary judgment on Counts I, IV, VII, and XI is **ALLOWED**. Given that the plaintiff has not demonstrated that he will be able to prove at trial the liability of Randall, Wernerfelt, and Prelec, MIT is entitled to summary judgment on the

plaintiff's claim of respondeat superior, Count XIV, as well.

II. **Punitive Damages**

"The Massachusetts wrongful death statute permits an award of punitive damages where the decedent's death was caused by the 'malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant.'" Aleo v. SLB Toys USA, Inc., 466 Mass. 389, 412 (2013), quoting G.L. c. 229, § 2. In Counts III, VI, IX, and XIII, the plaintiff alleges that he is entitled to punitive damages because the defendants' reckless and/or grossly negligent conduct was the proximate cause of Han's suicide. The defendants seek summary judgment on these counts because there is no evidence that the defendants' conduct was reckless or grossly negligent.

"The 'malicious, wilful, wanton, or reckless' and 'gross negligence' standards" that G.L. c. 229, § 2, requires "are appreciably higher than the standards for ordinary negligence." Coughlin, 54 Mass. App. Ct. at 641 (citations omitted). As the plaintiff has not demonstrated that he will be able to prove at trial that the defendants owed Han a duty and, therefore, that they were negligent, it follows that the plaintiff will be unable to prove at trial his "claim for punitive damages because more than ordinary negligence is required." Id.; see Boyd v. National R.R. Passenger Corp., 446 Mass. 540, 547 (2006) ("[T]he conduct at issue 'must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.'" (citation omitted)).

Even if the plaintiff did meet his burden as to ordinary negligence, the defendants' conduct towards Han cannot be considered reckless or grossly negligent as a matter of law where Han sought only academic assistance from the defendants and refused any mental-health-related assistance, and where the defendants accommodated Han's academic problems with relaxed exam schedules and

recommendations for research positions. See Isaacson v. Boston, Worcester & N.Y. St. Ry. Co., 278 Mass. 378, 387 (1932) (discussing wanton, wilful, or reckless conduct); Altman v. Aronson, 231 Mass. 588, 591-592 (1919) (discussing gross negligence); Christopher v. Father's Huddle Café, Inc., 57 Mass. App. Ct. 217, 230-231 (2003) (same).

Consequently, the defendants' motion for summary judgment as to Counts III, VI, IX, and XIII is **ALLOWED**.

III. **Conscious Pain and Suffering**

In Counts II, V, VIII, and XII, the plaintiff alleges that, as a proximate cause of the defendants' negligence, Han sustained severe conscious physical and mental pain and suffering. Given that the plaintiff has not demonstrated that he will be able to prove at trial that the defendants were negligent, "it makes no difference whether there was evidence of conscious suffering." Stepakoff v. Kantar, 393 Mass. 836, 843 (1985). That notwithstanding, the plaintiff has not demonstrated that he will be able to establish conscious pain and suffering at trial because that the first person to reach Han after he jumped from the building, Jamie Mehringer, saw no visible signs that Han was breathing, felt no pulse, and observed no movement. See Or v. Edwards, 62 Mass. App. Ct. 475, 492 (2004) ("To avail the plaintiff, the conscious suffering . . . must be demonstrated by cognizable proof beyond mere surmise."). The defendants' motion for summary judgment on Counts II, V, VIII, and XII is therefore **ALLOWED**.

IV. **Breach of Contract**

In addition to the claims of negligence, conscious pain and suffering, and punitive damages that the plaintiff has asserted against all of the defendants, the plaintiff has also alleged a claim of breach of contract (Count X) against MIT alone in which he claims that Han had an express and/or

implied contract with MIT pursuant to which MIT promised to provide reasonable, appropriate, and properly coordinated support services. The "contract" which the plaintiff alleges that MIT breached is the coordination between S^3 and MIT Mental Health. Information about coordination appears on the MIT website within the "Frequently Asked Questions" section on the S^3 page in response to the question, "What's the difference between [S^3] and MIT Mental Health . . . ?" MIT argues that this claim fails because breach of contract is not a ground of recovery under G.L. c. 229, § 2, and that, regardless, there is no evidence of a contract between Han and MIT.

The plaintiff is correct that a breach of contract claim survives the death of a party. Kraft Power Corp. v. Merrill, 464 Mass. 145, 150 (2013); see G.L. c. 228, § 1. The plaintiff also is correct that, if "the breach of contract is of a nature particularly likely to produce emotional distress, damages for that emotional distress may be recovered." St. Charles v. Kender, 38 Mass. App. Ct. 155, 159 (1995). Notwithstanding the question of whether a claim for a breach of contract that allegedly *caused* an individual's death actually survives that individual's death, the plaintiff alleges that MIT's breach caused Han conscious pain and suffering, pointing out in his opposition that the time between Han's telephone conversation with Wernerfelt and his suicide was approximately eleven minutes.

MIT is entitled to summary judgment on this claim. First, the plaintiff has not demonstrated that he will be able to prove conscious pain and suffering, as concluded above. See Or, 62 Mass. App. Ct. at 492 (requiring "cognizable proof beyond mere surmise" to establish conscious pain and suffering). Second, even if the plaintiff could demonstrate Han's conscious pain and suffering, the plaintiff cannot demonstrate that a contract exists between Han and MIT providing for coordinated services between S^3 and MIT Mental Health.

"The student-college relationship is essentially contractual in nature." Mangla v. Brown Univ., 135 F.3d 80, 83 (1st Cir. 1998). "Under Massachusetts law, the promise, offer, or commitment that forms the basis of a valid contract can be derived from statements in handbooks, policy manuals, brochures, catalogs, advertisements, and other promotional materials." Guckenberger v. Boston Univ., 974 F. Supp. 106, 150 (D. Mass. 1997); Massachusetts Ins. of Tech. v. Guzman, 90 Mass. App. Ct. 1102, 2016 WL 4395356, *5 (2016).

Here, again, Shin provides persuasive guidance in determining whether the assurance of coordination between S^3 and MIT Mental Health constituted a contract. In Shin, the plaintiffs alleged that the decedent had an express and/or implied contract with MIT pursuant to which MIT would "provide necessary and reasonable medical services for the benefit of" the decedent. 2005 WL 1869101, at *6. The court concluded that such "generalized representations" were not "'definite and certain'" and were "'too vague and indefinite to form an enforceable contract.'" Id. at *7.

Similarly, any "promise" that S^3 and MIT Mental Health would coordinate their services is merely a generalized representation that does not form an enforceable contract.[20] The defendants' motion for summary judgment on Count X is accordingly **ALLOWED**.

V. **Damages Cap**

The defendants argue that if the court denies MIT's summary judgment motion and a jury ultimately finds MIT liable to the plaintiff, MIT's liability is limited to $20,000 pursuant to G.L. c. 231, § 85K. Given that the plaintiff has not demonstrated that he will be able to prove MIT's liability at trial, the issue of the damages cap is moot.

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[20]Although the parties do not address this point, the court notes without deciding that even if this contract did exist, the plaintiff would unlikely be able to prove breach at trial given that Han rejected assistance from S^3 and MIT Mental Health.

ORDER

For the foregoing reasons, the defendants' motion for summary judgment is **ALLOWED** and the plaintiff's cross motion for summary judgment is **DENIED**. Final judgment shall be entered dismissing all of the plaintiff's claims against the defendants in this matter.

Bruce R. Henry
Associate Justice

DATED: October18, 2016

Tab C

86

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 11-3152

DZUNG DUY NGUYEN, administrator[1]

vs.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY & others[2]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S AND DEFENDANTS' CROSS MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, Dzung Duy Nguyen, as Administrator of the Estate of Han Duy Nguyen ("Nguyen"), filed this wrongful death action against the Massachusetts Institute of Technology ("MIT"), Birger Wernerfelt ("Wernerfelt"), Drazen Prelec ("Prelec"), and David W. Randall ("Randall") following Nguyen's death while enrolled in a graduate studies program at MIT. This action is before the court on defendants' motion for summary judgment on the grounds that Nguyen was an MIT employee at the time of his death, and therefore that his claims are barred by the Massachusetts Workers' Compensation Act, G. L. c. 152, § 1, et seq. (the "Act"). The plaintiff has filed a cross motion for summary judgment seeking this Court's determination as a matter of law that Nguyen was not an MIT employee at the time of his death for workers' compensation purposes. For the following reasons, the defendants' motion for summary judgment and the plaintiff's cross-motion for summary judgment are **DENIED**.

BACKGROUND

The following undisputed facts are taken from the summary judgment record. Where

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[1] Of the Estate of Han Duy Nguyen

[2] Birger Wernerfelt, Drazen Prelec, and David W. Randall

disputed, facts are viewed in the light most favorable to the nonmoving party. See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 28 (2005).

In the fall of 2006, Nguyen enrolled at MIT as a Ph.D. candidate in the Marketing Program at the Sloan School of Management ("Sloan"). SMF par. 5. He had graduated from Sanford University that same year with a Bachelor's degree in Economics and a Master's degree in psychology. Id. Nguyen's offer of admission included a financial aid package consisting of full tuition and a stipend of at least $20,845 annually for the first four years of his Ph.D. program. SMF par. 28. Tuition and the stipend were to be covered by a full fellowship for his first two years, and would be covered by a partial fellowship combined with Research/Teaching Assistantships for his third and fourth years. Id. He was also offered single graduate student health insurance. Id.

In May of 2009, Nguyen interviewed for a summer Research Assistant ("RA") position in MIT's Department of Brain and Cognitive Sciences ("BCS"). SMF par. 13. Prelec, a professor in the Sloan Marketing Group, had recommended Nguyen for this position, and was involved in the hiring process along with Hedden and Dr. Susan Whitfield-Gabrieli ("Whitfield-Gabrieli"). SMF par. 12. Nguyen was informed that the position involved a "largely independent project," and he would be "expected to learn and problem-solve on [his] own to some extent," with his supervisors providing "guidance and some oversight." SMF par. 36.

After Nguyen's interview, Hedden contacted Dr. John Gabrieli ("Gabrieli") seeking approval to hire Nguyen as an RA and pay him $3,000 per month for the summer.[3] SMF par. 14. On the morning of June 1, 2009, Gabrieli approved Hedden's funding request for Nguyen's RA position.

[3] The nature of this payment – i.e., salary or grant – is disputed. However this dispute is immaterial for purposes of summary judgment.

Hedden met with Nguyen that day and told him that he "effectively" had the position; Nguyen expressed a willingness to accept the position. SMF par. 17. Following the meeting, Hedden emailed the information technology systems department seeking an account for Nguyen because he was "coming on board." SMF par. 18. Hedden also emailed Whitfield-Gabrieli to inform her that Nguyen was "on-board" for the summer and asked her to introduce Nguyen to certain computer programs. Hedden contacted Prelec to confirm Nguyen's funding, but noted that they still did not know the "final figure" for his salary. SMF par. 20. On the same day, Hedden arranged for Nguyen to have a desk and workspace at the laboratory, granted him access to relevant databases, and added Nguyen to the laboratory group email list. SMF par. 21. Nguyen received an account and password to access laboratory computers and databases that day, and installed the necessary software and logged in to his account. SMF par. 22. He also requested and received a PowerPoint tutorial and manual related to his work. Id.

On June 2, 2009, in the morning, Nguyen sent Hedden an email stating, inter alia,

> "If we can quickly follow up on the conversation that we had yesterday, if you'll forgive me, I'd like to be honest with you about something. Drazen [Prelec] recommended me for this position; John Gabrieli himself knows me and was one of my recommenders to the graduate program that I'm currently in. And I'm not an undergrad anymore; I'm a grad student now. For those reasons, it was disturbing, as well as a little insulting, to me that yesterday you took pains to express your expectations of me in a manner that presumed that I would give you anything less than this project deserved, that you would 'give me a signal' if you didn't think that my contribution amounted to something deserving of authorship credit, that 'there would be a problem' if it turned out that '[you] could do [the work] faster [your]self,' that you threatened me that you could tell by visual inspection whether my work was up to par. I like to feel like I've earned the right not to have my effectiveness or my integrity questioned anymore, and to hear you do that yesterday was kind of hurtful. I'm not sure that if you continue to do this that I'll be able to

work as effectively as I'd like to be able to."

SMF par. 23. Nguyen continued the email, stating "I'm not just doing this for the money. I want to learn something and make a meaningful contribution . . . ." Id. He blind-copied Prelec on the email. SMF par. 24. After both professors read the email, the two spoke, and Hedden informed Prelec that Nguyen had taken his statements out of context and seriously misinterpreted the tone of the meeting, and that he thought it might be difficult to work with Nguyen. Id. Prelec forwarded the email to Wernerfelt, and asked him to speak with Nguyen. SMF par. 25.

At approximately 10:50 a.m., Wernerfelt spoke with Nguyen over the phone regarding his email to Hedden. SMF par. 26. They had an eight minute conversation. Id. Wernerfelt sent Prelec an email summarizing the phone call at 11:04 a.m., stating:

> "I read him the riot act
> Explained what is wrong about the email
> Told him that your or I would look over future e-mails he sent to the BCS people
> I said we know he is not out to offend anyone but that he seems poor at navigating the academe
> Said that this is an example of why we all recommend that he take an MS and go out to get a job
> I talked about some papers he could turn into MS thesis [sic] and volunteered to supervise it
> Said that he made you look bad vs BCS and that some patching up was necessary
> He will call you about what to do[.]"

SMF par. 26.

At 11:02 a.m., immediately following his phone call with Wernerfelt, Nguyen went to the roof of Building E-19 on the campus at MIT, and jumped off the building. SMF par. 27. He was pronounced dead at the scene. Id.

DISCUSSION

The defendants have moved for summary judgment on all of plaintiff's claims on the grounds that Nguyen was an employee of MIT at the time of his death, and that his death arose out of and in the course of that employment. Therefore, the defendants contend that all of plaintiff's claims are barred by the Act. The plaintiff opposes the motion, and has brought his own summary judgment motion seeking a determination by this court that, as a matter of law, Nguyen was not an MIT employee at the time of his death and therefore that the Act does not apply to bar his claims.

Standard of Review

Summary judgment shall be granted where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); DeWolfe v. Hingham Centre, Ltd., 464 Mass. 795, 799 (2013). The moving party bears the burden of demonstrating affirmatively the absence of a triable issue, and that it is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). All evidence must be viewed in the light most favorable to the non-moving party. Williams v. Hartman, 413 Mass. 398, 401 (1992).

Workers' Compensation Act

The defendants seek summary judgment on the grounds that the exclusivity provision of the Act bars plaintiff's claims because Nguyen was employed by MIT at the time of his death. Under

the Act, "[c]ommon law actions are barred . . . where: the plaintiff is shown to be an employee; his condition is shown to be a personal injury within the meaning of the compensation act; and the injury is shown to have arisen out of and in the course of . . . employment." Foley v. Polaroid Corp., 381 Mass. 545, 548-549 (1980), internal quotation omitted; G. L. c. 152, § 24. Actions for wrongful death fall within the exclusivity provision of the Act if the underlying injury is "compensable" under the Act. See Saab v. Massachusetts CVS Pharmacy, LLC, 452 Mass. 564, 566, 569-570 (2008) (additionally noting that wrongful death claims could be barred even if claimant is not entitled to or does not actually receive compensation under Act). Here, plaintiff's claims would be barred if the undisputed facts show that Nguyen was an employee of MIT, he suffered a "personal injury," and that injury arose "out of and in the course of" his employment. This court concludes that there remain genuine issues of material fact regarding Nguyen's employment status and whether his suicide arose out of and the course of his employment.

The defendants claim that Nguyen was an MIT employee on the date of his death, and cite to a number of facts that they contend support this proposition. Their primary argument appears to be that Nguyen's summer RA position was distinguishable from school year TA/RA positions, and while the latter is contemplated by students' financial aid packages and is not "employment," the former falls outside of that scope. However, in support of this argument the defendants cite to evidence that Nguyen was paid by MIT on a monthly basis during the school year, that he paid taxes on those wages, that he received a W-2 for that work, and that Plaintiff filed a 2009 tax return for Nguyen listing those wages. This evidence is irrelevant to the question of whether Nguyen was an employee on June 2, 2009 given the apparent distinction made between fall and spring positions, and summer positions.

Financial evidence aside, there are too many conflicting pieces of material evidence presented for this court to determine, as a matter of law, the unique question of whether or not Nguyen was an MIT employee at the time of his death and therefore whether his claims are barred by the Act. See Nat'l Ass'n of Gov't Emps. v. Labor Relations Comm'n, 59 Mass. App. Ct. 471, 474 (2003) (determination of whether individual is in employer-employee relationship is "ordinarily a question of fact"); Madariaga's Case, 19 Mass. App. Ct. 477, 481 (1985). Although Nguyen's summer RA position does seem to be regarded as distinguishable from typical school year TA/RA positions, additional questions regarding the nature and level of control over Nguyen's work remain disputed. See id. at 474-475 (primary factor in determining employer-employee relationship is degree of control over employee; other relevant factors include method of payment, provision of tools and place of work to purported employee, and parties' understanding of the nature of their relationship). In support of the defendants' argument, it is undisputed that Nguyen's summer position was in BCS, rather than at Sloan, where Nguyen was enrolled as a student; Nguyen was not registered for classes at MIT on June 2, 2009; and professors had tried, apparently successfully, to secure a $3000 monthly payment for Nguyen for each summer month. Nevertheless, the plaintiff has presented undisputed evidence that the RA work would be largely independent and unsupervised; Nguyen's grant was not officially finalized on June 1, 2009; and neither Nguyen nor his estate were paid for the work he allegedly performed on June 1 and 2, 2009. Plaintiff also disputes that Nguyen started the RA position on June 1 or was working on that project on the day of his death.

Moreover, assuming, arguendo, that Nguyen's status at MIT on the date of his death was that of an employee, there remains a genuine dispute regarding whether his suicide arose out of his RA position. "Generally, the determination whether an employee's injury arises out of [his] employment

is a question of fact." Corraro's Case, 380 Mass. 357, 359 (1980); accord Pettengill v. Curtis, 584 F. Supp. 2d 348, 368 (D. Mass. 2008); In re Hicks's Case, 62 Mass. App. Ct. 755, 762 (2005). "An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects." Caswell's Case, 305 Mass. 500, 502 (1940). In essence, "'[a]rising out of' refers to the causal origin" of the injury. Larocque's Case, 31 Mass. App. Ct. 657, 658 (1991).

The undisputed facts in this case do not clearly illustrate that Nguyen's suicide was caused by his RA position at BCS. It is undisputed that the telephone call Nguyen had with Wernerfelt minutes before his death was the "tipping point" leading to his suicide. However, the email Wernerfelt sent to Prelec summarizing that phone conversation references both job-related and student-related topics. Wernerfelt stated that he had explained to Nguyen what was wrong with the email he sent to Hedden, which arguably relates to Nguyen's alleged employment as an RA. Wernerfelt also wrote that he suggested that Nguyen consider changing to a Master's program and seeking a job other than a professorship, thus referencing his position as a student as well. It is for a jury to decide whether, given the mixed content of this phone call, in addition to the fact that he had begun this position at the earliest one day prior to his death, the stress leading to his death arose out of his employment or out of his graduate program. See Corraro's Case, 380 Mass. at 359.

Accordingly, the defendants' motion for summary judgment on plaintiff's wrongful death claims is **DENIED**. As there remain genuine issues of material fact regarding Nguyen's status as an employee or student at MIT at the time of his death, plaintiff's motion for summary judgment on that issue is also **DENIED**. Finally, to the extent that the defendants seek summary judgment for the individual defendants solely on the basis of the workers' compensation affirmative defense, their

motion is **DENIED**.

ORDER

For the reasons stated herein, it is **ORDERED** that the Defendants' Motion For Summary Judgment is **DENIED**. Plaintiff's Cross-Motion For A Summary Judgment is also **DENIED**.

Bruce R. Henry
Justice of the Superior Court

Dated: January 6, 2015

In the
Supreme Judicial Court
of the
Commonwealth of Massachusetts

Case No.: SJC-12329

DZUNG DUY NGUYEN, as Administrator of
the Estate of HAN DUY NGUYEN,

Plaintiff/Appellant,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
BIRGER WERNERFELT, DRAZEN PRELEC
and DAVID W. RANDALL,

Defendants/Appellees.

Appeal From the Middlesex County Superior Court

Certificate of Service

I, Jeffrey S. Beeler, hereby certify that on this 29th day of June, 2017, I served: (1) two copies of the Appellant's Brief; (2) two copies of the Record Appendix; (3) a flash drive containing PDFs of the Record Appendix and the Appellant's Brief; and, (4) this Certificate, by Federal Express overnight delivery on:

Anthony M. Feeherry, Esq.
Goodwin Procter, LLP
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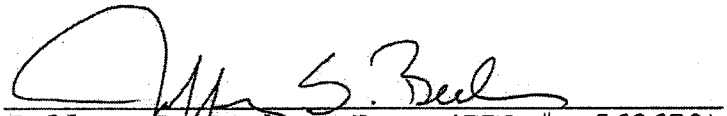

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