IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

JEANNE BEEN as Next of Friend of ROBERT JENKINS, Deceased,	)	
Plaintiff,	)	
v.	)	Case No. CJ-2003-02541
JASON M. WEED and LANDMARK EDUCATION CORPORATION,	)	
Defendant/Cross-Claimant,	)	
v.	)	
JASON M. WEED,	)	
Cross Plaintiff,	)	
v.	)	
LANDMARK EDUCATION CORPORATION,	)	
Cross-Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT LANDMARK'S
12 O.S. §2012 (B)(6) AND 12 O.S. §2012(B)(10) MOTIONS TO DISMISS

COMES NOW, the Plaintiff, Jeanne Been (hereinafter "Been") as next of friend of Robert Jenkins, Deceased, and for her Response to Defendant Landmark's Motion to Dismiss Plaintiff's Claim, and states as follows:

RESPONSE TO THE DEFENDANT LANDMARK'S INTRODUCTION

The Defendant Landmark is a "for profit" corporation that engages in "Large Group Awareness Training" ("LGAT"). Landmark's "Forum" is a LGAT based upon the "EST" technology

invented by Werner Erhard; "EST" is an acronym for "Erhard Seminar Training" and Latin for "it is". EST and Landmark's Forum have been referred to as "a cult", a "new-age pop-psychology mumbo jumbo," and "from of mental health standpoint, reckless and destructive."

The Defendant's courses are not skills training events, but instead resemble intense indoctrination or brain-washing programs. Defendant Landmark's authoritarian-style program leader then proceeds to persuade their unwitting consumer (who has paid a considerable sum to attend) to believe that (a) their lives are not working, (b) that they have caused every deleterious event that has ever happened to them, (c) that salvation is based upon accepting the belief system being offered, (d) learning to talk in the jargon of the trainers, and (e) remaining connected with the organization by being an unpaid volunteer/helper and (f) recruiting other customers for the organization.

John Paul Rosenberg who, in 1960, abandoned his family, moved to California from Pennsylvania, and changed his name to Werner Erhard started defendant Landmark's program. He founded Erhard Seminars Training in 1971. On or about 1985 Werner Erhard experienced various legal difficulties, transferred the EST Training Program to Landmark Education Corporation, and left the country. The EST program has become the "Forum," as referred to by Defendant Landmark, however, the original EST and the Forum are fundamentally the same.

STANDARD OF REVIEW FOR 12 O.S. §2012(B)(6)

The Oklahoma courts have been consistent in their establishment of a standard of review for a motion to dismiss such as Defendant Landmark's when the Court of Civil Appeals ruled issued their ruling in 1999 in *Smith v. Speligene*:

> "The petition is a short and plain statement of the claim and a demand for judgment. 12 O.S.1991, § 2008. The Court must take as true all of the challenged pleading's allegations, together with all reasonable inferences which may be drawn from them. *Indiana National Bank v. State Department of Human Services*, 1994 OK 98, 880 P.2d 371; *Great Plains Federal Savings & Loan v. Dabney*, 1993 OK 4, 846 P.2d 1088. Moreover, such motion is not favored. *Lockhart v. Loosen*, 1997 OK 103, 943 P.2d 1074; *Indiana National Bank v. State Department of Human Services*, 1994 OK 98, 880 P.2d 371.
>
> Therefore, a pleading must not be dismissed for failure to state a claim unless the allegations show beyond any doubt that the litigant can prove no set of facts which would entitle him to relief. *Id.*; *Frazier v. Brian Memorial Hospital Authority*, 1989 OK 73, 775 P.2d 281. The burden is upon the movant to demonstrate legal insufficiency and, the motion must comply with the statutory format. 12 O.S.1991, § 2012(B); *Indiana National Bank v. State Department of Human Services*, 1994 OK 98, 880 P.2d 371. A plaintiff need not identify either a specific theory or set out the correct remedy in order to prevail on the motion to dismiss. *Id.* The trial court's task is to inquire whether relief is possible under any set of facts that could be established consistently with the allegations. *Id.* Generally a motion to dismiss is not favored and may be sustained for two reasons: (1) lack of any cognizable legal theory, or, (2) insufficient facts under a cognizable legal theory. *Lockhart v. Loosen*, 1997 OK 103, 943 P.2d 1074, 1078."
>
> *Smith v. Speligene*, 990 P.2d 312, OK CIV APP 95 (Okla. 1999)

The Plaintiff has plead two cognizable legal theories, and Defendant Landmark acknowledges this. The first is negligence and the second is strict liability by reason of "ultra-hazardous activity." Therefore, the Plaintiff has satisfied the first of the two requirements of the *Lockhart v. Loosen*, 943 P.2d 1074, 1079 (Okla. 1979). The only remaining requirement is that the Plaintiff's Petition state sufficient facts under these two cognizable legal theories. This has been satisfied in this case.

ARGUMENT AND AUTHORITY

The Defendant Landmark has known for years that there were a substantial number of persons attending their programs would develop mental health problems and should not attend.[1] At the time of Defendant Weed's attendance, Defendant Landmark had a system in place to screen out such persons. Defendant Landmark knew that certain persons were likely to develop psychosis as a result of attending their Forum.

The Plaintiff's Petition alleges that the Defendant Landmark made Defendant Weed insane, and that Defendant Weed's insanity is the proximate cause of harm to the Plaintiff. "But for" Defendant Weed's attendance at the Forum and his resulting insanity, he would not have killed Robert Jenkins. Defendant Weed shot and killed Robert Jenkins, who at the time was a United States postal carrier delivering the mail on a Tulsa street. The United States District Court for the Eastern District of Oklahoma held that Defendant Weed was *not guilty by reason of insanity*, and in doing so *established that it was the insanity*, and not a willful or intentional act, that caused the harm to the Plaintiff. There is no intervening event between Defendant Landmark's causing Defendant Weed's insanity, and the foreseeable result of that insanity.

Defendant Landmark relies upon *Henry v. Merch, Co.*, 877 F.2d 1489 (10th Cir. 1989), and

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1 American Psychological Association, 1973, Ethical Principles of Psychologist (APA 1981) Report of the APA Task Force on Deceptive and indirect techniques of persuasion and control (1986)
Cults and psychological abuse, James B. Endres, Western Psychiatric Institute, Dr. Paul Martin (1992)
Glass, L.L., Kirsch, M.A., Parris, F.N. "Psychiatric disturbances associated with Erhard Seminars Training, I: a report of cases" American Journal of Psychiatry. 1977; 134:245-247.
Higgett, A.C., Murray, R.M. "A psychotic episode following Erhard Seminars Training" Acta Psychiatr Scand. 1983; 67:436-439.
Hockman, J. "Iatrogenic symptoms associated with a therapy cult: examination of an extinct 'new psychotherapy' with respect to psychiatric deterioration and brainwashing'" Psychiatry. 1997; 134:1254-1258.
Kirsch, M.A., Glass, L.L., "Psychiatric disturbances associated with Erhard Seminars Training, II: additional cases and theoretical considerations." American Journal of Psychiatry. 1977; 134:1254-1258. Thought reform programs and the production of psychiatric.

claims that it had no duty based upon no special circumstances. However, applying the facts plead by the Plaintiff; (1) the Defendant is under a special responsibility to the Plaintiff; and (2) Defendant's own affirmative act has created or exposed the Plaintiff to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.

First, Defendant Landmark's special relationship to the Plaintiff is that it was the Defendant's own conduct that created a foreseeable risk of harm to the Plaintiff. This was a foreseeable risk because Defendant Landmark knew that certain individuals should not attend and/or be exposed to the high psychological pressure of the sessions. Their fear of this risk was so great that they employed a board of psychologists to create a screening process to screen out these individuals. Defendant Landmark fully understood what happens when this screening process fails. When the screening process failed, it would cause certain individuals attending to become psychotic and/or insane. Defendant Landmark knew, therefore, that some individuals that they caused to become psychotic and/or insane would behave and cause the harm that insane individuals could foreseeably cause. They created a state of mind that deprived Defendant Weed of his ability to form intent or to comprehend the consequences of his acts. Therefore, a special relationship was created by Defendant Landmark.

Secondly, because of their affirmative acts, Defendant Landmark created and exposed the Plaintiff's decedent to the recognizable high degree of risk of harm that insane persons pose. A reasonable man would at all times take into account the high degree risk of harm posed by such insane persons. Defendant Landmark claims that they had no duty to control Defendant Weed, which

would be true if they had not caused him to become psychotic. Defendant Landmark certainly knew of the risks, or they would not have put a screening procedure in place. Defendant Landmark knew that before Defendant Weed left the graduation ceremony, he exhibited psychotic behavior. Defendant Landmark failed in its duty to Defendant Weed, and that failure resulted in the death of Robert Jenkins.

The Plaintiff does not claim that Defendant Weed experienced an idiosyncratic reaction. In fact, Defendant Weed was not a disturbed individual prior to the time he attended the Defendant's seminar, nor was his reaction to the seminar abnormal or an otherwise isolated incident. It was, in fact, a foreseeable reaction, which the Defendant Landmark had attempted to guard against. Further, the Plaintiff does not complain of the speech alone, but the totality of Landmark's conduct within the Forum, which included sleep deprivation, food deprivation, and extreme infliction of emotional distress as a normal part of their program. Nor, does the Plaintiff complain that Defendant Landmark furnished video games, movies, rape CD's, or internet websites that depicted violence, and caused harm to the Plaintiff. All of Defendant Landmark's authority and first amendment arguments are based upon cases that included such complaints.

James v. Meow Media, Inc., 300 F.3^{d} 683 (6th Cir. 2002) involved a school shooting with a claim against companies who produced and maintained videogames, movies, and internet websites. *McCollon v. CBS, Inc*., 202 Cal.App 3rd 989, 996, 1005 (1988) alleged the song "Suicide Solution" influenced conduct. *Davidson v. Time Warner,* No. Civ.A. V-94-006, 1997 WL 405907, at *13 (S.D. Tex. Mar. 1997), alleges that "rap" songs caused listeners to commit suicide. None of the cases cited, or their arguments, can be successfully applied to this case.

Defendant Weed's conduct does not fall within the general rule of *Henry v. Merch & Co.*, 877 F.2d 1489, 1492 (10th Cir. 1989), because as a matter of federal law his conduct as an insane person was never, nor could it ever be, criminal or intentional. At the time of the acts complained of, Defendant Weed lacked the mental capacity to form intent or to understand the consequences of his conduct, and Defendant Weed's mental state was the result of Landmark's intentional conduct.

It is important to note that the Plaintiff alleges "that the Defendant Landmark knew, because of prior experience, that the type of disorder that was experienced by Defendant Weed, was a likely and foreseeable result of attending the Defendant Landmark's classes." Defendant Weed was free of abnormal psychological manifestation(s) and/or disorder(s) prior to his attending the Defendant Landmark's classes. When Defendant Weed attended Defendant Landmark's classes, he was subjected to extreme emotional and psychological stress which caused his mental disorders, and which ultimately resulted in the death of the Plaintiff's son at Defendant Weed's hand. Further, the Defendant Landmark knew, because of their prior experiences, that this type of disorder was likely to be experienced by Defendant Weed. Weed's insanity and his conduct was a likely and foreseeable result of his participation in Defendant Landmark's Forum. These results were so foreseeable that Defendant Landmark had done testing to isolate and eliminate individuals who were identified as likely to have mental disorders as a result of attending of their classes. The Defendant Landmark employed a panel of psychologists to develop this test for them. Defendant Weed was not one of the individuals removed from the Defendant's program, despite screening by Defendant Landmark.

Defendant Landmark's argument that *Nicholson v. Tacker,* 512 P.2d 156, 158 (Okla. 1973) provides authority to establish that it owed no duty to the Plaintiff would be appropriate if this was a

premises liability or "slip and fall" case. However, it is not, and therefore, *Nicholson* provides no such authority or support for their argument.

For the clearest and most succinct articulation of the law as it applies to the Defendant's Motion, one needs to look at the authority the Court relied upon in both *Smith v. Speligene*, 990 P.2d 312 and *Delbrel v. Doenges Bros. Ford, Inc.*, 913, P.2d 1318 (Okla. 1996), which is *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Florida 1992):

> "On the merits, we find that the district court erred in ordering a directed verdict. In the present case, Florida Power clearly was under a duty to take reasonable actions to prevent the general type of injury that occurred here. Moreover, there is sufficient evidence in the record to justify a reasonable person in believing that Florida Power breached this duty and that the breach proximately (*i.e.*, foreseeably and substantially) contributed to the specific injury McCain suffered. Thus, the question of negligence could not be removed from the jury.
>
> The confusion evident in the district court's opinion apparently arose from the fact that the 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. A review of both precedent and public policy convinces us that such blurring would be incorrect, even though it often will yield the correct result. The present cause happens to be one of a minority of cases in which an imprecise foreseeability analysis would lead to the wrong result.
>
> Contrary to the tacit assumption made by the district court, foreseeability 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. 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. [Emphasis in original.]
>
> It might seem theoretically more appealing to confine all questions of foreseeability

within either the element of duty or the element of proximate causation. However, precedent, public policy, and common sense dictate that this is not possible. Foreseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions. Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. As we have stated: . . .

> **'Where a defendant's conduct creates a *foreseeable zone of risk,* the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.'**
>
> [Emphasis in bold supplied; italics in original.]

Thus, as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken.

The statute books and case law, in other words, are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty element. For these same reasons, duty exists as a matter of law and is not a factual question for the jury to decide: Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. As a corollary, the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant.

On the question of proximate causation, the legal concept of foreseeability also is crucial, but in a different way. In this context, foreseeability is concerned with the specific, narrow factual details of the case, not with the broader zone of risk the defendant created.

In the past, we have said that harm is "proximate" in a legal sense if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question. In other words, human experience teaches that the same harm can be expected to recur if the same act or omission is repeated in a similar context. However, as the *Restatement (Second) of Torts* has noted, it is immaterial that the defendant could not foresee the *precise* manner in which the injury occurred or its *exact* extent. *Restatement (Second) of Torts* § 435 (1965). In such instances, the true extent of the liability would remain questions for the jury to decide. [Emphasis in bold supplied; italics in original. Footnotes deleted for brevity.]

McCain v. Florida Power Corp., 593 So. 2d 500 (Florida 1992)

The Plaintiff's allegations against the Defendant are that Landmark made Defendant Weed psychotic and/or insane with their conduct, and that the Defendant Landmark knew there was a likelihood that their Forum would make some of their attendees psychotic and/or insane and that knowledge was based upon similar previous experiences, and that the psychosis/insanity caused the death of the Plaintiff's son. Thus, Defendant Landmark's conduct created a foreseeable zone of risk

to those affected by an insane psychotic person Defendant Landmark had a duty to lessen the risk by eliminating Defendant Weed, and they failed in that duty. Despite its screening program, Defendant Landmark's precautions to protect others failed; that failure was either due to inadequate application of the test(s), inadequate testing itself, or the simple fact that its Forum caused insanity/psychosis in an otherwise sane person. Defendant Landmark's duty was in fact heightened because they knowingly created the risk of harm, negligently attempted to lesson the risk, placed Jenkins within a "foreseeable zone of risk", since they knew that insanity and/or psychosis had resulted from others attending their Forum.

Throughout its Motion to Dismiss, Defendant Landmark switched from authority based upon a Motion to Dismiss (*i.e.*, dismissal for the lack of a "foreseeable zone of risk") to the authority for prevailing on a Motion for Summary Judgment (*i.e.*, dismissal for lack of "proximate cause"). An example can be found on Page 6, where they cite *Wofford v. Eastern State Hosp.*, 795 P.2d 516, which involved the consolidation for summary judgment. For a Motion to Dismiss, the analysis of *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Florida 1992), presented *supra*, used in both *Smith v. Speligene*, 990 P.2d 312 and *Delbrel v. Doenges Bros. Ford, Inc.*, 913, P.2d 1318 (Okla. 1996) should apply.

However, *Wofford* is not without some merit. It held that a psychiatrist has a duty to exercise reasonable professional care in the discharge of a mental patient. While Defendant Landmark's trainers were not psychiatrists, perhaps they should have been given the design of the Forum and its previous results found in some attendees. Nonetheless, Defendant Landmark employed a panel of psychiatrists to develop the screening program, which failed in either its application or design.

Additionally, at the time of the graduation (which was the day before the death of Robert Jenkins), Defendant Weed demonstrated psychotic behavior that Defendant Landmark should have recognized as dangerous.

DEFENDANT LANDMARK CAN BE HELD STRICTLY LIABLE FOR ITS ULTRA-HAZARDOUS ACTIVITIES

By definition, all ultra-hazardous activities are unique, and Defendant Landmark's activities fit within the consistent pronouncements of Oklahoma's Courts. The Plaintiff agrees with the Defendant that the Oklahoma Supreme Court has recognized that the deployment "of an instrumentality that is inherently 'ultra-hazardous' such as a wild animal or dynamite . . . without any regard to fault, will give rise to liability for harm proximately resulting from it." *Wetsel v. Indep. Sch. Dist. I-1*, 670 P.2d 986, 990 (Okla. 1983) A number of these cases have been "bear" cases. See *City of Mangum v. Brownlee*, 75 P.2d 174 (Okla. 1938), and *City of Tonkawa v. Danielson*, 27 P.2d 348 (Okla. 1933)

The Defendant Weed was recruited in Tulsa, Oklahoma by Defendant Landmark to attend their seminar conducted in Dallas, Texas. Defendant Weed attended. At the same time an obstetrician, Donna Anderson, M.D., attended Defendant Landmark's seminar in Minnesota. Both Weed and Anderson, after attending these seminars became psychotic. Defendant Weed, while insane and only one day after graduating from the Forum, killed Robert Jenkins. After attending Defendant Landmark's Forum in Minnesota, in December 2001 Dr. Anderson traveled from Minnesota to San Mateo County, California, where she stabbed her thirteen year-old son Stephen Burns to death, and seriously injured his father. Both of these individuals attended Defendant Landmark's seminars in different states, and with strikingly similar results.

Further, the Plaintiff has found studies that indicate that a significant number of attendees that were surveyed needed professional psychiatric care *after* attending Defendant Landmark's advanced courses. These studies and articles about them go as far back as 1977. Consequently, it is reasonable to substitute "psychotic killers" produced by Defendant Landmark's Forum for the "bears" which were the "ultra-hazardous" activity in *City of Mangum v. Brownlee*, 75 P.2d 174 (Okla. 1938) and *City of Tonkawa v. Danielson,* 27 P.2d 348 (Okla. 1933). The fact that a "bear" has no "free will" with ability to determine right from wrong, and understand the nature or extent that it could or would injure humans is what makes the "bear" abnormally dangerous.

In the case before the Court, Defendant Landmark is manufacturing psychotic/insane killers, and others with varying degrees of mental disorders. Thus, Defendant Landmark is creating a foreseeable risk of harm that rises to the level of an ultra-dangerous activity, when its Forum overcomes the "free will" of its attendees, and in a certain number of individuals causes them to be as abnormally dangerous as a "bear".

In *Taylor v. Hesser,* 991 P.2d 35, Ok.Civ.App. 151 (1998), the Court of Civil Appeals adopted the Oklahoma Supreme Court's analysis used in *Wetsel v. Indep. Sch. Dist. I-1, supra,* which stated that Oklahoma now adopted the approach of *The Second Restatement of Torts*:

"§519. General Principle"

> (1) "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous."

The Defendant Landmark carries on a business that caused some seminar attendees to become psychotic and /or insane, ultimately resulting in harm to these individuals and others. Defendant Landmark has attempted screening programs in an effort to minimize this risk of harm, however, they have failed in everything they have done to date to minimize the adverse effects on their seminar attendees. *The Second Restatement of Torts* defines "abnormally dangerous activity" as follows:

"§520. Abnormally Dangerous Activities"

> "In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carries on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Defendant Landmark's seminars clearly fall under the category of "abnormally dangerous activity" as defined within the *Restatement*:

> (a) Causing one human being to become insane and kill another is a high risk activity.
>
> (b) The likelihood that a large number of those who attended the seminars will develop significant psychological problems, severe enough to need psychiatric treatment, some resulting in the death of others while psychotic and/or insane. Thus, would result in great harm.

(c) Defendant Landmark hired a panel of psychiatrists to develop a screening process, which was implemented but which failed to protect either Robert Jenkins (died 2001) or Stephen Burns (died 2002).

(d) This cult-like activity is not one that is a matter of common usage.

(e) Given the foreseeable and disastrous results of their activity, there is no appropriate place for it: It does not matter where you turn the "bear" lose when you know the nature of bears, that it lives and is near you, and it likely to cause you harm.

(f) The activity of the Defendant Landmark has very little, if any, value to the community. Can it be reasonably argued that conducting brainwashing activities that cause some individuals to go insane and/or psychotic, and then kill other members of the community, and cause serious mental health problems for others, has no benefit to the community. Certainly, its dangerous attributes far outweigh any arguable value.

Defendant Landmark's conduct clearly falls within the *Second Restatement of Torts* definition of "abnormally dangerous activity" as adopted by Oklahoma Courts. Thus, the Plaintiff has plead a cognizable legal theory, and the necessary facts to support that theory.

DEFENDANT WEED'S ACTS ARE NOT A SUPERVENING CAUSE THAT WOULD INSULATE DEFENDANT LANDMARK FROM LIABILITY FOR THEIR ULTRA-HAZARDOUS ACTIVITIES

For argument sake, if the insane act of shooting the Plaintiff's son by Defendant Weed could be construed as an act separate from the insanity, it still would not be a superceding cause. *Henry v. Merk, supra,* at Footnote 10, acknowledges Oklahoma's adoption of the *Second Restatement of Torts,* which states at §442:

"§442 A. Intervening Force Risked by Actor's Conduct"

> "Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superceding cause.

Defendant Landmark's conduct, be it intentional or negligent, created and/or increased the foreseeable risk of harm and its activities were a substantial factor in causing the insanity, which was the direct cause of the harm to the Plaintiff. Therefore, the Defendant Landmark's conduct is not such an intervention that rises to the level of a superceding cause.

"§442 B. Intervening Force Causing Same Harm as That Risked by Actor's Conduct"

> "Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct."
>
> *Second Restatement of Torts*

Defendant Landmark's conduct created the foreseeable risk of harm. Defendant Landmark cannot claim that Defendant Weed's conduct was intentional. As a matter of Federal law, Defendant Weed's conduct was found to be *unintentional*. Therefore, absent any intentional conduct, there can be no superceding cause as claimed by Defendant Landmark.

PLAINTIFF'S RESPONSE TO
DEFENDANT LANDMARK'S 12 O.S. §2012(B)(10) MOTION

COMES NOW the Plaintiff, and for her response to Defendant Landmark's 12 O.S. §2012(B)1(10) Motion and states as follows:

STATEMENT OF FACTS

1. Prior to the Second Amended Petition, Jeanne Bean was nominated by Amber Jenkins, widow of Robert Jenkins, as well as, all other potential heirs to serve as Administrator of the Estate of Robert Jenkins (See Waiver of Notice of Hearing and any Right to Appointment, *In re the Estate of Robert W. Jenkins,* Tulsa County District Court Case No. PB-2002-655).

2. Thereafter, the Plaintiff learned that Mortgage Clearing Corporation had, as part of a foreclosure action and as a potential judgment creditor, opened a probate in Tulsa County District Court (Case No. PB-2002-655), and had Mr. Tim Gresham appointed as its Special Administrator.

3. Special Administrator Tim Gresham has agreed to sign an Agreed Order substituting the Plaintiff as the Administrator of the Estate of Robert Jenkins.

4. The proposed Agreed Order has been submitted to Judge Linda G. Morrissey for her consideration.

5. There is no known objection to the appointment of the Plaintiff.

6. The Plaintiff's attorney informed Defendant Landmark's attorney in early January that the reason the Plaintiff had not served his client was because the Plaintiff's attorney was waiting

to obtain the necessary signatures to make Ms. Bean Administrator of her son's estate.

7. Defendant Landmark, rather than waiting until they were served, waived service and has entered their appearance.

ARGUMENT AND AUTHORITY

Defendant Landmark's Motion is moot; by the time this Motion comes on for hearing, Plaintiff Jeanne Bean will be properly substituted as the Administrator of the *Estate of Robert Jenkins* in Tulsa County District Court Case No. PB-2002-655. Therefore, the Defendant's Motion to Dismiss, pursuant to 12 O.S. §2012 (B)(10), should be overruled.

CONCLUSION

Plaintiff Jeanne Been will shortly (or by the time this motion is heard) be properly substituted as the Administrator of the *Estate of Robert Jenkins* in Tulsa County District Court Case No. PB-2002-655, and therefore, has the capacity to bring this cause of action on behalf of her son's estate. The Plaintiff has plead two cognizable legal theories, and this has been acknowledged by Defendant Landmark, *i.e.*, negligence and strict liability by reason of "ultra-hazardous activity". By engaging in an "ultra-hazardous activity", Defendant Landmark owed a heightened duty of care similar to that of persons owning dangerous animals. Its ultra-hazardous Forum seminars resulted in Defendant Weed's insanity, and ultimately, the death of Robert Jenkins. Defendant Weed's insanity is not a supervening cause that would insulate Defendant Landmark from liability since as a matter of Federal law, Defendant Weed's conduct found to be *unintentional*. Absent any intentional conduct, there can be no superceding cause as claimed by Defendant Landmark. Defendant Landmark's free

speech argument is inapplicable where the Plaintiff complains not of their speech alone, but instead the **totality of their conduct** (*i.e.*, sleep deprivation, food deprivation, and extreme infliction of emotional distress upon Defendant Weed). Defendant Landmark does have a right to freedom of speech, and all United States citizens have a right of assembly, however, Landmark does not have the right to engage in an ultra-hazardous activity that they knew could ultimately result in insanity, psychosis, and ultimately, death.

WHEREFORE, for the arguments and authorities stated above, Plaintiff Jeanne Been prays this Honorable Court deny Defendant Landmark's Motion to Dismiss in its entirety.

Respectfully submitted,

HAYES & LIDDELL, P.C.

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As Next Friend of Robert Jenkins, Deceased

CERTIFICATE OF MAILING

This is to certify that on this, the ___ day of February, 2004, a true and correct copy of the above and foregoing instrument was sent via facsimile and mailed, postage pre-paid thereon *via* the U.S. Mails, to the following:

Mitchell M. McCune
406 South Boulder, Suite 400
Tulsa, OK 74103

Ronald L. Wallace
One N. Hudson Ave, Suite 700
Oklahoma City, Oklahoma 73102

Ted Eliot
1100 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4217

_____
Gaylon C. Hayes/Janet M. Liddell