ORAL ARGUMENT -- 11/18/98
97-1208
THAPAR V. ZEZULKA

EVANS: I would like to call your attention to the two very important yet very different issues contained therein. The first one is a procedural matter, which although I may not spend as much time on it here today, I don't want that to be interpreted as meaning I don't think it's a very, very important issue. The second one, of course, is the duty to warn. The procedural issue that the CA allowed this case to go forward on was the fact that the plaintiff's attorney consented to judgment at the time of the motion for summary judgment hearing. The record before this court contains the summary judgment on which Judge Link interlineated that the plaintiff's attorney had withdrawn his opposition to the entry of the judgment. At the oral hearing on the appeal, the plaintiff's attorney represented to the CA that he didn't mean to withdraw his opposition. What he meant to do was to agree to the judgment so that it could be appealed and the issue could be...

PHILLIPS: Don't attorneys do that all the time? there's a significant cost to preparing a case for trial. And isn't it rather common if there's a tough legal issue to let the issue be resolved by the appellate court, get law of the case, and then you can invest the money and try your case if that legal issue has been answered?

EVANS: The fact of the matter is when he walked into the courtroom and withdrew his opposition, at that point, he should not have been able to appeal it since he consented to the entry of the judgment against him. The point that I'm trying to make is that you cannot ask for an advisory opinion from the CA. You can't agree to a judgment to avoid the expense of going to trial just to see if you have a cause of action. If you don't think you have a legally justifiable cause of action, then you shouldn't file a lawsuit in the first place.

ABBOTT: On the substance it seems to me that virtually every other state who has considered this has decided that there should be some viable cause of action in a situation like this when the victim is identified by the person who may cause the harm. Do you concede that?

EVANS: I would concede that most states who have entertained this have said a victim or a readily identifiable victim or group of people.

ABBOTT: I think there is only one state this rule is contrary to that. I think it is Illinois. If that's the case, if virtually every state that has ruled upon this, tell us why we should be out of the mainstream of jurisprudence on this issue?

EVANS: First of all, Florida has ruled in the way that I am asserting in this case before the court. The courts that have found a duty of a third party does exist are also in states where they found that a physician/patient relationship is a special relationship as that term is understood under the restatement of torts. This court just recently in *Van Horn*, has said that the physician/patient privilege is not a special relationship as that is understood under the restatement of tort. And it cited 100 years of law, historical law, historical precedent in Texas that says that. Texas does not recognize a physician/patient relationship to be such a special relationship. So for us to decide now

that there would be a duty to warn, we would have to be overruling 100 years of recognition that the physician/patient relationship is not a special relationship.

ENOCH: It seems to me there are a lot of cases out there that acknowledge that there may be a cause of action for a failure of a physician or a psychiatrist to warn an identifiable third party of a threat. Other than *Tarasoff,* has any other state directly confronted the facts of a specifically identifiable victim that the psychiatrist failed to warn and therefore there was a recognized duty that existed?

EVANS: I haven't cited any cases, but I believe that there are cases to that extent somewhere in the US. Texas has never found that. There have been some appellate court rulings in Texas that contemplated that could be the situation.

ENOCH: But in all of those case those weren't the facts of the case?

EVANS: That's exactly right.

ENOCH: And that was my question. In your research in other states did you find a state that confronted those facts and determined that, yes, that duty existed?

EVANS: I can't cite a case off the top of my head, but I'm not going to represent that one doesn't exist.

What this court held in *Van Horn,* is very important to the case at hand. In *Van Horn*, the physician had a situation where there was a patient who they knew to be violent, who had been under restraints, who had been in intensive care unit because of his violence. And the physician let that patient out and let him into a regular room, and then he attacks someone and kills someone and hurts some other people right there in the hospital. That situation is very analogous to what we have here, because that according to the language other states use, the people on the hospital unit would have been a readily identifiable group of people that would be subject to potential harm from this patient. But what this court ruled was, that the gravamen of the plaintiff's cause of action is that the physician in *Van Horn*, just like Dr. Thapar, misdiagnosed the patient, didn't realize that the patient was dangerous, and therefore, it's actually a case of medical negligence in which the duty only runs to the patient, and that's precisely the case that we have here.

OWEN: Didn't that case also discuss physical control of the patient as opposed to a duty to warn?

EVANS: It did address the issue of control, and it found that there was nothing implicit in the doctor/patient relationship that gives rise to a duty to control.

OWEN: Isn't this case distinguishable because we're only talking about a duty to warn?

EVANS: No, I don't think so, because in *Van Horn*, the allegations were: that he knew or should have known that there was going to be a danger to a third-party, which is the same

situation of the case at bar. Dr. Thapar had no greater ability to control her patient than Dr. Gage had to control his patient.

ABBOTT: In *Van Horn* though, the potential victim was not identified.

EVANS: That's what I was referring to earlier. In the cases throughout the country that have found a duty to third-parties they usually term it a duty to a specifically identifiable person or group of people.

ABBOTT: And the point is that in *Van Horn* there could have been no warning because there was no known person, no specifically identified person to warn; whereas, in this particular case, there was a specified person to whom a warning could be given.

EVANS: Certainly in *Van Horn,* there was a specified group of people that could have been warned. They could have warned the people on the unit that this patient was dangerous if he would have perceived that the patient was dangerous. So what they are claiming is that he was medically negligent for not having perceived the patient as dangerous. Just as in our case where the plaintiffs are complaining that Dr. Thapar was medically negligent in failing to perceive the words that her patient uttered as being a threat to harm the plaintiff.

HANKINSON: But isn't that a question, not of whether there's a duty, but whether or not there's a breach of the duty? The plaintiff's position in this case is that this is a situation in which the patient did say something sufficient, and therefore, there was a breach of the duty to not warn. Your position is that: no, there was no breach of the duty because the physician didn't know enough to warn. Why isn't that a question of breach and not a question of duty in the first instance?

EVANS: It is a question of duty in the first instance. The question is, whether Dr. Thapar owes a duty to the third-party, Mr. Zezulka, to properly diagnose her patient, to properly listen to his complaints, listen to what he says and properly diagnose that as being a threat of dangerousness? So that's the essential element of what the plaintiff is complaining that she failed to do.

HANKINSON: Isn't *Tarasoff* though a little bit simpler than that once the physician has any information and the physician gives rise to a duty to warn the identifiable third-party of danger?

EVANS: That is what *Tarasoff* said.

HANKINSON: Isn't that what the plaintiff is contending in this case, which is different than a misdiagnosis case?

EVANS: No, because if you read the plaintiff's petition they allege that Dr. Thapar was negligent in failing to realize that he was dangerous; therefore, not realizing he was negligent they did not warn the third-party. So it was negligence in her perception of his dangerousness that was the cause of her not warning the third-party. And our position is, that this court should not recognize a duty to a third-party where it has not recognized a duty to a third-party within the confines of a

doctor/patient relationship.

OWEN: What if the allegations are not negligent, but that she knew. She knew that the patient was homicidal, but she decided that she did not want to breach her perceived duty of confidentiality. Would that change in any manner, the duty she might owe to a third-party where she did recognize that the patient was homicidal?

EVANS: In Texas, she should not have disclosed to a third-party because the laws of confidentiality prohibit her from doing that. And it is ill advised for the CA to impose a duty on Dr. Thapar, that would require her to violate a statute in order to comply with that common law duty.

OWEN: She's permitted to notify under the statute?

EVANS: No, she's not. She is permitted to notify law enforcement personnel who are also charged with maintaining the confidentiality of that information. What the CA said is that she had a duty to warn third-party - a duty to warn that third-party. For her to exercise that duty that the CA has imposed on her it would require her to violate the confidentiality statute.

ABBOTT: Let's assume that a doctor is treating a patient who has killed before. So the doctor knows that the person has the capability of killing. And in a particular session, the patient pulls out a gun, loads it, and says: I'm leaving, and I'm going to go kill Mr. X. The doctor presumes: well, maybe you're bluffing, or something like that, and the patient details specifically why and in an elaborate fashion how he is going to go kill Mr. X. What you're saying is that even though arguably the doctor had within his or her power to prevent that killing by warning Mr. X, nevertheless, there is no duty on the doctor to do so?

EVANS: That's absolutely right. But that doesn't leave the doctor's hand's tied. If the situation was as you have described it and the doctor could not persuade that patient to go into the hospital, like Dr. Thapar did with Mr. Lilly, the doctor can call law enforcement, which would be presumably what you or I would do. If your secretary came up with a gun and said: I'm going to go kill the copy guy because he never gets my copies on time, and here's my gun, and I'm walking down the hall there should be no more of a duty on a doctor than there would be on any other person in that situation.

PHILLIPS: What's the breach? What's the legal obligation that a doctor has to make such a report? It's purely optional. So it's always the doctor's call no matter how latent the hypothetical that is devised?

EVANS: That's correct. And this court has considered four permissive statutes, such as in *Praesel v. Johnson*, where there was a permissive statute allowing a doctor to warn Dept. of Transportation whether or not a person is epileptic. And that epileptic patient went out and drove and killed somebody or hurt somebody. And this court decided that just because there is a permissive statute that allows the doctor to warn the Dept. of Transportation, a permissive statute does not create a duty.

PHILLIPS: But we could create a common law duty that would not be inconsistent with that statute?

EVANS: It shouldn't create a common law duty where there is already a statutory requirement that the doctor maintain the confidentiality.

PHILLIPS: I see your point with regard to individuals. But we could have a common law duty requiring a report to officials that could be interwoven with a statutory permissive disclosure and those would not be inconsistent?

EVANS: When the legislature created the statutory exceptions to the confidentiality by allowing the doctor to use his discretion in warning law enforcement personnel it could have made that a requirement, but it didn't do so. So I think that this court would be ill advised to recognize a duty where the legislature, which is the body that's able to listen to all the countervailing concerns by people who are able to put them forth much better than I am, the American Psychiatric Association, the Crime Victim's Fund, people of that nature, who can argue both sides of the coin and make a legislative statutory construction as to how and when this kind of duty should be exercised, much like they did with the Family Code situation. And in that case, the legislature did exactly that. They required a duty to warn and they made that duty to anybody, not just to a doctor who perceives that a person may be being abused by someone. But also when the legislature made that requirement, it also put into the statute protections for people when they make those kinds of disclosures.

What we have now is a permissive statute that doesn't contain any protections for people who exercise the discretion in reporting someone to law enforcement. And I think that if the duty should be there, it should be created by the legislature and it should contain the protections that the legislature has afforded people in the Family law situation, people in the HIV reporting - partner reporting situation.

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RESPONDENT

LAWYER: I am going to respond to the first two issues, which are essentially whether or not this is an agreed judgment that the prior attorney who handled this in the TC dealt with. I want to say that as a young lawyer when I practiced law about 3 years, I wanted to overturn a statute. I fended off a motion for summary judgment. I spent two weeks of the TC's time. I got n.o.v. by the TC, and they took it up and only to lose. And so later on when I was the attorney in *Gooden v. Tipps*, at that point the defendant filed a motion for summary judgment. I was a little wiser at that point, and so what I did was I filed the proper response, advised the court that the law as it existed at the time was against me on the issue, and that the proper person to determine whether it was a duty or not was the appellate court. And the problem here is, you have a young lawyer who doesn't know how to maybe use the right words in addressing the court, but my client should be not be penalized for that.

The purpose of the summary judgment law is to encourage judicial efficiency.

It's often spoken from the defendant's side where they say that you want to eliminate cases that have no merit. But from the plaintiff's point of view if you're wanting to establish a new law or overturn a law it's also a viable efficient means to do so.

ABBOTT: Assuming that we create the duty that you are asking us to create why would it not be one small step, a logical extension of that duty to say that anyone who hears a death threat has an obligation to warn the person who is threatened if there is a specifically identified target?

LAWYER: That is a situation where you have the general public...

ABBOTT: Let me be real clear. Let's just assume that after these oral arguments, you pull out a gun, and say: you're going to kill your opposing counsel, and I hear you say that, you say it directly to me. You say: you're going to go outside, you're going to corner her, and shoot her. Why do I not have an obligation to warn her?

LAWYER: Well you have a moral obligation. The question is: would you be an accessory before the fact?

ABBOTT: That's not what we're dealing with here with regard to a doctor. If we create the duty you want us to create, why would that duty not extend to everyone?

LAWYER: Then let me discuss the special relationship that was discussed by _____. And this you want to look to the difference between *Van Horn* and the instant case. The court found that in *Van Horn*, the patient was a general patient, not a mental patient. The court found there was no special relationship there because of the control issue that was mentioned by Judge Hankinson. In this case, we have a voluntary mental commitment. Now that doesn't mean that the patient can walk out of the hospital. He has to sign a deal where he agrees. And at the time this case was decided, the way the statute was then, which we've cited §572 of the Health & Safety Code, he had to agree to stay there at least 96 hours. And furthermore, it was open-ended as to how long he would stay there. He would actually stay there as long as the doctor said he would stay there unless he filed a written statement that he wanted to be released, which would then give the doctor or other persons time to go get a mental health commitment if it was necessary. And while he's in the hospital, he has to agree to the treatment that the doctor proposes, which means that he's not free to leave as the patient was in *Van Horn*. So, therefore, this is a situation involving a special relationship. And even though the courts in this state have not yet recognized special relationship, they have really not had the case in which there really was a special relationship where the doctor had the right to control the patient.

ABBOTT: But your discussion now is focusing whereupon as you just said, the doctor's right to control a patient as opposed to the part of the equation I was talking about, and that is the obligation to warn the target. One of the aspects, as I understand it, is the obligation to warn the target. And even when you're in a situation where you have no ability to control the person who may perpetrate the crime, why would if we find in your favor that not also create a situation where virtually anyone who hears a meaningful death threat has an obligation to warn the target?

LAWYER: If taken to a logical but far conclusion, yes, that might occur. But within the confines of the facts that we have here and the case law that we have here, that doesn't necessarily follow.

ENOCH: As a matter of fact, the *Tarasoff* opinion has been criticized because it blended a couple of concepts. It used the concept of special relationship, which under the restatement is what creates the duty to control the action of an individual with some sort of notion of failure to warn. And as a result, it's created a duty out of _____. In other words, the restatement recognizes that there is no duty to warn, and in fact, uses the example of: A, walking down the street, sees B who is blind is about to step in front of a car, and fails to warn B. And the restatement said clearly: no duty. Then it goes on to the next section, 315, and starts talking about a duty to control the conduct of a person who poses a threat to another. So it's taking the example of the car driver is actually under the control of the person who sees the car going down the street, who is about to hit a blindman. And the question then is, what duty does this observer have? And the only duty is, if it has the duty to control, is to exercise that control to keep that car driver from posing an injury. Under this entire scheme there is no mention of warn, or an obligation to warn the person who's about to be injured. Now that's the criticism of *Tarasoff*. It somehow creates this duty to warn - a duty to a third-party that is not envisioned in the restatement. What's the response to that criticism of the *Tarasoff* duty?

LAWYER: What the court said was they had a duty to protect, which would have been contemplated under the restatement. And then as one of the elements of the duty to protect was a duty to warn. And then later, the California courts in *Thompson* narrowed that duty down strictly to a duty to warn the readily identifiable victim. And so that's how the *Tarasoff* position came about originally. And as it's evolved and been accepted by many other courts it's really been narrowed down from what could have been a _____ to take charge down to a very narrow duty to warn.

OWEN: If we were to recognize a duty to warn under the circumstances of this case, why shouldn't we limit it to warning medical or law enforcement personnel in line with the statute, because the statute doesn't appear to me contemplates warning a third-party who's not a medical...

LAWYER: That may well be in Texas, as the restriction that the only obligation the doctor had was a duty to warn medical personnel. But in terms of the overall *Thompson* duty, it's a duty to warn the individual also. And the doctor in this case never warned anyone much less the police personnel.

OWEN: Do you agree that otherwise without the statutory exception there is some requirement on the physician to maintain confidentiality?

LAWYER: Yes. The doctor has an obligation to maintain confidentiality.

OWEN: And the legislature has only waived it in one particular instance, 5561h?

LAWYER: That's correct.

OWEN: Where is our authority to go beyond that?

LAWYER: In actuality, that was a doctrine that was court created originally in the first place. The legislature just got into it when it codified some exceptions to it in late 1979 or early 1980s. And I think that the court can create its own exceptions.

OWEN: Even though we've got statutes that specifically delineate the scope of the confidentiality?

LAWYER: Yes.

PHILLIPS: You put in your brief several states that follow *Tarasoff.* It may be too early to call it the majority rule, but it certainly is the plurality rule.

LAWYER: That's correct.

PHILLIPS: Are you aware if any of those states have a statutory, scheme's too strong of a word, but a statute that speaks to the obligations in this area, the conflicting obligations?

LAWYER: There are actually two cases that did not follow *Tarasoff.* One, in Florida, it's in the brief. There they had a confidentiality statute that did not allow any - there were no exceptions in that state the way it was setup.

PHILLIPS: Do any of the states that have followed *Tarasoff*, like us, allowed some exceptions and the court has come through and allowed more?

LAWYER: Yes. There is one in which the court held that the limited exception did not preclude a warning.

ENOCH: On those, were those cases that were confronted with the identifiable victim and the doctor failed to warn, and therefore, there was liability?

LAWYER: Yes there was and it was a situation where the court held that the permissive statute did not preclude _____.

HANKINSON: Earlier, you got into the control issue a little bit and we talked about in answer to some of the questions that control verses the duty to warn. Would you clarify for us what you think the duty should be under Texas law? If you were going to write the opinion what should it say in terms of the duty?

LAWYER: I don't really think that the issue of needing to control the patient is involved here. Essentially this is a situation where the psychiatrist is treating a patient and the patient makes threats against a readily identifiable victim, that the psychiatrist should have the duty to warn the victim.

HANKINSON: Is it just a psychiatrist? What about the family practitioner?

LAWYER: I would feel that it's any physician. But I can see where the court might limit it to situations where it's a psychiatrist dealing with a voluntary commitment.

OWEN: What do you do about lawyers in family law cases?

LAWYER: Lawyers have actually, and I mentioned this in my brief, primarily just to merely refute the argument that the petitioner had made in which they were discussing the difficulty that these healthcare professionals have in making these decisions. And I pointed out that this court through the disciplinary rules has mandated attorneys to report if a client makes a threat against someone. There is a permissive statute if the threat doesn't involve serious bodily injury and it's a mandatory provision if the client actually threatens death or serious bodily injury. With regard to that, if you look at *O'Quinn*, the court held that the disciplinary rules have the same effect of statutes. And in that regard, I think that would extend to attorneys also looking at this court's ruling in balancing factors and the ruling in the *O'Quinn* case.

SPECTOR: When the patient is a member of the family and the victim is also a member of that family, how does the fact that the family knows that the patient has violent behavior?

LAWYER: The issue not here is the fact that he has violent behavior; although, that is a factor to be considered by the doctor. The issue is whether or not he's actually made death threats or threats to do serious bodily injury to a readily identifiable victim. And so just because the family knows that he might be dangerous or he might not be taking his medication they never knew that a specific threat to kill his stepfather was ever made.

SPECTOR: But in many instances where the reported victim is a member of the family they have similar knowledge of threats and so on?

LAWYER: I think that would become a fact issue. Did these people have knowledge of the death threats? And there are two cases cited in my brief where the courts failed to impose *Tarasoff - Thompson* in a situation where the victim already knew they had been threatened.

HANKINSON: In terms of defining the duty are you suggesting that control of a patient that's under some sort of order of commitment is a necessary element before the duty arises as *Tarasoff* originally talked about that right of control under the restatement, or are you just saying under any circumstances psychiatrists or other physicians has a duty to warn?

LAWYER: I'm saying as the case law has evolved now, I don't think that control precludes.

HECHT: Is it important do you think to protect the warner for good faith warning?

LAWYER: I think that that is an issue that's important because sometimes when you have a dangerous person like this when that person notifies authorities that he may turn his violent attitude

toward the warner, but at the same time it's a balancing test...

HECHT: I'm not thinking of that so much as a libel suit.

LAWYER: That boils down to truth as a defense and it's an issue I think to be balanced, under the *Phillips* test. Which is more important: To keep someone from being murdered or to try to protect the confidentiality of a doctor's records, or in this case, protect the doctor from a libel suit where he has the full defense of truth?

HECHT: Do you think a common law duty can include those kinds of protections like the statute clearly does? Does the family law code clearly provide protection to people who warn law enforcement officials in good faith? It keeps it confidential. It insulates them from liability, that sort of thing.

LAWYER: I think the common law duty could. The court has to just outline that.

HECHT: Do you know of a case that does that?

LAWYER: No.

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REBUTTAL

EVANS: I would like to turn your attention to the argument and the discussion about whether or not there's a duty for anybody and not just a duty of the doctor. My opposing counsel has said that he thinks the duty should be or that the rule should be all doctors would have a duty to report a threat of violence. That statement is in direct conflict with this court's ruling in *Van Horn*, in which this court said that there is nothing implicit in the doctor/patient relationship that gives rise to that kind of duty, that gives rise to a kind of control.

Now my opposing counsel opened his argument with talking about the fact that at one point in time Mr. Lilly was under a voluntary commitment. It's an important distinction to know that he was not under a voluntary commitment. He was a voluntary in-patient during part of this.

ABBOTT: But you're talking about the right of control, which is separate from the duty to warn?

EVANS: The duty to warn would arise out of the control that the doctor would have. In other words, if there is - in the situation where a doctor would have a duty or a right to control the patient, it is out of that that the duty to the third-party arises. So if there is no control, no ability to control there can't be a duty to the third-party is what I'm saying.

OWEN: In your example about an office setting where an employer sees an employee about to injure or shoot another employee, do they have a duty to warn or call the police, or call

authorities? Is there some duty to protect the employee who is about to become a victim?

EVANS: That's exactly the kind of situation that's contemplated in the restatement where it says: While we may have a moral obligation to do that, we don't have a legal obligation to do that.

OWEN: An employee/employer situation you don't think is a special situation where there is an obligation to warn?

EVANS: In the employer/employee situation because of *Otis Engineering*, I think that may be one of those situations that would fall under *Otis Engineering*. But I think *Otis Engineering,* the indicia of control that the employer had over telling his drunk employee: get in your car and go home. When your employer tells you to do that, you do it because he's your employer. Now presumably in the situation that we're talking about if your employer says: No, as your employer, I forbid you to commit murder. Presumably, that's not the kind of situation where the employer/employee relationship is going to have the kind of implicit control that will control someone from committing that kind of an act.

ABBOTT: How would you respond to the statement that your argument arguably creates a society that turns a blind eye to potential murder?

EVANS: I think that statement is ignoring the fact that when psychiatrist have threats of violence made daily by their patients, and within the confines of their therapeutic relationship they are able to talk to their patients, find out the source of this, they are able to if the person is acutely homicidal gain their cooperation in going into the hospital and curing them. One of the points I make in my brief is, is the threat of violence an event, or if you utter something like that are you continuously homicidal? Is it a condition, like schizophrenia, from which you cannot be cured? So in the situation that we presently had within the confines of the physician/patient relationship, which carries with it confidentiality, a patient will voice a threat of violence because he knows it's protected, and afford the doctor the opportunity to treat that patient in order to prevent these types of things from occurring. Is that 100% guarantee? No, it's not. But it's also not a 100% guarantee that if somebody has warned law enforcement or a third-party, that murder will not happen anyway. And you look at all the cases that you see about the stalking rules, the anti-stalking laws, people know that their ex-husband is stalking them, the police know that their ex-husband is stalking them, and they know he's dangerous, and the woman ends up being killed anyway. So I don't think in either situation with a duty or without a duty, you're going to have a 100% guarantee that there is not going to be a violent action taken out by a patient.

ENOCH: This court obviously in areas like this is concerned about what other states are doing in this area. And Mr. McCoy cites in his brief some cases he has searched follows *Tarasoff*. And you said that your brief cites no cases that have followed *Tarasoff*. Can you assess whether the states are moving in the direction of *Tarasoff*, or are the states moving away from *Tarasoff*?

EVANS: Recently the Florida case, the Florida CA did not go along with *Tarasoff*. They disagreed with *Tarasoff's* reasoning that a therapist/patient relationship is a special relationship

because in *Tarasoff* they didn't even discuss why it's a special relationship. They just said: Okay, it is. We just decide it is. And in the Florida CA case they said: no, there's nothing inherent in the relationship that gives rise to a finding of a third-party relationship.

ENOCH: I'm familiar with the Florida case, but can you tell whether that's the current thinking or is that just one court? Where are other states going with this?

EVANS: Some of the cases cited in my brief aren't - they didn't make their ruling on the specific issue that we are on. But what they have said is like the Michigan case that I cited they do not find a special relationship. So they are not going to make a decision as to whether or not there's a duty. So I think that - although other courts in this country haven't come to the apex of the decision that we're doing now, they have found holes in the theory of the special relationship creating a duty to control.