

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DANIEL SHIVELY and KURT)
SHIVELY, SR.,)

Plaintiffs,)

v.)

C.A. No. 96C-05-316-JRS

KEN CREST CENTERS FOR)
EXCEPTIONAL PERSONS, a)
Pennsylvania corporation, KEN-CREST)
SERVICES, INC. and MARK MORRIS,)

Defendants.)

Submitted: December 15, 2000

Decided: January 26, 2001

MEMORANDUM OPINION

*Upon Consideration of
Defendant Ken-Crest Services, Inc.'s
Motion for Summary Judgment.*

DENIED.

Lois J. Dawson, Esquire, 1525 Delaware Avenue, Wilmington, Delaware 19806.
Attorney for Plaintiff.

William J. Cattie, III, Esquire, 1001 Jefferson Plaza, Suite 201, Wilmington,
Delaware, 19801. Attorney for Defendant Ken-Crest Services, Inc.

SLIGHTS, J.

INTRODUCTION

In this case, the Court considers whether an entity which provides residential facilities and various supportive services to mentally impaired residents may be held liable in tort to a young boy who lived in the same apartment complex where one such facility was located and who, over several months, was sexually abused by a resident of the facility. The residential facility, operated by the defendant, Ken-Crest Services, Inc. (“Ken Crest”), has moved for summary judgment on the ground that it owed no duty to protect its neighbors from the acts of its residents. The plaintiffs, Daniel Shively, a minor,¹ and his father, Kurt Shively, Sr. (collectively, “plaintiffs”), argue that Ken Crest was in a unique position to control the behavior of its residents, including Mark Morris (“Morris”), a resident of Ken Crest who purportedly had a long history of sexually deviant behavior. Plaintiffs contend that Ken Crest maintained a special relationship with Morris which was both supervisory and therapeutic in nature. On this basis, plaintiffs contend that Ken Crest owed a duty to the public generally, or at least the neighbors of the residential facility, reasonably to control the behavior of its residents and to warn of any reasonably foreseeable dangerous propensities of the residents. Plaintiffs contend further that Ken Crest breached this duty with respect to them, and as a proximate cause of this breach, Morris was able to commit multiple

¹The minor’s identity has not been concealed throughout the litigation.

acts of sexual assault against Daniel Shively.²

Resolution of this motion for summary judgment requires the Court to consider: (1) the parameters of the legal duty a court will impose upon a defendant to protect the general public from the acts of third parties and to warn the general public that a third party might be dangerous; and (2) the extent to which public policy would be offended by imposing such a duty upon a State-sanctioned residential facility for mentally challenged individuals when such individuals commit acts of violence against others not resident in the facility. For the reasons that follow, the Court concludes that a reasonable extension of existing common law tort principles compels the conclusion that Ken Crest owed a duty to Daniel Shively to take reasonable measures to protect him from Morris and to warn him of Morris' reasonably foreseeable dangerous propensities. The Court also finds that public policy will not be offended by the imposition of this duty on Ken Crest and, indeed, public policy dictates the result here.

²Morris has been convicted for the crimes he committed against Daniel Shively and is currently incarcerated. The parties do not dispute that he sexually assaulted Daniel Shively on multiple occasions on the property of the apartment complex where they both resided.

FACTS

A. The Ken Crest Centers for Exceptional People

Ken Crest is a provider of supportive residential assistance to mentally challenged individuals. Specifically, Ken Crest operates four types of adult residential facilities: (1) group homes; (2) family living programs; (3) supervised apartments; and (4) semi-independent apartments. Each type of facility operated by Ken Crest offers differing degrees of care and supervision to its residents. A resident's placement in any of these facilities depends upon the assessment of the resident by a team of specialists comprised of employees of both Ken Crest and the referring agency. The only established admission criterion for each facility, aside from age, residency and consent for services, is that the resident must have a primary diagnosis of mental retardation. Otherwise, Ken Crest does not maintain any set policies or procedures with respect to admission to any of its facilities. Rather, Ken Crest conducts an independent evaluation of each candidate for admission and, with the assistance of the referring agency, determines the appropriate placement of the putative resident. Ken Crest reserves the right to decline to admit any referral it believes to be inappropriate for placement in its facilities.

As its name suggests, the "semi-independent apartment" operated by Ken Crest was designated as such because it was contemplated that its residents could assume

some degree of independence in their activities of daily living. Nevertheless, the record reflects that Ken Crest provided to residents of these apartments hands-on assistance, if needed, with respect to hygiene issues, personal finances, nutritional requirements and employment placement. Ken Crest also arranged appropriate medical care and mental health counseling for its residents.

B. Ken Crest's Relationship With The State of Delaware

Ken Crest contracted with the State of Delaware's Department of Health and Social Services, Division of Mental Retardation ("the Division"), to receive and to place in its facilities residents of Delaware who have been diagnosed with mental retardation. Among the facilities operated by Ken Crest in Delaware is the semi-independent apartment facility at the Fox Run Apartments in Bear, Delaware.³ Ken Crest's contract with the Division provided that Ken Crest, among other services, would provide: (1) "client admission and discharge criteria"⁴; (2) an "individual plan of services" for each resident developed by an "interdisciplinary team"; (3) appropriate housing; (4) access to appropriate nutrition; (5) access to appropriate transportation; and (6) a "compliment of staff" capable of providing for the needs of

³Fox Run Apartments, LP was dismissed from the litigation by stipulation of the parties after a negotiated settlement.

⁴According to James McFalls, Ken Crest's Rule 30(b)(6) designee, Ken Crest never did develop these criteria for the Fox Run facility notwithstanding this contractual obligation to do so.

the residents and supervising them, if necessary. The Division, for its part, agreed, *inter alia*, to “assign a case manager for each client in the home in order to monitor the implementation of the plan in the home...,” and to take financial responsibility for medical, dental, clinical and case management services for the residents.

Ken Crest was required by the Division to embrace and incorporate in its provision of services a “Proclamation of Beliefs and Guiding Principles” (“the Proclamation”) which generally provided that, in Delaware, Ken Crest’s residents were to be free to determine their own lifestyle and to interact with and contribute to the community in which they live. Consistent with the Proclamation were the “Standards for Staffed Apartments” (“the Standards”) promulgated by the Division which provided at § 6.4 that when interacting with the residents, “the Staffed Apartment Provider shall use [the] least restrictive alternatives that are consistent with the developmental needs of the client...” Both the Proclamation and the Standards embody a principal which is integral to mental health philosophy and, indeed, is embedded in Delaware law: allow as much freedom and normalcy in the life of the patient as the patient is safely able to handle.⁵ Nevertheless, the Standards recognize that some restriction of the activities of Ken Crest residents may be required and that Ken Crest was authorized to implement such restrictions at its discretion. Of

⁵ 16 *Del. C.* §§ 5504, 5507

particular note is Section 9.4 which provides:

Clients placed by the [Division] with the Staffed Apartment Provider may be changed only as a consequence to the service needs of the client as identified in his/her [individual program plan]. This might include, but is not limited to... (3) [a] [d]etermination that excessive adjustment problems exist that cannot be resolved after all attempts have been made to stabilize the placement.

The record clearly reveals that Ken Crest possessed the authority to supervise residents of its semi-independent apartments if warranted and that Ken Crest appreciated that this authority existed. For instance, another Ken Crest policy document, entitled “Intake and Orientation Policy,” which describes the staff’s role in “Apartment Living” situations, states: “[s]taff supervision [of residents] can be flexed according to the needs of the individuals.” Moreover, a Ken Crest memorandum, entitled “Residents in Neighborhood Homes with Plans for Unsupervised Time,” admonishes: “until further notice, no resident is to be left alone or follow any existing written plans for ‘unsupervised time.’” Indeed, the record reflects that Ken Crest has moved residents out of certain settings when they were a threat to their neighbors. Specifically, a Ken Crest representative explained at deposition that a resident was making lewd gestures towards children in a residential setting where many children lived nearby and that Ken Crest’s staff determined a placement with another provider was appropriate. It is also clear that Ken Crest was

compensated by the Division for supervising the residents of the Fox Run facility, including Morris.

In addition to supervisory services, Ken Crest also arranged therapeutic services for its residents of semi-independent apartments. These services included mental health and other counseling.

C. Morris' Relationship with Ken Crest

Morris has been diagnosed with numerous problems, including moderate to mild mental retardation, Attention Deficit Disorder, Conduct Disorder (socialized aggressive), and perhaps Fetal Alcohol Syndrome.⁶ By the time he was 20 months old he was a ward of the State.⁷ He had been in foster homes or institutionalized

⁶ *State v. Morris*, Del. Super., I.D. No. 9409017630, Silverman, J. (August 10, 1995).

⁷ *Id.*

almost continually at the time he moved in to his Fox Run apartment.⁸ It appears that he was placed at Ken Crest's Fox Run facility in late 1991.⁹

⁸ *Id.*

⁹The parties go to great lengths to describe information about Morris' history of sexually deviant behavior which was not known to Ken Crest at the time of or after Morris' placement at Fox Run. Plaintiffs say Ken Crest should have unearthed this information prior to admitting Morris to its facility; Ken Crest says the Division should have provided this information as part of the referral package which accompanied Morris to Fox Run. The resolution of this dispute may impact upon whether a fact-finder concludes that Ken Crest breached its duty, but it does not affect the Court's determination of whether a duty exists in the first instance.

The “individual plan of service” for Morris has not been provided to the Court.¹⁰ What have been provided, however, are documents labeled “Interdisciplinary/Progress Notes” which appear to recount Morris’ progress while a resident at Fox Run. These records reveal several disturbing behavioral problems exhibited by Morris, including: an incident where Morris was rebuked for having “three small children in the apartment”; an incident where he was accompanied home by a police officer who reported that Morris “allegedly told a boy something lewd”; an incident where Morris had “minor boys” in his apartment; yet another incident where a young boy was found drinking beer with Morris in Morris’ apartment; an incident where Morris entered another resident’s room without knocking and began to touch her genitals; and an incident where Morris was found in another resident’s room with his pants down.¹¹ A “Neighborhood Home Monthly Review” of Morris, performed on December 31, 1993, reflects that the Ken Crest staff was concerned about the escalating behavioral problems exhibited by Morris and notes particularly that he had been arrested recently for throwing a brick at a truck while intoxicated and that “[t]he guys [Morris] is hanging out with appear to be young.”

¹⁰While this document no doubt would be helpful to the Court in understanding the relationship between Morris and Ken Crest, and its absence from the record is troublesome, the Court is satisfied that the record is adequate in its present form to decide this controversy.

¹¹This last incident report is dated June 2, 1994, one day after Morris’ sexual abuse of Daniel Shively began.

Ken Crest's concern for and about Morris prompted it to provide counseling for Morris in 1994. Specifically, Ken Crest arranged for Daniel Thrash to counsel Morris with respect to "sexuality issues" and, to a lesser extent, concerns relating to Morris' excessive use of alcohol. Thrash testified that his counseling of Morris never reached a "therapeutic" level because he was not provided with information regarding the full extent of Morris' behavioral problems. Had he been so informed, Thrash speculated that "we [presumably referring to himself and the other Ken Crest staff members] would have had a team meeting and my first recommendation would be that the level of independence that Mark has would be reviewed...."

D. Morris Assaults Daniel Shively

The parties agree that Morris sexually assaulted Daniel Shively over a period of nearly four months, from June through September of 1994. The parties further agree that these acts occurred on the property of the Fox Run Apartments. Finally, the parties agree that Ken Crest had not taken steps to place Morris in another facility prior to September, 1994, nor had Ken Crest warned the residents of the Fox Run Apartments that Morris may be dangerous, particularly to children. Indeed, James McFalls, Ken Crest's corporate representative for purposes of this litigation, testified that Ken Crest maintained a strict policy of not warning surrounding residents or communities about a potentially dangerous Ken Crest resident out of concern for the resident's "privacy and confidentiality." (D.I. 177, Ex. C at 47-48)¹²

¹²To follow is the specific exchange at deposition:

Q: If a resident were arrested for committing an assault or a sexual assault against another resident at the Ken Crest program and there was a public record, you know, a charge is filed, some sort of disposition, would Ken Crest make the neighbors in the community aware of that?

A: No.

Q: Why is that?

A: Privacy and confidentiality.

Q: I'm asking you, sir, at this point about specific acts that would already be a matter of public record if someone went down to the courthouse and chose to look them up. With respect to things like that, would Ken Crest notify the community of incidents of that type?

A: No.

Q: And that would be out of a concern for the privacy of the resident?

A: And confidentiality of information, yes.

Morris was 23 years old at the time of the assaults; Daniel Shively was eight years old.¹³ Not surprisingly, the parties stipulate that Daniel Shively has experienced tremendous emotional and physical trauma as a result of the assaults and that the emotional components of his injuries are permanent.

DISCUSSION

A. Summary Judgment Standard

When considering a motion for summary judgment, the Court's function is to examine the record to determine whether genuine issues of fact exist.¹⁴ If, after viewing the record in a light most favorable to the non-moving party, the Court finds that there are no genuine issues of material fact, and that the party is entitled to judgment as a matter of law, summary judgment will be granted.¹⁵ Summary judgment will not be granted, however, if the record indicates that a material fact is

¹³ *Id.*

¹⁴ *Oliver B. Cannon & Sons, Inc. v. Door-Oliver Inc.*, Del. Super., 312 A.2d 322, 325 (1973).

¹⁵ *Id.*

in dispute, or if judgment as a matter of law is not appropriate.¹⁶

B. The Parties' Contentions

¹⁶*Ebersole v. Lowengrub*, Del. Supr., 180 A.2d 467, 470 (1962).

The parties appear to agree that the Court must begin its analysis by assessing the relationship between Ken Crest and Morris. Delaware law recognizes that certain relationships between individuals can give rise to duties which flow from the nature of the relationship and run to third parties not involved in the relationship.¹⁷ Ken Crest contends that neither its relationship with Morris, nor its relationship with plaintiffs are such that a duty may be created which would require it to control Morris or to protect plaintiffs from Morris. Ken Crest further contends that its business is highly regulated by the State and, consequently, if a cause of action running to third parties should lie for its negligence, the cause of action must be created by the General Assembly, not the courts.¹⁸

¹⁷See, e.g., *Naidu v. Laird*, Del. Supr., 539 A.2d 1064 (1988)(imposing duty upon psychotherapist to protect third parties from the dangerous propensities of his patient); *Furek v. University of Delaware*, Del. Supr., 594 A.2d 506 (1991)(imposing a duty upon a university to protect students from other students in certain situations).

¹⁸See *Moss Rehab v. White*, Del. Supr., 692 A.2d 902 (1997)(cause of action for malpractice against highly regulated driving school rejected); *Wright v. Moffitt*, Del. Supr., 437 A.2d 554 (1981)(dram shop liability rejected because of extensive State regulation of alcohol service industry).

Plaintiffs contend that Ken Crest accepted the responsibility of supervising and caring for Morris, an individual known to Ken Crest to be mentally retarded and prone to inappropriate sexual behavior. Having accepted this responsibility, plaintiffs contend that Ken Crest owed to them and to the other residents of Fox Run a duty to discharge its care and supervision of Morris in a reasonably prudent manner. Moreover, plaintiffs contend that the imposition of a duty upon Ken Crest is a logical application of settled Delaware jurisprudence which recognizes that a legal duty can extend to unknown third parties in certain circumstances. Specifically, plaintiffs contend that, like the psychotherapist and patient in *Naidu*, Ken Crest and Morris shared a “special relationship” as evidenced by Ken Crest’s ability to supervise and control Morris and its ability and actual efforts to provide counseling to Morris. Accordingly, plaintiffs contend that this “special relationship” created in Ken Crest a duty to protect its Fox Run neighbors from Morris and any other dangerous resident of its facility.¹⁹

C. Ken Crest Maintained a “Special Relationship” With Morris

Whether Ken Crest owes a duty to plaintiffs is a mixed question of law and fact to be answered by the Court.²⁰ The legal framework with which the Court should

¹⁹*Naidu*, 539 A.2d at 1073.

²⁰*Id.* at 1070. *See also O’Connor v. Diamond State Tel. Co.*, Del. Super., 503 A.2d 661, 663

analyze Ken Crest's duty to the plaintiffs is readily apparent in Delaware's case law.

The application of this framework to the facts presented here, however, requires the

(1985)(“[t]he question of duty is traditionally an issue for the court”); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 37, at 236 (5th Ed. 1984)(whether a duty exists “is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined only by the court”).

Court to venture a little further down the road first constructed in Delaware by *Naidu*.²¹ The map is clear.

“Generally a party does not have a duty to control the conduct of a third person.”²² Delaware courts have recognized exceptions to this general rule, however.²³ Of particular relevance in this case is the exception outlined in the *Restatement (Second) of Torts* § 315 (1965) (“Section 315”), which provides:

²¹Defendants urge the Court to follow *Marshall v. University of Delaware*, Del. Supr., No. 78, 1993, Moore, J. (September 22, 1993)(ORDER) in which the Court concluded that the University was not liable for the violent acts of its students against non-students. The Court is not persuaded that *Marshall* has any application here. In that case, the Court addressed liability based on the University’s status as landowner and the *Restatement (Second) of Torts* § 323. Neither of these theories provide the basis for liability here.

²²*Harden v. Allstate Ins. Co.*, D. Del., 883 F. Supp. 963, 971 (1995).

²³*See, e.g., Bright v. State*, Del. Supr., 740 A.2d 927, 931 (1999)(court recognized the duty of a psychiatrist to warn a potential victim of his patient who had expressed an intent to harm the victim); *Naidu*, 539 A.2d 1064 (imposing duty upon psychotherapist to protect third parties from the dangerous propensities of his patient); *Harden*, 883 F. Supp. at 971(imposing a duty upon a neurologist which extended to the motoring public to take reasonable measures to prevent his epileptic patient from driving).

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) a special relation exists between the actor and the other which gives the other a right to protection.

Section 315 first was adopted in Delaware in *Naidu*, where the Court was confronted with a wrongful death action brought by the widow of a man killed in a car accident involving a patient of Dr. Naidu, a psychiatrist with admitting privileges at the Delaware State Hospital. Plaintiff contended that Dr. Naidu prematurely discharged his patient from the hospital and, in so doing, failed properly to control the patient and prevent him from harming the public at large. Applying Section 315(a), the Court concluded that Dr. Naidu maintained a special relationship with his patient such that he owed to plaintiff a duty to control his patient's conduct.²⁴

²⁴*Naidu*, 539 A.2d at 1072-73.

In this case, the Court concludes that, for purposes of the analysis contemplated by Section 315(a), there are few, if any, meaningful facts which distinguish the relationship between a psychotherapist and his patient from the relationship Ken Crest maintains with its residents.²⁵ Like Dr. Naidu, Ken Crest was in a unique position to control the conduct of its residents, including Morris, to the extent Ken Crest believed that such control was needed under the circumstances. Ken Crest was able to coordinate mental health treatment, enforce more stringent supervisory measures, and remove Morris from the facility in its discretion.²⁶ Accordingly, Ken Crest owed to plaintiffs a duty to “initiate whatever precautions [were] reasonably necessary to protect potential victims of the [resident].”²⁷ Whether Ken Crest knew or should have

²⁵This is not a case for analysis under Section 315(b) since there can be no argument that Ken Crest enjoyed a special relationship with the plaintiffs or its other neighbors at Fox Run which would give rise to a duty to the plaintiffs.

²⁶Comment (c) to § 315 provides in part: “The relations between actor and a third person which requires the actor to control the third person’s conduct are stated in §§ 316-319.” Here, the Court finds that the relationship giving rise to Ken Crest’s duty under § 315 is defined in *Restatement (Second) of Torts*, § 319 (1965), entitled “Duty of Those in Charge of Person Having Dangerous Propensities” which provides:

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

²⁷*Id.* at 1073 (citation omitted). The Court notes that *Naidu* emphasized that this duty is not only owed by the psychiatrist, it is owed by “other mental health professionals” as well. This reference to “other mental health professionals” would seem to blunt any argument that psychiatrists somehow occupy a unique place in the § 315 analysis based on their training, experience, professional licensure, etc. The Court is satisfied that the duty contemplated by § 315 clearly is owed by other mental health professionals, such as Ken Crest.

known of the dangerous propensities of Morris, and whether Ken Crest took reasonable steps to protect potential victims of Morris, are questions of fact which are proper for the jury's consideration.²⁸

²⁸*Id.* at 1073.

The extension of a duty upon a residential facility such as Ken Crest to protect others from its residents is supported by decisions from other jurisdictions which considered facts closely in line with those *sub judice*.²⁹ In each of these cases, the courts have concluded that a special relationship existed between the defendant and residents of the defendant's facility such that the defendant owed a duty to others reasonably to prevent those under their charge from causing injury.

Ken Crest has urged the Court to reject a Section 315 duty in this case because it was obliged by contract and by statute to allow its residents to interact with their communities and to live independently without unnecessary restrictions on their freedom. The Court rejects this argument for two reasons. First, the record clearly reflects that Ken Crest was authorized and, indeed, expected to provide a degree of supervision and control over its residents as was required to protect the residents from themselves and each other. Second, a Section 315 duty is not predicated on the defendant's ability to exercise total control over individuals with whom it maintains a special relationship. Rather, "it is within the contemplation of the Restatement that

²⁹*See, e.g., Estates of Morgan v. Fairfield Family Counseling Center*, Oh. Supr., 673 N.E.2d 1311 (1997)(recognizing a duty of an outpatient counseling center to protect third parties from the dangerous acts of its patients); *Dudley v. Offender and Restoration of Richmond, Inc.*, Va. Supr., 401 S.E.2d 878 (1991)(recognizing duty of "halfway house" to protect neighbors from its dangerous residents); *Garrison Retirement Home Corp. v. Hancock*, Fla. Dist. Ct. App., 484 So.2d 1257 (1985)(recognizing duty of retirement village to protect third parties from its residents when an elderly resident injured another in an automobile accident).

there will be diverse levels of control which give rise to corresponding degrees of responsibility.”³⁰

³⁰*Fairfield Family Counseling Center*, 673 N.E.2d at 1323.

The Court also concludes that Ken Crest owed a duty to the plaintiffs to warn them of Morris' dangerous propensities to the extent it believed, or reasonably should have believed, that such propensities presented an unreasonable risk of harm to others.³¹ This duty to warn also flows from the relationship between Ken Crest and Morris and finds its roots as well in the *Restatement (Second) of Torts*.³²

D. The State's Regulation of Ken Crest Does Not Eliminate Ken Crest's Duty to Plaintiff

Ken Crest contends that it is highly regulated by the State of Delaware and, accordingly, the Court should defer to the General Assembly to create a cause of action for failure to control the facility's residents. Ken Crest points to two scenarios where Delaware courts have declined to create a cause of action in deference to regulatory schemes. As discussed below, both are inapposite.

³¹*Bright*, 740 A.2d at 931.

³²*Id.* (citing *Naidu*, 539 A.2d at 1072-73).

In *Wright v. Moffit*³³ and *Moss Rehab v. White*,³⁴ the Delaware Supreme Court was asked to create two new causes of action at common law which had not been recognized previously in Delaware - - Dram Shop liability and educational malpractice (involving a driving school), respectively - - both of which involve industries which are highly regulated within the State. The Court concluded in both cases that the General Assembly was in the best position to fit the proffered causes of action into the existing regulatory scheme. This case, however, does not present the need to create a cause of action and fit it within a regulatory scheme. As indicated, the Court's holding today simply extends settled common law jurisprudence in Delaware to a new set of facts. Rather than *create* a new cause of action, as the courts were asked to do in *Wright* and *Moss Rehab*, the Court in this case has simply *recognized* that an *existing* cause of action is implicated by the facts of record.³⁵

³³Del. Supr., 437 A.2d 554 (1981).

³⁴Del. Supr., 692 A.2d 902 (1997).

³⁵The Court takes note of the fact that the care of the mentally ill, directly at issue in *Naidu* (and here), is also highly regulated by statute. *Naidu*, 539 A.2d at 1071-72. The existence of a regulatory scheme, however, did not stop the Court from recognizing the duty enunciated in Section 315. *Id.* at 1072.

E. Public Policy Mandates The Recognition Of Ken Crest’s Duty To Control Its Residents

The public policy of Delaware appropriately embodies the notion that “[m]entally retarded persons have a right... to participate in all aspects of community life; and to have access to appropriate leisure time activities.”³⁶ Accordingly, it has been recognized in Delaware that “modification or denial of [the] rights [of mentally retarded individuals]... must be based on an evaluation of the social capability of the mentally retarded person by qualified experts....”³⁷ Among the rights enjoyed by patients resident in certain institutions including, arguably, residential facilities such as those operated by Ken Crest, is “the right to be free from chemical and physical restraints....”³⁸ Ken Crest argues that the imposition of a duty upon it to control its residents would be repugnant to these public policy considerations and would dissuade mental health professionals from offering residential options such as semi independent apartments to mentally retarded residents.

³⁶16 *Del. C.* § 5504

³⁷16 *Del. C.* §. 5507

³⁸16 *Del. C.* § 1121(7)

Ken Crest’s emphasis of public policy favoring the mentally retarded citizens of Delaware is entirely appropriate. The Court must consider these policy concerns when determining whether the duty urged by the plaintiffs is reasonable. The Court has done so and concludes for several reasons that public policy will not be offended by the Court’s holding. First, similar public policy arguments have been considered and rejected by Delaware courts. For instance, in *Harden*, the defendant neurologist argued that to impose a duty upon him to prevent his epileptic patient from driving would fly in the face of the public policy which encourages those with disabilities to be independent.³⁹ The court did not find the defendant’s reference to public policy sufficient to overcome the common law duty recognized in Section 315.⁴⁰ Likewise, in *Naidu*, the court, while acknowledging that there is “inherent difficulty” in the treatment of mentally ill patients, ultimately questioned the reliability of the contention that mental health providers would not treat mentally ill patients if saddled with a duty to protect others from the patient.⁴¹ Moreover, the court noted that the public policy argument “misinterpret[ed] the nature of the duty imposed on mental

³⁹*Harden*, 883 F. Supp. at 967-68.

⁴⁰*Id.* at 972.

⁴¹*Naidu*, 539 A.2d at 1074.

health professionals.”⁴² Specifically, the court observed:

Recognition of an affirmative duty owed persons other than the patient does not mean that the psychiatrist is liable for the negligence of the patient. Rather, the psychiatrist will be liable only when his own negligence is responsible for the injury in question.⁴³

As in *Naidu*, the Court finds that Ken Crest’s public policy argument simply does not comport with the duty which has been recognized here. The Court has concluded that Ken Crest maintained a special relationship with Morris which enabled it to exercise a degree of control over him which was commensurate with Morris’ dangerous propensities. This ability to control Morris was recognized by Ken Crest and sanctioned by the Division. Only to the extent that a fact finder determines that Ken Crest failed to act reasonably in its custodial obligations will it be liable to the plaintiffs. It is difficult to imagine that an organization, such as Ken Crest, would be discouraged from providing residential support services to mentally challenged individuals simply because the law expects that this function will be discharged without negligence.

Finally, the Court is compelled to observe that public policy actually dictates

⁴²*Id.*

⁴³*Id.*

the result here. Ken Crest operates some of its facilities in the heart of Delaware's residential neighborhoods. This proximity is necessary to allow the Ken Crest residents to interact with their community and to become productive members of society. Nevertheless, many of Ken Crest's residents have special needs and some of Ken Crest's residents have special difficulties which make their integration into the community a more sensitive matter. Ken Crest must recognize these issues and must take reasonable measures to address them for the protection of the communities in which it operates. Public policy requires that it do so.

CONCLUSION

For the foregoing reasons, Ken Crest's motion for summary judgment must be DENIED. The special relationship that exists between Ken Crest and its residents is the predicate for a duty owed by Ken Crest to individuals other than its residents. Its duty is to take whatever steps are reasonably necessary and available to protect potential victims of the residents when the facility determines, or reasonably should determine, that the patient presents an unreasonable risk of harm to such potential victims. The facility further has a duty to warn potential victims when it knows or should know that the resident's dangerous propensities present an unreasonable risk of harm to others. Whether this duty has been breached by Ken Crest will be determined at trial by the jury.

IT IS SO ORDERED.

