

FILED

09/15/2017

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 24, 2017 Session

IN RE ESTATE OF CHRISTINA MARIE COTTEN

**Appeal from the Circuit Court for Williamson County
No. 2015-194 Michael W. Binkley, Judge**

No. M2016-02402-COA-R3-CV

The personal representative, on behalf of the decedent's estate, brought this negligence action against the defendant based, *inter alia*, on the defendant's alleged acts of displaying and failing to properly store and prevent accessibility to the firearm with which the decedent ultimately committed suicide. The trial court granted summary judgment in favor of the defendant, determining that he owed no duty of care to the decedent and that her suicide was an independent, intervening cause that broke the chain of causation. The estate has appealed. Based upon the applicable balancing test, we conclude that the defendant owed a legal duty of care to the decedent and that summary judgment was improperly granted in the defendant's favor on the basis of lack of duty. We further determine that the estate's evidence at the summary judgment stage was sufficient to establish the existence of a genuine issue of material fact for trial regarding causation. We therefore vacate the trial court's grant of summary judgment and remand for further proceedings consistent with this opinion. We affirm, however, the trial court's determination that no special relationship existed such as to impose liability for nonfeasance.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Vacated in Part, Affirmed in Part; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and RICHARD H. DINKINS, J., joined.

H. Douglas Nichol, Knoxville, Tennessee, and John Chadwick Long, Gallatin, Tennessee, for the appellant, Benjamin Shea Cotten, as Personal Representative of the Estate of Christina Marie Cotten.

Christopher M. Jones and Britney K. Pope, Nashville, Tennessee, for the appellee, Dr. Jerry Scott Wilson.

OPINION

I. Factual and Procedural Background¹

Benjamin Shea Cotten² filed this negligence action on May 4, 2015, concerning the death of his ex-wife, Christina Marie Cotten (“Decedent”), on behalf of her estate (“the Estate”). Decedent committed suicide at the home of the defendant, Dr. Jerry Wilson, on November 9, 2014.

Mr. Cotten and Decedent were married in July 2006 and had one child together, a son, in 2010. Later that same year, Decedent became a registered nurse and obtained employment at Skyline Hospital in Nashville. Dr. Wilson, a board-certified psychiatrist, was the Director of the Military Unit at Skyline Hospital at that time. Decedent was employed as a nurse in this unit.

In May 2011, Dr. Wilson and Decedent commenced a dating relationship, notwithstanding Dr. Wilson’s knowledge that Decedent was married. Mr. Cotten and Decedent separated after Mr. Cotten discovered Decedent’s relationship with Dr. Wilson. The Cottens’ divorce was finalized in June 2012. Concerning residential care and responsibilities for their child, the divorce decree provided for Decedent and Mr. Cotten to exercise equal co-parenting time with their son.

Following the divorce, Decedent and Dr. Wilson continued their relationship, which led to Decedent’s moving into Dr. Wilson’s residence in October 2013. Sometime after Dr. Wilson and Decedent began residing together, Dr. Wilson observed that Decedent suffered crying spells and appeared to struggle with the loss of her job and eviction from her previous residence. Dr. Wilson acknowledged that Decedent seemed depressed at times, was not energetic or motivated, and did not take care of herself on certain days. In late 2013, Decedent informed Dr. Wilson that she had decided to seek treatment for depression and other mental health issues with Dr. Roy Asta, a psychiatrist who was also employed at Skyline. By the end of 2013, Dr. Wilson was aware that Decedent was taking Prozac and Klonopin for her depression.

¹ The facts presented herein are derived from the deposition excerpts and the parties’ responses to the statements of undisputed material facts contained in the record.

² Mr. Cotten is personal representative for the Estate of Christina Marie Cotten and natural guardian of Ms. Cotten’s minor child.

Dr. Asta testified that he began treating Decedent in March 2013. Decedent initially presented with complaints of depression and anxiety. Dr. Asta diagnosed Decedent with depression, prescribing Prozac, Klonopin, and supportive psychotherapy as treatment. According to Dr. Asta, Decedent informed him on her first visit that she and Dr. Wilson were dating. Decedent was seen as a patient again in June 2013, at which time Dr. Asta reported that Decedent was doing well such that he continued her ongoing treatment.

On January 23, 2014, Mr. Cotten filed legal proceedings wherein he sought full custody of his son. Mr. Cotten testified that prior to this filing, Decedent seemed “unstable and didn’t seem to be her normal happy self.” Mr. Cotten also expressed concern regarding Decedent’s residing with Dr. Wilson.

On January 26, 2014, a friend transported Decedent to the emergency room of Nashville General Hospital after Decedent consumed an overdose of Ativan while drinking wine. Hospital tests confirmed that Decedent had alcohol and benzodiazepines in her system. Based on this information and her evaluation of Decedent, Dr. DeAnn Bullock Watkins, the emergency medicine physician on duty, contacted the mobile crisis unit, an emergency psychiatric service, and requested a mental health evaluation for Decedent. Based on the resultant assessment, Dr. Watkins completed a certificate of need, which constituted an involuntary commitment form for Decedent’s admission to a psychiatric hospital.

Decedent called Dr. Wilson from the emergency room, informing him she had been drinking that evening and had “taken a couple of extra sleeping pills and passed out.” Additionally, Decedent informed Dr. Wilson that she was being admitted to the Middle Tennessee Mental Health Institute (“MTMHI”), a psychiatric hospital. Decedent subsequently contacted Dr. Wilson following her arrival at MTMHI and asked him to pick her up, which he did. Decedent’s MTMHI medical records contain a notation stating: “MOD spoken with boyfriend (Dr. Jerry Wilson), and boyfriend assured her safety especially since they lived together. Patient will see her Outpatient Psychiatrist within seven days.” Dr. Wilson admitted that he had spoken with a physician at MTMHI, who informed Dr. Wilson that Decedent was depressed and had attempted suicide. At the time, however, Decedent denied that she had attempted suicide.

Dr. Brooks, the psychiatrist at MTMHI who evaluated Decedent, found that Decedent’s relationships with her son and Dr. Wilson were extremely important to her. Upon Decedent’s release, Dr. Brooks understood that Decedent would be going home with Dr. Wilson and would follow up with her psychiatrist within seven days. In this regard, Dr. Brooks spoke with Dr. Wilson and Decedent for ten to fifteen minutes and was very firm regarding the need for follow-up care and support.

By contrast, Dr. Wilson testified that when he picked up Decedent from MTMHI, the treating psychiatrist told him he was comfortable discharging Decedent and made no recommendations as far as safety, outpatient treatment, or weapons. Dr. Wilson admitted that the psychiatrist at MTMHI knew that Dr. Wilson was a psychiatrist as well. Although Dr. Wilson assured the treating psychiatrist that Decedent would follow up with her psychiatrist, he testified that he did not know if Decedent consulted a psychiatrist within seven days of discharge. Decedent did subsequently discuss with Dr. Wilson the fact that she had, in fact, been contemplating suicide at the time of the January 2014 hospitalization.

In April 2014, Mr. Cotten gained “majority” custody of his and Decedent’s son. In June 2014, Dr. Wilson observed that Decedent was suffering crying spells one or two times per week and seemed to be struggling with the loss of custody of her son. Dr. Wilson related that when Decedent experienced “down” days, she wanted to sleep a lot and “ruminated” on the loss of custody. Also in June 2014, Decedent called Dr. Asta in distress and crying. Dr. Asta examined Decedent in his office on June 13, 2014, and reported that Decedent was doing poorly and appeared more depressed; as a result, he increased her medication.

In mid-August 2014, Dr. Wilson broke off his relationship with Decedent, and she moved from his residence. Dr. Asta documented following an office visit on August 29, 2014, that Decedent’s relationship with Dr. Wilson had ended but that Decedent was doing well. During the following months, Decedent and Dr. Wilson nonetheless resumed seeing one another. In addition, Decedent would occasionally stay a day or two with Dr. Wilson. Decedent and Dr. Wilson continued to communicate by telephone, texting, electronic mail, and personal contact, occasionally discussing reconciliation.

In October 2014, Dr. Wilson acquired a handgun and some ammunition as a gift from his father. Upon receipt, Dr. Wilson placed the gun in one sock and the ammunition in another sock, storing them in unlocked, separate drawers of a china cabinet located in his dining room.

Decedent continued in her medical care and treatment by Dr. Asta. Upon Dr. Asta’s examination on October 14, 2014, he specifically noted that Decedent presented no suicidal ideations. Decedent informed Dr. Asta that she planned to move back in with Dr. Wilson. During Decedent’s treatment, Dr. Asta never discussed the relationship between Dr. Wilson and Decedent with Dr. Wilson. Dr. Wilson also never personally discussed Decedent’s first suicide attempt with Dr. Asta. In fact, Dr. Asta did not learn of Decedent’s January 2014 hospitalization or suicide attempt until after her death. Dr. Asta stated that as Decedent’s treating psychiatrist, he would have wanted to know about

the January 2014 hospitalization so that he could properly treat Decedent. Dr. Asta also related that he relied on family and friends to have informed him of the suicide attempt, especially because Decedent seemed to be in denial about it. According to Dr. Asta, when he reviewed the notes from the hospitalization, he learned that Decedent was taking lorazepam without his knowledge. Dr. Asta opined that he would have worked on a plan to ensure that Decedent took her medication properly, became more compliant with her treatment, and eliminated alcohol. Dr. Asta also testified that he would have been concerned had he known that firearms were stored in the home.

Dr. Wilson acknowledged that on October 26, 2014, he showed Decedent his gun in the den at his home while her son was present. Decedent handled the gun while Dr. Wilson explained the gun's history, referring to it as a "lady's purse gun." Dr. Wilson then took the gun into the adjacent dining room, placing it back in the china cabinet. At some point during the evening, Dr. Wilson informed Decedent that he was interested in pursuing a relationship with another woman. According to Dr. Wilson, Decedent became upset and angry, accused Dr. Wilson of "just using her for sex," and stormed out of the residence.

Following this incident, Dr. Wilson and Decedent continued to have conversations indicating their mixed emotions about reconciling. Concerning weapons, Dr. Asta testified that a person with a prior suicide attempt, who was depressed and anxious, should not be shown a gun, especially when a relationship was ending. Mr. Cotten testified that his son described the event of October 26, 2014, as one wherein Dr. Wilson "waved" a gun while he and Decedent were "fighting." Shortly following the October 26 incident, Mr. Cotten informed Decedent that he was worried about their son's well-being if she continued to live with Dr. Wilson and that he was considering seeking supervised visitation.

On approximately November 1, 2014, Decedent contacted Dr. Wilson and requested to stay at his home because she had been evicted from her friend's apartment and had nowhere else to reside. Dr. Wilson allowed Decedent to remain at his home while he was out of town that week. On Wednesday, November 5, 2014, Dr. Wilson briefly returned to his house to stay the night before driving to his parents' residence in Harrogate, Tennessee, the following day. According to Dr. Wilson, Decedent was "in good spirits" when he departed. Dr. Wilson remained with his parents until Sunday, November 9, 2014. It was Dr. Wilson's understanding that Decedent intended to spend that weekend at her father's home in Chattanooga, Tennessee, with her son. Mr. Cotten confirmed that on the Friday prior to her death, Decedent had been scheduled to pick up their son from his parents' house and spend the weekend with him. Although Decedent called Mr. Cotten's mother on Friday and informed her that she was stuck in traffic and would pick up the child on Saturday, Decedent never arrived.

Dr. Wilson testified that he exchanged text messages with Decedent on that Friday. The communications varied in content from discussing a possible reconciliation to exchanging humorous pictures. The final text received by Dr. Wilson from Decedent was on Sunday morning, November 9, 2014. In the afternoon on November 9, 2014, Dr. Wilson arrived at his home to find Decedent in the bedroom, unconscious, with a gunshot wound to her chest. Dr. Wilson also discovered his gun in the bed near Decedent. Despite Dr. Wilson's call for emergency services, Decedent did not survive.

On May 4, 2015, Mr. Cotten, acting on behalf of the Estate, filed a complaint in the Williamson County Circuit Court ("trial court"), asserting that Dr. Wilson, as a homeowner, owed a duty to Decedent to properly store and maintain in a safe manner his firearms. Mr. Cotten further alleged that Dr. Wilson was aware of Decedent's "fragile mental state and suicidal tendencies" and knew or should have known that if she had access to firearms, she might harm herself. Mr. Cotten claimed that Decedent's injury was foreseeable and that Dr. Wilson was negligent in keeping firearms and ammunition in locations known and accessible to Decedent.

By his answer in response, Dr. Wilson admitted that while involved in a dating relationship with Decedent, he had known that she suffered from depression and "other possible psychiatric issues." Although Dr. Wilson acknowledged that Decedent had previously attempted suicide at his residence, he denied owing a duty of care to Decedent or committing any act of negligence. Dr. Wilson subsequently filed a motion for summary judgment, asserting that the Estate had failed to establish a *prima facie* case of negligence.

Following oral argument regarding the motion for summary judgment, the trial court entered its Memorandum and Order on October 21, 2016, wherein the court granted summary judgment in Dr. Wilson's favor. The court determined, *inter alia*, that Dr. Wilson did not owe a duty of care to Decedent, concluding that it was not foreseeable that Decedent would commit suicide, specifically with Dr. Wilson's firearm, because there was "no evidence supporting the conclusion [Decedent] was a continued risk of suicide from January 2014 to November 2014." The court rejected the Estate's argument that Dr. Wilson owed Decedent a duty, as a homeowner and a gun owner, to protect her from an unreasonable risk of injury. The court noted that Decedent had spoken with Dr. Asta on multiple occasions during the months leading up to her death, and "even [Decedent's] psychiatrist was unaware that she was suicidal." The court further stated: "Nothing in the record suggests behavior on the part of [Decedent] which would have alerted Dr. Wilson to the possibility of [Decedent's] using his guns for harmful purposes."

The trial court also rejected the Estate’s assertion that a duty arose because of a “special relationship” between Decedent and Dr. Wilson. Addressing the Estate’s argument that Dr. Wilson had a heightened duty because of his education and experience as a psychiatrist, the court disagreed, determining that no special relationship existed sufficient to impose a duty on Dr. Wilson. The court also determined that because Dr. Wilson was never Decedent’s treating physician, he was under no medical duty regarding her mental health.

The trial court further concluded that the Estate’s negligence claim lacked viability due to the absence of causation. Again noting its finding that Decedent’s suicide was not reasonably foreseeable, the court determined that Dr. Wilson’s conduct was not a substantial factor in bringing about Decedent’s death. Rather, the court analyzed the case law regarding suicide and the independent, intervening cause doctrine, determining that none of the exceptions to the doctrine had been shown to exist in this case. The court thus determined that Decedent’s suicide was an intervening cause, breaking the chain of causation. The court therefore granted Dr. Wilson’s motion for summary judgment. Following the dismissal of his claims, Mr. Cotten, on behalf of the Estate, filed a timely notice of appeal.

II. Issues Presented

The Estate presents the following issues, which we have restated slightly:

1. Whether the trial court erred by determining that Dr. Wilson did not owe a duty of care to Decedent.
2. Whether the trial court erred by determining that Decedent’s suicide was not reasonably foreseeable by Dr. Wilson.
3. Whether the trial court erred by determining that no special relationship existed between Dr. Wilson and Decedent.
4. Whether the trial court erred by determining that Decedent’s suicide was an intervening cause that broke the chain of causation.

III. Standard of Review

The grant or denial of a motion for summary judgment is a matter of law; therefore, our standard of review is *de novo* with no presumption of correctness. *See Rye v. Women’s Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452 (2016); *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395

S.W.3d 653, 671 (Tenn. 2013) (citing *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). As such, this Court must “make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied.” *Rye*, 477 S.W.3d at 250. As our Supreme Court has explained concerning the requirements for a movant to prevail on a motion for summary judgment pursuant to Tennessee Rule of Civil Procedure 56:

[W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party’s claim or (2) by demonstrating that the nonmoving party’s evidence *at the summary judgment stage* is insufficient to establish the nonmoving party’s claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party’s evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with “a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial.” Tenn. R. Civ. P. 56.03. “Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record.” *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. “[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56],” to survive summary judgment, the nonmoving party “may not rest upon the mere allegations or denials of [its] pleading,” but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, “set forth specific facts” *at the summary judgment stage* “showing that there is a genuine issue for trial.” Tenn. R. Civ. P. 56.06. The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475 U.S. [574,] 586, 106 S. Ct. 1348 [(1986)]. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party’s evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes

forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye, 477 S.W.3d at 264-65 (emphasis in original). The Supreme Court also elucidated that “the evidence must be viewed in a light most favorable to the claims of the non-moving party, with all reasonable inferences drawn in favor of those claims.” *Id.* at 286. Pursuant to Tennessee Rule of Civil Procedure 56.04, the trial court must “state the legal grounds upon which the court denies or grants the motion” for summary judgment, and our Supreme Court has instructed that the trial court must state these grounds “before it invites or requests the prevailing party to draft a proposed order.” *See Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 316 (Tenn. 2014).

IV. Duty of Care and Foreseeability

With regard to any claim of negligence, our Supreme Court has elucidated:

In order to establish a prima facie claim of negligence, basically defined as the failure to exercise reasonable care, a plaintiff must establish the following essential elements: “(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause.”

Giggers v. Memphis Hous. Auth., 277 S.W.3d 359, 364 (Tenn. 2009) (quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)). The High Court further explained that duty “is the legal obligation a defendant owes to a plaintiff to conform to a reasonable person’s standard of care in order to protect against unreasonable risks of harm.” *Giggers*, 277 S.W.3d at 364. Furthermore, “[w]hether a defendant owes a duty of care to the plaintiff is a question of law to be determined by the courts.” *Id.* at 365.

In the case at bar, the trial court granted summary judgment in favor of Dr. Wilson regarding the Estate’s claim of negligence, having determined in part that Dr. Wilson did not owe a duty to Decedent because it was not foreseeable that Decedent would commit suicide. In support, the court found that there was “no evidence supporting the conclusion [Decedent] was a continued risk of suicide from January 2014 to November 2014.” The court rejected the Estate’s argument that Dr. Wilson owed Decedent a duty of care, as a homeowner and a gun owner, to protect her from an unreasonable risk of injury. On this issue, the court noted that Decedent had spoken with Dr. Asta on multiple occasions during the months leading up to her death, and “even [Decedent’s] psychiatrist was unaware that she was suicidal.” The court further stated that “[n]othing in the record

suggests behavior on the part of [Decedent] which would have alerted Dr. Wilson to the possibility of [Decedent's] using his guns for harmful purposes.” Upon a careful examination of the record, we respectfully disagree.

As our Supreme Court has explained with regard to the duty of reasonable care:

Although not a part of the early English common law, the concept of duty has become an essential element in all negligence claims. *McCall [v. Wilder]*, 913 S.W.2d [150,] 153 [(Tenn. 1995)]; *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993); *see also* W. Page Keeton, *Prosser & Keeton on the Law of Torts* § 53 (5th ed. 1984). The duty owed to the plaintiffs by the defendant is in all cases that of reasonable care under all of the circumstances. *Doe v. Linder Const. Co.*, 845 S.W.2d 173, 177 (Tenn. 1992). Whether the defendant owed the plaintiffs a duty of care is a question of law to be determined by the court. *Burroughs v. Magee*, 118 S.W.3d 323, 327 (Tenn. 2003); *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89; *Coln [v. City of Savannah]*, 966 S.W.2d [34,] 39 [(Tenn. 1998)].

If a defendant fails to exercise reasonable care under the circumstances, then he or she has breached his or her duty to the plaintiffs. The term reasonable care must be given meaning in relation to the circumstances. *Linder Const. Co.*, 845 S.W.2d at 178; *McCormick v. Waters*, 594 S.W.2d 385, 387 (Tenn. 1980). Reasonable care is to be determined by the risk entailed through probable dangers attending the particular situation and is to be commensurate with the risk of injury. *Linder Const. Co.*, 845 S.W.2d at 178. Thus, legal duty has been defined as the legal obligation owed by a defendant to a plaintiff to conform to a reasonable person standard of care for the protection against unreasonable risks of harm. *Burroughs*, 118 S.W.3d at 329; *Staples*, 15 S.W.3d at 89; *McCall*, 913 S.W.2d at 153; *see also* Keeton, *supra*, § 53.

West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d 545, 550-51 (Tenn. 2005). The High Court has further elucidated:

When the existence of a particular duty is not a given or when the rules of the established precedents are not readily applicable, courts will turn to public policy for guidance. Doing so necessarily favors imposing a duty of reasonable care where a “defendant’s conduct poses an unreasonable and foreseeable risk of harm to persons or property.” *McCall v. Wilder*, 913 S.W.2d at 153. When conducting this analysis, the courts have considered, among other factors: (1) the foreseeable probability of the

harm or injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct to the defendant; (5) the feasibility of alternative conduct that is safer; (6) the relative costs and burdens associated with that safer conduct; (7) the relative usefulness of the safer conduct; and (8) the relative safety of alternative conduct. *Burroughs v. Magee*, 118 S.W.3d at 329; *McCall v. Wilder*, 913 S.W.2d at 153.

With these factors firmly in mind, Tennessee's courts use a balancing approach to determine whether the particular risk should give rise to a duty of reasonable care. *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d at 551; *Burroughs v. Magee*, 118 S.W.3d at 329. A duty arises when the degree of foreseeability of the risk and the gravity of the harm outweigh the burden that would be imposed if the defendant were required to engage in an alternative course of conduct that would have prevented the harm. *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d at 551; *Burroughs v. Magee*, 118 S.W.3d at 329; *McCall v. Wilder*, 913 S.W.2d at 153. The foreseeability and gravity of the harm are linked insofar as the degree of foreseeability needed to establish a duty is inversely proportional to the magnitude of the foreseeable harm. *Turner v. Jordan*, 957 S.W.2d [815,] 818 [(Tenn. 1997)]. The greater the risk of harm, the less degree of foreseeability is required. *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 433 (Tenn. 1994). During the balancing process, it is permissible for the courts to consider the contemporary values of Tennessee's citizens.

While every balancing factor is significant, the foreseeability factor has taken on paramount importance in Tennessee. *Hale v. Ostrow*, 166 S.W.3d 713, 716-17 (Tenn. 2005); *Biscan v. Brown*, 160 S.W.3d [462,] 480 [(Tenn. 2005)]. This factor is so important that if an injury could not have been reasonably foreseen, a duty does not arise even if causation-in-fact has been established. *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992). Conversely, foreseeability alone is insufficient to create a duty. *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 904 (Tenn. 1996). Thus, to prevail on a negligence claim, a plaintiff must show that the risk was foreseeable, but that showing is not, in and of itself, sufficient to create a duty. Instead, if a risk is foreseeable, courts then undertake the balancing analysis.

While there have certainly been able and skillful critiques of the role that foreseeability plays in determining whether a duty exists, the majority of courts continue to use foreseeability as a central component of their

analyses. Foreseeability has proven to be a useful hub from which central organizing principles can be maintained, while at the same time allowing for prudent modification and reformation of those principles. Despite the difficulties and significant stumbles, the experience of most courts has been that maintaining a role for foreseeability when addressing questions regarding the existence and scope of duty assists—more than it impedes—the application and development of the law of negligence.

The role that the concept of foreseeability plays in the context of a court's determination of the existence and scope of a duty differs from the role the concept plays when the fact-finder is addressing proximate causation. For a duty to exist, the defendant's "conduct must create a recognizable risk of harm to the [plaintiff] individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the [plaintiff] is a member." Restatement (Second) of Torts § 281 cmt. c, at 4-5. However, because almost any outcome is possible and can be foreseen, the mere fact that a particular outcome might be conceivable is not sufficient to give rise to a duty. For the purpose of determining whether a duty exists, the courts' consideration of foreseeability is limited to assessing whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it. In this context, the courts are not concerned with the ultimate reasonableness, or lack of reasonableness, of the defendant's conduct. Rather, the courts are simply ascertaining "whether [the] defendant was obligated to be vigilant of a certain sort of harm to the plaintiff."

Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 365-67 (Tenn. 2008) (footnotes omitted).

In its foreseeability analysis, the *Satterfield* Court relied on, *inter alia*, an opinion from the Florida Supreme Court, which further explained:

[T]he question of foreseeability can be relevant both to the element of duty (the existence of which is a question of law) and the element of proximate causation (the existence of which is a question of fact). The temptation therefore is to merge the two elements into a single hybrid "foreseeability" analysis, or to otherwise blur the distinctions between them.

* * *

[F]oreseeability relates to duty and proximate causation in different ways and to different ends. The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. See *Kaisner*, 543 So.2d at 735 (citing *Stevens v. Jefferson*, 436 So.2d 33, 35 (Fla. 1983)). The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold *legal* requirement for opening the courthouse doors, whereas the latter is part of the much more specific *factual* requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven.

McCain v. Florida Power Corp., 593 So. 2d 500, 502-03 (Fla. 1992) (footnote omitted) (emphasis in original).

As the trial court determined and the above precedent makes clear, the issue of whether a legal duty is owed is largely dependent upon whether the risk was foreseeable and significant. See *Satterfield*, 266 S.W.3d at 367; *McCain*, 593 So. 2d at 502-03. On this question, the Estate asserts that the risk of harm to Decedent, who suffered from ongoing depression, was foreseeable, significant, and unreasonable, thereby creating a duty for Dr. Wilson to properly secure his firearms.

As our Supreme Court has explained, "a risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable." *West*, 172 S.W.3d at 551 (quoting *Doe v. Linder Const. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992)). "The plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury." *West*, 172 S.W.3d at 551 (quoting *Tedder v. Raskin*, 728 S.W.2d 343, 348 (Tenn. Ct. App. 1987)). The Estate argues that it was foreseeable that Decedent would harm herself due to her previous suicide attempt, history of depression, and Dr. Wilson's recent revelation that he desired to date someone else.

The trial court, however, determined that Decedent's actions were not foreseeable because she had spoken with Dr. Asta on multiple occasions during the months leading up to her death and "even [Decedent's] psychiatrist was unaware that she was suicidal." The court further stated: "Nothing in the record suggests behavior on the part of [Decedent] which would have alerted Dr. Wilson to the possibility of [Decedent's] using

his guns for harmful purposes.” The court found that there was no indication, from the time of Decedent’s suicide attempt in January 2014 until her suicide in November 2014, that she was suicidal. We disagree with the trial court’s finding.

The undisputed facts demonstrated that following Decedent’s suicide attempt in January 2014, several significant and stressful events occurred, which may have contributed to the downturn in Decedent’s mental condition. In April 2014, Decedent lost her role as joint custodian of her son, which Dr. Wilson reported resulted in a worsening of Decedent’s ongoing depression. Dr. Wilson testified that in June 2014, Decedent experienced crying spells once or twice per week, also suffering “down” days when Decedent wanted to sleep a lot and “ruminated” on the loss of custody. Evidence was presented that Decedent contacted Dr. Asta during this time period, crying and exhibiting distress. According to Dr. Asta, Decedent’s depression was worse and she was doing “poorly,” such that he increased her medication regimen.

In August 2014, Dr. Wilson ended his romantic relationship with Decedent, informing her that he did not see a future for them and that it was “time to move on.” Dr. Wilson assisted Decedent, upset as a result of the break-up, to pack her belongings and leave his home. Despite this change in their relationship status, Dr. Wilson continued to see and communicate with Decedent, with occasional discussions of reconciliation. Noteworthy is the fact that on October 14, 2014, Decedent informed Dr. Asta that she would be moving back in with Dr. Wilson, thus demonstrating that she apparently embraced the hope that the two would reconcile. It is further significant that although Dr. Asta noted that Decedent presented no suicidal ideation on October 14, 2014, Dr. Asta was never informed of Decedent’s prior suicide attempt, her use of other medications with depressant qualities, or the accessibility to Decedent of Dr. Wilson’s firearm.

On October 26, 2014, Dr. Wilson shared lunch with Decedent and her son, and the three returned to his residence. On this occasion, Dr. Wilson chose to show Decedent his firearm and allow her to handle it. Immediately thereafter, Dr. Wilson returned the gun to its storage place in the unlocked drawer of a china cabinet. Dr. Wilson then informed Decedent that he was interested in pursuing a relationship with another woman, at which point Decedent became distraught, accused Dr. Wilson of exploiting her, and left abruptly. A few days later, Decedent returned to stay at Dr. Wilson’s residence in his absence. Tragically, Decedent used Dr. Wilson’s weapon to end her life approximately fourteen days after she first saw and handled the firearm.

Based on Decedent’s history of depression and previous suicide attempt, coupled with the loss of custodial rights concerning her son and the termination of her relationship with Dr. Wilson, it was reasonably foreseeable that Decedent might inflict harm upon herself by utilizing the deadly weapon of which Dr. Wilson made her aware. Dr.

Wilson's act of showing the firearm to Decedent and then returning it to an unsecured location within the home created an unreasonable risk of harm to Decedent. We further conclude that the degree of foreseeability of the risk and the gravity of the harm outweighed the burden that would be imposed if Dr. Wilson had engaged in an alternative course of conduct that would have prevented the harm. *See West*, 172 S.W.3d at 153. We therefore reverse the trial court's determination as a matter of law that Dr. Wilson owed no duty of care to Decedent and vacate the trial court's grant of summary judgment in Dr. Wilson's favor.

V. Special Relationship

The Estate also asserts that the trial court erred in its determination that no special relationship existed between Dr. Wilson and Decedent so as to justify the imposition of a legal duty. Although the Estate acknowledges that Dr. Wilson was not Decedent's treating physician, it asserts that a special relationship arose because Decedent was a guest in Dr. Wilson's home and his paramour.

The "special relationship" doctrine was explained by our Supreme Court in *Giggers* as follows:

In general, an individual has a duty to others to refrain from engaging in misfeasance, affirmative acts that a reasonable person "should recognize as involving an unreasonable risk of causing an invasion of an interest of another" or acts "which involve[] an unreasonable risk of harm to another." Restatement (Second) of Torts §§ 284, 302 (1965). Under our common law, however, courts were reluctant to impose liability for nonfeasance, a course of inaction, as opposed to an act risking harm to others. W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 56, at 373 (5th ed. 1984). As a means of mitigating the harshness of the common law rule, exceptions have been created for circumstances in which the defendant has a special relationship with either the individual who is the source of the danger or the person who is at risk.

Giggers, 277 S.W.3d at 364. The Court further explained in *Satterfield*:

Our decision in *West v. East Tennessee Pioneer Oil Co.* illustrates this principle. That case required us to determine whether a convenience store had a duty to the occupants of a vehicle who were injured when an intoxicated motorist struck their vehicle after the store's employees had helped the obviously intoxicated motorist fuel his vehicle shortly before the accident. The store asserted that the intoxicated motorist was only a

customer and, therefore, that no special relationship existed between the store and the intoxicated driver that would be sufficient to require the store employees to control the intoxicated driver's conduct. *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d at 551.

We did not hold that the convenience store's liability was predicated on the existence of a special relationship between the store and the intoxicated driver. Instead, we held that

the defendant misconstrues the plaintiffs' claims as being based upon a "special relationship" arising from the sale of gasoline to Mr. Tarver (the intoxicated driver). The plaintiffs' allegations do not revolve around any duty of the defendant to control the conduct of a customer. Instead, the claims are predicated on the defendant's employees' affirmative acts in contributing to the creation of a foreseeable and unreasonable risk of harm, i.e., providing mobility to a drunk driver which he otherwise would not have had, thus creating a risk to persons on the roadways.

West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d at 551.

* * *

As illustrated by *West v. East Tennessee Pioneer Oil Co.*, liability for misfeasance is not cabined within the confines of boxes created by particular relationships. To the contrary, "[l]iability for 'misfeasance' . . . may extend to any person to whom harm may reasonably be anticipated as a result of the defendant's conduct . . . ; while for 'nonfeasance' it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." *Prosser and Keeton* § 56, at 374.

Satterfield, 266 S.W.3d at 363-364.

Applying this precedent to the case at bar, we determine that the trial court was not required to find a special relationship between Dr. Wilson and Decedent in order to determine that a legal duty existed regarding alleged misfeasance. The Estate asserted in the complaint that Dr. Wilson was negligent for, *inter alia*, displaying his firearm to Decedent and placing it in a location that was known and accessible to Decedent. These

allegations concern affirmative acts “which involve[] an unreasonable risk of harm to another,” thus involving liability for misfeasance.³ See *Giggers*, 277 S.W.3d at 364.

To the extent that the Estate also alleged liability based upon nonfeasance or a failure to act, such a claim would require the existence of a special relationship between Dr. Wilson and Decedent. Generally speaking, examples of the “special relationships” that will give rise to a heightened duty of care requiring “an affirmative duty to act to prevent another from sustaining harm” include those arising from (1) a business/patron relationship, (2) a physician/patient relationship, and (3) a psychiatrist/patient relationship. See *Turner v. Jordan*, 957 S.W.2d 815, 818-19 (Tenn. 1997). Our Supreme Court has recognized a heightened duty with regard to a social host/guest relationship in the context of a voluntary assumption of a duty of care, see *Biscan v. Brown*, 160 S.W.3d 462, 482 (Tenn. 2005), or rendering aid to someone seriously injured, see *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 860 (Tenn. 1985). This Court has been unable to locate any Tennessee precedent determining that a heightened duty of protection exists based on a dating relationship.

Furthermore, we have identified only one case wherein the issue of potential negligence was found to require determination by a jury based on a homeowner/gun owner’s failure to secure guns and ammunition in the home. See *Stanley v. Joslin*, 757 S.W.2d 328 (Tenn. Ct. App. 1987). In that case, however, both the victim and the person wielding the gun were minors, and this Court determined that “when a person leaves a dangerous instrumentality where it is accessible to children, that person may be guilty of negligence and liable for injuries caused by the dangerous instrumentality if the negligence is the proximate cause of the injury.” *Id.* at 333. This Court did not suggest in *Stanley* that a similar rule would apply with regard to an adult.

In conclusion, we affirm the trial court’s determination that no special relationship was shown to exist in this case that would justify imposing a legal duty on Dr. Wilson for nonfeasance. To the extent that the trial court’s holding could be construed as requiring a special relationship concerning the Estate’s claims of misfeasance, however, we reverse

³ Our Supreme Court has further elucidated the distinction between misfeasance and nonfeasance as follows:

“[B]y ‘misfeasance’ the defendant has created a new risk of harm to the plaintiff, while by ‘nonfeasance’ he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.”

Bradshaw v. Daniel, 854 S.W.2d 865, 870 (Tenn. 1993) (quoting W. Keeton, *Prosser and Keeton on the Law of Torts* § 56 at 373 (5th ed. 1984)).

such determination and direct that, upon remand, the trial court evaluate such claims of misfeasance in accordance with general negligence principles.

VI. Independent, Intervening Cause

Finally, the Estate argues that the trial court erred in determining that its negligence claim must fail due to lack of causation. On this issue, the court found that Decedent's suicide was an independent, intervening cause that broke the chain of causation.

As our Supreme Court has explained regarding causation:

The plaintiff must prove two kinds of causation: causation in fact and proximate cause. *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993). Both causation in fact and proximate cause must be proven by the plaintiff by a preponderance of the evidence. *Id.* Cause in fact or "actual cause" means "that the injury or harm would not have occurred 'but-for' the defendant's negligent conduct." *Id.*

King v. Anderson Cty., 419 S.W.3d 232, 246 (Tenn. 2013).

Concerning proximate causation, our Supreme Court has explained that the issue requires a three-prong analysis:

(1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.

McClenahan v. Cooley, 806 S.W.2d 767, 775 (Tenn. 1991). Although the foreseeability requirement does not require the defendant to foresee "the exact manner in which the injury takes place," the defendant must or should be able to foresee, through the exercise of reasonable diligence, "the general manner in which the injury or loss occurred." *Id.* "[D]isputed issues regarding legal cause, intervening cause, and foreseeability must be left to the jury" unless "the undisputed facts and inferences to be drawn from the facts enable reasonable persons to draw only one conclusion." *Rains v. Bend of the River*, 124 S.W.3d 580, 588 (Tenn. Ct. App. 2003).

An intervening act can break the chain of causation when the act could not have been reasonably anticipated. *Id.* Suicide has been determined, in many cases, to be such an independent, intervening cause. See *Lancaster v. Montesi*, 390 S.W.2d 217, 222 (Tenn. 1965) (the decedent's suicide following weeks of suffering physical abuse by her boyfriend was an intervening and unforeseeable cause, which superseded the boyfriend's potential liability); *Weathers v. Pilkington*, 754 S.W.2d 75, 79 (Tenn. Ct. App. 1988) (the decedent's suicide was unforeseeable and thus an independent, intervening cause, relieving his physician of liability when the decedent had "functioned normally and lived an unremarkable life" for weeks prior to his death).

Exceptions to this doctrine have developed in instances wherein the decedent was in a custodial situation at the time of the suicide. See *White v. Lawrence*, 975 S.W.2d 525, 530 (Tenn. 1998); *Kane v. State*, No. 89-75-II, 1989 WL 136963, at *3 (Tenn. Ct. App. Nov. 15, 1989). Other exceptions include situations wherein (1) the defendant's negligence caused "delirium or insanity that results in self-destructive acts," or (2) based upon the existence of a special relationship, such as that between a physician and patient. See *White*, 975 S.W.2d at 530; *Rains*, 124 S.W.3d at 593-94. In *Rains*, however, the issue was whether a retailer of gun ammunition could be held liable for negligence *per se* by selling ammunition to an underage decedent, who then loaded the ammunition into his gun and took his own life.⁴ See *Rains*, 124 S.W.3d at 586. This Court suggested that if evidence demonstrated that the decedent's demeanor or actions should have raised concern about his mental stability such that the seller knew or should have known the decedent intended such a use for the ammunition, liability could exist in such a situation. *Id.* at 595. The Court ultimately found, however, that no such evidence existed in that case. *Id.*

As this Court has further elucidated regarding the exceptions to the independent, intervening cause doctrine:

The defendants in this case rely upon the three exceptions set forth by the court in *Rains* and argue that, in order for a municipality to be held liable for a suicide, one of these three exceptions must apply. [The plaintiff] acknowledges that the three *Rains* exceptions do not apply here. Citing *White*, she asserts that "the issue is simply a matter of whether it was foreseeable to Defendants that [the plaintiff's daughter] would take her own life if [the defendants] refused to respond to Plaintiff's plea for help." We agree with [the plaintiff]. As a federal district court stated in interpreting *White*, "the touchstone is foreseeability, not whether a given case fits into a

⁴ The decedent was eighteen, but state law mandated that ammunition could not be sold to those under the age of twenty-one.

previously carved-out exception.” *Smith v. Pfizer, Inc.*, 688 F. Supp. 2d 735, 748 (M.D. Tenn. 2010).

Ramsey v. Cocke Cty., No. E2016-02145-COA-R3-CV, 2017 WL 2713213, at *6 (Tenn. Ct. App. June 23, 2017) (footnote omitted.) Contrary to the trial court’s holding in the instant action, applicability of the independent, intervening cause doctrine hinges on foreseeability, rather than whether the situation fits a particular exception.

With regard to legal duty and foreseeability, we have previously determined that Decedent’s infliction of self-harm was reasonably foreseeable given the circumstances and that the gravity of the harm outweighed the burden to be imposed if Dr. Wilson had engaged in an alternative course of conduct that could have prevented the harm. *See West*, 172 S.W.3d at 153. Therefore, applying the proper balancing test, we have concluded as a matter of law that Dr. Wilson owed a duty of reasonable care to Decedent. *See Satterfield*, 266 S.W.3d at 365. As our Supreme Court has explained, however, foreseeability plays a different role when addressing causation. *Id.* at 366; *see also McCain*, 593 So.2d at 502-503.

In this action, with regard to causation, we determine that reasonable minds could draw more than one conclusion regarding causation. Therefore, “disputed issues regarding legal cause, intervening cause, and foreseeability [exist, which] must be left to the jury.” *See Rains*, 124 S.W.3d at 588. For this reason, we conclude that the trial court erred in holding that the Estate’s negligence claims were negated by the independent, intervening cause doctrine. Prior cases establish that liability could exist when a defendant knew or should have known that the decedent presented a reasonably foreseeable risk of suicide, as demonstrated by evidence indicating that the decedent’s demeanor or actions should have raised concerns about her mental stability and that the defendant’s actions increased such risk. *See Rains*, 124 S.W.3d at 595; *see also Drake v. Williams*, No. M2007-00979-COA-R3-CV, 2008 WL 1850872, at *15 (Tenn. Ct. App. Apr. 25, 2008) (holding that summary judgment was not properly granted based on the independent, intervening cause doctrine when reasonable minds could conclude that the decedent’s suicide was foreseeable). We therefore determine that because a genuine issue of material fact exists regarding causation, summary judgment was improperly granted on the basis of lack of causation. Ergo, we direct that the factual issue of causation be resolved at trial.

VII. Conclusion

For the reasons stated above, we determine that Dr. Wilson owed a legal duty to Decedent and conclude that summary judgment was improperly granted in Dr. Wilson’s favor on the basis of lack of duty. We further determine that the Estate’s evidence at the

summary judgment stage was sufficient to establish the existence of a genuine issue of material fact for trial regarding causation. We therefore vacate the trial court's grant of summary judgment and remand for further proceedings consistent with this opinion. We affirm, however, the trial court's determination that no special relationship existed such as to impose liability for nonfeasance. Costs on appeal are assessed to the appellee, Dr. Jerry Scott Wilson.

THOMAS R. FRIERSON, II, JUDGE