DOCKET NO. AAN-CV-12-6010861	:	SUPERIOR COURT
CLARENCE MARSALA, ET. AL.	:	J.D. OF MILFORD/ANSONIA
V.	:	AT DERBY
YALE NEW HAVEN HOSPITAL, INC.	:	MARCH 19, 2015

DOCKET NO. AAN-CV-12-6011711	:	SUPERIOR COURT
CLARENCE MARSALA, ADMINISTRATOR	:	J.D. OF MILFORD/ANSONIA
V.	:	AT DERBY
YALE NEW HAVEN HOSPITAL	:	MARCH 19, 2015

MEMORANDUM OF DECISION

The defendant, Yale New Haven Hospital, moves for summary judgment on certain counts of the plaintiffs' actions. The motion involves matters presented in two consolidated actions.[1] The first case, involving multiple counts, was commenced by service of process on the defendant on July 25, 2012. In the operative complaint,[2] the plaintiffs—Clarence Marsala, both individually and as administrator of the estate of his deceased wife, Helen Marsala, and their children, Gary Marsala, Michael Marsala, Tracey Marsala, Kevin Marsala, and Randy Marsala—allege the following facts. The defendant is an acute care facility licensed as a hospital in the state of Connecticut. During the course of her life, Helen did not have a living

[1] The first action was assigned docket number CV-12-6010861, and the second action docket number CV-12-6011711. The court, *Brazzel-Massaro, J.*, granted the motion to consolidate on June 30, 2014. Importantly, these two cases, although consolidated, remain separate actions. Practice Book § 9-5 (c) provides: "The court files in any action consolidated pursuant to this section shall be maintained as separate files and all documents submitted by counsel or the parties shall bear only the docket number and case title of the file in which it is to be filed." "This rule makes it clear that consolidation does not cause the two cases to lose their separate identity as they are consolidated only for trial. The balance of the rule is likewise clear that the cases retain their original character for all purposes." *Winiarski* v. *Hall*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-96-0566277-S (December 19, 1997, *Wagner, J.*) (21 Conn. L. Rptr. 514, 515) (discussing Practice Book [1978-97] § 84A [now § 9-5]).

[2] On August 31, 2012, the plaintiffs sought to amend their complaint pursuant to Practice Book § 10-59, which was granted by the court, *Matasavage, J.*, on December 3, 2012. This second amended complaint is, therefore, the operative complaint in the first case.

will; nevertheless, in discussions with Clarence, she asked him to make decisions regarding life support if she were ever unable to make those decisions for herself. Moreover, she expressed her intention to remain alive if ever on life support.

Beginning on April 7, 2010, and continuing until approximately June 19, 2010, Helen received care and treatment from Griffin Hospital following an operation on her wrist which became infected. While still conscious, she was placed on life support. Several times during the period of her stay, agents, apparent agents, employees, or staff of Griffin Hospital inquired with Clarence about removing life support, but Clarence refused to remove support. In an effort to ensure further care for Helen, Clarence, on or about June 19, 2010, had Helen transferred to the defendant's facilities. From this date until Helen's death on July 24, 2010, the defendant undertook care, treatment, monitoring, and supervision of Helen. Based on the defendant's consideration of the plaintiffs' family's finances, the defendant indicated that the family would not be responsible for Helen's medical expenses because they were "below the payment threshold."

On or about June 19, 2010, agents, apparent agents, employees, or staff of the defendant consulted the plaintiffs, Clarence and Michael, about removing the ventilator without reinserting it if Helen began breathing on her own. On several occasions between June 19, 2010, and July 24, 2010, Helen's ventilator was removed, but then replaced when it became apparent she could not breathe on her own. During this same period, the defendant consulted several of the plaintiffs about removing Helen's ventilator without reinstating it, even if she were unable to breathe on her own. Each time the individual plaintiffs were consulted, they refused to allow the ventilator to be removed, or otherwise insisted that the ventilator be replaced, and instructed the defendant to never "pull the plug."

On or about July 24, 2010, the defendant "encouraged" Helen's treating physicians to

remove her ventilator without replacement if she was unable to begin breathing on her own. Subsequently, agents, apparent agents, employees, or staff of the defendant informed Gary that they were going to permanently remove Helen's ventilator without replacement. Gary objected and then reported that information to Clarence. Clarence arrived at the defendant's facility, where, upon learning the defendant's intentions, he objected. Nevertheless, over the objections of Clarence and Gary and without giving Clarence time to transport Helen from the facility, the defendant permanently removed Helen's ventilator, causing her death. On this basis, the plaintiffs assert a variety of claims premised on their allegation that the defendant "ignored the wishes of . . . Helen, as expressed from her next of kin, Clarence . . . prior to removing life support," including: intentional infliction of emotional distress claims alleged by each individual plaintiff (counts seven through twelve); wrongful death and loss of consortium claims alleged by Clarence as administrator and in his individual capacity, respectively (counts twenty-one and twenty-two); and medical malpractice and loss of consortium claims alleged by Clarence as administrator and in his individual capacity, respectively (counts twenty-six and twenty-seven).[3]

In the second action, commenced by service of process on October 31, 2012, Clarence, as administrator for Helen's estate, alleges essentially the same facts as in the first action. In the first and only count, he claims that the acts of the defendant's agents, apparent agents, employees, or staff members constituted medical malpractice in a number of ways which resulted in Helen suffering, inter alia, anxiety, pain and suffering, and death.

On August 28, 2014, the defendant filed a motion for summary judgment, a

[3] The operative complaint originally contained twenty-seven counts. On October 30, 2013, the court, *Lee, J.*, granted the defendant's motion to strike counts one through six (negligent infliction of emotional distress), thirteen through nineteen (CUTPA), twenty (violation of § 19a-571), twenty-three (assault), twenty-four (battery), and twenty-five (right to privacy). The plaintiffs did not file a substitute pleading within the fifteen days as authorized by Practice Book § 10-44.

memorandum of law in support, and various exhibits in both actions.[4] In the first action, the defendant moves for summary judgment on all of the counts alleging an action for intentional infliction of emotional distress, claiming: (a) the plaintiffs' claims are precluded as a matter of law because the Supreme Court's decision in *Maloney* v. *Conroy* prohibits third party emotional distress claims arising from the medical treatment of third parties; (b) none of the plaintiffs were present when the challenged acts occurred or had the legally required contemporaneous sensory perception of those acts; and (c) the plaintiffs lack sufficient evidence to support the requisite elements of their intentional infliction of emotional distress claims. The defendant also moves for summary judgment as to the medical malpractice claims of the estate alleged in both actions, and the related loss of consortium claim alleged by Clarence in the first action, on the grounds that the law permits only a single recovery for injuries resulting in death, and the loss of consortium count, being a derivative claim, must also fail. The defendant filed a request to amend its memorandum of law on September 11, 2015, for the purpose of submitting the amended affidavit of Margaret Pisani, and no objection was filed.

On October 9, 2014, the plaintiffs filed their initial objection. Although the memorandum references several exhibits, no exhibits accompanied this objection. On October 22, 2014, the defendant filed its reply and supporting exhibits.[5] On October 23, 2014, the plaintiffs filed their surreply, and on October 24, 2014, submitted the deposition of Louis

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[4] Specifically, the defendant submitted in support of its motion: (1) the August 27, 2014, affidavit of Margaret Pisani, and the medical records of the defendant concerning its care and treatment of Helen; (2) excerpts of the February 27, 2014, deposition of Clarence; (3) excerpts of the June 16, 2014, deposition of Gary; (4) excerpts of the June 20, 2014, deposition of Tracey; (5) excerpts of the March 10, 2014, deposition of Michael; (6) excerpts of the March 25, 2014, deposition of Kevin; and (7) excerpts of the June 16, 2014, deposition of Randy. Each exhibit is certified or otherwise authenticated.

[5] These exhibits include: (1) excerpts of the September 4, 2014, deposition of Pisani; (2) excerpts of the February 27, 2014, deposition of Clarence; (3) excerpts of the June 16, 2014, deposition of Gary; (4) excerpts of the March 10, 2014, deposition of Michael; (5) excerpts of the June 20, 2014, deposition of Tracey; (6) excerpts of the March 25, 2014, deposition of Kevin; (7) excerpts of the June 16, 2014, deposition of Randy; and (8) excerpts of the August 20, 2014, deposition of Andrew Boyd. Each deposition is certified.

March Hamer in support.

On November 12, 2014, the defendant filed its second amended memorandum in support of its motion and several supporting exhibits.[6] On November 17, 2014, the plaintiffs resubmitted their objection with supporting exhibits.[7] On November 21, 2014, the plaintiff filed substitute exhibits, replacing the deposition excerpts submitted in support of its objection with full transcripts.[8]

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Stewart* v. *Watertown*, 303 Conn. 699, 709-10, 38 A.3d 72 (2012). "[T]he 'genuine issue' aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the

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[6] These exhibits include: (1) the September 11, 2014, amended affidavit of Pisani, and the medical records of the defendant concerning its care and treatment of Helen; (2) excerpts of the September 4, 2014, deposition of Pisani; (3) excerpts of the February 27, 2014, deposition of Clarence; (4) excerpts of the June 16, 2014, deposition of Gary; (5) excerpts of the June 20, 2014, deposition of Tracey; (6) excerpts of the March 10, 2014, deposition of Michael; (7) excerpts of the March 25, 2014, deposition of Kevin; (8) excerpts of the June 16, 2014, deposition of Randy; and (9) excerpts of the August 20, 2014, deposition of Boyd. Each exhibit is certified or otherwise authenticated.

[7] These exhibits include: (1) excerpts of the deposition of Clarence; (2) excerpts of the deposition of Pisani; (3) the July 23, 2010, notes concerning the bioethics committee's meeting; (4) the defendant's July 26, 2010, discharge summary for Helen; (5) portions of the defendant's medical records concerning Helen; (6) the July 24, 2010 notes by the defendant's nurses concerning Helen; (7) excerpts of the deposition of Boyd; (8) the transcript of the May 31, 1991, House Session debates; (9) the transcript of the April 16, 1991, judiciary committee hearing; (10) the defendant's nursing notes concerning Helen, dated July 22, 2010; (11) excerpts of the deposition of Tracey; (12) excerpts of the deposition of Michael; (13) excerpts of the deposition of Randy; (14) excerpts of the deposition of Kevin; (15) excerpts of the deposition of Gary; (16) a signed and sworn affidavit from each individual plaintiff, dated October 7, 2014; and (17) the August 28, 2014, deposition of Hamer. Many of the depositions are unaccompanied by a title page identifying them or a signed certification page, and several of the exhibits are not otherwise authenticated.

[8] Although each substitute exhibit replaces excerpts of the same deposition with a full transcript and title page, several of these depositions remain uncertified. Where uncertified deposition transcripts are submitted without objection in support of or in opposition to a motion for summary judgment, the court may, in its discretion, choose to consider or exclude them. *Barlow* v. *Palmer*, 96 Conn. App. 88, 92, 898 A.2d 835 (2006). As there has been no objection, the court has the discretion to consider their contents.

pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 10-11, 938 A.2d 576 (2008). A party's conclusory statements, "in the affidavit and elsewhere . . . do not constitute evidence sufficient to establish the existence of disputed

material facts." *Gupta* v. *New Britain General Hospital*, 239 Conn. 574, 583, 687 A.2d 111 (1996).

I

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS

The defendant advances three arguments in support of its motion for summary judgment as to the individual plaintiffs' claims for intentional infliction of emotional distress in the first action. The first argument advanced by the defendant in its second amended memorandum of law is that the plaintiffs' claims are for bystander emotional distress based on their apprehension of harm to the decedent, Helen, and the Supreme Court's decision in *Maloney* v. *Conroy*, 208 Conn. 392, 545 A.2d 1059 (1988) prohibits bystander emotional distress claims arising from medical treatment provided to third parties like Helen. The defendant notes that all of the evidence demonstrates that the conduct that the plaintiffs challenge relates to the medical treatment of Helen, and that discovery had revealed no other conduct that could have caused their alleged emotional distress aside from that which was asserted in the operative complaint—specifically, the removal of Helen's ventilator over the plaintiffs' objections. The defendant also argues that the fact these claims have been characterized as intentional infliction claims, rather than negligent, acts does not change the analysis because courts within this state have treated intentional infliction claims for actions directed at a third person as bystander claims.

In their objection, dated November 17, 2014, the plaintiffs raise two counterarguments. They first assert that Judge Lee's decision to the defendant's motion to strike is the law of the case. Because Judge Lee found that the plaintiff's intentional infliction claims were adequately pleaded under *Maloney*, the plaintiffs argue, the law of the case doctrine should prevent the court from reconsidering the question of whether the holding of

Maloney acts as a bar to these claims. Additionally, the plaintiffs argue that the Appellate Court decision in *Di Teresi* v. *Stamford Health System, Inc.*, 142 Conn. App. 72, 63 A.3d 1011 (2013), stands for the proposition that intentional infliction counts should not be assessed under a bystander emotional distress framework and that the defendant's reliance Superior Court opinions decided before *Di Teresi* is incorrect.

The defendant responds to each of these arguments. First, the defendant asserts that the law of the case should not bar consideration of its arguments because the doctrine is not binding, courts have refused to apply the doctrine to decisions made in the context of a motion to strike for when considering a motion for summary judgment, and Judge Lee's decision in the motion to strike did not address the argument raised here. Second, the defendant argues that the plaintiffs' reading of *Di Teresi* is mistaken as the court was addressing a situation where the conduct had been directed at the plaintiff rather than at a third party. It further claims that the plaintiffs' conclusion that the analysis required for bystander emotional distress claims does not apply to intentional infliction claims is wrong because the Restatement (Second) of Torts provisions governing intentional infliction claims specifically address conduct directed at third parties.

"In order for the plaintiff to prevail in a case for liability . . . [alleging intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." (Internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 526-27, 43 A.3d 69 (2012). "Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually

tolerated by decent society . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! . . . Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." (Citations omitted; internal quotation marks omitted.) Id., 527.

A claim for bystander emotional distress, a recognized action in this state, is a separate and distinct theory of recovery. In *Clohessy* v. *Bachelor*, 237 Conn. 31, 56, 675 A.2d 852 (1996), "[the Supreme Court] conclude[d] that a bystander may recover damages for emotional distress under the rule of reasonable foreseeability if the bystander satisfies the following conditions: (1) he or she is closely related to the injury victim, such as the parent or the sibling of the victim; (2) the emotional injury of the bystander is caused by the contemporaneous sensory perception of the event or conduct that causes the injury, or by arriving on the scene soon thereafter and before substantial change has occurred in the victim's condition or location; (3) the injury of the victim must be substantial, resulting in his or her death or serious physical injury; and (4) the bystander's emotional injury must be serious, beyond that which would be anticipated in a disinterested witness and which is not the result of an abnormal response."

The differentiation between direct claims for emotional distress and bystander, or indirect, claims is important. The Supreme Court has held that "a bystander to medical malpractice may not recover for emotional distress." *Maloney* v. *Conroy*, supra, 208 Conn.

393.[9] In *Maloney* v. *Conroy*, the Supreme Court considered the claim of a daughter who alleged that she lived with her mother and had remained at her mother's bedside following an operation, that her mother's caretakers had been negligent in their care of her mother by, inter alia, ignoring the daughter's requests to investigate symptoms related to her mother's condition, and had suffered emotional distress watching her mother's condition continue to deteriorate until the mother eventually passed away. Id., 394.

The Supreme Court discussed a number of concerns in refusing to recognize a claim of bystander liability in a medical malpractice action. In particular, it considered the complications offered by the case before it, which "pose[d] the troublesome question of causation involved in distinguishing the plaintiff's natural grief over the loss of her mother, with whom she had lived for many years and whose death she might well have had to bear even in the absence of malpractice, from the effects upon her feelings of her belief that the suffering and death of her mother were attributable to the defendants' wrongful conduct." Id., 399. It also raised two potential adverse consequences of recognizing such a cause of action: specifically, in order to limit its liability to bystanders, healthcare facilities might significantly curtail patient visitation and healthcare providers could feel obligated to address uninformed complaints from visitors rather than dedicate their entire focus to the patient's care. Id., 402-403. Although the failure of a doctor to address a deficiency brought to its attention could be important in considering whether malpractice occurred, the court articulated that "[i]t is . . . the consequences to the patient, and not to other persons, of deviations from the appropriate standard of medical care that should be the central concern of medical practitioners." Id., 403.

[9] Although there was debate in the Superior Court whether the Supreme Court's later decision in *Clohessy* abrogated its earlier decision in *Maloney*; see, e.g., *Medura* v. *Town & Country Veterinary Associates, P.C.*, Superior Court, judicial district of Hartford, Docket No. CV-11-6018916-S (August 10, 2012, *Woods, J.*) (54 Conn. L. Rptr. 483, 485-86), and cases cited therein; the Appellate Court has recently reaffirmed that *Maloney* remains a bar to bystander claims of emotional distress arising from the medical care of a third party. See *Milton* v. *Robinson*, 131 Conn. App. 760, 784-85, 27 A.3d 480 (2011), cert. denied, 304 Conn. 906, 39 A.3d 1118 (2012).

Thus, if the healthcare providers should have addressed the daughter's concerns, the court stated that "they should be held liable for the consequences of their neglect to the patient or her estate rather than to the plaintiff." Id.

There is considerable authority distinguishing a claim for negligent infliction of emotional distress from a claim for bystander emotional distress. "Traditionally, the method by which courts have addressed negligent infliction of emotional distress claims has depended on whether the injury was produced by the plaintiff's apprehension of harm to himself . . . or from apprehension of harm to another. . . . Emotional injuries resulting from apprehension of harm to another are typically identified by the catch phrases of bystander emotional distress or bystander liability . . . . The latter phase has been more specifically defined as the recovery of damages for witnessing the death or injury to another without significant injury or fear [of injury] to the witness. . . . The legal theory by which people seek damages for emotional injuries resulting from the apprehension of harm to themselves is generally identified by one of two terms, either the generic term negligent infliction of emotional distress or, in some cases, the more descriptive term the direct victim theory . . . . In such cases, the plaintiff is directly and personally exposed to the tortious conduct." (Internal quotation marks omitted.) *Hylton* v. *Stamford Board of Education*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6002746-S (October 20, 2011, *Adams, J.T.R.*) (52 Conn. L. Rptr. 790, 791); accord *Marsala* v. *Yale-New Haven Hospital, Inc.*, Superior Court, judicial district of Ansonia-Milford at Derby, Docket No. CV-12-6010861-S (October 30, 2013, *Lee, J.*).

There is significantly less authority discussing the difference between intentional infliction claims from bystander emotional distress claims. Although neither research nor the parties has disclosed binding appellate authority on the issue, several trial courts have

interpreted alleged intentional infliction of emotional distress claims as bystander emotional distress claims where the challenged conduct was not directed at the plaintiff, but at a third party. See *Stewart* v. *Kos*, Superior Court, judicial district of New Haven, Docket No. CV-11-6019945-S (July 27, 2012, *Young, J.*) (54 Conn. L. Rptr. 395, 401-402) (striking intentional infliction claims on basis that, inter alia, "[t]he analysis as to whether these are direct or third-party claims . . . applies to these claims as well" and "[t]he court determine[d] that these are third-party claims and, therefore, are claims of bystander emotional distress for which the plaintiffs have failed to allege the second element");[10] *Montanaro* v. *Baron*, Superior Court, judicial district of New Haven, Docket No. CV-06-5006991 (March 28, 2008, *Robinson, J.*) (construing claims by daughter for reckless and intentional infliction of emotional distress as bystander claims because conduct was directed at mother).

Additionally, "[i]n analyzing the tort of intentional infliction of emotional distress, our Supreme Court has looked to the Restatement (Second), Torts, for guidance. See, e.g., *Appleton* v. *Board of Education*, [254 Conn. 205, 210-11, 757 A.2d 1059 (2000)]; *DeLaurentis* v. *New Haven*, 220 Conn. 225, 266-67, 597 A.2d 807 (1991); *Petyan* v. *Ellis*, 200 Conn. 243, 253-54, 510 A.2d 1337 (1986)." *Kelly* v. *Seacorp, Inc.*, Superior Court, Docket No. 550383 (August 13, 2002, *Hurley, J.T.R.*). The Restatement (Second) of Torts places restrictions on claims of intentional infliction of emotional distress that parties must demonstrate to recover "[w]here such conduct is directed at a third person." 1 Restatement (Second), Torts § 46 (2) (1965); see also *Callahan* v. *Hennessy*, Superior Court, judicial district of Middlesex, Docket No. CV-00-0093104 (February 6, 2002, *Shapiro, J.*) (31 Conn. L. Rptr. 331, 332) (applying § 46 [2]). The restrictions placed upon the indirect intentional infliction claims of family members are similar to the elements of a bystander emotional

[10] This case has been captioned on Edison and cited to in one subsequent decision as "Jackson v. Kos."

distress claim in this state. Compare 1 Restatement (Second), supra, § 46 (2) (requiring immediate family members to be present for the behavior directed at their relative), and id., § 46 (1) (only authorizing recovery for "severe emotional distress" where no bodily harm has occurred), with *Clohessy* v. *Bachelor*, supra, 237 Conn. 56 (requiring recovering party to demonstrate that she is closely related to injured victim and had contemporaneous sensory perception of injuring event or immediate observation of its consequences, that injured party suffered substantial injury, and that recovering party suffered serious emotional distress beyond that anticipated from disinterested observer and which is itself not abnormal).

In the present case, all of the plaintiffs' allegations in their complaint are directed to the defendant's conduct towards Helen. Reviewing the submissions of the parties further demonstrates that there is no genuine issue of material fact that the plaintiffs' claims of emotional distress arise from their claims of wrongful conduct to Helen as opposed to any actions taken directly by the defendant towards them as individuals. Therefore, whether construed as a traditional bystander claim or as an intentional infliction claim subject to the third-party restrictions contained in § 46 of the Restatement (Second) of Torts, there is no genuine issue of material fact that the harms that the plaintiffs have allegedly suffered are indirect and could only result from their apprehension of any harms inflicted on Helen by the defendant's conduct.

Although the Supreme Court in *Maloney* was addressing bystander claims arising from negligence; see generally *Maloney* v. *Conroy*, supra, 208 Conn. 394-402; the court did not constrain its holding to the circumstances therein, but set forth a "bright line rule." See id., 393 (holding that "a bystander to medical malpractice may not recover for emotional distress"). Moreover, the concerns discussed by the *Maloney* court in determining causation in situations involving medical care of a third party patient are equally applicable to claims of

intentional infliction of emotional distress involving apprehension of harm to another. See *Di Teresi* v. *Stamford Health System, Inc.*, supra, 142 Conn. App. 83-84 (relying on concerns addressed in *Maloney* in holding hospital did not have duty to daughter of patient), citing *Maloney* v. *Conroy*, 397-99.

Each of the plaintiffs' arguments in opposition to the defendant's motion is unpersuasive. Concerning their law of the case argument, the doctrine involves "the practice of judges generally to refuse to reopen what [already] has been decided" and applies to arguments "intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader." (Internal quotation marks omitted.) See *Total Recycling Services of Ct., Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 322, 63 A.3d 896 (2013). In the previous motion to strike, the defendant raised only two arguments concerning the legal sufficiency of the intentional infliction counts: that the plaintiffs had failed to allege facts capable of demonstrating that the defendant intended to inflict emotional distress or that its behavior was extreme and outrageous. It also raised at the second oral argument the question about whether the plaintiffs had sufficiently alleged that their emotional distress was severe. In answering these arguments, the court, *Lee, J.*, invoked *Maloney* solely to articulate why the plaintiffs had sufficiently alleged facts that the defendant knew or should have known that its actions would cause emotional distress. See *Marsala* v. *Yale-New Haven Hospital, Inc.*, supra, Superior Court, Docket No. CV-12-6010861-S. The decision also mentions, in the portion addressing whether the defendant's conduct was extreme and outrageous, that "the court believes that . . . [the] plaintiffs have adequately pleaded the other elements of the tort of intentional infliction of emotional distress . . . ." Id. Thus, the issue of whether these claims are legally maintainable under *Maloney* was never considered and does not preclude the defendant's argument.

The court also disagrees with the plaintiff's interpretation of the Appellate Court's decision in *Di Teresi* v. *Stamford Health System.* In that case, the trial court granted summary judgment on, inter alia, the daughter's claims for negligent and intentional infliction of emotional distress on the basis that both claims asserted bystander emotional distress arising from medical malpractice on a third party, and the intentional infliction claim on the additional ground that the hospital's conduct was not extreme or outrageous. *DiTeresi* v. *Stamford Health System, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-06-5001340-S (December 14, 2010, *Tierney, J.*), aff'd, 142 Conn. App. 72, 63 A.3d 1011 (2013). The Appellate Court disagreed with the trial court's characterization of each claim, holding that the daughter's claim depended on allegations concerning the hospital's conduct towards her personally as opposed to indirect claims based on its treatment of her mother. *Di Teresi* v. *Stamford Health System, Inc.*, supra, 142 Conn. App. 79 & n.11, 86 n.17. Nevertheless, the Appellate Court affirmed the trial court, holding that the hospital did not owe a duty to the daughter under the circumstances alleged; id., 86; and that the defendant's conduct was not, as a matter of law, extreme and outrageous. Id., 89. The court neither held, nor stated in dicta, that a court cannot construe intentional infliction claims as bystander emotional distress claims. See id., 86-90.

In summary, there exists no genuine issue of material fact that the plaintiffs' intentional infliction of emotional distress claims fail as they are based on the plaintiffs' claims challenging the defendant's care and treatment of Helen. Those claims are indirect, or bystander liability, claims that are precluded under the decision in *Maloney*. Therefore, the defendant is entitled to a judgment as a matter of laws on those counts, and the court grants

the defendant's motion as to counts seven through twelve in the first action.[11]

II

MEDICAL MALPRACTICE CLAIMS AND LOSS OF CONSORTIUM CLAIM

The defendant also moves for summary judgment on counts twenty-six and twenty-seven of the operative complaint in the first action and the sole count in the second action. In the twenty-sixth count in the first action, Clarence, individually, brings a claim for medical malpractice under the wrongful death statute. In the twenty-seventh count, Clarence asserts a claim for loss of consortium that is derivative of the claim in the preceding malpractice count. In the second action, brought by Clarence as the administrator of Helen's estate, the only count alleged is for medical malpractice without any reference to the wrongful death statute. Clarence claims damages for the exact same injuries in both malpractice actions, which include claims for injuries prior to death and for death itself.

The defendant contends that "[b]ecause several of these counts are duplicative, and the wrongful death statute . . . provides the exclusive remedy for a personal injury action resulting in death, judgment should enter for the [defendant] on counts 26 and 27 of the [second] amended complaint [in the first action] and count 1 of the second complaint [in the second action]." Clarence responds that the wrongful death statute "does not preclude plaintiffs from recovering for Helen Marsala's antemortum injuries under a medical malpractice theory." The court disagrees with Clarence.

Explaining the relationship between injuries to a decedent giving rise to a wrongful death claim and those injuries which merely pass to the estate by virtue of the survival of actions statute, General Statutes § 52-599, our Supreme Court has stated: "To avoid misunderstanding, it perhaps should be pointed out that where damages for death itself are

[11] Because the court's conclusion is determinative on those counts, the court need not consider the defendant's additional claims.

claimed in an action based on our wrongful death statute, recovery of any ante-mortem damages flowing from the same tort must be had, if at all, in one and the same action. In other words, there cannot be a recovery of damages for death itself under the wrongful death statute in one action and a recovery of ante-mortem damages, flowing from the same tort, in another action brought under § 3235d [presently § 52-599]. . . . Because of this, the limitation on the amount of recovery which was formerly contained in our wrongful death statute and which, although changed in amount from time to time, persisted until 1951 . . . was construed as an over-all limitation on the amount of recovery in the one action seeking damages for wrongful death, even though ante-mortem damages were also claimed therein." (Citations omitted.) *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659, 669, 136 A.2d 918 (1957); accord *Lynn* v. *Haybuster Mfg., Inc.*, 226 Conn. 282, 294 n.10, 627 A.2d 1288 (1993) ("If the injuries were not fatal, the victim's action survives his death. General Statutes § 52-599. If the injuries were fatal, an action for wrongful death allows the victim to recover damages suffered before death as well as after. General Statutes § 52-555."). Subsequently, several trial court opinions have granted motions to strike claims seeking damages for death on the grounds that a wrongful death action provides the exclusive remedy for injuries resulting in death. See, e.g., *Marsala* v. *Yale-New Haven Hospital, Inc.*, supra, Superior Court, Docket No. CV-12-6010861-S, and cases cited therein.

Clarence's claim, asserted in his individual capacity, in the twenty-sixth count of his operative complaint in the first action alleging a wrongful death claim based on medical malpractice of the defendant is properly alleged. Therein, Clarence seeks the recovery of damages for antemortem damages and for death itself "flowing from the same tort:" that is, the defendant's alleged conduct in removing Helen's ventilator over the objections of the plaintiffs. Although he has attempted to do so, Clarence, both individually and in his

representative capacity, cannot legally bring a separate claim for medical malpractice seeking damages for antemortem harms and death itself that is untethered to the wrongful death statute. Recovery for such damages "must be had, if at all, in one and the same action." *Floyd* v. *Fruit Industries, Inc.*, supra, 144 Conn. 669. Clarence's claim in the second action for medical malpractice, admittedly not brought under the wrongful death statute, is legally insufficient.[12]

In view of the foregoing, the defendant's motion for summary judgment on the twenty-sixth and twenty-seventh counts of the operative complaint in the first action is denied. Further, the defendant's motion for summary judgment on the complaint in the second action is granted.

III

CONCLUSION

The defendant's motion for summary judgment is granted on counts 7 through 12 of the plaintiffs' operative complaint filed in the first action (Docket No. CV-12-6010861). It is denied on counts 26 and 27 of the plaintiffs' operative complaint in the first action. Finally, the motion is granted on the complaint in the second action (Docket No. CV-12-6011711).

TYMA, J.

[12] "The use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading." (Internal quotation marks omitted.) *American Progressive Life & Health Ins. Co. of New York* v. *Better Benefits, LLC*, 292 Conn. 111, 121, 971 A.2d 17 (2009).