APPELLATE COURT
STATE OF CONNECTICUT

NO. A.C. 37821 AND 37822

CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA, ET AL., PLAINTIFFS-APPELLANTS,

- **VS –**

YALE-NEW HAVEN HOSPITAL, DEFENDANT-APPELLEE

APPENDEX I TO BRIEF OF PLAINTIFFS-APPELLANTS

JEREMY C. VIRGIL

ZELDES, NEEDLE & COOPER, P.C.
1000 LAFAYETTE BOULEVARD
BRIDGEPORT, CT 06604
JURIS NO. 069695
TEL: (203) 333-9441
FAX: (203) 333-1489
Email: jvirgil@znclaw.com

ATTORNEY FOR PLAINTIFFS-APPELLANTS

TO BE ARGUED BY:
JEREMY C. VIRGIL

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Attorney/Firm: ZELDES NEEDLE & COOPER (069695) E-Mail: MMEDINA@ZNCLAW.COM Logout

AAN-CV12-6010861-S MARSALA, CLARENCE Et Al v. YALE-NEW HAVEN HOSPITAL, INC.

Prefix/Suffix: [none] **Case Type:** T90 **File Date:** 08/07/2012 **Return Date:** 09/04/2012

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Information updated as of: 10/07/2015

Case Information

Case Type: T90 - Torts - All other
Court Location: Milford
List Type: No List Type
Trial List Claim:
Referral Judge or Magistrate:
Last Action Date: 06/16/2015 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date:
Disposition:
Judge or Magistrate:

Party & Appearance Information

Party		No Fee Party
P-01 CLARENCE MARSALA		
Attorney: ZELDES NEEDLE & COOPER (069695) PO BOX 1740 BRIDGEPORT, CT 06601	File Date: 08/07/2012	
P-02 MICHAEL MARSALA		
Attorney: ZELDES NEEDLE & COOPER (069695) PO BOX 1740 BRIDGEPORT, CT 06601	File Date: 08/07/2012	
P-03 GARY MARSALA		
Attorney: ZELDES NEEDLE & COOPER (069695) PO BOX 1740 BRIDGEPORT, CT 06601	File Date: 08/07/2012	
P-04 TRACEY MARSALA		
Attorney: ZELDES NEEDLE & COOPER (069695) PO BOX 1740 BRIDGEPORT, CT 06601	File Date: 08/07/2012	
P-05 KEVIN MARSALA		
Attorney: ZELDES NEEDLE & COOPER (069695) PO BOX 1740 BRIDGEPORT, CT 06601	File Date: 08/07/2012	

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P-06 RANDY MARSALA

Attorney: ZELDES NEEDLE & COOPER (069695) File Date: 08/07/2012
PO BOX 1740
BRIDGEPORT, CT 06601

P-07 CLARENCE MARSALA ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA

Attorney: ZELDES NEEDLE & COOPER (069695) File Date: 08/07/2012
PO BOX 1740
BRIDGEPORT, CT 06601

D-01 YALE-NEW HAVEN HOSPITAL, INC.

Attorney: WIGGIN & DANA LLP (067700) File Date: 09/12/2012
PO BOX 1832
NEW HAVEN, CT 06508

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Motions / Pleadings / Documents / Case Status

Entry No	File Date	Filed By	Description	Arguable
	08/07/2012	P	**SUMMONS**	
	08/07/2012	P	**COMPLAINT**	
	08/07/2012	P	**RETURN OF SERVICE**	
	08/07/2012	P	**ADDITIONAL PARTIES PAGE**	
	09/12/2012	D	**APPEARANCE** Appearance	
	11/15/2012		**CLAIM/RECLAIM** Claim/Reclaim	
	11/21/2012		**CLAIM/RECLAIM** Claim/Reclaim	
	05/20/2013		**CLAIM/RECLAIM** Claim/Reclaim	
	07/31/2013		**CLAIM/RECLAIM** Claim/Reclaim	
	10/02/2013		**CLAIM/RECLAIM** Claim/Reclaim	
	10/08/2013		**CLAIM/RECLAIM** Claim/Reclaim	
	10/09/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	04/16/2015		**ADMINISTRATIVE DOCUMENT**	
101.00	08/31/2012	P	**AMENDED COMPLAINT** *RESULT:* Withdrawn 8/31/2012 BY THE CLERK	No
102.00	08/31/2012	P	**WITHDRAWAL OF MOTION**	No

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103.00	08/31/2012	P	**AMENDED COMPLAINT**	No
104.00	10/03/2012	D	**MOTION TO DISMISS** and Memo of Law i/s/o *RESULT:* Order 12/3/2012 HON PAUL MATASAVAGE	Yes
104.10	12/03/2012	C	**ORDER** *RESULT:* Order 12/3/2012 HON PAUL MATASAVAGE	No
105.00	10/09/2012	P	**REQUEST TO EXTEND TIME TO RESPOND TO INTERROGATORIES OR PRODUCTION REQ P.B. 13-7(a)(2)/13-10(a)(2)**	No
106.00	10/11/2012	P	**MOTION FOR EXTENSION OF TIME** to Defendant's Motion to Dismiss	No
107.00	10/22/2012	P	**MOTION FOR PERMISSION TO AMEND MOTION OR PLEADING** MOTION TO AMEND COMPLAINT *RESULT:* Granted 12/3/2012 HON PAUL MATASAVAGE	No
107.10	12/03/2012	C	**ORDER** *RESULT:* Granted 12/3/2012 HON PAUL MATASAVAGE	No
108.00	11/02/2012	D	**OBJECTION** to Plfs' Motion to Amend Complaint dtd 10-22-12 (Entry# 107.00) *RESULT:* Overruled 12/3/2012 HON PAUL MATASAVAGE	No
108.10	12/03/2012	C	**ORDER** *RESULT:* Overruled 12/3/2012 HON PAUL MATASAVAGE	No
109.00	11/08/2012	P	**OBJECTION TO MOTION TO DISMISS**	Yes
110.00	11/08/2012	P	**REPLY** TO DEFENDANT'S OBJECTION TO PLAINTIFFS' MOTION TO AMEND COMPLAINT	No
111.00	11/29/2012	D	**REQUEST FOR ARGUMENT (NON-ARG MATTER)** on Motion for Permission to Amend Complaint (#107.00)	No
112.00	12/10/2012	D	**MOTION FOR EXTENSION OF TIME** to Plead to P's 8/31/12 Amended Complaint *RESULT:* Granted 1/7/2013 HON DENISE MARKLE **Last Updated:** Result Information - 01/07/2013	No
112.01	01/07/2013	C	**ORDER** *RESULT:* Granted 1/7/2013 HON DENISE MARKLE	No
113.00	01/17/2013	D	**MOTION FOR EXTENSION OF TIME** to Plead to P's Amended Complaint	No
114.00	02/19/2013	D	**MOTION FOR EXTENSION OF TIME** to Plead to 10/22/12 Amended Complaint	No
115.00	03/18/2013	D	**MOTION FOR EXTENSION OF TIME**	No
116.00	03/22/2013	D	**MOTION TO STRIKE** and Memo of Law in Support *RESULT:* Order 10/30/2013 HON CHARLES LEE	Yes
116.10	10/30/2013	C	**ORDER** *RESULT:* Order 10/30/2013 HON CHARLES LEE	No
117.00	05/08/2013	P	**OBJECTION TO MOTION** TO STRIKE *RESULT:* Order 10/30/2013 HON CHARLES LEE	No
117.10	10/30/2013	C	**ORDER** *RESULT:* Order 10/30/2013 HON CHARLES LEE	No
117.50	10/30/2013	C	**MEMORANDUM OF DECISION ON MOTION**	No

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118.00	05/08/2013	P	**EXHIBITS** A TO OBJECTION TO MOTION TO STRIKE	No
119.00	05/08/2013	P	**EXHIBITS** B TO OBJECTION TO MOTION TO STRIKE	No
120.00	05/08/2013	P	**EXHIBITS** C TO OBJECTION TO MOTION TO STRIKE	No
121.00	05/22/2013	D	**REPLY MEMORANDUM** in support of Motion to Strike (#116)	No
122.00	06/24/2013	D	**BRIEF** Supplemental Brief in Support of Motion to Strike (#s 116.00, 117.00, 121.00)	No
123.00	07/08/2013	P	**OBJECTION** Supplemental Objection in Response to Brief on Motion to Strike (##116-122)	No
124.00	07/08/2013	P	**EXHIBITS** Exhibit A (#123)	No
125.00	07/08/2013	P	**EXHIBITS** Exhibit B (#123)	No
126.00	07/08/2013	P	**EXHIBITS** Exhibit C (#123)	No
127.00	07/16/2013	D	**REQUEST FOR ARGUMENT - NON-ARG MATTER (JD-CV-128)** Objection to Suppl Brief i/s/o Motion to Strike (#123.00) (#122.00)	No
128.00	08/05/2013	D	**REQUEST FOR ARGUMENT - NON-ARG MATTER (JD-CV-128)** Objection to Suppl Brief i/s/o Motion to Strike (#123.00) (#122.00) *RESULT:* Off 8/20/2013 HON CHARLES LEE	No
128.01	08/20/2013	C	**ORDER** *RESULT:* Off 8/20/2013 HON CHARLES LEE	No
129.00	08/26/2013	P	**MOTION FOR CONTINUANCE** *RESULT:* Granted 9/5/2013 HON CHARLES LEE	No
129.10	09/05/2013	C	**ORDER** *RESULT:* Granted 9/5/2013 HON CHARLES LEE	No
130.00	10/11/2013	P	**MOTION FOR CONTINUANCE** *RESULT:* Granted 10/11/2013 HON CHARLES LEE	No
130.10	10/11/2013	C	**ORDER** *RESULT:* Granted 10/11/2013 HON CHARLES LEE	No
131.00	04/24/2014	D	**ANSWER TO AMENDED COMPLAINT** to 2nd Amended Complaint dtd 10/22/12	No
132.00	04/24/2014	D	**ANSWER**	No
133.00	06/13/2014	P	**MOTION TO CONSOLIDATE** *RESULT:* Order 6/30/2014 HON BARBARA BRAZZEL-MASSARO	No
133.01	06/30/2014	C	**ORDER** *RESULT:* Order 6/30/2014 HON BARBARA BRAZZEL-MASSARO	No
134.00	06/13/2014	P	**DISCLOSURE OF EXPERT WITNESS** (Louis M. Hamer, M.D.)	No
135.00	06/26/2014	D	**OBJECTION TO MOTION**	No

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			to Consolidate	
136.00	06/27/2014	P	**REPLY** Reply to Defendant's Objection to Motion to Consolidate	No
137.00	07/22/2014	D	**MOTION FOR EXTENSION OF TIME** to File Dispositive Motions until August 18, 2014 *RESULT:* Granted 8/4/2014 HON ARTHUR HILLER	No
137.10	08/04/2014	C	**ORDER** *RESULT:* Granted 8/4/2014 HON ARTHUR HILLER	No
138.00	08/18/2014	D	**MOTION FOR EXTENSION OF TIME** to File Dispositive Motions *RESULT:* Granted 9/2/2014 HON THEODORE TYMA	No
138.10	09/02/2014	C	**ORDER** *RESULT:* Granted 9/2/2014 HON THEODORE TYMA	No
139.00	08/22/2014	D	**MOTION FOR PROTECTIVE ORDER** *RESULT:* Granted 9/10/2014 HON FRANK IANNOTTI	No
139.01	09/10/2014	C	**ORDER** *RESULT:* Granted 9/10/2014 HON FRANK IANNOTTI	No
140.00	08/28/2014	D	**MOTION FOR SUMMARY JUDGMENT** *RESULT:* Order 3/19/2015 HON THEODORE TYMA	Yes
140.10	03/19/2015	C	**ORDER** *RESULT:* Order 3/19/2015 HON THEODORE TYMA	No
140.20	03/19/2015	C	**MEMORANDUM OF DECISION ON MOTION**	No
141.00	09/05/2014	P	**REQUEST TO EXTEND TIME TO RESPOND - MOTION FOR SUMMARY JUDGMENT PB 17-45** *RESULT:* Granted 9/9/2014 BY THE CLERK	No
141.01	09/09/2014	C	**ORDER** *RESULT:* Granted 9/9/2014 BY THE CLERK	No
142.00	09/11/2014	D	**REQUEST** to Amend MOL in Supp of Mtn for S/J with Amended MOL in Support of Mtn for S/J	No
143.00	10/06/2014	P	**MOTION FOR EXTENSION OF TIME** to Respond to Defendant's Motion for Summary Judgment (Entry #140.00)	No
144.00	10/09/2014	P	**MOTION FOR PROTECTIVE ORDER**	No
145.00	10/09/2014	P	**MOTION FOR PERMISSION TO FILE BRIEF LONGER THAN PERMITTED BY RULE PB 4-6**	No
146.00	10/09/2014	P	**OBJECTION TO MOTION** Objection to Defendant's Motion for Summary Judgment	No
147.00	10/22/2014	D	**REPLY** to Plaintiff's Objection to Defendant's Motion for Partial Summary Judgment	No
148.00	10/23/2014	P	**OBJECTION TO MOTION** Sur Objection to MSJ	No
149.00	10/24/2014	P	**EXHIBITS** Attached to Sur OBjection to Motion for Summary Judgment	No
150.00	11/07/2014	C	**ORDER** *RESULT:* Order 11/7/2014 HON BARRY STEVENS	No
151.00	11/12/2014	D	**MEMORANDUM IN SUPPORT OF MOTION** Second Amended Memo of Law in Support of Motion for Partial Summary Judgment	No

152.00	11/17/2014	P	**OBJECTION TO MOTION** for Summary Judgment	No
153.00	11/17/2014	P	**EXHIBITS** A to H to Doc. #152	No
154.00	11/17/2014	P	**EXHIBITS** I to J to Doc. #152	No
155.00	11/17/2014	P	**EXHIBITS** K to R of Doc. #152	No
156.00	11/17/2014	P	**EXHIBITS** S to X of Doc. #152	No
157.00	11/17/2014	P	**EXHIBITS** Y to Doc. #152	No
158.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit B. Clarence Marsala	No
159.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit C. Dr. Margaret Pisani	No
160.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit H. Dr. Andrew Boyd	No
161.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit P. Tracey Marsala	No
162.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit Q. Michael Marsala	No
163.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit R. Randy Marsala	No
164.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit S. Kevin Marsala	No
165.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit T. Gary Marsala	No
166.00	12/02/2014	D	**MOTION TO MODIFY - GENERAL** (Scheduling Order) *RESULT:* Granted 12/15/2014 HON DENISE MARKLE	No
166.10	12/15/2014	C	**ORDER** *RESULT:* Granted 12/15/2014 HON DENISE MARKLE	No
167.00	12/03/2014	D	**AMENDED ANSWER AND SPECIAL DEFENSE**	No
168.00	01/16/2015	D	**DISCLOSURE OF EXPERT WITNESS** of Dr. Herbert	No
169.00	01/16/2015	D	**DISCLOSURE OF EXPERT WITNESS** for Dr. Metersky	No
170.00	01/16/2015	D	**DISCLOSURE OF EXPERT WITNESS** numerous witnesses	No
171.00	04/06/2015	P	**NOTICE OF INTENTION TO APPEAL**	No
172.00	04/06/2015	P	**APPEAL TO APPELLATE COURT**	No
173.00	04/09/2015	D	**MOTION FOR CONTINUANCE** Trial	No
174.00	04/15/2015	C	**APPELLATE COURT MATERIAL**	No
174.50	04/21/2015	C	**DRAFT JUDGMENT FILE**	No
175.00	04/29/2015	D	**MOTION FOR STAY** Trial and Memo of Law in Support	No

			RESULT: Granted 4/29/2015 HON THEODORE TYMA	
175.10	04/29/2015	C	**ORDER** *RESULT:* Granted 4/29/2015 HON THEODORE TYMA	No
176.00	05/08/2015	P	**OBJECTION TO MOTION** (Objection to and Motion to Re-argue Defendant's Motion for Stay) *RESULT:* Order 5/21/2015 HON THEODORE TYMA	No
176.10	05/21/2015	C	**ORDER** *RESULT:* Order 5/21/2015 HON THEODORE TYMA	No
177.00	05/08/2015	P	**MOTION TO REARGUE/RECONSIDER**	No
178.00	05/13/2015	C	**JUDGMENT FILE**	No
178.10	05/13/2015	C	**JUDGMENT FILE IN APPEALED CASE SENT TO SUPREME/APPELLATE COURT**	No
179.00	05/13/2015	D	**OBJECTION TO MOTION** Objection to Motion to Reargue (177.00) and Reply to Objection to Motion for Stay (176.00) *RESULT:* Sustained 5/21/2015 HON THEODORE TYMA	No
179.10	05/21/2015	C	**ORDER** *RESULT:* Sustained 5/21/2015 HON THEODORE TYMA	No
180.00	06/15/2015	C	**ORDER** Appellate Court order re: Mot Dismiss Appeal	No

Consolidated Cases

Docket Number	Case Caption	Disp. Date	Disp. Code
AAN-CV12-6011711S	MARSALA, CLARENCE, ADMINISTRATOR OF THE ESTATE OF v. YALE-NEW HAVEN HOSPITAL, INC., D/B/A YALE NEW HAVE		

Scheduled Court Dates as of 10/06/2015

AAN-CV12-6010861-S - MARSALA, CLARENCE Et Al v. YALE-NEW HAVEN HOSPITAL, INC.

#	Date	Time	Event Description	Status
			No Events Scheduled	

Judicial ADR events may be heard in a court that is different from the court where the case is filed. To check location information about an ADR event, select the **Notices** tab on the top of the case detail page.

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Periodic changes to terminology that do not affect the status of the case may be made. This list does not constitute or replace official notice of scheduled court events.

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AAN-CV12-6011711-S MARSALA, CLARENCE, ADMINISTRATOR OF THE ESTATE OF v. YALE-NEW HAVEN HOSPITAL, INC., D/B/A YALE NEW HAVE

Prefix/Suffix: [none] Case Type: T28 File Date: 11/09/2012 Return Date: 11/13/2012

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Information updated as of: 10/07/2015

Case Information

Case Type: T28 - Torts - Malpractice - Medical
Court Location: Milford
List Type: No List Type
Trial List Claim:
Referral Judge or Magistrate:
Last Action Date: 06/16/2015 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date:
Disposition:
Judge or Magistrate:

Party & Appearance Information

Party	No Fee Party

P-01 CLARENCE MARSALA ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA

Attorney: ZELDES NEEDLE & COOPER (069695) File Date: 11/09/2012
PO BOX 1740
BRIDGEPORT, CT 06601

D-01 YALE-NEW HAVEN HOSPITAL, INC., D/B/A YALE NEW HAVEN HOSPITAL

Attorney: WIGGIN & DANA LLP (067700) File Date: 11/15/2012
PO BOX 1832
NEW HAVEN, CT 06508

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Motions / Pleadings / Documents / Case Status

Entry No	File Date	Filed By	Description	Arguable
	11/09/2012	P	**SUMMONS**	
	11/09/2012	P	**COMPLAINT**	
	11/09/2012	P	**RETURN OF SERVICE**	
	11/15/2012	D	**APPEARANCE** Appearance	
	10/09/2014		**CLAIM/RECLAIM** Claim/Reclaim	
101.00	12/13/2012	D	**MOTION FOR EXTENSION OF TIME** to Plead to 10/22/12 Complaint	No
102.00	01/14/2013	D	**MOTION FOR EXTENSION OF TIME** until 2/11/13 to respond to 10-22-12 complaint *RESULT:* Granted 1/28/2013 HON ARTHUR HILLER	No
102.01	01/28/2013	C	**ORDER** *RESULT:* Granted 1/28/2013 HON ARTHUR HILLER	No
103.00	02/13/2013	D	**MOTION FOR EXTENSION OF TIME** to Plead to P's Complaint dated 10/22/12 *RESULT:* Granted 2/25/2013 HON DENISE MARKLE **Last Updated:** Result Information - 02/25/2013	No
103.01	02/25/2013	C	**ORDER** *RESULT:* Granted 2/25/2013 HON DENISE MARKLE	No
104.00	03/13/2013	D	**MOTION FOR EXTENSION OF TIME** until 4/12/13 to plead to complaint dtd 10/22/12	No
105.00	03/25/2013	D	**LETTER**	No
106.00	03/27/2013	P	**SCHEDULING ORDER** *RESULT:* Granted 3/27/2013 HON ARTHUR HILLER	No
107.00	04/12/2013	D	**MOTION FOR EXTENSION OF TIME** to Plead to P's 10/22/12 Complaint	No
108.00	05/22/2013	P	**REQUEST TO EXTEND TIME TO RESPOND TO INTERROGATORIES OR PRODUCTION REQ P.B. 13-7(a)(2)/13-10(a)(2)**	No
109.00	05/22/2013	P	**REQUEST TO EXTEND TIME TO RESPOND TO INTERROGATORIES OR PRODUCTION REQ P.B. 13-7(a)(2)/13-10(a)(2)**	No
110.00	08/29/2013	D	**MOTION TO MODIFY - GENERAL** Joint Motion to Modify Scheduling Order *RESULT:* Granted 9/16/2013 HON BARBARA BRAZZEL-MASSARO	No
110.01	09/16/2013	C	**ORDER** *RESULT:* Granted 9/16/2013 HON BARBARA BRAZZEL-MASSARO	No
111.00	09/13/2013	P	**MOTION FOR CONTINUANCE** oral argument scheduled for 9/16/2013	No
112.00	10/11/2013	P	**MOTION FOR CONTINUANCE** *RESULT:* Order 10/11/2013 HON PAUL MATASAVAGE	No
112.10	10/11/2013	C	**ORDER** *RESULT:* Order 10/11/2013 HON PAUL MATASAVAGE	No
113.00	10/11/2013	P	**WITHDRAWAL OF MOTION** FOR CONTINUANCE	No

114.00	11/14/2013	D	**MOTION FOR EXTENSION OF TIME TO PLEAD** to P's Second Amended Complaint, dated 10/22/12 *RESULT:* Granted 12/2/2013 HON JOHN RONAN	No
114.01	12/02/2013	C	**ORDER** *RESULT:* Granted 12/2/2013 HON JOHN RONAN	No
115.00	12/16/2013	D	**MOTION FOR EXTENSION OF TIME TO PLEAD** to p's Second Amended Complaint, dated 10-22-12 *RESULT:* Granted 1/10/2014 HON FRANK IANNOTTI	No
115.01	01/10/2014	C	**ORDER** *RESULT:* Granted 1/10/2014 HON FRANK IANNOTTI	No
116.00	04/24/2014	D	**ANSWER** to Complaint dtd 10/22/12	No
117.00	05/14/2014	D	**MOTION FOR MODIFICATION RE SCHEDULING ORDER** regarding expert disclosure *RESULT:* Granted 5/27/2014 HON ARTHUR HILLER	No
117.10	05/27/2014	C	**ORDER** *RESULT:* Granted 5/27/2014 HON ARTHUR HILLER	No
118.00	06/02/2014	P	**CLAIM FOR JURY OF 6**	No
119.00	06/04/2014	D	**MOTION TO STRIKE FROM JURY DOCKET** with Memorandum of Law in Support of Motion to Strike	No
120.00	06/12/2014	P	**OBJECTION TO MOTION** Plaintiff's Objection to Defendant's Motion to Strike From Jury Docket *RESULT:* Order 7/1/2014 HON BARBARA BRAZZEL-MASSARO	No
120.01	07/01/2014	C	**ORDER** *RESULT:* Order 7/1/2014 HON BARBARA BRAZZEL-MASSARO	No
121.00	06/13/2014	P	**MOTION TO CONSOLIDATE**	No
122.00	06/13/2014	P	**DISCLOSURE OF EXPERT WITNESS** (Louis M. Hamer, M.D.)	No
123.00	06/26/2014	D	**OBJECTION TO MOTION** to Consolidate-Wrongful Death	No
124.00	06/27/2014	P	**REPLY** Reply to Defendant's Objection to Motion to Consolidate	No
125.00	07/09/2014	P	**CASEFLOW REQUEST (JD-CV-116)** *RESULT:* Order 7/9/2014 HON PAUL MATASAVAGE	No
125.10	07/09/2014	C	**ORDER** *RESULT:* Order 7/9/2014 HON PAUL MATASAVAGE	No
126.00	07/22/2014	D	**MOTION FOR EXTENSION OF TIME** toi File Dispositive Motions until 08-18-14 *RESULT:* Granted 8/4/2014 HON JOHN RONAN	No
126.10	08/04/2014	C	**ORDER** *RESULT:* Granted 8/4/2014 HON JOHN RONAN	No
127.00	08/18/2014	D	**MOTION FOR EXTENSION OF TIME** to File Dispositive Motions *RESULT:* Granted 9/2/2014 HON THEODORE TYMA	No
127.10	09/02/2014	C	**ORDER** *RESULT:* Granted 9/2/2014 HON THEODORE TYMA	No
128.00	08/22/2014	D	**MOTION FOR PROTECTIVE ORDER** *RESULT:* Off 10/6/2014 HON ARTHUR HILLER	No

128.01	09/08/2014	C	**ORDER** *RESULT:* Off 9/8/2014 HON ARTHUR HILLER	No
128.02	10/06/2014	C	**ORDER** *RESULT:* Off 10/6/2014 HON ARTHUR HILLER	No
129.00	08/28/2014	D	**MOTION FOR SUMMARY JUDGMENT** *RESULT:* Granted 3/19/2015 HON THEODORE TYMA	Yes
129.10	03/19/2015	C	**ORDER** *RESULT:* Granted 3/19/2015 HON THEODORE TYMA	No
129.20	03/19/2015	C	**MEMORANDUM OF DECISION ON MOTION**	No
129.30	03/19/2015	C	**SUMMARY JUDGMENT-GENERAL** *RESULT:* HON THEODORE TYMA	No
130.00	09/11/2014	D	**REQUEST** to Amend MOL in Supp of Mtn for S/J with Amended MOL in Support of Mtn for S/J	No
131.00	10/09/2014	P	**MOTION FOR PROTECTIVE ORDER**	No
132.00	10/09/2014	P	**MOTION FOR PERMISSION TO FILE BRIEF LONGER THAN PERMITTED BY RULE PB 4-6**	No
133.00	10/09/2014	P	**OBJECTION TO MOTION** Objection to Defendant's Motion for Summary Judgment	No
134.00	10/22/2014	D	**REPLY** to Plaintiffs' Objection to Defendant's Motion for Partial Summary Judgment	No
135.00	10/24/2014	P	**OBJECTION TO MOTION** Sur Objection to MSJ	No
136.00	10/24/2014	P	**EXHIBITS** Attached to Sur Objection to Motion for Summary Judgment	No
137.00	11/10/2014	C	**ORDER** *RESULT:* Order 11/10/2014 HON BARRY STEVENS	No
138.00	11/12/2014	D	**MEMORANDUM IN SUPPORT OF MOTION** Second Amended Memo of Law in Support of Motion for Partial Summary Judgment	No
139.00	11/17/2014	P	**OBJECTION TO MOTION** for Summary Judgment	No
140.00	11/17/2014	P	**EXHIBITS** A to H of Doc. #139	No
141.00	11/17/2014	P	**EXHIBITS** I to J of Doc. #139	No
142.00	11/17/2014	P	**EXHIBITS** K to R of Doc. #139	No
143.00	11/17/2014	P	**EXHIBITS** S to X of Doc. #139	No
144.00	11/17/2014	P	**EXHIBITS** Y to Doc. #139	No
145.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit B. Clarence Marsala	No
146.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit C. Dr. Margaret Pisani	No
147.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit H. Dr. Andrew Boyd	No

148.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit P. Tracey Marsala	No
149.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit Q. Michael Marsala	No
150.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit R. Randy Marsala	No
151.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit S. Kevin Marsala	No
152.00	11/21/2014	P	**EXHIBITS** Substituted Exhibit T. Gary Marsala	No
153.00	12/02/2014	D	**MOTION TO MODIFY - GENERAL** (Scheduling Order) *RESULT:* Granted 12/15/2014 HON DENISE MARKLE	No
153.10	12/15/2014	C	**ORDER** *RESULT:* Granted 12/15/2014 HON DENISE MARKLE	No
154.00	12/03/2014	D	**AMENDED ANSWER AND SPECIAL DEFENSE**	No
155.00	01/16/2015	D	**DISCLOSURE OF EXPERT WITNESS** Dr. Peter Herbert	No
156.00	01/16/2015	D	**DISCLOSURE OF EXPERT WITNESS** Dr. Metersky	No
157.00	01/16/2015	D	**DISCLOSURE OF EXPERT WITNESS** Numerous Witnesses	No
158.00	04/06/2015	P	**NOTICE OF INTENTION TO APPEAL**	No
159.00	04/06/2015	P	**APPEAL TO APPELLATE COURT**	No
160.00	04/07/2015	C	**REPLACE RECORD TO PLEADING STATUS (KEYPOINT 2) AND ERASE ALL HIGHER KEYPOINT DATES**	No
161.00	04/21/2015	C	**DRAFT JUDGMENT FILE**	No
162.00	05/13/2015	C	**JUDGMENT FILE**	No
162.10	05/13/2015	C	**JUDGMENT FILE IN APPEALED CASE SENT TO SUPREME/APPELLATE COURT**	No
163.00	06/15/2015	C	**ORDER** Appellate Court order re: Mot Dismiss Appeal	No

Consolidated Cases

Docket Number	Case Caption	Disp. Date	Disp. Code
AAN-CV12-6010861S	MARSALA, CLARENCE Et Al v. YALE-NEW HAVEN HOSPITAL, INC.		

Scheduled Court Dates as of 10/06/2015

AAN-CV12-6011711-S - MARSALA, CLARENCE, ADMINISTRATOR OF THE ESTATE OF v. YALE-NEW HAVEN HOSPITAL, INC., D/B/A YALE NEW HAVE

#	Date	Time	Event Description	Status
No Events Scheduled				

Judicial ADR events may be heard in a court that is different from the court where the case is filed. To check location information about an ADR event, select the **Notices** tab on the top of the case detail page.

Short Calendar and family support magistrate calendar matters are shown as scheduled court

dates. If there are multiple motions on a single short calendar, the calendar will be listed once. The status of a short calendar matter is determined by the markings made by the parties. No status is displayed on this page. You can see more information on matters appearing on short calendars and family support magistrate calendars by going to the Civil/Family Case Look-Up page and Short Calendars By Juris Number or By Court Location.

Periodic changes to terminology that do not affect the status of the case may be made. This list does not constitute or replace official notice of scheduled court events.

Disclaimer: For civil and family cases statewide, case information can be seen on this website for a period of time, from one year to a maximum period of ten years, after the disposition date. If the Connecticut Practice Book Sections 7-10 and 7-11 give a shorter period of time, the case information will be displayed for the shorter period. Under the Federal Violence Against Women Act of 2005, cases for relief from physical abuse, foreign protective orders, and motions that would be likely to publicly reveal the identity or location of a protected party may not be displayed and may be available only at the courts.

DOCKET NO. AAN-CV12-6010861-S	:	SUPERIOR COURT
CLARENCE MARSALA, MICHAEL MARSALA, GARY MARSALA, TRACEY MARSALA, KEVIN MARSALA, RANDY MARSALA; and CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	J. D. OF MILFORD/ANSONIA
v.	:	AT MILFORD
YALE NEW HAVEN HOSPITAL, INC., d/b/a YALE NEW HAVEN HOSPITAL	:	OCTOBER 22, 2012

SECOND AMENDED COMPLAINT

FIRST COUNT (Clarence Marsala- Negligent Infliction of Emotional Distress)

1. At all times relevant herein, the Defendant, Yale New Haven Hospital, Inc. d/b/a Yale New Haven Hospital ("Yale New Haven Hospital"), was and is an acute care facility duly licensed as a hospital in the State of Connecticut with a principal place of business in New Haven, Connecticut.

2. At all times relevant herein, Yale New Haven Hospital deals with life and death decisions every day involving patients and their families.

3. At all times relevant herein, Griffin Hospital was and is an acute care facility duly licensed as a hospital in the State of Connecticut with a principal place of business in Derby, Connecticut.

4. At all times relevant herein, the plaintiff, Clarence Marsala, is and was a resident of Seymour, Connecticut and husband to Helen Marsala.

5. At all times relevant herein, the plaintiff, Michael Marsala, is and was a resident of Seymour, Connecticut and son of Helen Marsala.

6. At all times relevant herein, the plaintiff, Gary Marsala, is and was a resident of Seymour, Connecticut and son of Helen Marsala.

7. At all times relevant herein, the plaintiff, Tracey Marsala, is and was a resident of Seymour, Connecticut and daughter of Helen Marsala.

8. At all times relevant herein, the plaintiff, Kevin Marsala, is and was a resident of Newtown, Connecticut and son of Helen Marsala.

9. At all times relevant herein, the plaintiff, Randy Marsala, is and was a resident of Beacon Falls, Connecticut and son of Helen Marsala.

10. The decedent, Helen Marsala, died on July 24, 2010.

11. Clarence Marsala, Michael Marsala, Gary Marsala, Tracey Marsala, Kevin Marsala, and Randy Marsala were all the decedent, Helen Marsala's next of kin.

12. Prior to her death, the decedent, Helen Marsala, did not create a living will.

13. Prior to her death, the decedent, Helen Marsala, had discussions with the plaintiff, Clarence Marsala, where she asked him to make the decisions regarding life support if she were ever in a situation where she could not make the decision herself.

14. Prior to her death, the decedent, Helen Marsala, expressed intentions to remain alive if ever on life support.

15. Commencing on or about April 7, 2010 and continuing through to approximately June 19, 2010, Griffin Hospital, undertook the care, treatment,

monitoring and supervision of the decedent, Helen Marsala, for her general overall health.

16. On or about April 7, 2010, the decedent, Helen Marsala had surgery on her wrist at Griffin Hospital and contracted an infection.

17. During her stay at Griffin Hospital, the decedent, Helen Marsala, while still conscious, was placed on life support.

18. Several times during her stay at Griffin Hospital, agents, apparent agents, employees and/or staff of Griffin Hospital consulted the plaintiff, Clarence Marsala, about removing life support from the decedent, Helen Marsala. Clarence Marsala unambiguously refused.

19. On or about June 19, 2010, the plaintiff, Clarence Marsala, in an effort to ensure continued life support and avoid further requests to remove life support, had the decedent, Helen Marsala transferred to the defendant, Yale New Haven Hospital.

20. Commencing on or about June 19, 2010 and continuing through to on or about July 24, 2010, the defendant, Yale New Haven Hospital, undertook the care, treatment, monitoring and supervision of the decedent, Helen Marsala.

21. At some time between June 19, 2010 and July 24, 2010, the plaintiff, Clarence Marsala and/or the decedent Helen Marsala, filled out financial paperwork for the defendant, Yale New Haven Hospital, indicating that Helen Marsala and/or family was below the payment threshold and would not be able and/or obligated to compensate the defendant, Yale New Haven Hospital, for Helen Marsala's medical bills.

22. Prior to July 24, 2010, the plaintiff, Clarence Marsala submitted the financial paperwork indicting that Helen Marsala and/or family was below the payment threshold and would not be able and/or obligated to compensate the defendant, Yale New Haven Hospital, for Helen Marsala's medical bills to an agent, apparent agent, employee and/or staff of Yale New Haven Hospital.

23. On or about June 19, 2010, agents, apparent agents, employees and/or staff of Yale New Haven Hospital consulted the plaintiffs, Clarence Marsalsa and Michael Marsala, about removing the ventilator from the decedent, Helen Marsala without replacement (if she failed to begin breathing on her own). Clarence Marsala and Michael Marsala unambiguously refused and instructed the defendant to never "pull the plug."

24. Several times during her stay at Yale New Haven Hospital, agents, apparent agents, employees and/or staff of the defendant Hospital removed the decedent, Helen Marsala's ventilator, but replaced it when it was apparent that she could not breathe on her own.

25. At some time between June 19, 2010 and July 24, 2010, agents, apparent agents, employees and/or staff of Yale New Haven Hospital consulted the plaintiffs, Clarence Marsala, Gary Marsala, and Randy Marsala, about removing the ventilator from the decedent, Helen Marsala without replacement (if she failed to begin breathing on her own). Clarence Marsala, Gary Marsala, and Randy Marsala unambiguously refused and instructed the defendant to never "pull the plug."

26. Several times during her stay at the defendant, Yale New Haven Hospital, clergymen working as agents, apparent agents, servants, employees and/or staff members at Yale New Haven Hospital consulted the plaintiff, Clarence Marsala, about removing the ventilator from the decedent, Helen Marsala without replacement (if she failed to begin breathing on her own). Clarence Marsala unambiguously refused, insisted the ventilator be replaced, and instructed the defendant to never "pull the plug."

27. Prior to July 24, 2010, the defendant, Yale New Haven Hospital encouraged the decedent's treating physicians to the remove the ventilator from the decedent, Helen Marsala, without replacement (if she failed to begin breathing on her own).

28. On or about July 24, 2010, agents, apparent agents, employees and/or staff of the defendant, Yale New Haven Hospital informed the plaintiff, Gary Marsala, that they were going to permanently remove the ventilator from the decedent, Helen Marsala, that night without replacement (if she failed to begin breathing on her own). Gary Marsala unambiguously objected and reported the information to his father, Clarence Marsala.

29. On or about July 24, 2010, agents, apparent agents, employees and/or staff of the defendant, Yale New Haven Hospital informed the plaintiff, Clarence Marsala after he arrived, that they were going to permanently remove the ventilator from the decedent, Helen Marsala, that night without replacement (if she failed to begin breathing on her own). Clarence Marsala unambiguously objected.

30. On or about July 24, 2010, over the objection of Clarence Marsala and Gary Marsala, and without giving the plaintiff, Clarence Marsala, time to transport the decedent, the agents, apparent agents, employees, agents, and/or staff members of the defendant, Yale New Haven Hospital, acting within the scope of their employment with the defendant and in furtherance of the defendant's business, permanently removed the ventilator from the decedent, Helen Marsala, causing her to suffocate and die.

31. The defendant, Yale New Haven Hospital had a duty to ascertain the wishes of the decedent, Helen Marsala, from her next of kin, Clarence Marsala prior to removing life support.

32. The defendant, Yale New Haven Hospital ignored the wishes of the decedent, Helen Marsala, as expressed from her next of kin, Clarence Marsala prior to removing life support.

33. As a result of the defendant, Yale New Haven Hospital's conduct, through its agents, employees and/or staff members acting within the scope of their employment with the defendant, the plaintiff, Clarence Marsala suffered the following serious, painful and permanent injuries:

(a) severe emotional distress;

(b) loss of opportunity to say goodbye;

(c) depression;

(d) loss of sleep;

(e) stress;

(f) anxiety; and

(g) pain and suffering.

34. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, engaged in conduct that it knew or should have known involved an unreasonable risk of causing emotional distress to the plaintiff, Clarence Marsala.

35. The emotional distress suffered by the plaintiff, Clarence Marsala, was or should have been foreseeable to the defendant.

36. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, engaged in conduct that caused the plaintiff, Clarence Marsala, emotional distress that might result in bodily harm/illness.

SECOND COUNT (Michael Marsala- Negligent Infliction of Emotional Distress)

1-30. The Plaintiff, Michael Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Second Count.

31. The defendant, Yale New Haven Hospital had a duty to ascertain the wishes of the decedent, Helen Marsala, from her next of kin, Michael Marsala prior to removing life support.

32. The defendant, Yale New Haven Hospital ignored the wishes of the decedent, Helen Marsala, as expressed from her next of kin, Michael Marsala prior to removing life support.

33. As a result of the defendant, Yale New Haven Hospital's conduct, through its agents, employees and/or staff members acting within the scope of

their employment with the defendant, the plaintiff, Michael Marsala suffered the following serious, painful and permanent injuries:

(a) severe emotional distress;

(b) loss of opportunity to say goodbye;

(c) depression;

(d) loss of sleep;

(e) stress;

(f) anxiety; and

(g) pain and suffering.

34. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, engaged in conduct that it knew or should have known involved an unreasonable risk of causing emotional distress to the plaintiff, Michael Marsala.

35. The emotional distress suffered by the plaintiff, Michael Marsala, was or should have been foreseeable to the defendant.

36. The defendant, Yale New Haven Hospital, through its agents, employees, and/or staff members, engaged in conduct that caused the plaintiff, Michael Marsala, emotional distress that might result in bodily harm/illness.

THIRD COUNT (Gary Marsala- Negligent Infliction of Emotional Distress)

1-30. The Plaintiff, Gary Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Third Count.

31. The defendant, Yale New Haven Hospital had a duty to ascertain the wishes of the decedent, Helen Marsala, from her next of kin, Gary Marsala prior to removing life support.

32. The defendant, Yale New Haven Hospital ignored the wishes of the decedent, Helen Marsala, as expressed from her next of kin, Gary Marsala prior to removing life support.

33. As a result of the defendant, Yale New Haven Hospital's conduct, through its agents, employees and/or staff members acting within the scope of their employment with the defendant, the plaintiff, Gary Marsala suffered the following serious, painful and permanent injuries:

(a) severe emotional distress;

(b) loss of opportunity to say goodbye;

(c) depression;

(d) loss of sleep;

(e) stress;

(f) anxiety; and

(g) pain and suffering.

34. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, engaged in conduct that it knew or should have known involved an unreasonable risk of causing emotional distress to the plaintiff, Gary Marsala.

35. The emotional distress suffered by the plaintiff, Gary Marsala, was or should have been foreseeable to the defendant.

36. The defendant, Yale New Haven Hospital, through its agents, employees, and/or staff members, engaged in conduct that caused the plaintiff, Gary Marsala, emotional distress that might result in bodily harm/illness.

FOURTH COUNT (Tracey Marsala- Negligent Infliction of Emotional Distress)

1-30. The Plaintiff, Tracey Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Fourth Count.

31. The defendant, Yale New Haven Hospital had a duty to ascertain the wishes of the decedent, Helen Marsala, from her next of kin, Tracey Marsala prior to removing life support.

32. The defendant, Yale New Haven Hospital failed to ascertain the wishes of the decedent, Helen Marsala, from her next of kin, Tracey Marsala prior to removing life support.

33. As a result of the defendant, Yale New Haven Hospital's conduct, through its agents, employees and/or staff members acting within the scope of their employment with the defendant, the plaintiff, Tracey Marsala suffered the following serious, painful and permanent injuries:

(a) severe emotional distress;

(b) loss of opportunity to say goodbye;

(c) depression;

(d) loss of sleep;

(e) stress;

(f) anxiety; and

(g) pain and suffering.

34. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, engaged in conduct that it knew or should have known involved an unreasonable risk of causing emotional distress to the plaintiff, Tracey Marsala.

35. The emotional distress suffered by the plaintiff, Tracey Marsala, was or should have been foreseeable to the defendant.

36. The defendant, Yale New Haven Hospital, through its agents, employees, and/or staff members, engaged in conduct that caused the plaintiff, Tracey Marsala, emotional distress that might result in bodily harm/illness.

FIFTH COUNT (Kevin Marsala- Negligent Infliction of Emotional Distress)

1-30. The Plaintiff, Kevin Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Fifth Count.

31. The defendant, Yale New Haven Hospital had a duty to ascertain the wishes of the decedent, Helen Marsala, from her next of kin, Kevin Marsala prior to removing life support.

32. The defendant, Yale New Haven Hospital failed to ascertain the wishes of the decedent, Helen Marsala, as expressed from her next of kin, Kevin Marsala prior to removing life support.

33. As a result of the defendant, Yale New Haven Hospital's conduct, through its agents, employees and/or staff members acting within the scope of

their employment with the defendant, the plaintiff, Kevin Marsala suffered the following serious, painful and permanent injuries:

(a) severe emotional distress;

(b) loss of opportunity to say goodbye;

(c) depression;

(d) loss of sleep;

(e) stress;

(f) anxiety; and

(g) pain and suffering.

34. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, engaged in conduct that it knew or should have known involved an unreasonable risk of causing emotional distress to the plaintiff, Kevin Marsala.

35. The emotional distress suffered by the plaintiff, Kevin Marsala, was or should have been foreseeable to the defendant.

36. The defendant, Yale New Haven Hospital, through its agents, employees, and/or staff members, engaged in conduct that caused the plaintiff, Kevin Marsala, emotional distress that might result in bodily harm/illness.

SIXTH COUNT (Randy Marsala- Negligent Infliction of Emotional Distress)

1-30. The Plaintiff, Randy Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Sixth Count.

31. The defendant, Yale New Haven Hospital had a duty to ascertain the wishes of the decedent, Helen Marsala, from her next of kin, Randy Marsala prior to removing life support.

32. The defendant, Yale New Haven Hospital ignored the wishes of the decedent, Helen Marsala, as expressed from her next of kin, Randy Marsala prior to removing life support.

33. As a result of the defendant, Yale New Haven Hospital's conduct, through its agents, employees and/or staff members acting within the scope of their employment with the defendant, the plaintiff, Randy Marsala suffered the following serious, painful and permanent injuries:

(a) severe emotional distress;

(b) loss of opportunity to say goodbye;

(c) depression;

(d) loss of sleep;

(e) stress;

(f) anxiety; and

(g) pain and suffering.

34. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, engaged in conduct that it knew or should have known involved an unreasonable risk of causing emotional distress to the plaintiff, Randy Marsala.

35. The emotional distress suffered by the plaintiff, Randy Marsala, was or should have been foreseeable to the defendant.

36. The defendant, Yale New Haven Hospital, through its agents, employees, and/or staff members, engaged in conduct that caused the plaintiff, Randy Marsala, emotional distress that might result in bodily harm/illness.

SEVENTH COUNT (Clarence Marsala- Intentional Infliction of Emotional Distress)

1-30. The Plaintiff, Clarence Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Seventh Count.

31. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, intended to inflict emotional distress on the plaintiff, Clarence Marsala, or knew or should have known that emotional distress was the likely result of their conduct.

32. The defendant's conduct of encouraging its agents, employees and/or staff members to remove the ventilator from the decedent despite the family's objections when it knew or should have known that without the ventilator the decedent would pass away constitutes extreme and outrageous conduct.

33. The defendant, Yale New Haven Hospital's conduct through its agents, employees, and/or staff members, was the cause of the emotional distress experienced by the plaintiff, Clarence Marsala.

34. The emotional distress sustained by the plaintiff, Clarence Marsala, was severe.

EIGHTH COUNT (Michael Marsala- Intentional Infliction of Emotional Distress)

1-30. The Plaintiff, Michael Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Eighth Count.

31. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, intended to inflict emotional distress on the plaintiff, Michael Marsala, or knew or should have known that emotional distress was the likely result of their conduct.

32. The defendant's conduct of encouraging its agents, apparent agents, employees and/or staff members to remove the ventilator from the decedent despite the family's objections when it knew or should have known that without the ventilator the decedent would pass away constitutes extreme and outrageous conduct.

33. The defendant, Yale New Haven Hospital's, conduct through its agents, apparent agents, employees, and/or staff members, was the cause of the emotional distress experienced by the plaintiff, Michael Marsala.

34. The emotional distress sustained by the plaintiff, Michael Marsala, was severe.

NINTH COUNT (Gary Marsala- Intentional Infliction of Emotional Distress)

1-30. The Plaintiff, Gary Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Ninth Count.

31. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, intended to inflict emotional distress on the plaintiff, Gary Marsala, or knew or should have known that emotional distress was the likely result of their conduct.

32. The defendant's conduct of encouraging its agents, apparent agents, employees and/or staff members to remove the ventilator from the decedent despite the family's objections when it knew or should have known that without the ventilator the decedent would pass away constitutes extreme and outrageous conduct.

33. The defendant, Yale New Haven Hospital's, conduct through its agents, employees, and/or staff members, was the cause of the emotional distress experienced by the plaintiff, Gary Marsala.

34. The emotional distress sustained by the plaintiff, Gary Marsala, was severe.

TENTH COUNT (Tracey Marsala- Intentional Infliction of Emotional Distress)

1-30. The Plaintiff, Tracey Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Tenth Count.

31. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, intended to inflict emotional distress on the plaintiff, Tracey Marsala, or knew or should have known that emotional distress was the likely result of their conduct.

32. The defendant's conduct of encouraging its agents, apparent agents, employees and/or staff members to remove the ventilator from the decedent despite the family's objections when it knew or should have known that without the ventilator the decedent would pass away constitutes extreme and outrageous conduct.

33. The defendant, Yale New Haven Hospital's, conduct through its agents, apparent agents, employees, and/or staff members, was the cause of the emotional distress experienced by the plaintiff, Tracey Marsala.

34. The emotional distress sustained by the plaintiff, Tracey Marsala, was severe.

ELEVENTH COUNT (Kevin Marsala- Intentional Infliction of Emotional Distress)

1-30. The Plaintiff, Kevin Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Eleventh Count.

31. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, intended to inflict emotional distress on the plaintiff, Kevin Marsala, or knew or should have known that emotional distress was the likely result of their conduct.

32. The defendant's conduct of encouraging its agents, apparent agents, employees and/or staff members to remove the ventilator from the decedent despite the family's objections when it knew or should have known that without the ventilator the decedent would pass away constitutes extreme and outrageous conduct.

33. The defendant, Yale New Haven Hospital's, conduct through its agents, apparent agents, employees, and/or staff members, was the cause of the emotional distress experienced by the plaintiff, Kevin Marsala.

34. The emotional distress sustained by the plaintiff, Kevin Marsala, was severe.

TWELFTH COUNT (Randy Marsala- Intentional Infliction of Emotional Distress)

1-30. The Plaintiff, Randy Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Twelfth Count.

31. The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members, intended to inflict emotional distress on the plaintiff, Randy Marsala, or knew or should have known that emotional distress was the likely result of their conduct.

32. The defendant's conduct of encouraging its agents, apparent agents, employees and/or staff members to remove the ventilator from the decedent despite the family's objections when it knew or should have known that without the ventilator the decedent would pass away constitutes extreme and outrageous conduct.

33. The defendant, Yale New Haven Hospital's, conduct through its agents, apparent agents, employees, and/or staff members, was the cause of the emotional distress experienced by the plaintiff, Randy Marsala.

34. The emotional distress sustained by the plaintiff, Randy Marsala, was severe.

THIRTEENTH COUNT (Clarence Marsala- Connecticut Unfair Trade Practices Act)

1-30. The Plaintiff, Clarence Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Thirteenth Count.

31. A copy of this Amended Complaint has been mailed to the Attorney General's Office.

32. The defendant, Yale New Haven Hospital's, primary business is distributing healthcare and/or medical services in Connecticut.

33. The defendant, Yale New Haven Hospital, knew or should have known the cost of providing continuous life support to the decedent, Helen Marsala prior to permanently removing her ventilator causing her death.

34. The defendant, Yale New Haven Hospital, knew or should have known that the decedent, Helen Marsala and/or the plaintiff, Clarence Marsala, had submitted financial paperwork indicating that they were not able and/or obligated to pay for the continuous life support to the decedent, Helen Marsala prior to permanently removing her ventilator causing her death.

35. On or about June 19, 2010 and thereafter, the defendant, Yale New Haven Hospital, was the decedent, Helen Marsala's creditor.

36. By making the decision to permanently remove the decedent, Helen Marsala's life support over the objection of the family, the defendant, Yale New Haven Hospital placed itself in the position of also being the decedent's surrogate.

37. The defendant, Yale New Haven Hospital's conflicting positions of being the decedent's creditor and surrogate gave the defendant a financial incentive in making the decision to permanently remove the decedent's life support over the objection of her family.

38. The defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members, was immoral, unethical, oppressive and/or unscrupulous, in that they:

(a) violated public policy as expressed by the statute C.G.S. § 19a-571;

(b) removed the decedent's ventilator without replacement after it was apparent that she could not afford to pay for her medical bills;

(c) removed the decedent's ventilator without replacement because they believed that the decedent could not afford to pay her medical bills;

(d) removed the decedent's ventilator without replacement after it knew or should have known that the decedent might not be able to pay for her treatment;

(e) removed the decedent's ventilator without replacement because they believed that the decedent might not be able to pay for her treatment;

(f) allowed financial interests to dictate life and/or death decisions;

(g) placed itself in conflicting positions that gave it a financial incentive to permanently remove the decedent's life support;

(h) failed to provide sufficient time to transport the decedent prior to permanently removing her ventilator;

(i) removed the decedent's ventilator despite objections;

(j) failed to obtain probate court approval to resolve disputes over decedent's wishes prior to removal of ventilator; and

(k) assaulted the decedent in violation of public policy as expressed by C.G.S. § 53a-60b.

39. The defendant's, Yale New Haven Hospital's, conduct through its agents, apparent agents, employees, and/or staff members caused the plaintiff Clarence Marsala an ascertainable loss.

FOURTEENTH COUNT (Michael Marsala- Connecticut Unfair Trade Practices Act)

1-38. The Plaintiff, Michael Marsala, repeats and re-alleges paragraphs one through thirty-eight of the Thirteenth Count as if fully set forth herein as paragraphs one through thirty-eight of the Fourteenth Count.

39. The defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members caused the plaintiff, Michael Marsala an ascertainable loss.

FIFTEENTH COUNT (Gary Marsala- Connecticut Unfair Trade Practices Act)

1-38. The Plaintiff, Gary Marsala, repeats and re-alleges paragraphs one through thirty-eight of the Thirteenth Count as if fully set forth herein as paragraphs one through thirty-eight of the Fifteenth Count.

39. The defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members caused the plaintiff, Gary Marsala an ascertainable loss in the form of severe emotional distress.

SIXTEENTH COUNT (Tracey Marsala- Connecticut Unfair Trade Practices Act)

1-38. The Plaintiff, Tracey Marsala, repeats and re-alleges paragraphs one through thirty-eight of the Thirteenth Count as if fully set forth herein as paragraphs one through thirty-eight of the Sixteenth Count.

39. The defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members caused the plaintiff, Tracey Marsala an ascertainable loss.

SEVENTEENTH COUNT (Kevin Marsala- Connecticut Unfair Trade Practices Act)

1-38. The Plaintiff, Kevin Marsala, repeats and re-alleges paragraphs one through thirty-eight of the Thirteenth Count as if fully set forth herein as paragraphs one through thirty-eight of the Seventeenth Count.

39. The defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members caused the plaintiff, Kevin Marsala an ascertainable loss.

EIGHTEENTH COUNT (Randy Marsala- Connecticut Unfair Trade Practices Act)

1-38. The Plaintiff, Randy Marsala, repeats and re-alleges paragraphs one through thirty-eight of the Thirteenth Count as if fully set forth herein as paragraphs one through thirty-one of the Eighteenth Count.

39. The defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members caused the plaintiff, Randy Marsala an ascertainable loss.

NINETEENTH COUNT (Clarence Marsala Administrator of the Estate of Helen Marsala - Connecticut Unfair Trade Practices Act)

1-38. The Plaintiff, Clarence Marsala Administrator of the Estate of Helen Marsala, repeats and re-alleges paragraphs one through thirty-eight of the Thirteenth Count as if fully set forth herein as paragraphs one through thirty-one of the Eighteenth Count.

39. On or about June 26, 2012, the plaintiff, Clarence Marsala, was duly appointed Administrator of the Estate of Helen Marsala by the Probate Court District of Derby and continues to act in said capacity.

40. The defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members caused the decedent, Helen Marsala an ascertainable loss.

TWENTIETH COUNT (Clarence Marsala Administrator of the Estate of Helen Marsala- Violation of Connecticut General Statutes § 19a-571)

1-30. The Plaintiff, Clarence Marsala Administrator of the Estate of Helen Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Twentieth Count.

31. On or about June 26, 2012, the plaintiff, Clarence Marsala, was duly appointed Administrator of the Estate of Helen Marsala by the Probate Court District of Derby and continues to act in said capacity.

32. The defendant, Yale New Haven Hospital, violated C.G.S. § 19a-571 through its agents, apparent agents, employees, and/or staff members in one or more of the following ways:

(a) failing to considered the patient's wishes concerning the withholding or withdrawal of life support systems before it permanently removed the ventilator without replacement from the decedent, Helen Marsala, causing her death;

(b) failed to provide sufficient time to transport the decedent prior to permanently removing her ventilator;

(c) removed the decedent's ventilator despite objections from her family members explaining that the decedent expressed a desire to remain alive if ever on life support; and

(d) failed to obtain probate court approval to resolve disputes over decedent's wishes prior to removal of ventilator.

33. As a direct and proximate result of the defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members, the decedent suffered the following injuries:

(a) death;

(b) suffocation;

(c) fear of death;

(d) stress;

(e) anxiety; and

(f) pain and suffering

TWENTY- FIRST COUNT (Clarence Marsala Administrator of the Estate of Helen Marsala- Wrongful Death -Connecticut General Statutes § 52-555)

1-31. The Plaintiff, Clarence Marsala Administrator of the Estate of Helen Marsala, repeats and re-alleges paragraphs one through thirty-one of the Twentieth Count as if fully set forth herein as paragraphs one through thirty-one of the Nineteenth Count.

32. The plaintiff brings this wrongful death cause of action pursuant to Connecticut General Statutes § 52-555.

33. The defendant, Yale New Haven Hospital, violated C.G.S. § 19a-571 through its agents, apparent agents, employees, and/or staff members in one or more of the following ways:

(a) failing to considered the patient's wishes concerning the withholding or withdrawal of life support systems before it permanently removed the ventilator without replacement from the decedent, Helen Marsala, causing her death;

(b) failed to provide sufficient time to transport the decedent prior to permanently removing her ventilator;

(c) removed the decedent's ventilator despite objections from her family members explaining that the decedent expressed a desire to remain alive if ever on life support; and

(d) failed to obtain probate court approval to resolve disputes over decedent's wishes prior to removal of ventilator.

34. As a direct and proximate result of the defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members the decedent suffered the following injuries:

(a) death;

(b) suffocation;

(c) fear of death;

(d) stress;

(e) anxiety; and

(f) pain and suffering

TWENTY- SECOND COUNT (Clarence Marsala – Loss of Consortium - Connecticut General Statutes § 52-555a)

1-34. The Plaintiff, Clarence Marsala Administrator of the Estate of Helen Marsala, repeats and re-alleges paragraphs one through thirty-four of the Twenty-First Count as if fully set forth herein as paragraphs one through thirty-four of the Twenty-Second Count.

35. At all times relevant herein, the plaintiff, Clarence Marsala, was At all times relevant herein, the plaintiff, Clarence Marsala, was the husband of Helen Marsala and has thereby lost, and will continue to lose, the companionship, care, and affection of his wife as a result of the injuries and damages Helen Marsala suffered as a consequence of the events outlined in this complaint.

TWENTY- THIRD COUNT (Clarence Marsala Administrator of the Estate of Helen Marsala- Assault)

1-31. The Plaintiff, Clarence Marsala Administrator of the Estate of Helen Marsala, repeats and re-alleges paragraphs one through thirty-one of the Twentieth Count as if fully set forth herein as paragraphs one through thirty-one of the Twenty-Third Count.

32. The defendant, Yale New Haven Hospital's intentionally, wantonly or without exercise of due care encouraged its agents, apparent agents, employees, and/or staff members to remove the decedent's ventilator caused the decedent immediate apprehension of harmful and offensive.

33. The defendant, Yale New Haven Hospital's agents, apparent agents, employees, and/or staff members, intentionally, wantonly or without

exercise of due care removed the decedent's ventilator caused the decedent immediate apprehension of harmful and offensive contact.

34. As a direct and proximate result of the defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members the decedent suffered the following injuries:

(a) death;

(b) suffocation;

(c) fear of death;

(d) stress;

(e) anxiety; and

(f) pain and suffering

TWENTY- FOURTH COUNT (Clarence Marsala Administrator of the Estate of Helen Marsala- Battery)

1-31. The Plaintiff, Clarence Marsala Administrator of the Estate of Helen Marsala, repeats and re-alleges paragraphs one through thirty-one of the Twentieth Count as if fully set forth herein as paragraphs one through thirty-one of the Twenty-Fourth Count.

32. The defendant, Yale New Haven Hospital's intentionally, wantonly or without exercise of due care encouraged its agents, apparent agents, employees, and/or staff members to remove the decedent's ventilator.

33. The defendant, Yale New Haven Hospital's agents, apparent agents, employees, and/or staff members intentionally, wantonly or without

exercise of due care removed the decedent's ventilator which constituted harmful and offensive contact that offends a reasonable sense of personal injury.

34. As a direct, immediate, and proximate result of the defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members the decedent suffered the following injuries:

(a) death;

(b) suffocation;

(c) fear of death;

(d) stress;

(e) anxiety; and

(f) pain and suffering

TWENTY- FIFTH COUNT (Clarence Marsala Administrator of the Estate of Helen Marsala- Right to Privacy)

1-31. The Plaintiff, Clarence Marsala Administrator of the Estate of Helen Marsala, repeats and re-alleges paragraphs one through thirty-one of the Twentieth Count as if fully set forth herein as paragraphs one through thirty-one of the Twenty-Fifth Count.

32. The defendant, Yale New Haven Hospital's agents, apparent agents, employees, and/or staff members removal of the decedent's ventilator violated the decedent's right to privacy, in that it:

(a) failed to considered the patient's wishes concerning the withholding or withdrawal of life support systems before it permanently removed the ventilator without replacement from the decedent, Helen Marsala, causing her death;

(b) failed to abide by the decedent's constitutional right to determine her own medical treatment;

(c) deprived the decedent of life without the consent of the decedent, next of kin, and/or any other legally authorized persons;

33. As a direct and proximate result of the defendant, Yale New Haven Hospital's conduct through its agents, apparent agents, employees, and/or staff members the decedent suffered the following injuries:

(a) death;

(b) suffocation;

(c) fear of death;

(d) stress;

(e) anxiety; and

(f) pain and suffering

TWENTY- SIXTH COUNT (Clarence Marsala, Administrator of the Estate of Helen Marsala- Medical Malpractice -Connecticut General Statutes § 52-555)

1-30. The Plaintiff, Clarence Marsala Administrator of the Estate of Helen Marsala, repeats and re-alleges paragraphs one through thirty of the First Count as if fully set forth herein as paragraphs one through thirty of the Twenty-Sixth Count.

31. As a result of the defendant, Yale New Haven Hospital's conduct, through its agents, employees and/or staff members acting within the scope of their employment the ventilator was removed from Helen Marsala without replacement causing her to suffer the following serious, painful and permanent injuries:

a) death;

b) suffocation;

c) fear of death;

d) stress;

e) anxiety; and

f) pain and suffering.

32. The injuries and damages suffered by the decedent, Helen Marsala, were caused as a result of the professional negligence and careless of the defendant, Yale New Haven Hospital, through its agents, apparent agents, servants and/or employees in that they:

(a) Failed to reintubate Helen Marsala when she ceased breathing on her own;

(b) Executed do not resuscitate orders without request, consultation or sent by Helen Marsala or Clarence Marsala;

(c) Failed to properly ascertain Helen Marsala's wishes to remain on life support;

(d) Failed to honor Helen Marsala's wishes to remain on life support;

(e) Failed to consult Clarence Marsala to ascertain Helen Marsala's wishes to remain on life support;

(f) Failed to honor the wishes of Helen Marsala to remain on life support as advised by Clarence Marsala;

(g) Failed to honor the wishes of Helen Marsala to remain on life support as advised by Helen Marsala's family and next of kin;

(h) Unilaterally decided to withhold life support systems from Helen Marsala;

(i) Failed to consult with a disinterested expert despite Yale New Haven Hospital, The Ethics Committee, and the treating physicians despite a strong economic incentive for discontinuing life sustaining therapy for Helen Marsala;

(j) Executed at least two do not resuscitate orders without request of Helen Marsala or Clarence Marsala in violation of C.G.S. §10a-580d;

(k) Failed to consider the wishes of Helen Marsala concerning the withholding or withdrawal of life support systems in violation of C.G.S. §19a-571;

(l) Failed to consider the wishes of Helen Marsala as expressed by Clarence Marsala concerning the withholding or withdrawal of life support systems in violation of C.G.S. §19a-571;

(m) Failed to consider the wishes of Helen Marsala as expressed by her family and next of kin concerning the withholding or withdrawal of life support systems in violation of C.G.S. §19a-571;

(n) Failed to take all reasonable steps to transfer care of Helen Marsala as promptly as practicable once they had decided they were unwilling to comply with the wishes of Helen Marsala in violation of C.G.S. §19a-580a;

(o) Failed to assist in the transfer of Helen Marsala to a medical facility that would honor her wishes to remain on life support;

(p) Failed to provide notice within a reasonable time prior to withholding or causing the removal of any life support system in violation of C.G.S. §19a-580; and

(q) Failed to pursue resolution of any dispute over the meaning or application of C.G.S. §19a-570 *et seq* or the wishes of Helen Marsala with the probate court in violation of C.G.S. §19a-580c.

33. On or about June 26, 2012, the plaintiff, Clarence Marsala was duly appointed Administrator of the Estate of Helen Marsala by the Probate Court District of Derby and continues to act in said capacity.

34. An opinion by a similar healthcare provider in accordance with C.G.S. §52-190a(a) is attached hereto as Exhibit A.

35. A petition for a ninety day extension filed in accordance with C.G.S. §52-190a(b) is attached in support of these claims is attached as Exhibit B.

TWENTY- SEVENTH COUNT (Clarence Marsala – Loss of Consortium - Connecticut General Statutes § 52-555a)

1-35. The Plaintiff, Clarence Marsala, repeats and re-alleges paragraphs one through thirty-five of the Twenty-Sixth Count as if fully set forth herein as paragraphs one through thirty-five of the Twenty-Sixth Count.

36. At all times relevant herein, the plaintiff, Clarence Marsala, was At all times relevant herein, the plaintiff, Clarence Marsala, was the husband of Helen Marsala and has thereby lost, and will continue to lose, the companionship, care, and affection of his wife as a result of the injuries and

damages Helen Marsala suffered as a consequence of the events outlined in this complaint.

WHEREFORE, plaintiffs claim the following relief:

1. Compensatory damages;
2. Punitive damages;
3. Attorney's fees;
4. Interests and costs; and
5. Such other relief as the court deems appropriate.

PLAINTIFFS

By: _____
Jeremy C. Virgil

Zeldes, Needle & Cooper, P.C.
1000 Lafayette Blvd., 5th Floor
Bridgeport, CT 06604
Tel: (203) 333-9441
Fax: (203) 333-1489
Juris No. 69695

Their Attorneys

DOCKET NO. AAN-CV12-6010861-S	:	SUPERIOR COURT
CLARENCE MARSALA, MICHAEL MARSALA, GARY MARSALA, TRACEY MARSALA, KEVIN MARSALA, RANDY MARSALA; and CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	J. D. OF MILFORD/ANSONIA
v.	:	AT MILFORD
YALE NEW HAVEN HOSPITAL, INC., d/b/a YALE NEW HAVEN HOSPITAL	:	OCTOBER 22, 2012

AMOUNT IN DEMAND

The plaintiffs claim damages that are greater than FIFTEEN THOUSAND and 00/100 DOLLARS ($15,000.00), exclusive of interest and costs.

PLAINTIFFS

By: _____
Jeremy C. Virgil

Zeldes, Needle & Cooper, P.C.
1000 Lafayette Blvd., 5th Floor
Bridgeport, CT 06604
Tel: (203) 333-9441
Fax: (203) 333-1489

Juris No. 69695

Their Attorneys

RETURN DATE: NOVEMBER 13, 2012	:	SUPERIOR COURT
CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	J.D. OF MILFORD/ANSONIA
v.	:	AT MILFORD
YALE NEW HAVEN HOSPITAL, INC., d/b/a YALE NEW HAVEN HOSPITAL	:	OCTOBER 22, 2012

COMPLAINT

FIRST COUNT (Medical malpractice)

1. At all times relevant herein, the Defendant, Yale New Haven Hospital, Inc. d/b/a Yale New Haven Hospital ("Yale New Haven Hospital"), was and is an acute care facility duly licensed as a hospital in the State of Connecticut with a principal place of business in New Haven, Connecticut.

2. On July 24, 2010, the decedent, Helen Marsala died.

3. Prior to her death, the decedent, Helen Marsala, did not create a living will.

4. Prior to her death, the decedent, Helen Marsala, had discussions with Clarence Marsala, where she asked him to make the decisions regarding life support if she were ever in a situation where she could not make the decision herself.

5. Prior to her death, the decedent, Helen Marsala, expressed intentions to remain alive if ever on life support.

6. Clarence Marsala (spouse), Michael Marsala (son), Gary Marsala (son), Tracey Marsala (daughter), Kevin Marsala (son) and Randy Marsala (son) were all the decedent, Helen Marsala's next of kin.

7. Commencing on or about April 7, 2010 and continuing through to approximately June 19, 2010, Griffin Hospital, undertook the care, treatment, monitoring and supervision of the decedent, Helen Marsala, for her general overall health.

8. On or about April 7, 2010, the decedent, Helen Marsala had surgery on her wrist at Griffin Hospital and contracted an infection.

9. During her stay at Griffin Hospital, the decedent, Helen Marsala, while still conscious, was placed on life support.

10. Several times during her stay at Griffin Hospital, agents, apparent agents, employees and/or staff of Griffin Hospital consulted the plaintiff, Clarence Marsala about removing life support from the decedent, Helen Marsala. Clarence Marsala unambiguously refused.

11. On or about June 19, 2010, the plaintiff, Clarence Marsala, in an effort to ensure continued life support and avoid further requests to remove life support, had the decedent, Helen Marsala transferred to the defendant, Yale New Haven Hospital.

12. Commencing on or about June 19, 2010 and continuing through to on or about July 24, 2010, the defendant, Yale New Haven Hospital, undertook the care, treatment, monitoring and supervision of the decedent, Helen Marsala.

13. On or about June 19, 2010, agents, apparent agents, employees and/or staff of Yale New Haven Hospital consulted Clarence Marsala and Michael Marsala, about removing the ventilator from the decedent, Helen Marsala without replacement (if she failed to continue breathing on her own).

Clarence Marsala and Michael Marsala unambiguously refused and instructed the defendant to never "pull the plug."

14. Several times during her stay at Yale New Haven Hospital, agents, apparent agents, employees and/or staff of the defendant, Yale New Haven Hospital removed the decedent, Helen Marsala's ventilator, but replaced it when she stopped breathing on her own.

15. At some time between June 19, 2010 and July 24, 2010, agents, apparent agents, employees and/or staff of Yale New Haven Hospital consulted Clarence Marsala, Gary Marsala and Randy Marsala about removing the ventilator from the decedent, Helen Marsala without replacement (if she failed to continue breathing on her own). Clarence Marsala, Gary Marsala, and Randy Marsala unambiguously refused and instructed the defendant to never "pull the plug."

16. Several times during her stay at the defendant, Yale New Haven Hospital, staff members and/or clergymen working as agents, apparent agents, servants, employees at Yale New Haven Hospital consulted Clarence Marsala about removing the ventilator from the decedent, Helen Marsala without replacement (if she failed to continue breathing on her own). Clarence Marsala unambiguously refused, insisted the ventilator be replaced, and instructed the defendant to never "pull the plug."

17. Prior to July 24, 2010, the defendant, Yale New Haven Hospital encouraged the decedent's treating physicians to remove the ventilator from the

decedent, Helen Marsala without replacement (if she failed to continue breathing on her own).

18. On or about July 24, 2010, agents, apparent agents, employees and/or staff of the defendant, Yale New Haven Hospital informed the Gary Marsala that they were going to permanently remove the ventilator from the decedent, Helen Marsala, that night without replacement (if she failed to continue breathing on her own). Gary Marsala unambiguously objected and reported the information to his father, Clarence Marsala.

19. On or about July 24, 2010, agents, apparent agents, employees and/or staff of the defendant, Yale New Haven Hospital informed Clarence Marsala after he arrived, that they were going to permanently remove the ventilator from the decedent, Helen Marsala, that night without replacement (if she failed to continue breathing on her own). Clarence Marsala unambiguously objected.

20. On or about July 24, 2010, over the objection of Clarence Marsala and Gary Marsala, and without giving Clarence Marsala, time to transport the decedent, the agents, apparent agents, employees, agents, and/or staff members of the defendant, Yale New Haven Hospital, acting within the scope of their employment with the defendant and in furtherance of the defendant's business, permanently removed the ventilator from the decedent, Helen Marsala, causing her to suffocate and die.

21. The defendant, Yale New Haven Hospital had a duty to ascertain the wishes of the decedent, Helen Marsala, from her spouse, Clarence Marsala prior to removing life support.

22. The defendant, Yale New Haven Hospital ignored the wishes of the decedent, Helen Marsala, as expressed from her spouse, Clarence Marsala prior to removing life support.

23. As a result of the defendant, Yale New Haven Hospital's conduct, through its agents, employees and/or staff members acting within the scope of their employment the ventilator was removed from Helen Marsala without replacement causing her to suffer the following serious, painful and permanent injuries:

a) death;

b) suffocation;

c) fear of death;

d) stress;

e) anxiety; and

f) pain and suffering.

24. The injuries and damages suffered by the decedent, Helen Marsala, were caused as a result of the professional negligence and careless of the defendant, Yale New Haven Hospital, through its agents, apparent agents, servants and/or employees in that they:

(a) Failed to reintubate Helen Marsala when she ceased breathing on her own;

(b) Executed do not resuscitate orders without request, consultation or sent by Helen Marsala or Clarence Marsala;

(c) Failed to properly ascertain Helen Marsala's wishes to remain on life support;

(d) Failed to honor Helen Marsala's wishes to remain on life support;

(e) Failed to consult Clarence Marsala to ascertain Helen Marsala's wishes to remain on life support;

(f) Failed to honor the wishes of Helen Marsala to remain on life support as advised by Clarence Marsala;

(g) Failed to honor the wishes of Helen Marsala to remain on life support as advised by Helen Marsala's family and next of kin;

(h) Unilaterally decided to withhold life support systems from Helen Marsala;

(i) Failed to consult with a disinterested expert despite Yale New Haven Hospital, The Ethics Committee, and the treating physicians despite a strong economic incentive for discontinuing life sustaining therapy for Helen Marsala;

(j) Executed at least two do not resuscitate orders without request of Helen Marsala or Clarence Marsala in violation of C.G.S. §10a-580d;

(k) Failed to consider the wishes of Helen Marsala concerning the withholding or withdrawal of life support systems in violation of C.G.S. §19a-571;

(l) Failed to consider the wishes of Helen Marsala as expressed by Clarence Marsala concerning the withholding or withdrawal of life support systems in violation of C.G.S. §19a-571;

(m) Failed to consider the wishes of Helen Marsala as expressed by her family and next of kin concerning the withholding or withdrawal of life support systems in violation of C.G.S. §19a-571;

(n) Failed to take all reasonable steps to transfer care of Helen Marsala as promptly as practicable once they had decided they were unwilling to comply with the wishes of Helen Marsala in violation of C.G.S. §19a-580a;

(o) Failed to assist in the transfer of Helen Marsala to a medical facility that would honor her wishes to remain on life support;

(p) Failed to provide notice within a reasonable time prior to withholding or causing the removal of any life support system in violation of C.G.S. §19a-580; and

(q) Failed to pursue resolution of any dispute over the meaning or application of C.G.S. §19a-570 *et seq* or the wishes of Helen Marsala with the probate court in violation of C.G.S. §19a-580c.

25. On or about June 26, 2012, the plaintiff, Clarence Marsala was duly appointed Administrator of the Estate of Helen Marsala by the Probate Court District of Derby and continues to act in said capacity.

26. An opinion by a similar healthcare provider in accordance with C.G.S. §52-190a(a) is attached hereto as Exhibit A.

27. A petition for a ninety day extension filed in accordance with C.G.S. §52-190a(b) is attached in support of these claims is attached as Exhibit B.

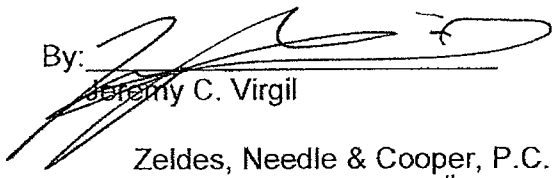
WHEREFORE, the Plaintiff claims the following:

1) Compensatory Damages;

2) Interest and Costs; and

3) All other additional relief this Court deems appropriate.

PLAINTIFF

By: 
Jeremy C. Virgil

Zeldes, Needle & Cooper, P.C.
1000 Lafayette Blvd., 5th Floor
Bridgeport, CT 06604
Tel: (203) 333-9441
Fax: (203) 333-1489
Juris No. 69695

RETURN DATE: NOVEMBER 13, 2012	:	SUPERIOR COURT
CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	J.D. OF MILFORD/ANSONIA
v.	:	AT MILFORD
YALE NEW HAVEN HOSPITAL, INC., d/b/a YALE NEW HAVEN HOSPITAL	:	OCTOBER 22, 2012

AMOUNT IN DEMAND

The plaintiffs claim damages that are greater than FIFTEEN THOUSAND and 00/100 DOLLARS ($15,000.00), exclusive of interest and costs.

PLAINTIFF

By: _____
Jeremy C. Virgil

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v.	:	AT MILFORD
YALE NEW HAVEN HOSPITAL, INC., d/b/a YALE NEW HAVEN HOSPITAL	:	OCTOBER 22, 2012

CERTIFICATE OF GOOD FAITH

It is not clear that this matter qualifies for or is subject to the requirements of C.G.S. §52-190a. However, I attest that this matter has been reviewed in accordance with the requirements of C.G.S. §52-190a and that after a reasonable inquiry, as permitted by the circumstances, there are grounds for a good faith belief that there was negligence in the care and/or treatment of the decedent, Helen Marsala. I am in possession of a written and signed opinion of a similar health care provider, as defined in C.G.S. §52-184c A properly redacted copy of such written opinion of the similar health care provider is attached to this complaint as Exhibit A.

PLAINTIFF

By: _____
Jeremy C. Virgil

Zeldes, Needle & Cooper, P.C.
1000 Lafayette Blvd., 5th Floor
Bridgeport, CT 06604
Tel: (203) 333-9441
Fax: (203) 333-1489

Juris No. 69695

DOCKET NO.: AAN-CV-12-6010861-S

CLARENCE MARSALA, MICHAEL MARSALA GARY MARSALA, TRACEY MARSALA, KEVIN MARSALA, RANDY MARSALA; and CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	SUPERIOR COURT J.D. OF MILFORD/ANSONIA AT MILFORD
VS.	:	
YALE-NEW HAVEN HOSPITAL, INC. d/b/a YALE NEW HAVEN HOSPITAL	:	MARCH 22, 2013

DEFENDANT YALE-NEW HAVEN HOSPITAL'S MOTION TO STRIKE

Pursuant to Practice Book §10-39, defendant Yale-New Haven Hospital (the "Hospital") moves to strike Counts One through Twenty and Counts Twenty-Three through Twenty-Five of plaintiffs' Second Amended Complaint, dated October 22, 2012.

Counts One through Six (negligent infliction of emotional distress) must be stricken because the Hospital did not owe plaintiffs a duty of care to prevent emotional distress arising out of the medical care and treatment rendered to the decedent, Helen Marsala.

Counts Seven through Twelve (intentional infliction of emotional distress) fail as a matter of law because the facts as pled do not support a claim for intentional infliction of emotional distress. Specifically, plaintiffs fail to plead facts establishing that the Hospital "intended to inflict emotional distress" on the plaintiffs. In addition, plaintiffs are unable to establish that the Hospital's conduct was "extreme and outrageous" where the Hospital's actions were consistent with Connecticut's removal of life support statute – General Statutes §19a-571.

Counts Thirteen through Nineteen (CUTPA) also fail as a matter of law because plaintiffs' allegations involve the delivery of medical care at the Hospital, rather than any entrepreneurial aspects of the case, and therefore cannot state a claim under *Haynes v. Yale New*

Haven Hospital, 243 Conn. 17, 35 (1997). Moreover, plaintiffs lack standing to bring a CUTPA claim because they have failed to allege any "ascertainable loss" as required by the statute.

Count Twenty (violation of General Statutes § 19a-571) fails to state a cognizable claim because General Statutes §19a-571 does not contain any provision creating a private right of action and, in fact, provides immunity to healthcare providers in decisions involving the removal of life support. Moreover, even if a private cause of action were permitted under the statute – which the Hospital asserts it is not – the actions taken by the Hospital were consistent with General Statutes § 19a-571.

Counts Twenty-three and Twenty-Four (assault and battery) fail to state cognizable claims. Specifically, plaintiffs fail to plead any facts to support that the Hospital's alleged actions "caused the decedent immediate apprehension of harmful and offensive contact" or constituted an "intentional blow" – required elements of a claim for assault and/or battery. Moreover, plaintiffs' claims are barred by General Statutes § 19a-571.

Count Twenty-Five (right to privacy) fails as a matter of law because the facts as pled do not support a claim for violation of right to privacy. Moreover, plaintiffs' claim is barred by General Statutes § 19a-571.

For these reasons, as discussed more fully in the accompanying Memorandum of Law, plaintiffs' claims must be stricken as a matter of law.

DEFENDANT,
YALE-NEW HAVEN HOSPITAL

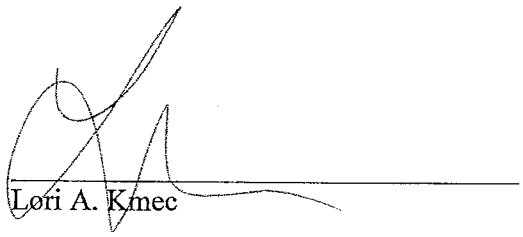
By: _____

Penny Q. Seaman
Lori A. Kmec
Wiggin and Dana LLP
One Century Tower, P.O. Box 1832
New Haven, CT 06508-1832
Tel: (203)498-4490
Juris No. 67700

CERTIFICATION

This is to certify that a copy of the foregoing was served via first class mail, this 22nd day of March 2013 on the following counsel of record:

Jeremy C. Virgil, Esq.
Michael R. Pedevillano, Esq.
Zeldes, Needle & Cooper, P.C.
PO Box 1740
Bridgeport, CT 06601-1740



Lori A. Kmec

DOCKET NO.: AAN-CV-12-6011711-S

CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	J.D. OF MILFORD/ANSONIA AT MILFORD
VS.	:	
YALE-NEW HAVEN HOSPITAL, INC. d/b/a YALE NEW HAVEN HOSPITAL	:	MARCH 22, 2013

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT YALE-NEW HAVEN HOSPITAL'S MOTION TO STRIKE

In this tort action, plaintiffs challenge Yale-New Haven Hospital's (the "Hospital") decision to remove life support from the decedent, Helen Marsala, on July 24, 2010. Plaintiffs filed this action on July 20, 2012 and amended their complaint on August 31, 2012 and October 22, 2012, respectively. Plaintiffs' Second Amended Complaint (hereinafter "Complaint") contains twenty-seven Counts against the Hospital, including negligent infliction of emotional distress (Counts 1-6); intentional infliction of emotional distress (Counts 7-12); violation of the Connecticut Unfair Trade Practices Act (Counts 13-19); violation of Conn. Gen. Stat. § 19a-571 (Count 20); wrongful death with loss of consortium (Counts 21-22); assault (Count 23); battery (Count 24); violation of the right to privacy (Count 25); and medical negligence with loss of consortium (Counts 26-27).

Although alleging a variety of claims, the underlying facts giving rise to each of plaintiffs' claims involve the medical treatment rendered to the decedent, Helen Marsala. Specifically, plaintiffs challenge the Hospital's decision to "permanently remove the ventilator from the decedent, Helen Marsala" on July 24, 2010 and allege that the removal of life support on this date caused Mrs. Marsala "to suffocate and die." Complaint, ¶¶ 25-30. All counts rely on these allegations.

On these facts alone, plaintiffs are unable to establish claims for negligent and intentional infliction of emotional distress (Counts 1-12), violation of General Statutes § 19a-571 (Count 20), assault and battery (Counts 23-24), and violation of right to privacy (Count 25) as a matter of law. Moreover, plaintiffs lack standing to assert a claim under General Statutes §19a-571 because it does not contain any provision creating a private right of action and, in fact, provides immunity to healthcare providers in decisions involving the removal of life support. Furthermore, plaintiffs lack standing to bring a CUTPA claim because they have failed to allege any "ascertainable loss" as required by the statute. In addition, plaintiffs' CUTPA allegations fail as a matter of law because they involve the delivery of medical care at the Hospital, rather than any entrepreneurial aspects of the case, and therefore cannot state a claim under *Haynes v. Yale New Haven Hospital*, 243 Conn. 17, 35 (1997). For these reasons, Counts 1-20 and Counts 23-25 of plaintiffs' Complaint must be stricken.

ARGUMENT

I. Motion to Strike Standards

A motion to strike contests the legal sufficiency of the allegations to state a claim upon which relief can be granted. *See* Practice Book § 10-39(a)(1); *Novametrix Med. Sys., Inc. v. BOC Group, Inc.*, 224 Conn. 210, 214-15 (1992). The motion admits facts that are "well pleaded," but "does not admit legal conclusions or the truth or accuracy of opinions." *Bennett v. Connecticut Hospice, Inc.*, 56 Conn. App. 134, 136 (1999). In ruling on a motion to strike, "the trial court's inquiry is to ascertain whether the allegations in each count, if proven, would state a claim on which relief could be granted." *Id.* at 136. "[M]ere conclusions of law that are unsupported by the facts" are insufficient to avoid a motion to strike. *Novametrix*, 224 Conn. at 215. Moreover, absent factual allegations sufficient to provide a legal basis for imposing

liability, a claim is properly disposed of at the pleadings stage by way of a motion to strike. *See, e.g., Gazo v. City of Stamford*, 255 Conn. 245, 260 (2001).

II. Counts One Through Six Fail To State A Bystander Claim For Negligent Infliction Of Emotional Distress.

In Counts One through Six, plaintiffs[1] allege that the Hospital negligently inflicted emotional distress upon the plaintiffs by providing medical care to *a third party* – namely, the decedent, Helen Marsala. None of the plaintiffs were patients of the Hospital and the Hospital owed them no duty of care with respect to the medical treatment provided to the decedent. Accordingly, plaintiffs' independent claims of emotional distress must be stricken.

A threshold issue for any claim of negligence is whether the defendant owed the plaintiff a duty of care. *See e.g., Murillo v. Seymour Ambulance Ass'n*, 264 Conn. 474, 478-79 (2003); *Perodeau v. City of Hartford*, 259 Conn. 729, 754-63 (2002). Here, plaintiffs rely on an alleged breach of a duty that the Hospital owed to the decedent, a patient of the Hospital, to recover for their own emotional distress. *See* Compl., Counts 1-6, ¶¶ 32-33. In other words, plaintiffs are pursuing a cause of action that "is a form of third party liability of the defendants." *Mendillo v. Bd. of Educ. of E. Haddam*, 246 Conn. 456, 480 (1998). In essence, plaintiffs "seek to recover from the [Hospital], not for tortious harms that the [Hospital] inflicted directly on them, but for emotional harms they suffered as a result of the [Hospital's] tortious conduct committed against another with whom they have a close relationship, namely, their [spouse and] parent." *Id.*[2]

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[1] There are seven named plaintiffs in this action, including the decedent's husband, Clarence Marsala, individually and on behalf of the decedent's estate, and his five children – Michael Marsala, Gary Marsala, Tracey Marsala, Kevin Marsala, and Randy Marsala. For ease, the term "plaintiffs" is used collectively in this motion.

[2] Plaintiffs concede that the Hospital did not have a medical professional-patient relationship with any plaintiff – only the decedent. *See* Pls'. Obj. to Def.'s Mot. to Dismiss, dated Nov. 8, 2012, at 6 (dkt. no. 109) ("no plaintiff other than the decedent had a professional-patient relationship with the defendant hospital.").

Extending a duty to a third party, however, is "the exception rather than the rule," and the Supreme Court has repeatedly refused to recognize any exception in cases involving medical care and emotional distress. *Id.* at 482. *See, e.g.*, *Murillo*, 264 Conn. at 478 ("[A]s a matter of public policy, the defendants owed no duty to the plaintiff—a bystander who was not a patient of the defendants—to prevent foreseeable injury to her as a result of her observing the medical procedures performed on her sister."); *Mendillo*, 246 Conn. at 477-96 (defendants owed no duty of care to children to avoid children's emotional harm resulting from defendants' tortious conduct committed against parent).[3]

Courts have repeatedly recognized that, as a matter of public policy, a health care provider's duty does not extend beyond the patient. *See Murillo*, 264 Conn. at 481. In fact, "[m]edical judgments as to the appropriate treatment of a patient ought not to be influenced by the concern that a visitor may become upset from observing such treatment or from the failure to follow some notion of the visitor as to care of the patient." *Maloney*, 208 Conn. at 403. The *Maloney* Court recognized that the "focus of the concern of medical care practitioners should be upon the patient and any diversion of attention or resources to accommodate the sensitivities of

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[3] Indeed, case law makes clear that third-party emotional distress claims are barred in cases involving medical care. *See Zamstein v. Marvasti*, 240 Conn. 549, 559 (1997) (psychiatrist engaged to examine children for possible sexual abuse owed no duty of care to the children's father); *Fraser v. United States*, 236 Conn. 625, 632-633 (1996) (psychotherapist owed no duty of care to a third party injured by his psychiatric outpatient); *Maloney v. Conroy*, 208 Conn. 392, 399 (1988) (physician owed no duty of care to his patient's daughter, who suffered emotional distress from observing her mother's health deteriorate from the physician's substandard care); *Krawczyk v. Stingle*, 208 Conn. 239, 244-46 (1988) (attorney owed no duty of care to client's intended beneficiaries for failing to arrange for timely execution of estate planning documents); *Amodio v. Cunningham*, 182 Conn. 80, 81-82 (1980) (defendants owed no duty of care to mother to avoid emotional distress she suffered upon witnessing deterioration of daughter's health, and death, due to medical malpractice); *see also Calabrese v. Conn. Hospice, Inc.*, 2009 WL 2357898, at *7-13 (Conn. Super. Ct. June 30, 2009) (defendant hospice provider owed no duty of care to spouse to avoid emotional distress she suffered upon witnessing the deterioration of her husband's health, and death, due to medical malpractice).

others is bound to detract from that devoted to patients." *Id.* Additionally, "the law should encourage medical care providers, such as the defendants, to devote their efforts to their patients, and not be obligated to divert their attention to the possible consequences to bystanders of medical treatment of the patient." *Murillo*, 264 Conn. at 481.

Because a health care provider owes no duty to a non-patient plaintiff arising out of medical care rendered to a third person, plaintiffs may not pursue the independent claims alleged in Counts One through Six as a matter of law. *See Murillo*, 264 Conn. at 478; *Zamstein*, 240 Conn. at 559; *Maloney*, 208 Conn. at 399; *Amodio*, 182 Conn. at 82. *See also, e.g.*, Clark v. New Britain Gen. Hosp., X03CV990496131, 2002 WL 1150726, at *2 (Conn. Super. Ct. May 9, 2002) (parents of infant patient "cannot state a cause of action for Negligent Infliction of Emotional Distress because the [parents] themselves were not placed in any risk").[4]

Moreover, even if the Court were to find that the narrowly circumscribed cause of action for bystander emotional distress applies in this case – which the Hospital asserts it does not – plaintiffs have not pled each of the elements of a bystander emotional distress claim required under *Clohessy v. Bachelor*, 237 Conn 31, 49 (1996) – namely, that the alleged injury was reasonably foreseeable and: (1) that the bystander was closely related to the injured victim, (2) the bystander's distress was caused by contemporaneous sensory perception of the event, (3) the victim was seriously injured, and (4) the bystander suffered serious emotional injury. *Clohessy*, 237 Conn. at 52-54. Specifically, plaintiffs fail to allege observation of a specific negligent

[4] *Valentin v. St. Francis Hosp. & Med. Ctr.*, CV040832314, 2005 WL 3112881, at *3 (Conn. Super. Ct. Nov. 7, 2005) is inapposite on this issue. In that case, plaintiff's negligent infliction of emotional distress claim centered on the defendant hospital's failure to contact her as next of kin at any time prior to terminating the decedent's life support. *Id.* Here, plaintiffs' complaint establishes that the Hospital consulted plaintiffs on numerous occasions regarding the decedent's life support measures. *See* Complaint, Counts 1-6, ¶¶ 23, 28-29. All unpublished cases are attached hereto as Exhibit A.

event resulting in their alleged injuries and thus fail to meet the "contemporaneous sensory perception" requirement under *Clohessy*. Here, plaintiffs allege that the Hospital "ignored the wishes of the decedent, Helen Marsala, as expressed from her next of kin . . . prior to removing life support" and that the removal of the decedent's life support resulted in emotional harm. Compl., Counts 1-6, ¶ 32. However, "contemporaneous sensory perception" requires that plaintiffs observe a "sudden and brief event which proximately caused the [decedent's] injury and which could be the subject of sensory perception by the [plaintiffs]." *Amodio*, 182 Conn. at 92. Under *Clohessy*, "[m]erely observing the consequences of the defendant's negligence towards another person without perceiving the actual negligent behavior, however, is insufficient to maintain a cause of action for emotional distress to a bystander." *Clohessy*, 237 Conn. at 37 (quoting *Amodio*, 182 Conn. at 90)). Furthermore, "recovery for emotional distress resulting from injury inflicted upon another is . . . restricted to situations where the injury to the third party is manifest[ed] contemporaneously with the negligent act." *Amodio*, 182 Conn. at 91-92.

Plaintiffs' complaint does not allege that any plaintiff was present when the decedent's life support was removed. Therefore, plaintiffs fail to meet the contemporaneous sensory perception requirement under *Clohessy*. In cases where plaintiffs do not observe the specific negligent event that results in injury to a third person, "a cause of action for bystander emotional distress must be confined in order to avoid limitless liability. *Clohessy*, 237 Conn. at 44 (quoting *Portee v. Jaffee,* 84 N.J. 88, 99, 417 A.2d 521 (1980) (absent perception of a specific negligent event "the threat of emotional injury is lessened and the justification for liability is fatally weakened."). Accordingly, plaintiffs' claims for negligent emotional distress must be stricken.

III. Counts Seven Through Twelve Fail to State a Claim for Intentional Infliction of Emotional Distress

On the same facts, plaintiffs assert independent claims for intentional infliction of emotional distress in Counts Seven through Twelve. To state a claim for intentional infliction of emotional distress, plaintiffs must allege "'(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.'" *Appleton v. Bd. of Educ. of Town of Stonington*, 254 Conn. 205, 210 (2000) (quoting *Petyan v. Ellis,* 200 Conn. 243, 253 (1986)).

Here, plaintiffs have provided only conclusory language that the defendant intended to cause emotional distress. The Complaint states only that the Hospital "through its agents, apparent agents, employees, and/or other staff members, intended to inflict emotional distress . . ." Compl., Counts 7-12, ¶¶ 31. There are no facts alleged to support this allegation – only the legal conclusion that the Hospital intended to cause distress. Conclusory allegations, unsupported by facts, are insufficient to avoid a motion to strike. *See Novametrix Med. Sys.*, 224 Conn. at 215.

In addition, the Hospital's conduct does not rise to the level of "extreme and outrageous" because the Hospital's actions were compliant with Connecticut's removal of life support statute – General Statues §19a-571 – which provides immunity to healthcare providers. To qualify as "extreme and outrageous", the Hospital's conduct must exceed "'all bounds usually tolerated by decent society . . . .'" *Appleton*, 254 Conn. at 210 (quoting *Petyan*, 200 Conn. at 254 n. 5); *see also id.* at p. 210-211 (quoting 1 Restatement (Second), Torts § 46, comment (d), p. 73 (1965)) (to be liable, conduct must be "'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.'").

Here, General Statutes § 19a-571 required the Hospital to consider – not follow – plaintiffs' wishes prior to removing life support. The statute provides in relevant part:

> [A]ny physician . . . or any licensed medical facility who or which withholds, removes or causes the removal of a life support system of an incapacitated patient shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for such withholding or removal, provided . . . ***the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems.***[5]

Conn. Gen. Stat. § 19a-571(a) (emphasis added). Plaintiffs acknowledge in their complaint that the Hospital consulted plaintiffs regarding the removal of life support on several occasions. *See* Complaint, Counts 13-19, ¶¶ 23 ("[o]n or about June 19, 2010 . . . [the] Hospital consulted the plaintiffs, Clarence Marsala and Michael Marsala, about removing the ventilator from the decedent"); *see also* ¶¶ 25 ("[a]t some time between June 19, 2010 and July 24, 2010 . . . [the] Hospital consulted the plaintiffs, Clarence Marsala, Gary Marsala, and Randy Marsala, about removing the ventilator from the decedent . . . without replacement"); ¶¶ 26 ("several times during her stay . . . [the] Hospital consulted the plaintiff, Clarence Marsala, about removing the ventilator from the decedent").

Moreover, the complaint establishes that the Hospital, after consulting plaintiffs, informed them of the decision to remove life support on July 24, 2010. *See* Complaint, Counts 13-19, ¶¶ 28 ("on or about July 24, 2010 . . . [the] Hospital informed the plaintiff, Gary Marsala, that [it] was going to permanently remove the ventilator from the decedent . . . without replacement"); *see also* ¶¶ 29 ("on or about July 24, 2010 . . . [the] Hospital informed the

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[5] Plaintiffs concede that they are only alleging a violation of the third prong of General Statutes §19a-571. *See* Pls'. Obj. to Def.'s Mot. to Dismiss, dated Nov. 8, 2012, at 9 (dkt. no. 109) ("the plaintiffs are only alleging that the defendant violated the third prong of this statute . . .").

plaintiff, Clarence Marsala after he arrived, that [it] was going to permanently remove the ventilator from the decedent . . . without replacement"). By plaintiffs' own admission, the Hospital did not violate General Statutes § 19a-571 and therefore could not have constituted extreme or outrageous conduct.

It is the court's "gatekeeping function" to determine whether a reasonable fact finder could find the conduct alleged to be extreme or outrageous. *See e.g., Hartmann v. Gulf View Estates Homeowners Ass'n., Inc.,* 88 Conn. App. 290, 295 (2005) ("in assessing a claim for intentional infliction of emotional distress, the court performs a gatekeeping function"). In this capacity, it is the role of the Court to "determine whether the allegations of a complaint . . . set forth behaviors that a reasonable fact finder could find to be extreme or outrageous." *Id.* "In exercising this responsibility, the court is not fact finding, but rather it is making an assessment whether, as a matter of law, the alleged behavior fits the criteria required to establish a claim premised on intentional infliction of emotional distress." *Id.* at 295. Here, even the absence of General Statutes § 19a-571, the Hospital's actions do not rise to the level of "extreme and outrageous" conduct. Indeed, the facts as alleged in plaintiffs' complaint establish that the Hospital consulted plaintiffs on numerous occasions regarding the decedent's life support measures and notified them of the decision not to continue life support measures. Compl., Counts 7-12, ¶¶ 23, 25, 28-29. Accordingly, on these facts, plaintiffs' claims for intentional infliction of emotional distress fail as a matter of law.

IV. Counts Thirteen Through Nineteen Fail to State a Claim Under CUTPA

Plaintiffs claim that the Hospital's actions were "immoral, unethical, oppressive, and or unscrupulous" in violation of CUTPA in several ways. For three reasons, as explained in detail below, plaintiffs fail to allege a cause of action under CUTPA. Specifically, plaintiffs' claims

fail as a matter of law because the allegations involve the delivery of medical care at the Hospital, rather than any entrepreneurial aspects of the case, and therefore cannot state a claim under *Haynes v. Yale New Haven Hospital*, 243 Conn. 17, 35 (1997). Moreover, the Hospital's actions were consistent with public policy – specifically Connecticut's removal of life support statute (General Statutes§ 19a-571) – and could not violate CUTPA. Finally, plaintiffs lack standing to bring a CUTPA claim because they have failed to allege any "ascertainable loss" as required by the statute.

A. Standards of Unfairness

CUTPA prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). To determine if an act or practice is "unfair," Connecticut courts have applied the three-factor test, known as the "Cigarette Rule," adopted in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972). *See A-G Foods, Inc. v. Pepperidge Farm, Inc.*, 216 Conn. 200, 215 (1990). The three factors are: "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *FTC*, 405 U.S. at 244 n.5. The third "unjustified consumer injury" factor has its own three part test, which requires that an injury "must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." *Cheshire Mortg. Serv., Inc. v. Montes*, 223 Conn. 80, 113 (1992).

B. Plaintiffs' Complaint Fails to State A Claim Under CUTPA Because The Hospital's Alleged Actions Did Not Arise From the Entrepreneurial Aspects of Medicine.

In Counts Thirteen through Nineteen, plaintiffs attempt to implicate the entrepreneurial aspects of the Hospital's medical services. Specifically, plaintiffs allege that the submission of "financial paperwork for the defendant indicating that Helen Marsala and/or family was below the payment threshold and would not be able and/or obligated to compensate the defendant . . ." put the Hospital in the role of the decedent's creditor and that the "conflicting positions of being the decedent's creditor and surrogate gave the defendant a financial incentive in making the decision to permanently remove the decedent's life support over the objection of her family." *See* Complaint, Counts 13-19, ¶¶ 21, 34-37. These allegations do not bring plaintiffs' claims within the ambit of CUTPA.

The "touchstone" for a legally sufficient CUTPA claim against a health care provider is the involvement of an "entrepreneurial or business aspect" of the services in question – as distinct from "medical competence" or "medical malpractice based on the adequacy of staffing, training, equipment or support personnel." *Haynes v. Yale-New Haven Hosp.*, 243 Conn. 17, 38 (1997). Indeed, our Supreme Court has made clear that the practice of medicine may give rise to a CUTPA claim "only when the actions at issue are *chiefly* concerned with 'entrepreneurial' aspects of practice, such as the solicitation of business and billing practices, as opposed to claims directed at the competence of and strategy employed by the defendant." *Janusauskas v. Fichman*, 264 Conn. 796, 809 (2003) (emphasis in original, and internal quotation marks, citations, and alterations omitted). Put simply, "[m]edical malpractice claims recast as CUTPA claims cannot form the basis for a CUTPA violation. To hold otherwise, would transform every claim for medical malpractice into a CUTPA claim." *Haynes*, 243 Conn. at 38. As discussed below,

plaintiffs' allegations, at their core do not "chiefly" involve entrepreneurial aspects of the medical services in question. *Janusauskas*, 264 Conn. at 809.

In determining whether a claim against a healthcare provider falls under CUTPA, courts "must review the plaintiff[s'] allegations of CUTPA violations and look to the underlying nature of the claim to determine whether it is really a medical malpractice claim recast as a CUTPA claim." *Id.* Indeed, "the practice of medicine may give rise to a CUTPA claim 'only when the actions at issue are *chiefly* concerned with 'entrepreneurial' aspects of practice, such as the solicitation of business and billing practices, as opposed to claims directed at the 'competence of and strategy' employed by the . . . [Hospital].'" *Janusauskas v. Fichman*, 264 Conn. 796, 809 (2003) (quoting *Ikuno v. Yip,* 912 F.2d 306, 312 (9th Cir.1990)).

Regardless of how plaintiffs' allegations are styled in this case, the factual basis underlying each claim is the Hospital's care and treatment of the decedent, Helen Marsala. All of the allegations arise from actions taken in the course of the Hospital's provider-patient relationship with the decedent and the alleged misconduct relates to the exercise of medical judgment, specifically the judgment required in determining when to cease additional life saving measures. The decision whether or not to continue life support is clearly a medical decision and thus outside the scope of CUTPA. *See Haynes*, at 38 (prohibiting plaintiffs from utilizing CUTPA to penalize a health care provider's decision to render care or a health care provider's medical judgment that a patient will no longer benefit from such care).

Moreover, the Supreme Court has determined that CUTPA claims against health care providers are "not based on whether the motivation for an act is medical judgment or commercial advantage, but whether the act is part of the practice of medicine or part of the business of running a facility." *Bridgeport Hosp. v. Cone*, X01CV980151787S, 2000 WL 1705739, at *5

(Conn. Super. Ct. Oct. 24, 2000). Additionally, "[a]n inquiry into motivation is not a useful yardstick. Virtually any choice in medical treatment can be characterized as having some cost impact and thus be alleged to be related to commercial aspects of provision of health care." *Id.* CUTPA is applicable "only to the business operations that are the same for health care providers as for a business offering any other kind of product or service, such as billing or transactions involving corporate assets." *Id.* In the present case, the conduct at issue is the termination of life support, which is unquestionably related to the provision of medical care – not the non-medical administrative aspects of running a hospital. Accordingly, the plaintiffs do not have grounds for a claim under CUPTA.

C. The Hospital's Alleged Actions Were Consistent With Public Policy, and, Therefore Could not Violate CUTPA

a. The Hospital's Alleged Actions Did Not Violate General Statutes §19a-571.

As a basis for their CUTPA claims, plaintiffs allege that the Hospital violated General Statutes § 19a-571 by "making the decision to permanently remove the decedent's life support over the objection of her family." Compl., Counts 13-19, ¶ 37. However, the very section of the General Statutes cited by plaintiffs as supporting their CUTPA claims actually establishes that the Hospital had no obligation to follow plaintiffs' wishes regarding the removal of life support. Indeed, General Statutes § 19a-571 required the Hospital to consider – not follow - plaintiffs' wishes prior to removing life support. The statute provides in relevant part:

> [A]ny physician . . . or any licensed medical facility who or which withholds, removes or causes the removal of a life support system of an incapacitated patient shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for such withholding or removal, provided . . . ***the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems.***

Conn. Gen. Stat. § 19a-571(a) (emphasis added). Plaintiffs acknowledge in their complaint that the Hospital consulted plaintiffs regarding the removal of life support on several occasions. *See* Complaint, Counts 13-19, ¶¶ 23 ("[o]n or about June 19, 2010 . . . [the] Hospital consulted the plaintiffs, Clarence Marsala and Michael Marsala, about removing the ventilator from the decedent"); *see also* ¶¶ 25 ("[a]t some time between June 19, 2010 and July 24, 2010 . . . [the] Hospital consulted the plaintiffs, Clarence Marsala, Gary Marsala, and Randy Marsala, about removing the ventilator from the decedent . . . without replacement"); ¶¶ 26 ("several times during her stay . . . [the] Hospital consulted the plaintiff, Clarence Marsala, about removing the ventilator from the decedent"). Moreover, the complaint establishes that the Hospital, after consulting plaintiffs, informed them of the decision to remove life support on July 24, 2010. *See* Complaint, Counts 13-19, ¶¶ 28 ("on or about July 24, 2010 . . . [the] Hospital informed the plaintiff, Gary Marsala, that [it] was going to permanently remove the ventilator from the decedent . . . without replacement"); *see also* ¶¶ 29 ("on or about July 24, 2010 . . . [the] Hospital informed the plaintiff, Clarence Marsala after he arrived, that [it] was going to permanently remove the ventilator from the decedent . . . without replacement"). By plaintiffs' own admission, the Hospital did not violate General Statutes § 19a-571 and therefore could not have violated CUTPA.

Moreover, General Statutes §19a-571 is intended "by its express terms, to provide a safe harbor for physicians by insulating them from civil and criminal liability for discontinuing life support measures under certain specified circumstances." *Valentin v. St. Francis Hosp. & Med. Ctr.*, CV040832314, 2005 WL 3112881, at *3 (Conn. Super. Ct. Nov. 7, 2005). Under the statute, the Hospital is not required to obtain consent from the decedent's next of kin, but has a "duty to make reasonable efforts to inform the known and available next of kin so that he or she

could participate in the decision, based upon what the decedent would have wanted, prior to the removal of life support." *Id.* at *8. Here, the Hospital clearly satisfied this duty by consulting plaintiffs on numerous occasions about the wishes of the decedent. The fact that the Hospital did not ultimately follow these wishes as conveyed by plaintiffs does not constitute a violation of the statute.

b. The Hospital's Alleged Actions Did Not Violate General Statutes §53a-60b.

As an alternate basis for their CUTPA claims, plaintiffs allege that the Hospital's "decision to permanently remove the decedent's life support over the objection of her family" violated Connecticut's criminal assault statute - General Statutes § 53a-60b. However, plaintiffs fail to plead any facts establishing that the Hospital's decision to remove life support constituted "assault" in violation of public policy as expressed by General Statutes § 53a-60b. Courts define assault as the "intentional placing of another person in fear of imminent harmful or offensive contact." *United Nat. Ins. Co. v. Waterfront New York Realty Corp.*, 994 F.2d 105, 108 (2d Cir. 1993).

To establish a claim for assault, plaintiffs must allege "(1) that the defendant intended to cause a harmful or offensive contact, or an imminent apprehension of such contact, with another person; and (2) that the other person was put in imminent apprehension as a result." *Doe v. City of Waterbury*, 453 F. Supp. 2d 537, 552 (D. Conn. 2006) *aff'd sub nom. Roe v. City of Waterbury*, 542 F.3d 31 (2d Cir. 2008) and *judgment entered*, CIVA 301CV2298 SRU, 2006 WL 3332978 (D. Conn. Nov. 16, 2006). Here, the decedent was indisputably incapacitated at the time the decision was made to remove life support. Because the decedent was not conscious, it was not possible for her to be placed "in fear of imminent harmful or offensive contact." *United Nat. Ins.*, 994 F.2d at 108. Nowhere in plaintiffs' complaint is it alleged that the decedent

actually perceived any "imminent harmful or offensive contact." *Id.* Because plaintiffs have failed to adequately plead a claim for assault under General Statutes § 53a-60b, plaintiffs cannot establish a CUTPA claim under this statute.

D. Plaintiffs Lack Standing to Bring a CUTPA Claim Because They Fail to Allege Any Ascertainable Loss of Money or Property As Required By General Statutes §42-110g(a).

In order to have standing to bring an action under CUTPA, plaintiffs are required to allege "an ascertainable loss of money or property" as a result of the "use or employment of a method, act or practice" that is prohibited under the statute. *See, e.g.,* General Statutes § 42-110g(a). Here, plaintiffs have not alleged any "ascertainable loss" associated with the Hospital's decision to remove the decedent from life support on July 24, 2010. The complaint contains only the conclusory language that "the Hospital's conduct . . . caused the plaintiff . . . an ascertainable harm." *See* Complaint, Counts 13-19, § ¶ 39. Such conclusory allegations, unsupported by facts, are insufficient to avoid a motion to strike. *See Novametrix Med. Sys.*, 224 Conn. at 215. Accordingly, plaintiffs CUTPA allegations should be stricken.

VI. Count Twenty Fails To State A Claim Under General Statutes § 19a-571.

Plaintiffs allege in Count Twenty that the Hospital violated General Statutes § 19a-571 by "making the decision to permanently remove the decedent's life support over the objection of her family." Compl., Counts 13-19, ¶ 37. However, the language of the statute does not provide any private right of action for next of kin. To the contrary, the statute by its express terms provides immunity from liability to healthcare providers, such as the Hospital, in discontinuing life support measures, and provides in relevant part:

> [A]ny physician . . . or any licensed medical facility who or which withholds, removes or causes the removal of a life support system of an incapacitated patient shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for

such withholding or removal, provided . . . ***the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems.***

Conn. Gen. Stat. § 19a-571(a) (emphasis added). Indeed, the statute is intended to "provide a safe harbor for physicians by insulating them from civil and criminal liability for discontinuing life support measures under certain specified circumstances." *Valentin v. St. Francis Hosp. & Med. Ctr.*, CV040832314, 2005 WL 3112881, at *3 (Conn. Super. Ct. Nov. 7, 2005).

The statute does not provide a private right of action for next of kin. It is a "well settled fundamental premise that there exists a presumption in Connecticut that private enforcement does not exist unless expressly provided in a statute." *Gerardi v. City of Bridgeport*, 294 Conn. 461, 468 (2010). Nothing in the text of General Statutes §19a-571 or its legislative history suggests any intent to create a private cause of action for next of kin.[6] In the absence of an express right of action, plaintiffs' claim must be stricken as a matter of law.

Moreover, even if a private right of action did exist under General Statutes §19a-571 – which the Hospital asserts it does not - the statute does not require the Hospital to obtain consent from the decedent's next of kin prior to removing life support. Instead, the Hospital has only the "duty to make reasonable efforts to inform the known and available next of kin so that he or she could participate in the decision, based upon what the decedent would have wanted, prior to the removal of life support." *Valentin,* at *8. Here, the Hospital clearly satisfied this duty by consulting plaintiffs on numerous occasions about the wishes of the decedent. *See* Complaint,

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[6] Connecticut's removal of life support statute was enacted in 1985 and is codified at Connecticut General Statutes §19a-571. As originally enacted, the statute required the consent of the patient's next of kin before a Hospital or physician terminated life support. See General Statutes (Rev. to 1991) at §19a-571. In practice, the informed consent requirement had the unintended result of allowing next of kin to overrule a patient's wishes. *See* 34 H.R. Proc., Pt. 23 1991 Sess. p. 8668, 8669, 8670 In response, the legislature amended the statute in 1991 to abolish the requirement of obtaining the consent of next of kin prior to the removal of life support. *See id.* Given the changes in the statute, nothing in its language supports a private right of action for next of kin. (Attached as Exhibit B)

Counts 13-19, ¶¶ 23, 28. Thus, by plaintiffs' own admission, the Hospital did not violate General Statutes § 19a-571. Moreover, any allegation that the Hospital failed to consider the patient's wishes prior to withholding or withdrawing life support is patently false in light of the facts as pled.

VII. Count Twenty-Three Fails To State A Claim for Assault.

In Count Twenty-three, plaintiffs attempt to bring a common law claim for assault. Specifically, plaintiffs allege that the Hospital "intentionally, wantonly, or without exercise of due care removed the decedent's ventilator" and that this action "caused the decedent immediate apprehension of harmful and offensive contact." *See* Complaint, Count 23, ¶ 33. However, plaintiffs fail to plead any facts establishing that the Hospital's decision to remove life support constituted assault. Assault claims are based on a patient's right to determine what can be done to his or her body; for example, "a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schmeltz v. Tracy*, 119 Conn. 492, 522 (1935) (quoting *Schloendorff v. Soc'y of New York Hosp.*, 211 N.Y. 125, 130 (1914) *abrogated by Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3 (1957)). Courts define assault as the "intentional placing of another person in fear of imminent harmful or offensive contact." *United Nat. Ins. Co. v. Waterfront New York Realty Corp.*, 994 F.2d 105, 108 (2d Cir. 1993).

"To establish a claim for assault, plaintiffs must allege (1) that the defendant intended to cause a harmful or offensive contact, or an imminent apprehension of such contact, with another person; and (2) that the other person was put in imminent apprehension as a result." *Doe v. City of Waterbury*, 453 F. Supp. 2d 537, 552 (D. Conn. 2006) *aff'd sub nom. Roe v. City of Waterbury*, 542 F.3d 31 (2d Cir. 2008) and *judgment entered*, CIVA 301CV2298 SRU, 2006 WL 3332978 (D. Conn. Nov. 16, 2006). Here, the decedent was indisputably incapacitated at

the time the decision was made to remove life support. Because the decedent was not conscious, it was not possible for her to be placed "in fear of imminent harmful or offensive contact." *United Nat. Ins.*, 994 F.2d at 108. Nowhere in plaintiffs' complaint is it alleged that the decedent actually perceived any "imminent harmful or offensive contact." *Id.* Accordingly, plaintiffs have failed to adequately plead a claim for assault.

Moreover, as stated above, Connecticut's removal of life support statute – General Statutes § 19a-571 – shields the Hospital from liability on plaintiffs' assault claim. *See supra* Sections III and IV(c). Plaintiffs acknowledge in their complaint that the Hospital consulted plaintiffs regarding the removal of life support on several occasions. *See* Complaint, Counts 13-19, ¶¶ 23, 26. By plaintiffs' own admission, the Hospital consulted the plaintiffs about the decedent's wishes on several occasions, and therefore could not have violated General Statutes §19a-571. Accordingly, the statute shields the Hospital from liability for an assault claim.

VIII. Count Twenty-Four Fails To State A Claim For Battery.

In Count Twenty-four, plaintiffs attempt to bring a claim for battery alleging that the Hospital "intentionally, wantonly or without exercise of due care removed the decedent's ventilator which constituted harmful and offensive contact that offends a reasonable sense of personal injury." *See* Complaint, Count 24, ¶ 33. In order to establish a claim for battery, plaintiffs are required to allege a "negligent, wanton, or intentional blow." *See, e.g., Swainbank v. Coombs*, 19 Conn. Supp. 391, 394 (Conn. Super. Ct. 1955). Here, plaintiffs pled no facts to support the claim that the Hospital's actions constituted an "intentional blow." Plaintiffs have only pled that "[o]n or about June 19, 2010, agents, apparent agents, employees and/or staff of Yale New Haven Hospital consulted the plaintiffs, Clarence Marsala and Michael Marsala, about removing the ventilator from the decedent" and "[a]t some time between June 19, 2010 and July

24, 2010, agents, apparent agents, employees and/or staff of Yale New Haven Hospital consulted the plaintiffs, Clarence Marsala, Gary Marsala, and Randy Marsala, about removing the ventilator from the decedent . . . without replacement." Compl., Count 20, ¶¶ 23, 25.

In addition, a claim for civil battery requires plaintiffs to allege "that the defendant intended to cause a harmful or offensive contact, or an imminent apprehension of such contact, with another person, and that a harmful contact directly or indirectly results." *Doe v. City of Waterbury*, 453 F. Supp. 2d 537, 552 (D. Conn. 2006) *aff'd sub nom. Roe v. City of Waterbury*, 542 F.3d 31 (2d Cir. 2008). Plaintiffs have pled nothing more than conclusory language that the Hospital "intentionally, wantonly or without exercise of due care removed the decedent's ventilator which constituted harmful or offensive contact that offends a reasonable sense of personal injury." Compl., Count 24, ¶ 33. This language does not establish "an intent to cause harmful or offensive contact" or that such "harmful contact" resulted. Accordingly, plaintiffs' claim for battery must be struck as a matter of law.

Moreover, as stated above, Connecticut's removal of life support statute – General Statutes § 19a-571 – shields the Hospital from liability on plaintiffs' battery claim. *See supra* Sections III and IV(c). Plaintiffs acknowledge in their complaint that the Hospital consulted plaintiffs regarding the removal of life support on several occasions. *See* Complaint, Counts 13-19, ¶¶ 23, 26. By plaintiffs' own admission, the Hospital consulted the plaintiffs about the decedent's wishes on several occasions, and therefore could not have violated General Statutes §19a-571. Accordingly, the statute shields the Hospital from liability for a battery claim.

IX. Count Twenty-Five Fails To State A Claim For Violation of Right to Privacy.

In Count Twenty-five, plaintiffs attempt to bring a claim for violation of right to privacy, alleging that the Hospital violated the decedent's right to privacy by failing to "consider the

patient's wishes concerning the withholding or withdrawal of life support systems before it permanently removed the ventilator" or "abide by the decedent's constitutional right to determine her own medical treatment." *See* Complaint, Count 25, ¶ 32(a)-(b). Plaintiffs further allege the Hospital violated the decedent's right to privacy by "depriv[ing] the decedent of life without the consent of the decedent, next of kin, and/or any other legally authorized persons." *Id.* at 32(c). These allegations are not supported by the facts as pled. Specifically, the complaint alleges that the Hospital consulted plaintiffs regarding the removal of life support on several occasions. *See* Counts 13-19, ¶¶ 23 ("[o]n or about June 19, 2010 . . . [the] Hospital consulted the plaintiffs, Clarence Marsala and Michael Marsala, about removing the ventilator from the decedent"); *see also* ¶¶ 25 ("[a]t some time between June 19, 2010 and July 24, 2010 . . . [the] Hospital consulted the plaintiffs, Clarence Marsala, Gary Marsala, and Randy Marsala, about removing the ventilator from the decedent . . . without replacement"); ¶¶ 26 ("several times during her stay . . . [the] Hospital consulted the plaintiff, Clarence Marsala, about removing the ventilator from the decedent"). By plaintiffs' own admission, the Hospital consulted the plaintiffs about the decedent's wishes on several occasions and therefore could not have violated the decedent's right to privacy (i.e. to refuse treatment).

CONCLUSION

For the reasons stated above, the Court should grant the Hospital's motion to strike plaintiffs' claims.

DEFENDANT
YALE-NEW HAVEN HOSPITAL

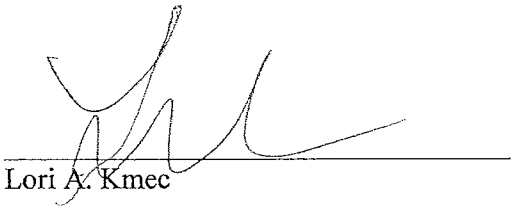
By: _____

Penny Q. Seaman
Lori A. Kmec
Wiggin and Dana LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508-1832
Tel: (203)498-4490
Juris No. 67700

CERTIFICATION

This is to certify that a copy of the foregoing was served via first class mail, this 22nd day of March 2013 on the following counsel of record:

Jeremy C. Virgil, Esq.
Michael R. Pedevillano, Esq.
Zeldes, Needle & Cooper, P.C.
PO Box 1740
Bridgeport, CT 06601-1740



Lori A. Kmec

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DOCKET NO. AAN-CV12-6010861-S	:	SUPERIOR COURT
CLARENCE MARSALA, MICHAEL MARSALA, GARY MARSALA, TRACEY MARSALA, KEVIN MARSALA, RANDY MARSALA; and CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	J. D. OF MILFORD/ANSONIA
v.	:	AT MILFORD
YALE NEW HAVEN HOSPITAL, INC., d/b/a YALE NEW HAVEN HOSPITAL	:	MAY 8, 2013

OBJECTION TO MOTION TO STRIKE

INTRODUCTION

Pursuant to Practice Book § 10-39, the plaintiffs Clarence Marsala, Michael Marsala, Gary Marsala, Tracey Marsala, Kevin Marsala, Randy Marsala, and Clarence Marsala, Administrator of the Estate of Helen Marsala ("Plaintiffs"), hereby object to the defendant's, Yale New Haven Hospital, Inc. d/b/a Yale New Haven Hospital ("Defendant"), Motion to Strike dated March 22, 2013 (Doc. #116.00). As discussed below, Plaintiffs' Second Amended Complaint dated October 22, 2012 ("Complaint") sufficiently alleges causes of action for negligent infliction of emotional distress (Counts 1-6), intentional infliction of emotional distress (Counts 7-12), violation of the Connecticut Unfair Trade Practices Act (Counts 13-18), violation of General Statutes § 19a-571 (Count 21), assault (Count 23), battery (Count 24) and violation of the right to privacy (Count 25).

This is a case involving very serious allegations that Defendant, knowingly against Helen Marsala's wishes, unilaterally made the decision to remove her from life support and cause her death in furtherance of its business; namely, only after it was apparent that the she could not afford to pay her medical bills. Further, Plaintiffs allege that Defendant did

not give the plaintiff family members *any* opportunity or make *any* effort to transport their mother/wife so that she could prolong her life as was her wish; nor did Defendant give Plaintiffs the opportunity to resolve the life or death dispute in Probate Court. That is because the decision to remove Helen Marsala from life support, the communication of that decision to Plaintiffs, and the execution of that decision, which resulted in her death, all occurred within a fourteen-hour window. While General Statutes § 19a-571 grants hospitals immunity in certain narrowly prescribed situations, it simply does not give a hospital the right to terminate life support against a patient's wishes. Only the patient has the right to make that decision. Therefore, Defendant is not entitled to immunity and is "liable for damages in any civil action," and also "subject to prosecution in any criminal proceeding." General Statutes § 19a-571(a).

As discussed below, construing the allegations broadly as the Court is obligated to do and assuming as true any allegations raised in the Complaint, Defendant's Motion to Strike should be denied in its entirety.

FACTUAL BACKGROUND

Before the decedent Helen Marsala became ill, she had conversations with her husband, Clarence Marsala, indicating that he was to make decisions regarding life support on her behalf if she could no longer make them herself. *See* Complaint, Count One at ¶ 13. She also indicated that she wanted to remain on life support in the event she was incapacitated. *Id.* at ¶ 14. Helen had never created a living will. *Id.* at ¶ 12. Clarence and Helen's next of kin knew of her decision to remain alive if ever on life support. *Id.* at ¶¶ 11-14.

On or about April 7, 2010, while Helen Marsala was being treated at Griffin Hospital, she was placed on life support. *Id.* at ¶¶ 15-17. During her stay at Griffin Hospital, agents, employees and/or staff at Griffin Hospital consulted Plaintiffs about removing life support from the decedent. *Id.* at ¶ 18. Plaintiffs unambiguously refused to remove life support from the decedent. *Id.*

On or about June 19, 2010, Plaintiffs, expressly in an effort to continue life support, had Helen Marsala transferred to Yale New Haven Hospital. *Id.* at ¶ 19. Numerous times during her stay, staff members and/or clergy working at Yale New Haven Hospital had conversations with several members of the decedent's family regarding the permanent removal of life support from the decedent. *Id.* at ¶¶ 23, 25, 26, 28. Every family member unambiguously objected, insisted the ventilator be replaced, and instructed Defendant to never "pull the plug." *Id.*

In every instance that Plaintiffs objected to Defendant's suggestion that the decedent be removed from life support, Defendant took no further action, until the date of the decedent's passing. On or about July 24, 2010, without involving Plaintiffs in the process, Defendant unilaterally made the decision to permanently remove the ventilator from the decedent. *Id.* at ¶ 28 -30. That same day, Defendant informed Gary Marsala of Defendant's decision, who objected and reported the information to Clarence Marsala. *Id.* at ¶ 28. That same day, Clarence Marsala rushed to Yale New Haven Hospital and objected to Defendant's decision. Yet it was too late. On July 24, 2010, the decedent suffocated and died without Plaintiffs having the opportunity to transport Helen Marsala or seek redress in Probate Court. At some time while being treated at Yale New Haven Hospital, Plaintiffs filled out and submitted paperwork indicating that they could not afford

the treatment. *Id.* at ¶¶ 21-22. Plaintiffs allege that Defendant's decision was made only after it was apparent that the decedent could not afford to pay her medical bills. *Id.*

On July 20, 2012, Clarence Marsala, Michael Marsala, Gary Marsala, Tracey Marsala, Kevin Marsala, Randy Marsala, and Clarence Marsala, Administrator of the Estate of Helen Marsala initiated this suit against the defendant. On August 31, 2012, Plaintiffs amended their Complaint. Counts one through six of the Amended Complaint allege negligent infliction of emotional distress. Counts seven through twelve allege intentional infliction of emotional distress. Counts thirteen through nineteen allege claims under the Connecticut Unfair Trade Practices Act. Count Twenty alleges a breach of General Statutes § 19a-571. Count Twenty-One alleges a cause of action for wrongful death. Count Twenty-Two alleges a loss of consortium claim pursuant to the breach of General Statutes § 19a-571. Counts Twenty-Three and Twenty-Four allege assault and battery respectively. Count Twenty-Five alleges a breach of the decedent's right to privacy. Count Twenty-Six alleges medical malpractice. Count Twenty-Seven alleges loss of consortium pursuant to General Statutes § 52-555a.

On March 22, 2013, Defendant filed a motion to strike. Plaintiffs hereby object.

STANDARD OF REVIEW

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498 (2003). "A motion to strike challenges the legal sufficiency of a pleading ... and, consequently, requires no factual findings by the trial court." (Internal quotation marks omitted.) *Batte-Holmgren v. Commissioner of Public Health*, 281 Conn. 277, 294 (2007).

The role of the trial court in ruling on a motion to strike is "to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." (Internal quotation marks omitted.) *Dodd v. Middlesex Mutual Assurance Co.*, 242 Conn. 375, 378 (1997). "In ruling on a motion to strike, the court is limited to the facts alleged in the complaint." (Internal quotation marks omitted.) *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 580, (1997). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Holmgren*, 281 Conn. 294. "Moreover ... [w]hat is necessarily implied [in an allegation] need not be expressly alleged." (Internal quotation marks omitted.) *Violano v. Fernandez*, 280 Conn. 310, 318 (2006).

LAW AND ARGUMENT

I. CONNECTICUT'S REMOVAL OF LIFE SUPPORT SYSTEMS ACT

A. Background

It has long been recognized that individuals have the right to "bodily self-determination" or "bodily autonomy," supported by a constitutional right to privacy. *See, e.g., Union Pacific Ry. Co. v. Botsford,* 141 U.S. 250, 251 (1891) ("No [legal] right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."). Our Supreme Court has noted that the "common law right, and its roots in our legal tradition, have a long and impressive pedigree." *Stamford Hosp. v. Vega*, 236 Conn. 646, 664-65 (1996). "The right of one's person is a right of complete immunity to be let alone." *Foody v. Manchester*

Mem'l Hosp., 40 Conn. Supp. 127, 132 (Super. Ct. 1984).[1] "To deny the exercise because the patient is unconscious or incompetent would be to deny the right. It is incumbent upon the state to afford an incompetent the same panoply of rights and choices it recognizes in competent person." *Id.*

In order to provide hospitals with immunity in the limited situation where patients wish to remove life support and exercise their individual right-to-die, Connecticut enacted the Removal of Life Support Systems Act, General Statutes §§ 19a-570 through 19a-575, by which the legislature authorized the removal of life support under statutorily specified circumstances. *See McConnell v. Beverly Enterprises-Connecticut,* 209 Conn. 692, 696-97 (1989) (noting that "the legislature cognizant of a common law right of self-determination and of a constitutional right to privacy, sought to provide a statutory mechanism to implement these important right."). General Statutes § 19a-571 was enacted to provide guidelines for appropriate decision-making in situations where patients seek to invoke their right to remove medical treatments that artificially prolong life. *See Id.*; *Law v. Camp*, 116 F. Supp. 2d 295, 304 (D. Conn. 2000) *aff'd,* 15 F. App'x 24 (2d Cir. 2001) ("The only logical construction of this statute is that it was enacted to implement a terminal patient's common law rights to self-determination and privacy.").

Connecticut's Removal of Life Support Systems Act was enacted in 1985, shortly after Connecticut's first right-to-die case, *Foody v. Manchester Mem'l Hosp.*, 40 Conn. Supp. 127 (Super. Ct. 1984). In *Foody*, the family of a semicomatose patient brought an action for a permanent injunction restraining the defendant hospital from using artificial devices to prolong the patient's life. The Court granted the injunction, recognizing: (1) the patient's right to decide to terminate life support where the patient's prognosis was

[1] Unreported decisions are attached hereto at Exhibit A.

extremely poor; (2) that the family could lawfully act as the patient's substitute decision maker; and (3) that the hospital would not be subject to liability in the event the family decided to terminate life support. *Id.* at 140-41. Shortly after the *Foody* decision, the legislature enacted General Statutes § 19a-571, which provided immunity to hospitals that removed life support based on the decedent's wishes, but only where: (1) the decision to remove life support was based on the best medical judgment of the attending physician; (2) the patient's attending physician deemed "the patient to be in a terminal condition"; (3) the attending physician obtain the informed consent of the patient's next of kin prior to removing a life support system; and (4) the physician "considered the patient's wishes as expressed by the patient directly, through his next of kin or legal guardian...." General Statutes § 19a-571 (Supp. 1985). The legislation was intended to provide relief from liability for hospitals that honored their patients' wishes to withhold or withdraw life support. In essence, it was right-to-die legislation.

In 1991, General Statutes § 19a-571 was amended in the wake of the Connecticut Supreme Court decision in *McConnell v. Beverly Enterprises-Connecticut* and the U.S. Supreme Court decision in *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 277 (1990). *See* P.A. 91-283; 34 H.R. Proc., Pt. 23, 1991 Sess., pp. 288-456 (Rep. Lawlor noted that "we really are not changing the law regarding the withdrawal of a life support system. We're only conforming our statutes to what is now the law in Connecticut based on the *McConnell* case and throughout the nation, based on the *Cruzan* case.").[2] These cases concluded that a State may require clear and convincing evidence of an incompetent's wishes to withdraw life support and States were not required to accept the judgment of family members absent proof that their views reflected those of the patient.

[2] The May 31, 1991 House Session Transcript is attached hereto at Exhibit B.

Again, these decisions were intended to protect an individual's right-to-die. *See* Rep. Lawlor remarks from the April 16, 1991 Committee (Judiciary) Hearing Transcript, attached hereto at Exhibit C ("The third weakness in the existing statute is its creation of a virtual veto power for the next of kin. ***That again distorts the role of the patient and the right of the patient himself or herself to control decisions until the end of his or her life.***") (emphasis added.).

As a result of these decisions, General Statutes § 19a-571 was amended in 1991 by removing subsection (3), which required the attending physician to obtain the informed consent of the patient's next of kin prior to removing life support. Yet the amendment maintained the precise language used in the 1985 version of the statute that the physician must "consider[] the patient's wishes." *See* General Statutes §§ 19a-571; 19a-571 (Supp. 1985). The amendment absolutely did not remove an individual's right to "bodily self-determination," "bodily autonomy" or right to privacy. Nor did it grant medical providers the right to make the decision as to the removal of life support. That right remains with the patient.

B. <u>General Statutes § 19a-571 Does Not Bar Plaintiffs' Claims</u>

Defendant's Motion to Strike should be denied because it mainly argues, incorrectly, that hospitals have the right to remove life support, even against a patient's wishes. *See* MOL at 8 (Defendant interprets General Statutes § 19a-571 to "require[] the Hospital to consider – not follow – plaintiffs' wishes prior to removing life support.").

First, the issue of whether Defendant is entitled to immunity should be pleaded and raised as a defense and should not be considered in ruling on a motion to strike. "[T]he court is limited to the facts alleged in the complaint." *Faulkner*, 240 Conn. at 580. While the

parties disagree as to whether or not Defendant is entitled to immunity, it is for a jury to evaluate the facts and weigh the credibility of the witnesses; that is not the court's function in adjudicating a motion to strike.

Second, while Plaintiffs agree that the 1991 amendment removed the requirement to obtain the consent of next of kin, it absolutely did not remove the patient's common law right to self-determination and constitutional right to privacy; nor did it grant hospitals the right to remove life support against a patient's wishes. That right remains exclusively with the patient. The legislative history of Public Act 91-283 supports this conclusion:

> REP. LAWLOR: (99th)
> Well, I'd only suggest to you that as the Chairman has indicated many times, Chairman Tulisano, this is only an immunity statute really and I would suggest to you if someone had -- ***and it could be demonstrated either before or after the person's death that expressly they had said that I do not want this to happen and the doctor did it anyway, I do not think that this immunity would any longer protect that particular physician because the first category of priority is the patients direct expressions in this regard, so I think if it were demonstrated that that was taking place and the doctor knew about it, then he would not be protected by this immunity legislation***.

See Exhibit C. Rep. Lawlor testimony at the May 31, 1991 Housing Session similarly supports this conclusion:

> DEPUTY SPEAKER MARKHAM:
> What if he cannot determine the wishes of the patient. Let's say the patient has not expressed his wishes. Let's say there's no known relatives or guardians or anyone else that can express this. What happens then?
>
> REP. LAWLOR: (99th)
> Thank you, Mr. Speaker. Under those conditions, the language of the bill itself ***specifically states that a physician is required to continue life support systems*** . . .

See Exhibit B. There is an overwhelming amount of legislative history indicating that medical providers have no right to remove an individual from life support against their wishes.[i] General Statutes § 19a-571 only provides medical providers with immunity in the

limited situation where it removes life support based on the patients' exercise of their right-to-die, provided the specific procedures enumerated in the statute are followed. For this reason, General Statutes § 19a-571 does not bar Plaintiffs' claims. *See also* discussion infra Part V; *O'Connell v. Bridgeport Hosp.*, 2000 WL 728819 (Conn. Super. Ct. May 17, 2000)(recognizing a cause of action for the aggrieved under C.G.S. §19a-571).

II. COUNTS ONE THROUGH SIX OF THE COMPLAINT SUFFICIENTLY ALLEGE CLAIMS FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Plaintiffs have properly alleged causes of action for negligent infliction of emotional distress (NIED) against Defendant. The elements of NIED are: "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 444 (2003).

(1) Defendant's Conduct Created an Unreasonable Risk of Causing Plaintiffs Emotional Distress

Plaintiffs allege that Defendant intentionally removed life support from their wife and mother, against her wishes, over their objections, without an opportunity for transfer, in a manner that denied them their rights to challenge, in violation of General Statutes §19a-571, for financial reasons. The normal expectation is that the decisions of the patient and their family members will dictate whether life support is continued. *Valentin v. St. Francis Hosp. & Med. Ctr.*, 2005 WL 3112881 at *6 (Conn. Super. Ct. Nov. 7, 2005). "To remain coherent and consistent with §§ 19a–571(a) and 19a–580, the hospital's duty to the plaintiff should be construed as a duty to make reasonable efforts to inform the known and available next of kin so that he or she could participate in the decision, based upon what

the decedent would have wanted, prior to the removal of life support." *Id.* Count One of the Complaint specifically alleges:

> 19. On or about June 19, 2010, the plaintiff, Clarence Marsala, in an effort to ensure continued life support and avoid further requests to remove life support, had the decedent, Helen Marsala transferred to the defendant, Yale New Haven Hospital.
> ...
> 30. On or about July 24, 2010, over the objection of Clarence Marsala and Gary Marsala, and without giving the plaintiff, Clarence Marsala, time to transport the decedent, ..., the defendant, Yale New Haven Hospital, ..., permanently removed the ventilator from the decedent, Helen Marsala, causing her to suffocate and die.
> 31. The defendant, Yale New Haven Hospital had a duty to ascertain the wishes of the decedent, Helen Marsala, from her next of kin, Clarence Marsala prior to removing life support.
> 32. The defendant, Yale New Haven Hospital ignored the wishes of the decedent, Helen Marsala, as expressed from her next of kin, Clarence Marsala prior to removing life support.

See also Complaint Counts Two through Six ¶¶19; 30-32. Defendant knowingly taking these actions against Plaintiffs' wife and mother created an unreasonable risk that Plaintiffs would suffer the alleged emotional distress. See *O'Connell v. Bridgeport Hospital*, 2000 WL 728819 *5 (medical providers "should have realized that its conduct [in failing to contact next of kin who had left contact information with the hospital before discontinuing life support] involved an unreasonable risk of causing the distress" to the next of kin).

(2) Plaintiff's Distress was Foreseeable

A reasonable person in Defendant's position would foresee that the process used to remove Helen Marsala from life support, against unambiguous and vehement objection by every family member, without providing Plaintiffs the opportunity to transport her, would cause emotional distress to Plaintiffs. Complaint Counts One through Six ¶¶19-36. "The ultimate test of the existence of the duty to use care is found in the foreseeability that harm

may result if it is not exercised ... [In other words], would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" (Internal quotation marks omitted.) *Valentin*, supra, 2005 WL 3112881 *6 (citing *Monk v. Temple George Associates, LLC*, 273 Conn. 108, 115 (2005)).

Defendant is a hospital and deals with life and death decisions every day involving patients and families. They know the emotional harm that families suffer from the loss of a patient. There is also no dispute that "the decision to terminate life support is emotionally charged and often controversial with differing points of view leading to bitter disagreements, even within the same family." *Id.* at *5. Connecticut's removal of life support statute explicitly involves the participation of family members in the process to respect and protect the patient and their family's wishes. See discussion supra Part I.

Specifically, Plaintiffs allege that Helen Marsala was transferred to Yale "in an effort to ensure continued life support and avoid further requests to remove life support [from Griffin Hospital]." Complaint, Count One, ¶ 19. Plaintiffs allege that on multiple occasions they "unambiguously refused and instructed the defendant to never 'pull the plug.' " *Id.* at ¶¶ 23, 25-26, 28. This was based on discussions Plaintiffs had with Helen Marsala where she expressed her intentions to remain alive if ever on life support. *Id.* at ¶¶ 14-15. Plaintiffs allege that on July 24, 2010, Defendant unilaterally decided to remove Helen Marsala from life support, informed Plaintiffs of that decision, and on the same day, without giving Plaintiffs time to transport Helen Marsala, removed her from life support, causing her to die. *Id.* ¶¶ 29-32. Plaintiffs allege that this life and death decision was motivated by

financial reasons. *Id.* Consequently, the Complaint sufficiently alleges foreseeability on behalf of Defendant.

(3) The Emotional Distress was Severe Enough that it Might Result in Illness or Bodily Harm.

The Complaint alleges that the emotional distress, from having their mother and wife intentionally killed, despite her wishes, without taking all reasonable steps to transfer her care, was severe enough that it might result in illness or bodily harm.

> 33. As a result of the defendant, Yale New Haven Hospital's conduct, ..., the plaintiff, Clarence Marsala, suffered the following serious, painful and permanent injuries: (a) severe emotional distress; (b) loss of opportunity to say goodbye; (c) depression; (d) loss of sleep; (e) stress; (f) anxiety; and (g) pain and suffering.
> ...
> 36. The defendant, Yale New Haven Hospital, ..., engaged in conduct that caused the plaintiff, Clarence Marsala, emotional distress that might result in bodily harm/illness.

Complaint, Count One. See also Complaint, Counts Two through Six ¶¶33; 36. These allegations, in conjunction with the preceding paragraphs, satisfy the third element for an NIED claim.

(4) Defendant's Conduct was the Cause of Plaintiff's Distress

The Complaint alleges that Defendant's conduct was the cause of the Plaintiffs' illness, injuries, bodily harm and losses. Complaint, Counts One through Six ¶¶33; 36. Plaintiffs have sufficiently plead claims for NIED.

(5) Defendant's Argument

Defendant's motion only contests whether it owed Plaintiffs a duty of care.[3] "The test for determining legal duty is a two-prong analysis that includes: (1) a determination of

[3] Defendant mischaracterizes Counts One through Six as claims for bystander emotional distress based upon medical malpractice to the decedent. Plaintiff's Complaint does not allege bystander emotional distress, nor are they about the medical treatment provided to the decedent. They are claims based on the process

foreseeability; and (2) public policy analysis." *Monk v. Temple George Associates, LLC,* supra, 273 Conn. at 115. The foreseeability of these injuries is discussed above under Part II (2). There are "four factors to be considered in determining the extent of a legal duty as a matter of public policy: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging continued vigorous participation in the activity, while protecting the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." *Seguro v. Cummiskey,* 82 Conn. App. 186, 195 (2004). Upon applying these factors, imposing a duty of care on Defendant is consistent with public policy.

First, the normal expectation of all individuals is that they have the right to make the life or death decision and that their family members have a right to be involved in that decision. *See Valentin,* 2005 WL 3112881 at *6. General Statutes § 19a–571(a) instructs physicians and hospitals to determine the wishes of the patient by determining whether any statements were made to the next of kin where no living will or other document, or oral statement to the attending physician or to a guardian, are available. Furthermore, if the hospital decides that it no longer can comply with the patient's wishes (either to remain on or terminate life support), General Statutes § 19a-580 instructs physicians and hospitals to take all reasonable steps to transfer care of the patient to a physician that will meet the patient's wishes. Connecticut's removal of life support statute contemplates providing family members with every opportunity to be involved in the decision to terminate life support; a decision which ultimately is based on the patient's wishes.

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taken by Defendant in discontinuing life support without ascertaining, considering, and over the objection of the decedent's wishes as expressed by her next of kin.

Second, the Court must consider the benefits of encouraging the underlying activity. Cases involving life support termination usually recognize four interests: "(1) the preservation of life; (2) the prevention of suicide; (3) the protection of interest of innocent third parties; and (4) the maintenance of the ethical integrity of the medical profession." *Valentin*, 2005 WL 3112881 at *6 (citing *McConnell v. Beverly Enterprises–Connecticut, Inc.*, 209 Conn. 692, 716 (1989) (Healey, J., concurring)). Here, recognizing a duty supports these interests. This is a suit based on Defendant's conduct in not preserving the decedent's life and for victimizing the decedent and her family members. As to the preservation of life, Plaintiffs allege that Helen Marsala expressed to her next of kin her intentions to remain alive if ever on life support. Recognizing a duty will ensure that hospitals do a better job ascertaining the individual's right to self-determination. As to the maintenance of the integrity of the medical profession, this duty would improve the integrity by preventing the hospital from becoming the patient's surrogate decision maker. The potential damage to the integrity of the medical profession posed by permitting it to become the decision maker was captured by the court in *Valentin*:

> "Common law and statutory law have not given the physician any right to be the incompetent patient's surrogate. Connecticut statues do have provisions by which surrogates can be appointed: Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1985 Sess., p. 1613, remarks of Dr. Robert Harkins, Esq. Moreover, the physician or hospital's judgment may be checked by the judgment of the next of kin. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1991 Sess., p. 1314. ("[Representative Richard P. Tulisano:] [How do we develop a system in which that M.D.'s judgment is checked? [Attorney Joseph Healey:] ... [Here, one relies on the advocates for the patient.]").
>
> Further, the involvement of the next of kin provides a safeguard against fabrication of a statement of the patient's last wishes. 34 H.R. Proc., Pt. 23, 1991 Sess., pp. 8762–63 ("[Representative Raymond M.H. Joyce:] [W]hat would stop the physician from saying ... [the patient] expressed his wish to die. [Representative Michael P. Lawlor:] [I]f the physician believes he's met the test, he's required to notify the next

> of kin ... and must allow for a reasonable time to pass for them to become involved in the process.").
>
> Moreover, any pressure physicians and hospitals might feel to disconnect a patient from life support based upon financial considerations may be countered by participation of the next of kin. Finally, in terms of the next of kin and the grieving process, encouraging participation may help give the next of kin a sense of control. *See* 28 H.R. Proc., Pt. 30, 1985 Sess ., p. 11178, remarks of Representative Richard D. Tulisano ("***It is when that final decision to pull the plug is made that the family should and must be involved, not just for the person. So that they do not have a lonely death, but for those who survive and are involved in that.***").

(Emphasis added). *Id* at *6.

Third, the Court must consider the possibility of increased litigation. In recognizing a duty in this case, the possibility of litigation is limited to the person or persons considered to be the next of kin and the class of persons to bring suit over the issue would be sufficiently limited. Hopefully, upon recognition of a duty in this case, medical providers would never breach it again.

Finally, the Court must consider what other jurisdictions have done. Plaintiff could find no case in any jurisdiction with similar facts as those alleged here. More importantly, however, two Connecticut cases weigh in favor of finding a duty of care. In *Valentin*, the court concluded that the hospital had a duty to inform the next of kin so that they could learn and adhere to the wishes of the decedent before removing life support. 2005 WL 3112881 at *6. In *O'Connell v. Bridgeport Hospital,* the court also found that the plaintiff alleged a cause of action for negligent infliction of emotional distress where the plaintiff left instructions with Bridgeport Hospital as to where and how the plaintiff could be reached while she was out-of-state; without the plaintiff being present, having knowledge or giving consent, the defendant removed the ventilator tube, her husband died the next day and, as a result, she has suffered emotional distress. 2000 WL 728819 at *5. The Court, in denying

the defendant's motion to strike, concluded that it could imply that the defendant "should have realized that its conduct involved an unreasonable risk of causing the distress." *Id.*

While Defendant attempts to distinguish *Valentin*, arguing that Defendant "consulted plaintiffs on numerous occasions regarding the decedent's life support measures," what is relevant is participation in the *decision to remove life support* and communication of that decision. First, that decision belongs solely to the patient and unlike in *Valentin*, Plaintiffs allege that Helen Marsala expressed her wish to remain on life support. Second, while Plaintiffs acknowledge that Defendant had many conversations with Plaintiffs in an effort to convince them to agree to the removal of life support, it was not until July 24, 2010, without involving them in the process, that Defendant unilaterally made the decision to permanently remove the ventilator from the decedent. Complaint, Count One at ¶ 28-30. It was not until that day that Defendant informed Plaintiffs of the decision; the same day the decedent suffocated and died without Plaintiffs having the opportunity to transport her and prolong her life.

Defendant owed a duty to the Plaintiffs. Plaintiffs allegations are sufficient to support their causes of action for NIED.

III. COUNTS SEVEN THROUGH TWELVE OF THE COMPLAINT SUFFICIENTLY ALLEGE CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiffs have sufficiently alleged causes of action for intentional infliction of emotional distress, which requires the following elements: (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.) *Appleton v. Board of Education,* 254 Conn. 205, 757 A.2d 1059 (2000). Defendant's Motion to Strike, challenging the first and second elements, lacks merit and should be rejected.

Paragraphs 1-30 of Count One, which are re-alleged in Counts 7-12, provide the factual support of Plaintiffs' allegations that Defendant intended to inflict emotions distress. Plaintiffs allege that Defendant allowed financial interests to dictate the life and death decision and terminated life support against the decedent's wishes, without providing Plaintiffs reasonable notice of the decision, nor the opportunity to transport the decedent or seek redress in Probate Court. *See* Complaint, Count One at ¶ 28-31. The Court can infer, based on these allegations, that Plaintiffs have alleged facts necessary to show intent to inflict emotional distress. *Amodio v. Cunningham,* 182 Conn. 80, 83 (1980) ("[F]acts necessarily implied from the allegations are taken as admitted.").

Similarly, these allegations sufficiently allege "extreme and outrageous" conduct on the part of Defendant. Intentionally killing a family member for financial reasons and orchestrating Helen Marsala's death in disregard of her and her family members' wishes is "extreme and outrageous" conduct. Plaintiffs also allege that Defendant did not consult with Plaintiffs when it made its decision and did not provide Plaintiffs the opportunity to transfer the decedent (and prolong her life as was her wish). *See* Complaint, Count One at ¶ 28-30. Certainly such conduct, if proven to be true, constitutes extreme and outrageous conduct. This conduct, in fact, constitutes homicide. General Statutes § 53a-54a ("A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person.").

IV. COUNTS THIRTEEN THROUGH NINETEEN SUFFICIENTLY STATE CLAIMS UNDER THE CONNECTICUT UNFAIR TRADE PRACTICES ACT

Plaintiffs have sufficiently alleged causes of action under CUTPA, which requires analysis of the following criteria: "(1)[W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers." (Internal quotation marks omitted.) *Ventres v. Goodspeed Airport, LLC,* 275 Conn. 105, 154–55 (2005), *cert. denied,* 547 U.S. 1111 (2006). Defendant makes three arguments: (1) that its conduct did not arise from the entrepreneurial aspects of the institution, (2) that its conduct did not offend public policy and (3) that Plaintiffs failed to allege an ascertainable loss of money. As discussed below, Defendant's arguments lack merit.

A. Plaintiff's CUTPA Claims Are Directed At The Entrepreneurial Aspects Of The Institution

Counts One through Thirteen relate to Defendant, Yale New Haven Hospital, in its capacity as a business institution. According to the Connecticut Supreme Court:

> [A]lthough physicians and other health care providers are subject to CUTPA, they may be liable only for unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of the entrepreneurial, commercial, or business aspect of the practice of medicine ... The practice of medicine may give rise to a CUTPA claim only when the actions at issue are *chiefly* concerned with entrepreneurial aspects of practice, such as the solicitation of business and billing practices, as opposed to claims directed at the competence of and strategy employed by the ... defendant ... [T]he touchstone for a legally sufficient CUTPA claim against a health care provider is an allegation that an entrepreneurial or business aspect of the provision of services is implicated, aside from medical competence or aside

> from medical malpractice based on the adequacy of staffing, training, equipment or support personnel.

(internal citations omitted). *Janusauskas v. Fichman,* 264 Conn. 796, 808-09 (2003). While professional negligence-that is, malpractice-does not fall under CUTPA, allegations directed at the billing and entrepreneurial aspects of the institution fall under CUTPA. *See Hayes v. Yale New Haven Hospital,* 243 Conn. 17, 34 (1997); *Salzano v. Gouley*, 2005 WL 1154225 (Conn. Super. Ct Apr. 18, 2005) ("Entrepreneurial activity includes activities such as solicitation of business and billing and does not extend to claims involving issues of competence and strategy.").

This is not a medical malpractice claim recast as a CUTPA claim. "[T]he relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment." *Trimel v. Lawrence & Memorial Hospital Rehabilitation Center,* 61 Conn. App. 353, 358 (2001).

Here, the CUTPA allegations against Defendant are directed at the billing and entrepreneurial aspects of the institution. An example is that Defendant removed life support only after it was aware that the decedent could not afford her medical care. Further, Plaintiffs allege that the hospital had a conflict of interest when it became surrogate and creditor. *See* Complaint, Count Thirteen at ¶¶ 34-38. These counts only attack the hospital in its capacity as a business institution. Additionally, no plaintiff other than the decedent had a professional-patient relationship with the Defendant hospital.

Finally, Defendant's failure to comply with the procedures in General Statutes § 19a-571 required no medical judgment.

Defendant's reliance on *Haynes v. Yale* is misplaced. In the present case, Plaintiffs allege that Defendant removed the decedent from life support and caused her to die against her wishes; in other words, committed homicide. Count One at ¶¶ 31-32. Plaintiffs allege that Defendant's motive was a conscious business decision to save money. *Haynes*, on the other hand, had nothing to do with the removal of life support and involved the issue of whether the defendant hospital breached its duty to meet the applicable standard of care as a certified major trauma center by failing to properly staff the emergency department and train its personnel. *Haynes* involved a claim sounding solely in professional medical malpractice, and did not involve the nefarious act of removing life support only after finding out that the decedent would be unable to pay her hospital bills. This is not a medical malpractice claim recast as a CUTPA claim, as the Court found in *Haynes.* Indeed, the Court in *Haynes* agreed that where, as here, the claims fall outside the penumbra of the "competence of and strategy employed by the defendant," a CUTPA violation may lie. *Haynes*, 243 Conn. at 35-36. Plaintiffs' allegations that Defendant terminated life support against the wishes of the decedent, and without allowing the family members to transfer her, solely for the reason that she could no longer pay medical bills, sufficiently allege a cause of action under CUTPA.

B. <u>The Complaint Alleges That Defendant's Actions Were Unlawful And Offend Public Policy</u>

The alleged conduct is unlawful and offends public policy and human decency. General Statutes § 53a-54a, succinctly states that "[a] person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person."

Defendant, knowingly against Helen Marsala's wishes, unilaterally decided to remove her from life support and cause her death; that this decision was made after it was apparent that the decedent could not afford to pay her medical bills; that Defendant did not give Plaintiffs any opportunity or make any effort to transport Helen Marsala so that she could prolong her as was her wish; and that Defendant did not attempt to resolve the life or death dispute in Probate Court. *See* Complaint, Count One at ¶¶ 28-32; Count Thirteen ¶38. Defendant's conduct constitutes murder. There is no question it offends public policy. *McConnell*, 209 Conn. at 702; *Union Pacific Ry. Co.*, 141 U.S. at 251 (every individual's right to the control of their own person is the most sacred and carefully guarded right). See also discussion Parts I, II, III, IV.A; C.G.S. §19a-571; Endnote 1; *Valentin v. St. Francis Hosp. & Med. Ctr.*, 2005 WL 3112881; *O'Connell v. Bridgeport Hospital*, 2000 WL 728819. See also Complaint, Count Thirteen ¶38(k) ("assault the decedent in violation of public policy as expressed by C.G.S. §53a-60b [assault of an elderly or disabled person is a class D felony]").

Defendant argues that it is entitled to immunity. Immunity is a special defense not raised in the Complaint. It is not before the court on this motion to strike. Instead the allegation of the complaint states that defendant "violated public policy as expressed by the statute C.G.S. §19a-571." Complaint, Count Thirteen, ¶38(a). Taken as true this asserts a violation of public policy.

Plaintiffs' allegations are sufficient to support a CUTPA claim.

C. <u>There Is No Requirement To Allege Or Prove The Amount Of The Ascertainable Loss</u>

Plaintiffs have alleged that they have suffered an ascertainable loss. Complaint, Counts 13-19 at ¶ 39 (alleging that Plaintiffs suffered "ascertainable harm" as a result of

Defendant's conduct). "The ascertainable loss requirement is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief." *Hinchliffe v. Am. Motors Corp.*, 184 Conn. 607, 612-13 (1981). There is no requirement, however, to allege the specific amount of the ascertainable loss. *Id.* ("We hold that the words 'any ascertainable loss' as used in this section do not require a plaintiff to prove a specific amount of actual damages in order to make out a prima facie case."). For purposes of CUTPA, "[a]n ascertainable loss is a deprivation, detriment, [or] injury that is capable of being discovered, observed or established . . . Our Supreme Court [does] not require that a claimant make a purchase to establish an ascertainable loss; it defined 'ascertainable loss' in much broader terms." *Larobina v. Home Depot, USA, Inc.*, 76 Conn. App. 586, 592-93 (2003). Courts have denied motions to strike where a complaint alleges simply a loss. *Kenneally v. First Gen. Servs. of E. Ct., Co., LTD*, 2005 WL 2429924 (Conn. Super. Ct. Aug. 31, 2005) ("Plaintiff has alleged that defendant improperly placed a mechanic's lien on her property, the existence of which 'has prevented plaintiff from financing her home.' This allegation is clearly sufficient to indicate that a loss has been sustained."). Plaintiffs' allegation is sufficient under *Hinchliffe*.

V. COUNT TWENTY SUFFICIENTLY STATES A CLAIM UNDER GENERAL STATUTES § 19a-571

Connecticut case law recognizes a cause of action for next of kin under General Statutes § 19a-571. In *O'Connell v. Bridgeport Hosp.*, 2000 WL 728819 (Conn. Super. Ct. May 17, 2000), the court recognized a cause of action under § 19a-571 against the defendant Bridgeport Hospital. The court concluded that the plaintiff sufficiently stated a cause of action under the statute based on allegations that "there was no consideration of the documents that the decedent executed pursuant to General Statutes §§ 19a-575 and

19a-575a"; that the plaintiff "left information as to where and how she could have been reached since she was the decedent's health care agent"; and "that she was never consulted on the decision to remove life support." *Id.* at *2-5. The court denied the plaintiff's motion to strike, holding that the defendant hospital may be subject to liability under § 19a-571(a). *Id.* at *5.

Here, similarly, Plaintiffs have alleged that Defendant did not involve Plaintiffs in the decision to remove the decedent from life support, did not provide within a reasonable time notice to the Plaintiffs of that decision, and did give Plaintiffs any opportunity, nor took any steps, to transfer the decedent to a health care provider who was willing to comply with her wish to remain on life support. *See* Complaint, Count One at ¶¶ 28-32. Under *O'Connell*, these allegations are sufficient to state a cause of action under General Statutes § 19a-571(a).

VI. COUNT TWENTY-THREE SUFFICIENTLY STATES A CLAIM FOR ASSAULT

Plaintiffs sufficiently allege a cause of action for assault, which is defined as "the intentional causing of imminent apprehension of harmful or offensive contact in another." *Dewitt v. John Hancock Mutual Life Ins., Co.*, 5 Conn. App. 590, 594 (1985). Plaintiffs allege that Defendant removed the decedent from life support, against her wishes, causing her to die. Complaint ¶30.

Defendant essentially argues that an assault cannot take place where the alleged victim is unconscious. *See* MOL at 19. While Defendant argues that "the decedent was indisputably incapacitated at the time the decision was made to remove life support," (MOL at 19), there is no allegation contained within the four-corners of the Complaint regarding the consciousness of the decedent. *Faulkner,* 240 Conn. at 580 ("In ruling on a motion to

strike, the court is limited to the facts alleged in the complaint."). Defendant's bald assertion that the decedent was incapacitated is not contained within the Complaint, and therefore not grounds for striking the assault claim. Indeed, Plaintiffs note, although not contained within the Complaint, Defendant's assertion is contradicted by Defendant's records which show that the decedent was alert and minimally responsive immediately prior to the removal of life support. It is also contradicted by statements made by Defendant in the presence of Plaintiffs.

Finally, Plaintiffs are unable to find any Connecticut authority on whether or not an assault can take place where the victim is unconscious. However, other jurisdictions have held that it is irrelevant that the victim is incapable of forming a reasonable apprehension. *See, e.g., United States v. Bell*, 505 F.2d 539, 541 (7th Cir. 1974) (holding that "it is irrelevant that the victim is incapable of forming a reasonable apprehension . . . There are many statements to the effect that an attempt upon an unconscious or otherwise insensitive victim is an assault, both in the cases and in the treatises."). Therefore, even if the decedent was incapacitated, which Plaintiffs dispute, the Court should still recognize a cause of action for assault.

VII. COUNT TWENTY-FOUR SUFFICIENTLY STATES A CLAIM FOR BATTERY

Plaintiffs sufficiently allege a cause of action for battery, which is defined "as any touching of the person of another in rudeness or anger." *Singer v. Stammel*, 1997 WL 306736 (Conn. Super. Ct. May 28, 1997). Our Supreme Court has stated that "[i]n this state an actionable assault and battery may be one committed willfully . . . and therefore intentionally; one done under circumstances showing a reckless disregard of

consequences; or one committed negligently." (Internal quotation marks omitted.) *Markey v. Santangelo,* 195 Conn. 76, 78 (1985).

Plaintiffs allege that Defendant allowed financial interests to dictate the life and death decision and terminated life support against Helen Marsala's wishes and without providing Plaintiffs reasonable notice of the decision, nor the opportunity to transport the decedent or seek redress in Probate Court. *See* Complaint, Count One at ¶¶ 28-32. The Court can infer, based on these allegations, that Defendant has alleged facts necessary to show intent to cause harmful contact.

Defendant argues that Plaintiffs are required to allege an "intentional blow." However, it is well settled that any offensive "touching" will suffice. *See, e.g., Boyles v. Preston*, 1997 WL 32783 (Conn. Super. Ct. Jan. 17, 1997) ("at the very least 'touching and rubbing the plaintiff without the plaintiff's consent' is a battery"); *Boanno v. Papcin*, 2001 WL 103876 (Conn. Super. Ct. Jan. 26, 2001) (defining battery as "*any touching* of the person of another in rudeness or in anger."). Regardless, Plaintiffs allege that Defendant intentionally removed the decedent from life support against her wishes, thereby causing her to die (i.e. committed homicide). Certainly such act constitutes an "intentional blow."

VIII. COUNT TWENTY-FIVE SUFFICIENTLY STATES A CLAIM FOR VIOLATION OF RIGHT TO PRIVACY

Plaintiffs sufficiently allege a claim for violation of the right to privacy. Our Supreme Court has held that individuals have a common law right of self-determination supported by a constitutional right to privacy. *McConnell*, 209 Conn. at 702; *Union Pacific Ry. Co.,* 141 U.S. at 251 ("No [legal] right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own

person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

Plaintiffs allege that Defendant violated that right by terminating life support and ending the life of the decedent against her wishes. *See* Complaint at ¶ 32. Defendant, once again, argues that it is immune from liability under General Statutes § 19a-571(a). As discussed above in Part I, the statute does not grant Defendant the authority to terminate life support against an individual's wishes. See also endnote I; Exhibit B.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Strike should be denied in its entirety.

PLAINTIFFS

By: _____
Jeremy C. Virgil
Dominic Spinelli

Zeldes, Needle & Cooper, P.C.
1000 Lafayette Blvd., 5th Floor
Bridgeport, CT 06604
Tel: (203) 333-9441
Fax: (203) 333-1489
Juris No. 69695
Their Attorneys

DOCKET NO. AAN-CV-12-6010861-S	:	SUPERIOR COURT
CLARENCE MARSALA, et al.,	:	J.D. OF ANSONIA-MILFORD
v.	:	AT DERBY
YALE-NEW HAVEN HOSPITAL, INC.	:	OCTOBER 30 , 2013

MEMORANDUM OF DECISION

Before the court is the motion of defendant Yale-New Haven Hospital, Inc. (the Hospital) to strike counts one through twenty and counts twenty-three through twenty-five of the plaintiffs' second amended complaint, dated October 22, 2012 (the Complaint).

As alleged in the Complaint, the plaintiffs' decedent, Helen Marsala, was admitted to Griffin Hospital in Derby, Connecticut on April 7, 2010 for surgery on her wrist. Helen then contracted an infection and, while still conscious, was placed on life support. On June 19, 2010, Helen was transferred to the Hospital. Helen died at the Hospital on July 24, 2010, after agents or employees of the Hospital permanently removed her respirator. Helen did not create a living will; however, she expressed her intention "to remain alive if ever on life support."

Shortly after her admission to the Hospital, Helen's husband, Clarence Marsala, and/or Helen filled out financial forms for the Hospital indicating that Helen and her family were below a financial threshold and would be unable to pay for her treatment. On the day of her admission, agents and employees of the Hospital "consulted" with Clarence and Helen's son, Michael Marsala, about removing the ventilator from Helen without replacement if she failed to begin breathing on her own. Clarence and Michael refused and instructed the Hospital never to "pull the plug." Agents and employees continued to discuss removing Helen's ventilator, and Clarence and other members of the family continued to refuse to allow the Hospital to do so.

On or about July 24, 2010, agents or employees of the Hospital informed Helen's son, Gary Marsala, that they were going to permanently remove Helen's respirator that evening, to which Gary objected. Upon learning of the Hospital's plan, Clarence also objected. Nevertheless, the Hospital removed Helen's ventilator, causing her to suffocate and die that night.

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Subsequently, this action was commenced against the Hospital by Clarence, both as administrator of Helen's estate and in his personal capacity, and by Helen's five children, Michael Marsala, Gary Marsala, Tracey Marsala, Kevin Marsala and Randy Marsala. The Hospital now moves to strike the Complaint's counts sounding in negligent infliction of emotional distress, intentional infliction of emotional distress, violation of the Connecticut Unfair Trade Practices Act (CUTPA), violation of Connecticut's Removal of Life Support Systems Act, General Statutes §§ 19a-570, et seq. (the Act), assault and battery, and violation of the right to privacy. As more fully set forth below, the Hospital's motion to strike is granted with respect to the counts sounding in negligent infliction of emotional distress (counts one through six), CUTPA (counts thirteen through nineteen), the Removal of Life Support Systems Act (count twenty), assault and battery (counts twenty-three and twenty-four, respectively), and the right of privacy (count twenty-five). The motion to strike is denied as to the counts sounding in intentional infliction of emotional distress (counts seven through twelve).

Applicable Standards

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action . . . the complaint is not vulnerable to a motion to strike." *Bouchard v. People's Bank*, 219 Conn. 465, 471, 594 A.2d 1 (1991). On the other hand, "[a] motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC v. Ganim*, 303 Conn. 205, 213, 32 A.3d 296 (2011).

"[I]t is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Coe v. Board of Education*, 301 Conn. 112, 116-17, 19 A.3d 640 (2011). "[P]leadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240, 253, 990 A.2d 206 (2010). "Moreover [the court notes] that [w]hat is necessarily implied [in an allegation] need not be expressly alleged." (Internal quotation marks omitted.) Id., 252. This court takes "the facts to be those alleged in the complaint . . . and . . . construe[s] the complaint in the manner most favorable to sustaining its legal

sufficiency." (Internal quotation marks omitted.) *New London County Mutual Ins. Co.* v. *Nantes*, 303 Conn. 737, 747, 36 A.3d 224 (2012).

"In ruling on a motion to strike, the court is limited to the facts alleged in the complaint." *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 580, 693 A.2d 293 (1997). "In ruling on a motion to strike, the trial court is limited to considering the grounds specified in the motion." *Meredith v. Police Commission*, 182 Conn. 138, 140, 438 A.2d 27 (1980).

Negligent Infliction of Emotional Distress (Counts One through Six)

Each of the six family member plaintiffs asserts in a separate count that the Hospital negligently caused them emotional distress by ignoring the wishes of Helen, the decedent, regarding the continuation of life support, as communicated by her next of kin. As a result, plaintiffs allege that the Hospital caused them severe emotional distress, loss of the opportunity to say goodbye, depression, loss of sleep, stress, anxiety, and pain and suffering. The plaintiffs allege that the Hospital engaged in conduct that it knew or should have known involved an unreasonable risk of causing emotional distress to the plaintiffs and that such distress was or should have been foreseeable to the Hospital. Further, the plaintiffs allege that the Hospital engaged in conduct that caused the plaintiffs emotional distress that might result in bodily harm or illness.

Within Connecticut jurisprudence regarding negligent infliction of emotional distress, there are two subsets of case law: where the conduct causing distress is directed to the plaintiff, and where the conduct causing distress is directed towards another (the so-called bystander emotional distress claims). See *Maloney v. Conroy*, 208 Conn. 392, 397-400, 545 A.2d 1059 (1988); *Di Teresi v. Stamford Health Systems*, 142 Conn. App. 72, 79, 63 A.3d 1011 (2013). Accordingly, the court must initially determine whether the individual plaintiffs' counts sound as claims for direct negligent infliction of emotional distress or as claims for bystander emotional distress.

Our Supreme Court first recognized a cause of action for direct negligent infliction of emotional distress in the case of *Montinieri* v. *Southern New England Telephone Co.*, 175 Conn. 337, 345, 398 A.2d 1180 (1978). Since that time, the court has consistently held that "in order to prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm." *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 446, 815 A.2d 119 (2003).

Additionally, in cases such as *Clohessy v. Bachelor*, 237 Conn. 31, 46, 675 A.2d 852 (1996), the Supreme Court also recognized that a bystander can recover for emotional distress under certain circumstances. In order to do so, the court held that the bystander must prove the following elements:

> (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.

Id., 56.

The Supreme Court, however, has carved out an exception to the bystander doctrine, as articulated in *Maloney*: "We hold that a bystander to medical malpractice may not recover for emotional distress and accordingly find no error in the striking of the complaint by the trial court." *Maloney v. Conroy*, supra, 208 Conn. at 394. The Court explained its rationale by observing,

> Because the etiology of emotional disturbance is usually not as readily apparent as that of a broken bone following an automobile accident, courts have been concerned, apart from the problem of permitting bystander recovery, that recognition of a cause of action for such an injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act. W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 54, pp. 359-61. . . .
>
> When the complication of liability to a bystander for emotional distress is injected into the scene, the concerns that have placed restrictions upon claims for emotional distress by those directly affected by the negligent act are enhanced. The present case, for example, poses 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. Indeed, § 313 of the Restatement expressly disavows the applicability of the rule of that section, approving a cause of action for emotional distress in behalf of the person directly affected by the unintended wrongful conduct in situations "where the emotional distress arises solely because of harm or peril to a third person, and the negligence of the actor has not threatened the plaintiff with bodily harm in any other way." 2 Restatement (Second), Torts § 313 (2), comment d. This view is consistent with our decision in *Strazza v. McKittrick*, [146 Conn. 714, 719, 156 A.2d 149], where we held that a mother could recover for the injuries she suffered from the fright of hearing a truck crash into the porch where she thought her child was waiting "[t]o the extent that these injuries resulted from fear of injury to herself . . . but she cannot recover for nervous shock resulting from fear of injury to her child."

Maloney, 208 Conn. at 397-399.

As a result of the foregoing, it is necessary to determine if plaintiffs' claims are direct or bystander claims for negligent infliction of emotional distress. The decisions of the Superior Court have generally taken one of two approaches when determining whether a count asserts a direct claim of negligent infliction of emotional distress or a claim for bystander emotional distress. The first looks for the existence of a legal duty owed directly to the plaintiff as opposed to the "indirect" duty owed to a bystander. See *Burnette* v. *Boland*, Superior Court, judicial district of New London, Docket No. CV-085-009111-S (April 23, 2010, *Martin, J.*); *Browne* v. *Kommel*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-08-5006167-S (July 14, 2009, *Pavia, J.*) (48 Conn. L. Rptr. 248, 250); *Gregory* v. *Plainville*, Superior Court, judicial district of New Britain, Docket No. CV-03-0523568-S (August 29, 2006, *Shaban, J.*); *Pattavina* v. *Mills*, Superior Court, judicial district of Middlesex, Docket No. CV-96-0080257-S (August 23, 2000, *Higgins, J.*) (27 Conn. L. Rptr. 521, 527-28).

The second method finds the distinction to be primarily determined by whether a party's emotional distress arises from the apprehension of harm to the party themself or from the apprehension of harm to a third party. If the apprehension is of harm directly to the party, the party asserts a claim for negligent infliction of emotional distress; if the apprehension is of harm to a third party, the claim is for bystander emotional distress. See, e.g., *Hylton* v. *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, 792); *Zurzola* v. *Danbury Hospital*, Superior Court, judicial district of Danbury, Docket No. CV-02-0347228-S (December 17, 2003, *Upson, J.*) (36 Conn. L. Rptr. 207, 208); *Clark* v. *New Britain Hospital*, Superior Court, judicial district of New Britain, complex

litigation docket, Docket No. X03-CV-99-0496131-S (May 9, 2002, *Aurigemma, J.*); *Doe* v. *Jacome*, Superior Court, judicial district of Danbury, Docket No. CV-98-0331360-S (May 13, 1999, *Stodolink, J.*) (24 Conn. L. Rptr. 591, 593); *Shaham* v. *Wheeler*, Superior Court, judicial district of Danbury, Docket No. 321879 (June 26, 1996, *Moraghan, J.*) (17 Conn. L. Rptr. 232, 233).

In support of their claims, the plaintiffs make the following allegations, which are substantively common to all six counts alleging negligent infliction of emotion distress:

> 30. On or about July 24, 2010, over the objection of Clarence Marsala and Gary Marsala, and without giving the plaintiff, Clarence Marsala, time to transport the decedent, the agents, apparent agents, employees, agent, and/or staff members of the defendant, Yale New Haven Hospital, acting within their scope of their employment with the defendant and in furtherance of the defendant's business, permanently removed the ventilator from the decedent, Helen Marsala, causing her to suffocate and die.
>
> 31. The defendant, Yale New Haven Hospital, had a duty to ascertain the wishes of the decedent, Helen Marsala, from her next of kin, Clarence Marsala, prior to removing life support.
>
> 32. The defendant, Yale New Haven Hospital, ignored the wishes of the decedent, Helen Marsala, as expressed from her next of kin, Clarence Marsala, prior to removing life support.
>
> 33. As a result of the defendant, Yale New Haven Hospital's conduct, through its agents, employees and/or staff members acting within the scope of their employment with the defendant, the plaintiff Clarence Marsala suffered the following serious, painful and permanent injuries: (a) severe emotional distress; (b) loss of opportunity to say goodbye; (c) depression; (d) loss of sleep; (e) stress; (f) anxiety; and (g) pain and suffering.

Complaint, counts 1-6, paras. 30-33 (# 103).

Interpreting these allegations as pleaded, the court finds that the injury that forms the basis of the individual plaintiffs' emotional distress claims was to Helen, whose wishes concerning removal of life support the Hospital was required to ascertain, whose wishes it allegedly ignored, and who suffered the consequences of these acts. Plainly, the plaintiffs do not allege that they were in apprehension of physical harm to themselves.

This finding does not end the inquiry, however, because the plaintiffs argue that the Hospital owed them a direct duty because the damage was foreseeable; see *Maloney v. Conroy*, supra, 208 Conn. at 401 ("it takes no great prescience to realize that friends or relatives of a seriously injured accident victim will probably be affected emotionally in some degree"); and the imposition of a duty is consistent with public policy because, inter alia, "the normal expectation of all individuals is that they have the right to make the life or death decision *and that their family members have a right to be involved in that decision*." (Emphasis added.) Plaintiffs' Objection to Motion to Strike (# 117), p. 14.

The plaintiffs do not cite any persuasive authority in support of this asserted "right." Under the removal of life support statute, General Statutes § 19a-571 (a), as amended, the role of the family in making the removal of life support is basically limited to conveying the patient's wishes to the health provider. The primary determination is to be made in the first instance by reference to the patient's living will. The family, limited to those members listed as "next of kin" under General Statutes § 19a-570 (9), are only consulted if the patient's wishes are not expressed in the living will and are one of several potential sources for such information. See § 19a-571 (a).[1]

The court finds that the central allegation, that the Hospital ignored Helen's wishes, relates to a violation of a duty owed to Helen, not to the family. As the Supreme Court said in a similar situation,

> It is, however, 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. In the case before us, if the defendants should have responded to the various requests the plaintiff alleges she made about her mother's condition, they should be held liable for the consequences of their neglect to the patient or her estate rather than to the plaintiff.

Maloney v. Conroy, supra, 208 Conn. at 402.

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[1] The plaintiffs note that the Superior Court in *Valentin v. St. Francis Hospital & Medical Center*, Superior Court, judicial district of Hartford, Docket No. CV-04-0832314 (November 7, 2005, *Hales, J.T.R.*) (40 Conn. L. Rptr. 371, 376), found a direct duty to the family where they alleged that they had not been notified of the intent to remove life support until after the death of their family member. Here, in contrast, the plaintiffs have pleaded that the Hospital notified the family of the impending removal and that the family advised the Hospital of Helen's wishes in that regard, which the Hospital allegedly ignored.

Accordingly, the plaintiffs' claims should be characterized as arising under the bystander branch of the tort of negligent infliction of emotional distress because the physical harm was inflicted upon Helen and not them, and they have not identified a direct duty violated by the Hospital's alleged behavior. As a result, their claims must be stricken for two different reasons. First, as explicitly pleaded in count twenty-six and evidenced by the attached certificate of good faith, the plaintiffs' claims are essentially for malpractice against the Hospital in its treatment of Helen, and therefore barred under the holding of *Maloney*. Second, the plaintiffs nowhere allege that they witnessed the actual removal of the respirator or the resulting demise of Helen or arrived shortly thereafter, and so cannot satisfy the requirement of "the contemporaneous sensory perception of the event or conduct that causes the injury, or by [arrival] on the scene soon thereafter and before substantial change has occurred in the victim's condition or location," as required by *Clohessy v. Bachelor*, supra, 237 Conn. at 56. The motion to strike counts one through six is granted.

Intentional Infliction of Emotional Distress (Counts Seven through Twelve)

Each of the six family member plaintiffs also asserts in separate counts that the Hospital intentionally inflicted severe emotional distress on them because its agents and employees knew or should have known that terminating Helen's life support would cause them emotional distress, that such behavior constituted extreme and outrageous conduct, and that the plaintiffs suffered severe emotional distress.

The Hospital moves to strike these counts, arguing that plaintiffs have failed to plead facts establishing that the Hospital intended to inflict emotional distress on the plaintiffs, and that its conduct in terminating Helen's life support contrary to her wishes was consistent with Connecticut's removal of life support statute, § 19a-571, and so cannot be considered wrongful. For the reasons set forth below, the court rejects both of these contentions.

The Supreme Court in *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 526-27, 43 A.3d 69 (2012), quoting *Appleton* v. *Board of Education*, 254 Conn. 205, 210-11, 757 A.2d 1059 (2000), reiterated the elements of the tort of intentional infliction of emotional distress as follows:

> In order for the plaintiff to prevail in a case for liability . . . 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. . . . Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine. . . . Only where reasonable minds disagree does it become an issue for the jury. . . .

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.

(Internal quotation marks omitted.)

Further, the Appellate Court in *Gagnon* v. *Housatonic Valley Tourism District Commission*, 92 Conn. App. 835, 847, 888 A.2d 104 (2006), noted that the trial court is authorized to make a preliminary determination as to whether the allegations sufficiently assert a claim for intentional infliction of emotional distress:

[I]n assessing a claim for intentional infliction of emotional distress, the court performs a gatekeeping function. In this capacity, the role of the court is to determine whether the allegations of a complaint . . . set forth behavior that a reasonable fact finder could find to be extreme or outrageous. In exercising this responsibility, the court is not fact finding, but rather it is making an assessment whether, as a matter of law, the alleged behavior fits the criteria required to establish a claim premised on intentional infliction of emotional distress.

(Internal quotation marks omitted.)

In its "gatekeeper" role, this court finds as a matter of law that the Hospital's asserted conduct in allegedly removing Helen's life support and thus ending her life in conscious disregard of her wish to remain on life support is extreme and outrageous, and

that an average member of the community would exclaim "Outrageous!" upon hearing the facts.

Although neither the court nor the litigants have apparently found a case with a comparable fact pattern, several courts have come to the same conclusion in similar circumstances. See, e.g., *Eberl v. Lawrence & Memorial Hospital*, Superior Court, judicial district of New London, Docket No. 560937 (March 7, 2003, *Hurley, J.T.R.*) (denying motion to strike where defendants forcibly held down plaintiff and withdrew blood without plaintiff's consent by repeated stabbing of needle into his arm); *Triano* v. *Fitzpatrick, M.D.*, Superior Court, judicial district of New Britain, Docket No. CV-00-0494828 (February 17, 2000, *Graham, J.*) (26 Conn. L. Rptr. 454, 457) (denying motion to strike where defendant, "who had been treating both of the plaintiffs eyes for four months prior to surgery, who knew that his patient only had vision in his right eye and had consented only to the operation for the left eye, knowingly operated on the sighted right eye, rendering it sightless and causing the plaintiff severe emotional distress"). On its face, terminating a patient's life support with an awareness of her contrary wishes constitutes unacceptable behavior and would readily be considered extreme and outrageous.

Turning to the Hospital's first argument, that the plaintiffs have failed to support their allegations beyond mere legal conclusions that the Hospital "through its agents, apparent agents, employees, and/or other staff members, intended to inflict emotional distress," it is noted that the Hospital has selectively edited the pleading at issue, and misquoted applicable law. As actually pleaded within the Complaint, this paragraph in each of the counts at issue reads: "The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members intended to inflict emotional distress on the plaintiff . . . *or knew or should have known that emotional distress was the likely result of their conduct*." (Emphasis added.) Complaint, counts 7-12, para. 31 (# 103). As quoted in *Perez-Dickson*, the first element of the tort is that "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* . . . ." (Emphasis added.) *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. at 483. As pleaded, the allegations of the Complaint satisfy the first element.

Further, the plaintiffs have alleged additional facts which support their allegation that the Hospital knew or should have known that its actions would cause emotional distress, e.g., that the Hospital repeatedly inquired as to whether Helen's life support should be removed, the plaintiffs consistently objected and the Hospital, over their objections and in violation of Helen's wishes concerning the matter, nevertheless

removed life support. Further, the plaintiffs raise a fair inference that, as a health care provider, the Hospital is aware that issues concerning the removal of life support arouse passions and that emotional distress is therefore likely. *Valentin* v. *St. Francis Hospital & Medical Center*, Superior Court, judicial district of Hartford, Docket No. CV-04-0832314 (November 7, 2005, *Hale, J.T.R.*) (40 Conn. L. Rptr. 371, 374) ("In this case, the defendant is a hospital and likely deals with life and death decisions every day involving patients and their families. Recent debates in the press illustrate that the decision to terminate life support is emotionally charged and often controversial with differing points of view leading to bitter disagreements, even within the same family."); see also *Maloney* v. *Conroy*, supra, 208 Conn. at 401, "[I]t takes no great prescience to realize that friends or relatives of a seriously injured accident victim will probably be affected emotionally in some degree." Therefore, the plaintiffs' pleading that the Hospital "knew or should have known" that its behavior would result in emotional distress to the plaintiffs is adequately supported by their allegations, and this basis is not sufficient to grant the Hospital's motion to strike these counts.

The Hospital next asserts that its actions could not rise to the level of being extreme and outrageous because it acted in accordance with the removal of life support statute, § 19a-571 (a). The court finds the Hospital's reliance on this statute at this stage of the pleading to be problematic. Section 19a-571 (a) grants immunity from damages in a civil action or criminal prosecution to a physician or medical facility that withholds or removes life support upon the demonstration that three factors are met, the third being that "the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems." General Statutes § 19a-571 (a) (3).

The Hospital contends that it has complied with this provision and the other requirements of § 19a-571 (a). This position, however, is properly categorized as a special defense, which has not been pleaded in this case because the Hospital has not yet filed its answer. As the Appellate Court noted in *Girard* v. *Weiss*, 43 Conn. App. 397, 416, 682 A.2d 1078 (1996), "[a] motion to strike should not generally be used to assert a special defense because the facts in a plaintiff's complaint must be taken as true for purposes of the motion, without considering contrary facts proffered by a defendant . . . ." Further, "[u]nder our practice, when a defendant pleads a special defense, the burden of proof on the allegations contained therein is on the defendant." *DuBose* v. *Carabetta*, 161 Conn. 254, 262, 287 A.2d 357 (1971). As a result, the court will not grant this motion

to strike on the basis of the Hospital's special defense of its purported compliance with the cited statute, which is not before the court at this stage of the proceedings.[2]

Therefore, construing the plaintiffs' allegations as true and in the light most favorable to them, the court believes that a reasonable fact finder could find that the Hospital's actions were "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"; (internal quotations marks omitted) *Perez-Dickson v. Bridgeport,* supra, 304 Conn. 527; that plaintiffs have adequately alleged the other

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[2] Furthermore, it is difficult to understand how the Hospital could successfully assert that it complied with § 19a-571 of the Removal of Life Support Systems Act for several reasons, including the plain meaning of the statute and of the Act as a whole. Subsection 3 of § 19-571 (a), which grants the physician or health care provider immunity from suit if, inter alia, the physician has "considered the patient's wishes regarding the withholding or withdrawal of life support systems," does not mean that the physician is free to ignore the patient's wishes. On the contrary, the Supreme Court construed this section in the leading case of *McConnell v. Beverly Enterprises-Connecticut*, 209 Conn. 692, 703, 553 A.2d 596 (1989), saying, "[I]f a patient . . . is deemed by his or her physician to be in a terminal condition, life sustaining technology may be removed, in the exercise of the physician's best medical judgment, when that judgment . . . coincides with the expressed wishes of the patient. General Statutes § 19a-571." This interpretation is consistent with other sections of the Act, including General Statutes § 19a-580a, entitled "Transfer of patient when attending physician or health care provider unwilling to comply with wishes of patient," and General Statutes § 19a-580c, entitled "Probate Court jurisdiction over disputes re provisions concerning withholding or withdrawal of life support systems . . . ." If the physician were free to disregard the patient's wishes, it would not have been necessary to provide for transfer in case of disagreement with the patient's wishes or to direct disputes on the issue of withdrawal of life support to the Probate Court's consideration.

Finally, the specter of a health care provider terminating a patient against her will was specifically addressed by the legislature in connection with the passage of the 1991 amendments to § 19a-571 (a). Representative Lawlor stated that, if a doctor proceeded to remove life support without verifying the patient's wishes to forego life support or by attesting that a patient wished to forego life support where the patient had not necessarily so indicated, then the doctor would not enjoy immunity under the statute. 34 H.R. Proc., Pt. 23, pp. 8761-64, remarks of Representative Michael Lawlor.

elements of the tort of intentional infliction of emotional distress, and that the Hospital's purported compliance with the Act is not properly considered in this motion to strike.[3]

For the foregoing reasons, the court denies the Hospital's motion to strike counts seven through twelve.

CUTPA (Counts Thirteen through Nineteen)

Each of the six individual family members as well as Clarence in his role as administrator of Helen's estate also claims that the Hospital violated the Connecticut Unfair Trade Practices Act, General Statutes §§ 42-110a, et seq. (CUTPA), by terminating Helen's life support despite the wishes of Helen to the contrary, allegedly because her family could not pay the Hospital's medical bills. Specifically, the plaintiffs assert that the Hospital knew or should have known the plaintiffs could not afford to pay for Helen's continuing care, thus making the Hospital a creditor. By making the decision to permanently remove the respirator over the objection of plaintiffs, defendant also allegedly placed itself in the position of "being the decedent's surrogate," which created a conflict of interest in that it "gave the defendant a financial incentive in making the decision to permanently remove the decedent's life support . . . ." Complaint, counts 13-19, paras. 36-37. Further, the plaintiffs allege that the Hospital's conduct was immoral, unethical, oppressive and/or unscrupulous, in several specified ways and caused them ascertainable loss.

The Hospital moves to strike these counts, arguing that the plaintiffs' allegations involve the delivery of medical care rather than the entrepreneurial aspects of the medical profession and health care delivery system, and therefore cannot state a CUTPA claim under the holding of *Haynes v. Yale-New Haven Hospital*, 243 Conn. 17, 699 A.2d 964 (1997). Moreover, the Hospital contends that the plaintiffs have failed to allege any "ascertainable loss" as required by the statute.

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[3] At the second oral argument, held on October 22, 2013, and after extensive briefing, the Hospital contended for the first time that the plaintiffs' emotional distress was not sufficiently severe to support their cause of action for emotional distress, citing the standard set forth in *Appleton* v. *Board of Education*, supra, 205 Conn. 210, and referring to the opinion in *Almonte v. Coca-Cola Bottling Co.*, 959 F. Supp. 569, 576 (1997), which granted defendant summary judgment because, inter alia, "the facts alleged in [Almonte's] pleadings and opposition papers, taken in the light most favorable to plaintiff, do not support his claim of severe emotional distress." *Almonte* is inapposite, however, because it involved a motion for summary judgment and not a motion to strike. Because the plaintiffs here have alleged that they suffered severe emotional distress, the court finds the Hospital's argument unpersuasive.

General Statutes § 42-110b (a) provides, in relevant part, that "no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." In *Haynes*, our Supreme Court held that the medical profession is subject to regulation by CUTPA, but only with respect to the business or entrepreneurial aspects of the delivery of health services, and not with respect to malpractice in the performance of medical services. *Id.*, 343 Conn. at 38. The Court explained,

> We appreciate, however, that "[i]t would be a dangerous form of elitism, indeed, to dole out exemptions to our [consumer protection] laws merely on the basis of the educational level needed to practice a given profession, or for that matter, the impact which the profession has on society's health and welfare." *United States* v. *National Society of Professional Engineers*, 389 F. Sup. 1193, 1198 (D.D.C. 1974). A blanket exemption for the medical profession would therefore be improper. *Nelson* v. *Ho*, [222 Mich. App. 74, 83, 564 N.W.2d (1997)]. We thus conclude that the touchstone for a legally sufficient CUTPA claim against a health care provider is an allegation that an entrepreneurial or business aspect of the provision of services is implicated, aside from medical competence or aside from medical malpractice based on the adequacy of staffing, training, equipment or support personnel. Medical malpractice claims recast as CUTPA claims cannot form the basis for a CUTPA violation. To hold otherwise would transform every claim for medical malpractice into a CUTPA claim.

Id., 343 Conn. at 37-38. The Supreme Court in *Janusauskas v. Fichman*, 264 Conn. 796, 809, 826 A.2d 1066 (2003), addressed the principle of an exception for professional services in the provision of health care, stating:

> The practice of medicine may give rise to a CUTPA claim "only when the actions at issue are *chiefly* concerned with 'entrepreneurial' aspects of practice, such as the solicitation of business and billing practices, as opposed to claims directed at the 'competence of and strategy' employed by the . . . defendant." (Emphasis added.) *Ikuno v. Yip*, 912 F.2d 306, 312 (9th Cir. 1990) (applying State of Washington's Consumer Protection Act); see *Haynes* v. *Yale-New Haven Hospital*, supra, 243 Conn. 35-37 (approving of reasoning in *Ikuno*).

Here, the plaintiffs argue that the Hospital's decision to remove Helen's respirator was motivated by the desire to avoid ongoing medical expenses caused by the Marsala family's inability to pay the Hospital's bills, thus implicating the entrepreneurial aspects of the provision of health care. However, there can be no doubt that the care and treatment of Helen were medical actions supervised by physicians and carried out by

medical staff. Even accepting the allegations of the Complaint as true, as we must on a motion to strike, the actions of which Plaintiffs complain, i.e., the termination of Helen's life support, were not "chiefly" entrepreneurial in nature. Rather, they were part and parcel of the Hospital's medical treatment of Helen. In essence, the plaintiffs disagree with the Hospital's decision to terminate Helen's life support. Because this decision was medical in nature, a CUTPA claim is not available to plaintiffs under controlling authority. As a result, the Hospital's motion to strike the CUTPA counts thirteen through nineteen is granted.[4]

Violation of General Statutes § 19a-571 (Count Twenty)

In count twenty, Clarence Marsala, as administrator of Helen's estate, attempts to assert a private cause of action under § 19a-571 against the Hospital, alleging that it violated the act by (1) failing to consider Helen's wishes concerning the withholding or withdrawal of life support before permanently removing her ventilator, (2) failing to provide sufficient time to transport her to another facility, (3) removing the ventilator despite objections from her family members that Helen wished to stay alive if on life support, and (4) failing to obtain Probate Court approval to resolve disputes over Helen's wishes prior to removal of the ventilator.

The Hospital moves to strike this count, claiming that § 19a-571 (a) does not explicitly create a private right of action and that there is nothing in the text of the statute or its legislative history suggesting any intent to create a private cause of action. As more fully set forth below, the court agrees with the Hospital on this issue and finds that no private cause of action for damages is available under § 19a-571.

Statutes have been found to provide a private cause of action when they explicitly allow a party or class to bring a claim against another party. See *Marinos* v. *Poirot*, 308 Conn. 706, 713, 66 A.3d 860 (2013) ("[t]o give effect to [CUTPA's] provisions, § 42-110g (a) of the act establishes a private cause of action, available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b" [internal quotation marks omitted]); *Jarmie* v. *Troncale*, 306 Conn. 578, 622, 50 A.3d 802 (2012) (noting that Connecticut's Dram Shop Act, General Statutes § 30-102, "authorizes a private cause of action against the seller of alcohol to an intoxicated person who causes injury to another person due to his or her intoxication"). If no such cause of action is

[4] Because the court has decided that the professional services exception makes CUTPA inapplicable here, it does not reach the Hospital's contention that the plaintiffs have failed to allege ascertainable loss.

explicitly provided, there is a presumption in this state that private enforcement of the statute does not exist and the burden is on the plaintiff to prove that a private right of action is implicitly created by the statute. *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. at 507.

In order to determine whether a statute implicitly creates a private cause of action, the Supreme Court in *Napoletano* v. *Cigna Healthcare of Connecticut, Inc.*, 238 Conn. 216, 680 A.2d 127 (1996), cert. denied, 520 U.S. 1103, 117 S. Ct. 1106, 137 L. Ed. 2d 308 (1997), identified three factors that a court is to consider in determining whether a private remedy is implicit in a statute not expressly providing one:

> First, is the plaintiff one of the class for whose . . . benefit the statute was enacted . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

(Internal quotation marks omitted.)

Id., 238 Conn. 249.

The Supreme Court in *Gerardi* v. *Bridgeport*, 294 Conn. 461, 469-70, 985 A.2d 328 (2010), explained how the courts are to weigh the *Napoletano* factors in considering the statute before the court:

> [I]n examining [the three *Napoletano*] factors, each is not necessarily entitled to equal weight. Clearly, these factors overlap to some extent with each other, in that the ultimate question is whether there is sufficient evidence that the legislature intended to authorize [these plaintiffs] to bring a private cause of action despite having failed expressly to provide for one. . . . Therefore, although the [plaintiffs] must meet a threshold showing that none of the three factors weighs against recognizing a private right of action, stronger evidence in favor of one factor may form the lens through which we determine whether the [plaintiffs] satisf[y] the other factors. Thus, the amount and persuasiveness of evidence supporting each factor may vary, and the court must consider all evidence that could bear on each factor. It bears repeating, however, that the [plaintiffs] must meet the threshold showing that none of the three factors weighs against recognizing a private right of action. . . .
>
> The stringency of the test is reflected in the fact that, since this court decided *Napoletano*, we have not recognized an implied cause of action despite numerous requests.

Id., 469-70; see also *Provencher* v. *Enfield*, 284 Conn. 772, 790, 936 A.2d 625 (2007) ("the plaintiff has not met his burden of establishing that none of the three *Napoletano* factors militates against the recognition of a private right of action under [General Statutes] § 22-331 and that the factors, when viewed together, demonstrate that the legislature implicitly created such an action").

Here, the administrator seeks to state a claim specifically pursuant to § 19a-571.[5] Examining the statute, the court notes that the statute does not explicitly provide a cause of action to any individual party. Therefore, the existence of an implicit private cause of action must be evaluated using the factors identified in *Napoletano, supra*.

Considering the first *Napoletano* factor, whether Helen was within a class for whose benefit the statute was enacted, the statute on its surface provides civil and

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[5] Section 19a-571 (a) provides in relevant part:

> Subject to the provisions of subsection (c) of this section, any physician licensed under chapter 370 or any licensed medical facility who or which withholds, removes or causes the removal of a life support system of an incapacitated patient shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for such withholding or removal, provided (1) the decision to withhold or remove such life support system is based on the best medical judgment of the attending physician in accordance with the usual and customary standards of medical practice; (2) the attending physician deems the patient to be in a terminal condition or, in consultation with a physician qualified to make a neurological diagnosis who has examined the patient, deems the patient to be permanently unconscious; and (3) the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems. In the determination of the wishes of the patient, the attending physician shall consider the wishes as expressed by a document executed in accordance with sections 19a-575 and 19a-575a, if any such document is presented to, or in the possession of, the attending physician at the time the decision to withhold or terminate a life support system is made. If the wishes of the patient have not been expressed in a living will the attending physician shall determine the wishes of the patient by consulting any statement made by the patient directly to the attending physician and, if available, the patient's health care representative, the patient's next of kin, the patient's legal guardian or conservator, if any, any person designated by the patient in accordance with section 1-56r and any other person to whom the patient has communicated his wishes, if the attending physician has knowledge of such person.

criminal immunity to "any physician licensed under chapter 370 or any licensed medical facility who or which withholds, removes or causes the removal of a life support system of an incapacitated patient" if that party fulfills the three requirements precedent to removing life support. General Statutes § 19a-571 (a). As a result, physicians and health care providers are clearly a class whom the statute was intended to protect.

In *McConnell v. Beverly Enterprises-Connecticut*, 209 Conn. 692, 698-99, 703, 553 A.2d 596 (1989), the Supreme Court suggested that the legislature had additional purposes in the enactment of the statute, i.e., "to enact guidelines for appropriate private decision-making in these heart-rending dilemmas," and, "cognizant of a common law right of self-determination and of a constitutional right to privacy, sought to provide a statutory mechanism to implement these important rights." Plainly, these rights belong to the patient. The Act's standards for when life support can be removed, and especially the mandate for consideration of the patient's wishes in that regard, support the conclusion that the patient was also in the zone of concern of the legislature in enacting the statute. See *Law v. Camp*, 116 F. Supp. 2d 295, 304 n.4 (D. Conn. 2000), aff'd, 15 Fed. Appx. 24 (2d Cir. 2001), cert den'd, 534 U.S. 1162 (2002)("[t]he only logical construction of this statute is that it was enacted to implement a terminal patient's common law rights to self-determination and privacy, *see McConnell* [supra], and, by its express terms, to provide a safe harbor for physicians by insulating them from civil and criminal liability for discontinuing life support measures under certain specified circumstances." The first factor is therefore met or, at the very least, does not militate against recognizing a private cause of action on behalf of the patient, Helen.

Turning to the second factor, whether there is any explicit or implicit indication of legislative intent to create or deny a remedy, the court must consider the text of the specific statutory provision and its place in the broader statutory scheme. *Gerardi* v. *Bridgeport*, supra, 294 Conn. at 471. The most pertinent part of § 19a-571 is the language in subsection (a), which grants immunity to a physician or institution if the attending physician has complied with the three identified factors. General Statutes § 19a-571 (a). It is incongruous to imply a right of action for damages in a statute the purpose of which is to define the grounds on which liability will be prevented. See *Dias* v. *Grady*, 292 Conn. 350, 361, 972 A.2d 715 (2009) ("those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results" [internal quotation marks omitted]). The Superior Court previously has resisted efforts to find an explicit or implicit cause of action in another immunity statute. See *Chadha* v. *Charlotte Hungerford Hospital*, Superior Court, Judicial District of Litchfield, Docket No. CV-99-0079598-S (November 21, 2000, *DiPentima, J.*) (holding that General Statutes §§ 19a-17b, which provides immunity for those who offer information concerning "the

qualifications, fitness or character of a health care provider," and 19a-20, which provides immunity for any member of a board or commission subject to certain provisions of the General Statutes concerned with healthcare or any person making a complaint or giving information to such a board or the Department of Public Health, do not support causes of action and therefore granting defendants' motion to strike).

Looking to other sections within the Act (codified as chapter 368w, entitled "Removal of Life Support Systems"), the court notes that the other sections are similarly devoid of any indication that the legislature intended to create a private cause of action under § 19a-571. Of particular interest are two dispute resolution sections in the Act which make no mention of a civil damage remedy. General Statutes § 19a-580a provides that an attending physician or health care provider who is unwilling to follow the patient's wishes must, "as promptly as practicable, take all reasonable steps to transfer care" of the patient to another physician or health care provider that is willing to give effect to the wishes of the patient. General Statutes § 19-580c (a) provides, in relevant part, that the Probate Court has jurisdiction "over any dispute concerning the meaning or application of any provision of [section] . . . 19a-571. . . ." Thus, the Act deals with the possibility of disagreements in connection with the removal of life support, but specifically provides for responses other than a civil action for damages. As a result, neither the text of § 19a-571 nor the surrounding statutory scheme supports the contention that a private cause of action is implied within that section.

Because the court finds the second factor determinative of the matter, it need not fully address the third factor, i.e., consistency of a private cause of action with the underlying purpose of the legislative scheme. See *Gerardi v. Bridgeport*, supra, 294 Conn. at 473 (not addressing third factor in light of its holding that failure of plaintiffs to establish second factor was fatal to their claim that General Statutes § 31-48d supports private cause of action). Nevertheless, the court notes that the statute provides immunity to physicians and health care providers from preexisting common law and criminal theories of liability. There was no need for the legislature to create a new basis for liability.[6]

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[6] The plaintiffs cite the opinion in *O'Connell* v. *Bridgeport Hospital*, Superior Court, judicial district of Fairfield, Docket No. CV-99-0362525-S (May 17, 2000, *Skolnick, J.*), which they claim provides support for their assertion of a private cause of action under § 19a-571. That case, however, is distinguishable. There, the court refused to strike a claim under the wrongful death statute, General Statutes § 52-555, which alleged that defendants violated § 19a-571 by not giving the plaintiff notice of the decision to remove

Under the analysis required by governing precedent, the court finds that § 19a-571 does not create a private cause of action for damages and that it was intended to function as a shield for physicians and health care providers and not as a sword for patients or their families. The motion to strike count twenty is granted.

Assault and Battery (Counts Twenty-Three and Twenty-Four), Right to Privacy (Count Twenty-Five)

The Hospital advances substantive arguments in favor of its motion to strike counts twenty-three (assault), twenty-four (battery), and twenty-five (violation of right to privacy); the Hospital, however, also asserts an alternative ground in support of striking those counts by claiming that Connecticut's wrongful death statute, General Statutes § 52-555,[7] provides the exclusive available remedy for injuries where death is a result of the wrongful act and therefore precludes the administrator from pleading alternative common law causes of action. The Hospital is correct, and counts twenty-three through twenty-five are stricken for that reason, as more fully set forth below.

The preclusive effect of the wrongful death statute was explained by the Supreme Court in its opinion in *Ecker v. West Hartford*, 205 Conn. 219, 226, 530 A.2d 1056 (1987), as follows:

> Recently in the case of *Ladd v. Douglas Trucking Co.*, 203 Conn. 187, 191-92, 523 A.2d 1301 (1987), this court reiterated the one hundred and thirty-one year adherence by the courts of this state to the almost unanimously held principle of law, as first proclaimed by Lord Ellenborough in the case of *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (K.B. 1808), that there is no civil right of action at common law for damages resulting from the death of a human being.

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life support. It did not address whether § 19a-571 standing alone could provide a private cause of action for damages.

[7] Section 52-555 (a) provides: "In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of."

Because at common law a party could not recover for death as an element of damages or for damages flowing directly from death, such damages may now only be recovered pursuant to § 52-555.

The Supreme Court in *Ladd* v. *Douglas Trucking Co.*, supra, 203 Conn. at 190-91, explained the effect of asserting a cause of action under § 52-555 on a party's ability to bring other claims under Connecticut's survival of action statute, General Statutes § 52-599, as follows:

> In an action by the estate of the victim pursuant to § 52-555 . . . the damages suffered before his death are one of the elements of the just damages to be awarded and must be sought in that action rather than in a separate suit under the survival-of-actions statute. . . . [T]here 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 [§ 52-599].

(Citation omitted; internal quotation marks omitted.)

In other words, the differentiation between a cause of action that merely survives the decedent's death and one that must be brought under the wrongful death statute can be stated as follows: "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." *Lynn* v. *Haybuster Mfg., Inc.*, 226 Conn. 282, 294 n.10, 627 A.2d 1288 (1993).

Therefore, as decisions of the Superior Court have repeatedly held, an estate must assert a cause of action under § 52-555 where the underlying tortious action is the direct and proximate cause of death and where death is an element of the recoverable damages. See *Hebert* v. *Frontier of Northeast Connecticut, Inc.*, Superior Court, judicial district of Windham at Putnam, Docket No. CV-01-0065465 (January 29, 2004, *Swienton, J.*) (36 Conn. L. Rptr. 448, 451) (striking claims for attorney's fees under Connecticut's Patients' Bill of Rights, General Statutes § 19a-550, and punitive damages under federal Nursing Home Reform Act, 42 U.S.C. § 1935i-(3)); *Alfano* v. *Montowese Health & Rehabilitation*, Superior Court, judicial district of New Haven, Docket No. CV-02-0469356-S (April 2, 2003, *Thompson, J.*) (34 Conn. L. Rptr. 418, 419) (striking loss of chance of recovery claim); *Fritz* v. *Veteran's Memorial Medical Center*, Superior Court, judicial district of New Haven, Docket No. CV-97-00400949 (November 10, 1998, *Moran, J.*) (23 Conn. L. Rptr. 378, 379) (striking count asserting various injuries including death to decedent that allegedly arose out of defendant's negligence and carelessness and its violations of General Statutes §§ 17a-541, which prohibits a facility engaged in the

treatment of people with psychiatric disabilities from depriving them of their rights, and 17a-542, which requires the humane and dignified treatment of patients with such disabilities by the same facilities); *Morgan* v. *Tolland County Health Care, Inc.*, Superior Court, judicial district of Hartford-New Britain at New Britain, Docket No. CV-95-469204-S (February 9, 1996, *Handy, J.*) (16 Conn. L. Rptr. 294, 295) (striking medical malpractice claim)), overruled on other grounds by *Johnson Electric Co. v. Salce Contracting Associates, Inc.*, 72 Conn. App. 342, 805 A.2d 735 (2002)(regarding CUTPA ruling).

In this case, the administrator has asserted claims for assault, battery and violation of privacy causing ante mortem injuries as well as Helen's death. As any claim for damages which includes death must be asserted in the context of a wrongful death claim, the court grants the motion to strike counts twenty-three, twenty-four and twenty-five.

Conclusion

For the foregoing reasons, the court grants the Hospital's motion to strike counts one through six (negligent infliction of emotional distress), counts thirteen through nineteen (CUTPA), count twenty (violation of § 19a-571), and counts twenty-three through twenty-five (assault, battery, and invasion of privacy), but denies the motion as to counts seven through twelve (intentional infliction of emotional distress).

Lee, J.

DOCKET NO.: AAN-CV-12-6010861-S

CLARENCE MARSALA, MICHAEL MARSALA GARY MARSALA, TRACEY MARSALA, KEVIN MARSALA, RANDY MARSALA; and CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	SUPERIOR COURT J.D. OF MILFORD/ANSONIA AT MILFORD
VS.	:	
YALE-NEW HAVEN HOSPITAL, INC. d/b/a YALE NEW HAVEN HOSPITAL	:	DECEMBER 3, 2014

AMENDED ANSWER AND SPECIAL DEFENSE

Defendant, Yale-New Haven Hospital, Inc., hereby answers plaintiffs' Second Amended Complaint, dated October 22, 2012, as follows:

COUNT ONE

Does not answer Count One because it was stricken.

COUNT TWO

Does not answer Count Two because it was stricken.

COUNT THREE

Does not answer Count Three because it was stricken.

COUNT FOUR

Does not answer Count Four because it was stricken.

COUNT FIVE

Does not answer Count Five because it was stricken.

COUNT SIX

Does not answer Count Six because it was stricken.

COUNT SEVEN

1. Denies the allegations contained in paragraph 1, except to admit that Yale-New Haven Hospital is a licensed general hospital that provides hospital services in New Haven, Connecticut.

2. Denies the allegations contained in paragraph 2, except to admit that at times, Yale-New Haven Hospital provides care and treatment to many patients, including patients with terminal or life-threatening illnesses.

3-9. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3, 4, 5, 6, 7, 8 and 9.

10. Admits the allegations contained in paragraph 10.

11-18. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 11, 12, 13, 14, 15, 16, 17 and 18.

19. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19, except to admit that Helen Marsala was transferred to Yale-New Haven Hospital on June 19, 2010.

20. Denies the allegations contained in paragraph 20, except to admit that Helen Marsala was a patient at Yale-New Haven Hospital from June 19, 2010 to July 24, 2010 and, during that period, was provided care by, inter alia, Yale-New Haven Hospital.

21-22. Denies the allegations contained in paragraphs 21 and 22.

23. Denies the allegations contained in paragraph 23, except to admit that Yale-New Haven Hospital employees, among others, consulted with Clarence Marsala and/or other family members regarding end-of-life decisions for Helen Marsala on June 19, 2010, and thereafter.

24. Denies the allegations contained in paragraph 24, except to admit that Helen Marsala was extubated on July 20, 2010, after ventilator weaning trials.

25-27. Denies the allegations contained in paragraphs 25, 26 and 27, except to admit that Yale-New Haven Hospital employees, among others, consulted Clarence Marsala and/or other family members regarding end-of-life decisions for Helen Marsala between June 19, 2010, and July 24, 2010.

28-30. Denies the allegations contained in paragraphs 28, 29 and 30, except to admit that Helen Marsala was extubated on July 20, 2010, and passed away on July 24, 2010.

31-33. Denies the allegations contained in paragraphs 31, 32 and 33.

34. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34.

COUNT EIGHT

1-30. Incorporates its responses to paragraphs 1-30 of Count Seven as its responses to paragraphs 1-30 of Count Eight.

31-33. Denies the allegations contained in paragraphs 31, 32 and 33.

34. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34.

COUNT NINE

1-30. Incorporates its responses to paragraphs 1-30 of Count Seven as its responses to paragraphs 1-30 of Count Nine.

31-33. Denies the allegations contained in paragraphs 31, 32 and 33.

34. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34.

COUNT TEN

1-30. Incorporates its responses to paragraphs 1-30 of Count Seven as its responses to paragraphs 1-30 of Count Ten.

31-33. Denies the allegations contained in paragraphs 31, 32 and 33.

34. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34.

COUNT ELEVEN

1-30. Incorporates its responses to paragraphs 1-30 of Count Seven as its responses to paragraphs 1-30 of Count Eleven.

31-33. Denies the allegations contained in paragraphs 31, 32 and 33.

34. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34.

COUNT TWELVE

1-30. Incorporates its responses to paragraphs 1-30 of Count Seven as its responses to paragraphs 1-30 of Count Twelve.

31-33. Denies the allegations contained in paragraphs 31, 32 and 33.

34. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34.

COUNT THIRTEEN

Does not answer Count Thirteen because it was stricken.

COUNT FOURTEEN

Does not answer Count Fourteen because it was stricken.

COUNT FIFTEEN

Does not answer Count Fifteen because it was stricken.

COUNT SIXTEEN

Does not answer Count Sixteen because it was stricken.

COUNT SEVENTEEN

Does not answer Count Seventeen because it was stricken.

COUNT EIGHTEEN

Does not answer Count Eighteen because it was stricken.

COUNT NINETEEN

Does not answer Count Nineteen because it was stricken.

COUNT TWENTY

Does not answer Count Twenty because it was stricken.

COUNT TWENTY-ONE

1-30. Incorporates its responses to paragraphs 1-30 of Count Seven as its responses to paragraphs 1-30 of Count Twenty-One.

31. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31.

32. Does not answer paragraph 32 because it calls for a legal conclusion.

33-34. Denies the allegations contained in paragraphs 33 and 34.

COUNT TWENTY-TWO

1-34. Incorporates its responses to paragraphs 1-34 of Count Twenty-One as its responses to paragraphs 1-34 of Count Twenty-Two.

35. Denies the allegations contained in paragraph 35.

COUNT TWENTY-THREE

Does not answer Count Twenty-Three because it was stricken.

COUNT TWENTY-FOUR

Does not answer Count Twenty-Four because it was stricken.

COUNT TWENTY-FIVE

Does not answer Count Twenty-Five because it was stricken.

COUNT TWENTY-SIX

1-30. Incorporates its responses to paragraphs 1-30 of Count Seven as its responses to paragraphs 1-30 of Count Twenty-Six.

31-32. Denies the allegations contained in paragraphs 31 and 32.

33. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33.

34-35. Does not answer paragraphs 34 and 35 because they call for a legal conclusion.

COUNT TWENTY-SEVEN

1-35. Incorporates its responses to paragraphs 1-35 of Count Twenty-Six as its responses to paragraphs 1-35 of Count Twenty-Seven.

36. Denies the allegations contained in paragraph 36.

SPECIAL DEFENSE

Defendant complied with the provisions of Connecticut General Statutes § 19a-571 (a) and is therefore immune from liability.

DEFENDANT,
YALE-NEW HAVEN HOSPITAL, INC.

By: /s/ Penny Q. Seaman

Penny Q. Seaman
Benjamin W. Cheney
Wiggin and Dana LLP
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
Juris No. 067700
pseaman@wiggin.com
bcheney@wiggin.com

CERTIFICATION

This is to certify that on this 3rd day of December, 2014, a copy of the foregoing was served via electronic mail on the following counsel of record:

Jeremy C. Virgil, Esq.
Zeldes, Needle & Cooper, P.C.
PO Box 1740
Bridgeport, CT 06601-1740
jvirgil@znclaw.com

/s/ Penny Q. Seaman
Penny Q. Seaman

487/13065/2997930.2

DOCKET NO. AAN-CV-12-6011711-S

CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	SUPERIOR COURT
	:	J.D. OF MILFORD/ANSONIA
v.	:	AT MILFORD
YALE-NEW HAVEN HOSPITAL	:	DECEMBER 3, 2014

AMENDED ANSWER AND SPECIAL DEFENSE

The defendant, Yale-New Haven Hospital, hereby answers plaintiff's Complaint, dated October 22, 2012, as follows:

COUNT ONE

1. Denies the allegations contained in paragraph 1, except to admit that Yale-New Haven Hospital is a licensed general hospital that provides hospital services in New Haven, Connecticut.

2. Admits the allegations contained in paragraph 2.

3-10. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9 and 10.

11. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11, except to admit that Helen Marsala was transferred to Yale-New Haven Hospital on June 19, 2010.

12. Denies the allegations contained in paragraph 12, except to admit that Helen Marsala was a patient at Yale-New Haven Hospital from June 19, 2010 to July 24, 2010 and, during that period, was provided care by, inter alia, Yale-New Haven Hospital.

13. Denies the allegations contained in paragraph 13, except to admit that Yale-New Haven Hospital employees, among others, consulted Clarence Marsala and/or other family members regarding end-of-life decisions for Helen Marsala.

14. Denies the allegations contained in paragraph 14, except to admit that Helen Marsala was extubated on July 20, 2010, after ventilator weaning trials.

15-17. Denies the allegations contained in paragraphs 15, 16 and 17, except to admit that Yale-New Haven Hospital employees, among others, consulted Clarence Marsala and/or other family members regarding end-of-life decisions for Helen Marsala.

18-20. Denies the allegations contained in paragraphs 18, 19 and 20, except to admit that Helen Marsala was extubated on July 20, 2010, and passed away on July 24, 2010.

21-14. Denies the allegations contained in paragraphs 21, 22, 23 and 24.

25. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25.

26-27. Does not answer paragraphs 26 and 27 because they call for a legal conclusion.

SPECIAL DEFENSE

Defendant complied with the provisions of Connecticut General Statutes § 19a-571 (a) and is therefore immune from liability.

DEFENDANT,
YALE-NEW HAVEN HOSPITAL

By: /s/ Penny Q. Seaman

Penny Q. Seaman
Benjamin W. Cheney
Wiggin and Dana LLP
P.O. Box 1832
New Haven, CT 06508-1832
Juris No. 067700
203-498-4438; 204-782-2889-fax
pseaman@wiggin.com
bcheney@wiggin.com

CERTIFICATION

This is to certify that on this 3rd day of December, 2014, a copy of the foregoing was served via electronic mail on the following counsel of record:

Jeremy C. Virgil, Esq.
Zeldes, Needle & Cooper, P.C.
1000 Lafayette Blvd., 5th Floor
Bridgeport, CT 06604
jvirgil@znclaw.com

/s/ Penny Q. Seaman
Penny Q. Seaman

487/13065/2864823.2

DOCKET NO.: AAN-CV-12-6010861-S	:	SUPERIOR COURT
CLARENCE MARSALA, ET AL.	:	J.D. OF MILFORD/ANSONIA
VS.	:	AT MILFORD
YALE-NEW HAVEN HOSPITAL	:	AUGUST 28, 2014

DOCKET NO. AAN-CV-12-6011711-S	:	SUPERIOR COURT
CLARENCE MARSALA, ADMINSTRATOR OF THE ESTATE OF HELEN MARSALA	:	J.D. OF MILFORD/ANSONIA
VS.	:	AT MILFORD
YALE-NEW HAVEN HOSPITAL	:	AUGUST 28, 2014

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Practice Book § 17-44 *et seq.*, Yale-New Haven Hospital ("YNHH") respectfully moves for partial summary judgment on the Amended Complaint filed in docket number AAN-CV-12-6010861-S ("Amended Complaint") and summary judgment on the Complaint filed in docket number AAN-CV-126011711-S ("Second Complaint"). YNHH submits that summary judgment should enter in its favor on counts 7 -12 of the Amended Complaint, in which each plaintiff alleges intentional infliction of emotional distress against YNHH. There is no triable issue of fact on those counts, and YNHH is entitled to judgment as a matter of law. Additionally, YNHH is entitled to summary judgment on the Second Complaint, the Counts of the Amended Complaint that sound in medical malpractice, and the loss of consortium claim that is derivative of the medical malpractice claim because Conn. Gen Stat. §§ 52-555 and 52-555a provide the exclusive remedy for damages resulting in death. YNHH therefore respectfully requests that the Court enter judgment in its favor on the Second

Complaint and Counts 7, 8, 9, 10, 11, 12, 26 and 27 of the Amended Complaint. In support of this motion, the Hospital relies on the accompanying Memorandum of Law In Support of Defendant's Motion for Partial Summary Judgment.

ASSIGNED FOR TRIAL – DECEMBER 9, 2014

Respectfully submitted,

DEFENDANT,
YALE-NEW HAVEN HOSPITAL

By: /s/ Penny Q. Seaman

Penny Q. Seaman
Benjamin W. Cheney
Wiggin and Dana LLP
One Century Tower
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
Juris No. 067700
pseaman@wiggin.com
bcheney@wiggin.com

DOCKET NO.: AAN-CV-12-6010861-S	:	SUPERIOR COURT
CLARENCE MARSALA, ET AL.	:	J.D. OF MILFORD/ANSONIA
VS.	:	AT MILFORD
YALE-NEW HAVEN HOSPITAL	:	NOVEMBER 12, 2014

DOCKET NO. AAN-CV-12-6011711-S	:	SUPERIOR COURT
CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	J.D. OF MILFORD/ANSONIA
VS.	:	AT MILFORD
YALE-NEW HAVEN HOSPITAL	:	NOVEMBER 12, 2014

SECOND AMENDED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT[1]

These are consolidated personal injury actions arising from the death of Helen Marsala at Yale-New Haven Hospital in July 2010. Plaintiffs, the Estate of Mrs. Marsala, her husband, Clarence ("Mr. Marsala"), and her five adult children, Michael, Kevin, Gary, Randy and Tracey, have filed a wrongful death claim and two medical malpractice claims on behalf of the Estate, two loss of consortium claims on behalf of Mr. Marsala, and intentional infliction of emotional distress claims on behalf of Mr. Marsala and each of the Marsala children.

The Hospital has now moved for summary judgment on the medical malpractice and derivative loss of consortium claims and on each individual plaintiff's emotional distress claim, which would leave only a wrongful death claim on behalf of the Estate and a derivative loss of consortium claim on behalf of Mr. Marsala. Judgment should enter for the Hospital on the

[1] Defendant files this Second Amended Memorandum of Law in Support of its Motion for Summary Judgment pursuant to the Court's request that it incorporate into one Memorandum any argument in its previously filed Reply.

medical malpractice claims and the derivative loss of consortium claim because a wrongful death action is the exclusive remedy for an injury resulting in death.

The Hospital is also entitled to judgment on the emotional distress claims, which are premised on an allegation that the Hospital intended to inflict emotional distress on the individual plaintiffs when it "remove[d] the ventilator from [Mrs. Marsala] despite the family's objections..."[2], because such emotional distress claims are not actionable in the medical malpractice context. Further, none of the plaintiffs allege that they witnessed the conduct that they challenge. Accordingly, their claims must fail because a "contemporaneous sensory perception" of the conduct is an essential element to a bystander emotional distress claim. Finally, the claims must fail because the plaintiffs lack evidence of the essential elements of such a claim.

FACTUAL BACKGROUND

On June 18, 2010, 75-year old Helen Marsala was admitted to Yale-New Haven Hospital from Griffin Hospital. On admission, she was noted to have:

> an extensive past medical history, which includes [Diabetes Mellitus] moderate aortic stenosis, hypertension, hyperlipidemia. She was admitted to Griffin in late May with abdominal pain and found to have colitis. . . . She has had a long hospital course, which has included prolonged respiratory failure and failure to wean, shock requiring vasopressors, Morganella bacteremia requiring treatment with imipenem, volume overload, and GI bleeding thought to be due to ischemic colitis. According to her husband, she had been obtunded for approximately one week for unclear reasons . . . .

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[2] *See, e.g.*, Amended Complaint, CV12-6010861-S, October 22, 2012 ("Amended Compl."), Count Seven at ¶¶ 31, 32.

Amended Affidavit of Margaret Pisani, M.D., September 11, 2014 ("Pisani Aff.") (attached as Ex. A), at Exhibit 1 ("MR") at 16.[3] A physical exam revealed that Mrs. Marsala was in respiratory failure, had metabolic acidosis, hemodynamic instability, sepsis and was comatose. *Id.* at 17. She had been intubated for almost a month, and was receiving all of her nutrition through tube feedings. *Id.* at 11, 16; Pisani Aff. at ¶ 7. She had continuous diarrhea and was bleeding from her rectum. MR at 4. Because of her poor perfusion and lack of movement, she had pressure ulcers on her coccyx, left upper groin, left knee, left foot, right hip, right ear, and right thigh. *Id.* at 5, 6, 7. Although she opened her eyes periodically, she was not able to track movement and did not react to painful stimuli. *Id.* at 2. Although her prognosis was poor, the plan was to try to "identify reversible problems to treat" in an effort to help her regain mental status. *Id.* at 17.

Over the next month, the Hospital did a comprehensive workup in an attempt to identify the cause of Mrs. Marsala's multiorgan failure. A neurological evaluation, including a CT scan of her head, an EEG, and an MRI of her brain, failed to identify a cause of her depressed mental state, although she was noted to have an infarct (dead tissue) in her right cerebellum and a lesion in her right hippocampus. *Id.* at 16, 18. She was in renal failure, and hemodialysis was started. *Id.* at 19. The dialysis addressed her acidosis and electrolyte abnormalities, but did not improve her mental status. *Id.* at 23.

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[3] Plaintiffs argue that Dr. Pisani's affidavit is not credible based on her deposition testimony that she had not reviewed the relevant medical records. Following Dr. Pisani's deposition, the Hospital filed an Amended Affidavit, signed on September 11, 2014, in which Dr. Pisani avers that the Amended Affidavit is based on her personal knowledge and her review of the medical records attached thereto. Further, plaintiffs' counsel has stipulated that the medical records attached to Dr. Pisani's Amended Affidavit are accurate. Deposition of Margaret Pisani, M.D., September 4, 2014 ("Pisani Dep."), at 113:18-23 (excerpts attached as exhibit B).

On June 23, five days after Mrs. Marsala's admission to the Hospital, her treating physician called Mr. Marsala to advise him of the results of the MRI and her poor prognosis:

> I called Mr. Clarence Marsala today to give him an update with regards to his wife's clinical situation and overall prognosis. . . . I emphasized that she is reaching the limits of the time she can be orally intubated, and that her overall clinical situation has not improved. Mr. Marsala asked about a possible tracheostomy; I explained that we often create tracheostomies when we feel that the patient has significant possibility for clinical improvement and rehabilitation. Mr. Marsala seemed to understand that the patient's combination of renal failure, widespread ischemic colitis, infarcts and infections did not portend well. I asked him to notify a nurse when next he was in the hospital so that a physician from the team could speak with him personally.
>
> He also plans to discuss the current situation with his family. He reported that ***he and his wife had never explicitly discussed her wishes for aggressive interventions with an eye towards life-prolongation***. He was concerned about the possibility that she was suffering, and seemed receptive to hearing the views of the team. He seemed to understand that withdrawal of care may be indicated if the clinical situation does not improve. ***He did not seem to feel that "life" at all costs was consistent with his frame of reference or beliefs***.

Id. at 21 (emphasis added).

Despite a comprehensive workup, Mrs. Marsala's condition did not improve during her hospitalization; indeed it worsened. Pisani Aff. at ¶ 8. A CT scan of her brain revealed two new infarcts, and EEGs showed diffuse brain slowing. MR at 23. She developed pitting edema in her extremities, remained dependent on hemodialysis, and her skin degradation continued with additional and worsening skin ulcers. *Id.* at 23, 25. Throughout this hospitalization, the clinicians discussed her lack of progress and dire prognosis with Mr. Marsala, and they recommended that her status be changed to provide comfort care only. Pisani Aff. at ¶¶ 9, 13, 14. Mr. Marsala did not agree with these recommendations.

A patient cannot remain intubated indefinitely. *Id.* at ¶ 10. Prolonged intubation can contribute to a patient's depressed mental status, and Mrs. Marsala's physicians believed the best course of treatment was to extubate her and see whether she was capable of breathing without

assistance. *Id.* To determine whether this was a prudent course, her physicians began conducting "weaning trials," which tested her ability to maintain acceptable oxygen levels without a ventilator's assistance. MR at 29; Pisani Aff. at ¶ 11. Mrs. Marsala withstood periods of breathing on her own, and, on July 20, the decision was made to extubate her with the hope that extubation might help to restore her mental status. MR at 29; Pisani Aff. at ¶¶ 10, 11. The medical team discussed this plan with Mr. Marsala and recommended that, in light of her many problems and poor prognosis, her status be changed to reflect that she should not be re-intubated if she was unable to withstand extubation. MR at 31; Pisani Aff at ¶13. Mr. Marsala disagreed with the recommendation that his wife should not be re-intubated, but he agreed to maintain her status at "Do Not Resuscitate." *Id.*

Mrs. Marsala was extubated at 16:30 on July 20, and placed on a face mask to provide her with supplemental oxygen. *Id.* at 33. None of her family was present at the time of the extubation. Pisani Aff. at ¶ 11. Although she initially was able to sustain acceptable oxygen levels without the ventilator, over the next few days her breathing became labored, and the face mask used to deliver supplemental oxygen caused the skin on her face to breakdown. MR at 37, 43. On July 22, hemodialysis was aborted because she developed hypertension during the treatment. *Id.* at 38. It became clear that she could not independently protect her airway. *Id.* Her attending physician, Dr. Pisani, did not think that re-intubation was appropriate given Mrs. Marsala's continued deterioration and dire prognosis. Pisani Aff. at ¶ 13. Because Mr. Marsala had indicated that he wanted his wife re-intubated if she was unable to breathe on her own, Dr. Pisani requested a meeting with the Hospital Ethics Committee to address treatment goals.[4] MR

[4] The Hospital Ethics Committee is a standing committee authorized to consider ethical issues regarding patient treatment. The Committee consists of several permanent members as well as

at 40; Pisani Aff. at ¶13. Mr. Marsala was invited, but did not attend, the meeting. Pisani Aff. at ¶¶ 13, 14. The Ethics Committee concluded that, although Mr. Marsala wanted his wife to be re-intubated, further care was futile and not in Mrs. Marsala's best interest, explaining:

> The bioethics committee recommends that there be no further escalation of care (meaning no intubation or pressors) considering this is not in the best interest of the patient and we are not providing care that would achieve the patient's goal of going home. We also recommend that the dialysis trial should cease, as it has not shown to be of any meaningful benefit in improving her mental status.

MR at 42.

Mr. Marsala was advised of this recommendation. The Hospital arranged for a second opinion from a physician who had not been involved in Mrs. Marsala's care, and that physician concurred in the recommendation of the treatment team and the Ethics Committee, noting

> further attempts at therapeutic intervention do not offer a chance of a better outcome. Reintubation, ongoing use of bipap based on both asynchrony and skin breakdown is not warranted. I agree to moving to a comfort plan. I have left a message for the Husband at the cell no I was given.

MR at 47. Accordingly, in the afternoon of July 23, Mrs. Marsala's status was changed to comfort care only and an order of "Do Not Intubate" was entered.[5] *Id.* at 45. She died at 10:45 p.m. the following night, July 24, 2010. *Id.* at 49. Her family was not present when her status was changed or at the time of her death. *See* Pisani Aff. at ¶ 11; Deposition of Clarence Marsala, February 27, 2014 ("Clarence Dep.") (Excerpts attached as Ex. C), at 68:13-69:14; Deposition of Gary Marsala, June 16, 2014 ("Gary Dep.") (Excerpts attached as Ex. D), at 43:3-21; 45:4-8; 46:13-17; Deposition of Tracey Marsala, June 20, 2014 ("Tracey Dep.") (Excerpts attached as Ex. E), at 19:12-14; Deposition of Michael Marsala, March 10, 2014 ("Michael Dep.") (Excerpts

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specialists from the field in question, treaters and social workers familiar with the patient's case; family members are invited to participate. *See, e.g.,* MR at 41.

[5] Mrs. Marsala already had a do Not Resuscitate Order authorized by her husband shortly after her admission. *See*, MR at 31.

attached as Ex F), at 36:15-37:22; Deposition of Kevin Marsala, March 25, 2014 ("Kevin Dep.") (Excerpts attached as Ex. G), at 68:8-23; Deposition of Randy Marsala ("Randy Dep.") (Excerpts attached as Ex. H), at 44:15-23.

ARGUMENT

Summary judgment is appropriate 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." Practice Book §17-49. "A material fact is a fact that will make a difference in the result of the case." *Washington v. Blackmore*, 119 Conn. App. 218, 220 (2010). The party seeking summary judgment bears the burden of showing "the absence of any genuine issue as to all material facts, which, under the applicable principles of substantive law, entitle[s] [it] to a judgment as a matter of law." *Id.* at 220-21. Once the movant presents evidence in support of its summary judgment motion, the plaintiffs cannot stand on conclusory allegations in the Complaint. Rather, they "must present evidence that demonstrates the existence of some disputed factual issue." *Wells Fargo Bank, N.A. v. Strong*, 149 Conn. App. 384, 391 (2014). "It is not enough . . . merely to assert the existence of such a disputed issue." *Id.* "[T]he party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . ." *Rivera v. Double A Transportation, Inc.*, 248 Conn. 21, 24 (1999) (Citations omitted; internal quotation marks omitted).

The purpose of summary judgment is to "eliminate the delay and expense of litigating an issue when there is no real issue to be tried." *Grenier v. Comm'n of Transp.*, 306 Conn. 523, 534-35 (2012). "A motion for summary judgment is properly granted if it raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact." *Washington*, 119 Conn. App. at 221.

I. None Of The Individual Plaintiffs Have A Viable Claim For Emotional Distress.

In analyzing the emotional distress claims, this Court must first determine whether the claim sounds in bystander emotional distress, where the conduct in question was directed toward another party, or emotional distress caused by conduct directed at the plaintiff. The allegations of the Complaints and the uncontroverted evidence in this case demonstrate that the conduct in question was directed at Mrs. Marsala; the individual plaintiffs were merely third parties to the conduct. Thus, the emotional distress claims are barred by *Maloney v. Conroy,* 208 Conn. 392 (1988).

Even if *Maloney* did not control, the emotional distress claims must fail because plaintiffs did not have a contemporaneous sensory perception of the act they challenge. Finally, each plaintiff's claim must fail on the further ground that there is insufficient evidence of the four requisite elements of an intentional infliction of emotional distress claim.

A. *Maloney v. Conroy* Prohibits Third Party Emotional Distress Claims Arising from Medical Treatment of Another.

Third party emotional distress claims are not permitted in medical malpractice actions. *Maloney*, 208 Conn. at 402 (1988). In *Maloney,* the plaintiff daughter of a hospitalized patient sought to recover "for a severe emotional disturbance alleged to have resulted from the malpractice of the defendants in treating her mother . . . ." *Id.* at 393. The *Maloney* Court held that "a bystander to medical malpractice may not recover for emotional distress . . . ." *Id.* The Court explained that strong public policy interests preclude third party emotional distress claims in medical malpractice actions. It warned that permitting claims of emotional distress by the friends and relatives of a patient may lead to the undesirable consequences of limiting patient visitation or directing valuable hospital resources away from patient care. *Id.* at 402-403. The

Court recognized that the "focus of the concern of medical care practitioners should be upon the patient and any diversion of attention or resources to accommodate the sensitivities of others is bound to detract from that devoted to patients." *Id.* at 403. This decision "is dispositive of [the] issue [of whether emotional distress damages are available in a medical malpractice action]." *Medura v. Town & Country Veterinary Assocs., P.C.*, No. CV-11-6018916-S, 2012 WL 3871953, at *5 (Conn. Supp. Ct. Aug. 12, 2012) (citing *Milton v. Robinson*, 131 Conn. App. 760 (2011).

Here, all of the evidence demonstrates that the conduct that the plaintiffs challenge relates to the medical treatment provided to Helen Marsala. As this Court noted in striking plaintiffs' claims of negligent infliction of emotional distress:

> the injury that forms the basis of the individual plaintiffs' emotional distress claims was to [Mrs. Marsala], whose wishes concerning removal of life support the Hospital was required to ascertain, whose wishes it allegedly ignored, and who suffered the consequences of these acts . . . . Accordingly, the plaintiffs' claims should be characterized as arising under the bystander branch of the tort of negligent infliction of emotional distress because the physical harm was inflicted upon [Mrs. Marsala] and not them. . . .

Marsala v. Yale-New Haven Hospital, No. CV-126010861-S, 2013 WL 6171307, at *5-6 (Conn. Supp. Ct. Oct. 30, 2013).[6] Indeed, discovery has revealed no other conduct that could have caused individual plaintiffs' alleged emotional distress aside from that which was asserted in

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[6] Plaintiffs argue that the denial of the Hospital's Motion to Strike the intentional infliction of emotional distress claims precludes the entry of summary judgment. This argument is unpersuasive. "A motion to strike does not establish the law of the case for subsequent pleadings, particularly when those pleadings address the merits of the parties' claims . . . ." *Velasquez v. Jones Lang LaSalle Americas, Inc.*, No. CV-116016361, 2013 WL 5716828, at 18 (Conn. Supp. Ct. Sept. 30, 2013), *accord Breen v. Phelps*, 186 Conn. 86, 101 (1982) (rejecting the notion that a Judge deciding a summary judgment motion must adhere to interpretation of the law of a Judge who previously decided a motion to strike). Moreover, in this case, the grounds for summary judgement are broader than those asserted in the Motion to Strike.

their Amended Complaint, the removal of "the ventilator from Mrs. Marsala despite the family's objections when it knew or should have known that without the ventilator Mrs. Marsala would pass away . . . ." Amended Complaint, Counts 7 -12, ¶ 32. This is the same conduct that this Court found, in striking the negligent infliction claims, is essentially a claim "for malpractice against the Hospital in its treatment of [Mrs. Marsala], and therefore barred under the holding of *Maloney*." *Marsala*, 2013 WL 6171307, at *6.

That the plaintiffs have characterized these claims as intentional, rather than negligent, infliction of emotional distress does not change the analysis. Whether pled as intentional or negligent, courts classify claims of emotional distress as a result of an act directed at a third person as bystander emotional distress. *See, e.g. Montanaro v. Baron,* CV-065006991, 2008 WL 1798528, at *2, *6-7 (Conn. Supp. Ct. Mar. 28, 2008) (granting motion to strike daughter's intentional infliction claims after determining that witnessing a physician verbally slander her mother "clearly [fell] within the purview of bystander emotional distress"); *Jackson v. Kos,* CV-116019945-S, 2012 WL 3641812, at *10 (Conn. Supp. Ct. July 27, 2012) (applying same rationale to intentional infliction claims that it used to determine the negligent infliction claims were claims of bystander emotional distress). Here, this Court has already determined that the emotional distress claims are bystander claims because all the conduct in question pertained to the treatment of Mrs. Marsala. Plaintiffs cannot circumvent the holding in *Maloney* by characterizing their claims as intentional, rather than negligent, infliction of emotional distress.

Plaintiffs' reliance on *DiTerisi v. Stamford Health Systems*, No. CV-065001340-S, 2010 WL 5493514 (Conn. Supp. Ct. Dec. 14, 2010), *aff'd, DiTerisi v. Stamford Health Systems*, 142 Conn. App. 72 (2013) is similarly unpersuasive. In *DiTerisi*, the daughter of a hospitalized patient sued for emotional distress arising from an alleged failure of the defendant hospital to tell

her that her mother had been sexually assaulted. Relying on *Maloney*, the trial court granted summary judgment to the hospital. *DiTerisi*, 2010 WL 5493514 at *26. The Appellate Court held that because the conduct challenged, the failure to timely advise the daughter of her mother's assault, did not arise in the course of treatment, it was not controlled by *Maloney*. *DiTerisi*, 142 Conn. App. at 82-83. Nevertheless, the Court affirmed the granting of summary judgment, finding that the challenged conduct was not extreme and outrageous, noting that "the concerns that led the Supreme Court to reject the bystander cause of action lend support to our decision today." *Id.* at 82.[7]

Plaintiffs usually cannot recover for intentional infliction without evidence that the conduct in question was directed at them. *See, e.g., Vargas v. Specialized Education Services*, No. CV-12-6028454, 2013 WL 6671230, at *5 (Conn. Supp. Ct. Nov. 19, 2013) (granting defendants' motion to strike because plaintiff's complaint "fails to allege that the defendants' actions were directed at [the plaintiff]"); *see also, Henderson v. Frick*, No. 66630, 1993 WL 128614, at *4 (Conn. Sup. Ct. Apr. 14 1993). In *Henderson*, the Court granted the defendant's motion to strike a plaintiff's claim for intentional infliction arising from the sexual assault of her child. In so doing, the Court stated:

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[7] Plaintiffs argue that *DiTeresi* stands for the proposition that an intentional infliction claim is not subject to a bystander emotional distress analysis, but this is a flawed interpretation of the case. Rather, in *DiTeresi*, the Court noted that the plaintiff alleged that the challenged conduct, the failure to advise her of an assault, was conduct directed at the plaintiff. It is unquestionable that bystander emotional distress claims can involve an intentional act. *See, e.g.*, Restatement (Second) of Torts § 46 (setting forth the requirements for an intentional infliction claim where the challenged conduct is directed at a third person). If the intentional conduct in question is directed at a third person, the plaintiff is a bystander to such conduct, as was the case in *Montanaro v. Baron*, CV 06-5006991, 2008 WL 1798528 (Conn. Supp. Ct. Mar. 28, 2008). *DiTeresi* did not overrule *Montanaro,* but rather explained that the crucial distinction is determining toward whom the conduct in question was directed. In this case, as in *Montanaro*, the conduct in question was directed at a third party.

> [a] claim of intentional infliction of emotional distress is normally based on conduct ***directed at the plaintiff*** and therefore may not be available as a remedy for the parent of a child who is sexually assaulted. Unless the plaintiff alleges that the child was assaulted ***for the specific purpose of tormenting her***, there is no cause of action for intentional infliction of emotional distress.

Id. (emphasis added). In *DiTeresi,* the Appellate Court noted the same principle in affirming summary judgment on the intentional infliction claims of the daughter of a comatose patient who was sexually assaulted by an orderly. *DiTeresi*, 142 Conn. App. 72, 87-88 (2013) ("Even if the delay in informing [the plaintiff] was motivated in part by public relations or pecuniary concerns, there is no evidence that the hospital intended to inflict emotional distress ***on her***") (emphasis added).

Here, it is undisputable that the action that plaintiffs challenge was directed at Mrs. Marsala; it was Mrs. Marsala's life support that was discontinued. Discovery has revealed no intentional act that could have caused the individual plaintiff's alleged distress beyond that asserted in plaintiffs' complaint, namely that removing Mrs. Marsala's ventilator was done over their "objections." *See, e.g.,* Amended Compl, Count 7, at ¶¶ 31, 32.[8] But the allegation that the family objected to the proposed treatment does not make the treatment an act directed at the family. In fact, our Supreme Court has cautioned that "[m]edical judgments as to the appropriate treatment of a patient ought not to be influenced by the concern that a visitor may become upset from observing such treatment or from the failure to follow some notion of the visitor as to the care of the patient." *Maloney*, 208 Conn. at 403. Because the plaintiffs have alleged no conduct directed at them, each of the intentional infliction claims must fail.

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[8] To the extent that plaintiffs argue that ***every*** family member objected to the removal of life support, the evidence refutes this claim. Although Mr. Marsala, Gary and Randy recall that they objected to the plan to disconnect life support, Tracey testified that she never visited the Hospital and Michael and Kevin recall no discussions with Hospital personnel. *See infra*, pp. 13-14.

B. The Emotional Distress Claims Fail on the Further Ground that Plaintiffs Were Not Present and had no Contemporaneous Sensory Perception of the Act they Challenge.

For years there was a split of authority in Superior Courts about whether the Supreme Court's decision in *Clohessy v. Bachelor*, 237 Conn. 31 (1996), which outlined the necessary elements for a claim of bystander emotional distress, overruled *Maloney*'s complete bar to claims of third party emotional distress arising from alleged medical malpractice. *See Maffe v. Banker*, No. CV-10-6010305-S, 2013 WL 2350456, at *2-7 (Conn. Sup. Ct. May 1, 2013) (discussing the evolution of the Superior Court split and holding that *Maloney* still controls); *see also, Medura*, 2012 WL 3871953 at *4-5 (same). In *DiTerisi*, the Appellate Court noted that *Maloney* precludes such claims in the medical malpractice context, likely ending the dispute amongst trial courts. *See, DiTerisi*, 142 Conn. App. at 82 ("bystander emotional distress claim in the context of observed medical malpractice, a cause of action not recognized in Connecticut").

Even if *Maloney* was not dispositive, plaintiffs' claims must fail because they do not claim that they were present at the time of the act they challenge. In *Clohessy,* the Supreme Court set forth the essential elements of a bystander emotional distress claim:

> 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.

237 Conn. at 56. In this case, the undisputed evidence is that none of the plaintiffs were present when Mrs. Marsala's ventilator was removed or when she died four days later.[9] Gary had a discussion with one of Mrs. Marsala's doctors in which she told him that they were considering removing the ventilator, but he left the Hospital before the ventilator was removed. He thinks that may have been the last time he saw his mother. Gary Dep., at 43:3-21; 45:4-8; 46:13-17. Mr. Marsala testified that he went to the Hospital to tell the physicians not to remove the ventilator and he found out from a phone call later that night that the ventilator had been removed. Clarence Dep. 68:13-69:14. Tracey testified that she never saw her mother at the Hospital. Tracey Dep., at 19:12-14. Michael, Kevin and Randy each testified that they found out about the removal of the ventilator during a phone call. Michael Dep., at 36:15-37:22; Kevin Dep., at 68:8-23; Randy Dep., at 44:15-23. Because none of the plaintiffs claim the contemporaneous sensory perception that is required to support a bystander emotional distress claim under *Clohessy,* the Hospital is entitled to judgment on each claim.

C. Plaintiffs Lack the Evidence Necessary to Support a Claim of Intentional Infliction of Emotional Distress.

Even under the analysis required for non-bystander intentional infliction claims, judgment should enter for the Hospital. The Supreme Court has recognized that to recover for intentional infliction of emotional distress, plaintiff must establish four elements:

> (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....

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[9] Indeed, as the Court noted in granting the Hospital's Motion to Strike, the plaintiffs do not even allege a contemporaneous sensory perception of the conduct they challenge.

Perez–Dickson v. Bridgeport, 304 Conn. 483, 526-27 (2012). Here, the uncontroverted evidence shows that, even if the Court were to analyze the intentional infliction claims without regard to the plaintiffs' status as bystanders, the Hospital is entitled to judgment because none of the plaintiffs can satisfy these requirements.

1. The evidence does not support that the Hospital intended to cause, or knew or should have known that each individual plaintiff would experience, emotional distress.

It is undisputed that at the time the Hospital decided not to reintubate Mrs. Marsala, it was aware that Mr. Marsala did not consent to this plan. It is equally undisputed that the decision was made after Mrs. Marsala's treating physicians determined that further care was futile, after the Ethics Committee recommended no further escalation of care, after a pulmonologist who had not been involved in her care agreed with the recommendations of her treaters and with the Ethics Committee, and after each of these recommendations was relayed to Mr. Marsala. Pisani Aff. at ¶¶ 13-15. The argument that the Hospital made this decision with the intent to cause the plaintiffs emotional distress finds no support in the record.

Each of the individual plaintiffs have been deposed and agree that Mr. Marsala was the spokesperson for Mrs. Marsala. *See, e.g.,* Gary Dep., at 54:8-13; Pisani Dep. 61:8-19; 75:7-9; Michael Dep., at 43:8-10. His children had little or no interaction with the Hospital. Three of the plaintiffs, Michael, Kevin and Tracey, recall no interaction with the physicians at the Hospital; in fact, Tracey never went to the Hospital at all. Michael Dep. at 42:17-43:10; Kevin Dep. at 59:25-60:5; Tracey Dep. at 19:12-14. Although Randy and Gary recall a meeting at the Hospital in which they and their father objected to the idea of removing Mrs. Marsala's life support,

neither had significant interaction with Hospital personnel.[10] Randy Dep. at 39:24-40:24. Gary Dep., at 50:4-12.

Clearly, the Hospital cannot be said to have intended to cause emotional distress to the three Marsalas with whom it had no interaction. Similarly, given the limited interactions between the Hospital and the Gary Marsala children, there is no evidence that the Hospital did anything with the intent to cause any one of them emotional distress. To hold that the Hospital should have known that its conduct would cause emotional distress to family members who had very little, if any, contact with the Hospital would unreasonably expand tort liability.

2. The Hospital's conduct toward the individual plaintiffs was not extreme and outrageous.

The second element that a plaintiff seeking to recover for intentional infliction of emotional distress must prove is that the conduct *directed at the plaintiff* was extreme and outrageous. This oft-cited language from our Supreme Court clarifies just how repugnant an actor's conduct must be toward that plaintiff to clear the extreme and outrageous threshold:

> [l]iability 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.

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[10] Randy testified that this was the only interaction he had with any physicians at the Hospital. He spent most of his visits sitting in the hallway outside of his mother's room not talking to anyone. *Id.* at 41:16-24; 42:21-44:14. Gary had one additional conversation with one of the physicians, but generally did not speak with his mother's doctors. *Id.* at 21:13-16.

Appleton v. Board of Education, 254 Conn. 205, 210-11 (2000) (citing Restatement (Second) of Torts § 46) (citations omitted; internal quotation marks omitted.). Extreme and outrageous conduct presents a "high bar for distasteful behavior" for plaintiffs to clear. *DiTerisi*, 142 Conn. App. at 87 (summary judgment appropriate given lack of evidence that the hospital's conduct was extreme and outrageous); *see also, Perez-Dickson*, 304 Conn. at 527 (directed verdict was appropriate because plaintiff failed to produce evidence that defendants' actions met the "high threshold" for extreme and outrageous conduct). "Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine. Only where reasonable minds disagree does it become an issue for the jury." *Appleton,* 254 Conn. at 210 (Citation omitted; internal quotation marks omitted).

This case presents a situation analogous to *Perez-Dickson*; not in the conduct alleged, but in the lack of evidence to support a finding that the conduct of the Hospital addressed to each of the individual plaintiffs was extreme and outrageous. Surely, Michael, Kevin and Tracey who recall no interaction with the Hospital cannot establish that any conduct of the Hospital toward them was extreme or outrageous. Similarly, although Gary and Randy recall one or two conversations with Hospital personnel, neither of them suggested that anything in those conversations was remarkable, much less extreme or outrageous. Even Mr. Marsala, who testified that he had grown frustrated with Hospital personnel asking him to reconsider his refusal to authorize the removal of life support, cites nothing in the Hospital's dealings with him that is extreme or outrageous.

At best, the plaintiffs can only argue that the Hospital's refusal to continue Mrs. Marsala's life support, notwithstanding Mr. Marsala's advice that she would have wanted it

continued, is extreme and outrageous conduct directed at each of them. Contrary to the allegations in the complaint, it was not extreme and outrageous at all.

The medical records reflect that Mrs. Marsala's ventilator was removed on July 20, 2010, four days before her death. MR at 31, 33. Gary Marsala testified that he remembered having a conversation with one of Mrs. Marsala's physicians about this before it happened, and that she told him that they were going to extubate Mrs. Marsala and see if she could breathe on her own. Gary Dep. at 43:3-21. Before then, Mrs. Marsala had tolerated several weaning trials, and her medical team believed that removing the ventilator and allowing her to try and breathe on her own was the best course of treatment. Deposition of Andrew Boyd, M.D., August 20, 2014 ("Boyd Dep.") (Excerpts attached as Ex. I), at 77:8-11; Pisani Dep. at 60:20-61:4; Pisani Aff. at ¶ 10. Mrs. Marsala had been on a ventilator for over two months and her condition had not improved. Dr. Pisani was concerned about keeping the patient intubated because she knew that prolonged intubation can result in further medical problems and can actually suppress a patient's cognitive ability, which was the reason Mrs. Marsala was on a ventilator. *Id.*

When extubation did not restore Mrs. Marsala's mental status, her medical team did not think there was anything further that could be done for her. Boyd Dep. at 69:7-11; Pisani Dep. at 116:18-23. Dr. Pisani, the Ethics Committee, and a critical care pulmonologist, who was called for a second opinion, all believed that Mrs. Marsala had no chance of meaningful recovery. Pisani Dep. at 86:16-87:18, 117:20-119:8. The Ethics Committee considered Mrs. Marsala's goal of going home and concluded that further escalation of care—including re-intubation—would not further this interest.[11] MR at 42. As long as Mrs. Marsala was intubated, however,

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[11] It is undisputed that Mrs. Marsala's goal was to return home; each plaintiff testified that Mrs. Marsala would have wanted to stay alive to care for her daughter, Tracey, who suffers from a degenerative disease. *See* Randy Dep. at 35:7-13 ("Q. It was your impression that the basis for

she was not going to be able to return home. Dr. Pisani and the members of the Ethics Committee considered her medical course and determined that re-intubation would be futile toward achieving Mrs. Marsala's goal. MR at 42; Pisani Aff. at ¶ 14.

In Dr. Pisani's opinion, Mrs. Marsala was not a candidate for transfer to a different facility due to the fact that she had already been transferred once and had such a dire prognosis. Pisani Dep. at 125:15-126:19. She also believed that re-intubating Mrs. Marsala would be futile to both her overall prognosis and her goal of returning home to care for her daughter. Pisani Aff.. at ¶ 13. During this time, the Hospital made numerous attempts to contact and had several conversations with Mr. Marsala informing him that further care was futile and suggesting the removal of life sustaining treatment in an effort to ease him into the decision and limit the distress that naturally results under such difficult circumstances. Pisani Dep. at 130:20-132:15; Pisani Aff. at ¶ 17. Further, Mr. Marsala testified that he was informed of the decision to remove Mrs. Marsala's life sustaining treatment on the night that she died, and that even though he objected, he did not ask about possibly transferring his wife nor did he get any confirmation from the physicians that they would heed his objection. Rather, his objection noted, he went home. Clarence Dep., at 68:10-69:10.

The question before the Court is not whether Mrs. Marsala's medical team acted properly in continuing care that they found to be futile; this will be answered at trial on the wrongful death

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your mother wanting to stay on any life support measures was to see your sister – A. To take care of my sister."); Gary Dep. at 30:18-31:2 ("Q. So taking care of your sister, was her – your understanding of her primary rationale for wanting to stay on life support? A. I would say so, yes."); Clarence Dep. 46:21-47:10 ("Q. So you and your wife talked about the fact that if you ended up on life support, you wanted to be maintained on life support? A. Absolutely. Q. Because then Tracey could take care of you? A. No. No. We could take care of her."); Kevin Dep. 45:24-46:3 ("Q. Do you remember any specifics from any of those – aside from restating that your mother wouldn't want to be removed from life support? A. Just that, you know, like I said, she wanted to be alive as long as she can for her daughter Tracey.").

claim. Rather, the question is whether the refusal of the Hospital to continue to provide care requested by a patient's surrogate—care that its treating physicians, Ethics Committee and an uninvolved physician asked to give a second opinion all agreed was futile and not in the best interest of the patient—was conduct directed at the surrogate that is "beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Appleton v. Board of Education*, 254 Conn. 205, 211 (2000). As a matter of law, the Hospital contends that such a decision is simply not an appropriate basis for an intentional infliction claim on behalf of the surrogate.

3. It is impossible for the plaintiffs to distinguish the distress caused by the challenged conduct from that resulting from the loss of Mrs. Marsala.

In cases with similar facts, courts have noted that emotional distress claims raise a "troublesome question of causation involved in distinguishing the plaintiff's natural grief over the loss of her mother . . . 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 defendant's wrongful conduct." *Maloney*, 208 Conn. at 399. *See also, DeTeresi*, 142 Conn. App. at 83 ("it would be difficult to distinguish whether the plaintiff's distress was the result of natural grief over her mother's death, which may have occurred even in the absence of malpractice, or, as the plaintiff alleged, [as a result of defendant's actions]"). Due to the inevitable intertwining of such emotions, plaintiffs must be able to demonstrate that the distress for which they seek to recover is actually attributable to the conduct in question.

The testimony of each plaintiff reveals that each was understandably distressed by the loss of their wife or mother. But that distress is what one would expect to accompany the death

of a close family member. For example, Mr. Marsala repeatedly acknowledged that he would have experienced the same emotions following his wife's death regardless of the Hospital's role:

> As long as I had my wife . . . I've never worried about my children. Now I can't make a move, you know. I've got to always put Tracey in front of me. ***I realize regardless of what happened I'd still be in that boat. I understand that.*** But, I mean, to ask me how much it changed my life now, it brought me from a person who could do whatever he wanted to a person who can't do nothing unless I – I either got to take Tracey. Not that I – don't misunderstand me that I regret taking Tracey. But the whole idea is naturally Tracey was a lot more comfortable with her mother as far as going and visit because they would stay hours, whatever. You know. And she never refused to go or anything. But with me it's just a whole different life thing. It just changed my life. ***But I understand that could have happened anyway.*** But they took that from me. They took from me.

Clarence Dep. at 98:12-99:7 (emphasis added).

The difficulty in distinguishing the emotions the individual plaintiffs felt as a result of the death of Mrs. Marsala as opposed to the removal of life support is exemplified in the deposition testimony of Tracey. Tracey is disabled and had been living with Mr. and Mrs. Marsala before Mrs. Marsala was hospitalized. Tracey Dep. at 13:22-14-2. She found out in February 2014, almost four years after the death of her mother, that the Hospital had removed her mother's ventilator and that she was a named plaintiff in this case. Clarence Dep. at 102:3-22; Tracey Dep. at 19:15-22:16. Because she was unaware of the Hospital's decision to terminate life support, any distress she experienced prior to February 2014 could not have been due to the Hospital's conduct. With regard to her mother's death, Tracey testified: "I was not happy. I was very depressed. I was angry. I was sad. It was a very serious situation. I missed her." Tracey Dep. at 46:20-23. With regard to the conduct in question, Tracey said: "Oh, I was very unhappy. Yale was wrong." *Id.* at 46:24-48:7.

In their objection to the Hospital's Motion, each plaintiff has submitted an identical affidavit stating: "My severe emotional distress was not due to merely the natural grief of the

loss of my mother but; rather, was due to my belief that the suffering and death of my mother was due to Yale New Haven Hospital's improper treatment of my mother." Affidavit of Gary Marsala at ¶ 15; Affidavit of Randy Marsala at ¶ 15; Affidavit of Kevin Marsala at ¶ 15; Affidavit of Tracey Marsala at ¶ 15; Affidavit of Michael Marsala at ¶ 15. *See also,* Affidavit of Clarence Marsala at ¶ 16 (using the word "wife" instead of the word "mother" without any other difference in the sentence). Such conclusory statements, like a conclusory allegation in a complaint, cannot defeat summary judgment.

The Supreme Court in *Maloney* and the Appellate Court in *DiTerisi* have noted the inherent difficulty in separating the natural loss caused by the death of a spouse or parent from distress caused by a belief that the conduct of another has contributed to the death. Simply providing an identical undetailed sentence in each plaintiff's affidavit stating that his or her emotions are "severe" and attributed to one thing and not the other—without providing any further evidentiary support—does not cure the fundamental causation problem recognized by the appellate courts.

Each individual plaintiff has offered insufficient evidence as to causation. The Hospital is therefore entitled to judgment on each individual plaintiff's claim of intentional infliction of emotional distress.

4. The evidence does not support that the individual plaintiffs experienced emotional distress to an extraordinary degree.

In order to recover on a claim of IIED, a plaintiff must have experienced severe emotional distress. *See Appleton*, 254 Conn. at 211. The Restatement (Second) of Torts § 46 characterizes the necessary severity of an emotional distress claim by stating that "[e]motional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock . . . fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin,

disappointment, worry, and nausea. It is only where it is ***extreme*** that the liability arises." Restatement (Second) Torts § 46 (hereinafter "Restatement"), comment (j) (1965) (emphasis added). One of the ways that Courts measure the severity of emotional distress is by determining whether the plaintiffs have experienced any bodily harm. *See* Restatement, comment (k). Though not a requirement, "[n]ormally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm." *Id.*, comment (j). Claims of emotional distress have been dismissed because the plaintiff "fail[ed] to allege or offer proof that he sought medical treatment for alleged severe distress." *Meola v. Eagle Snacks Co.*, CV-960384760, 2000 WL 1342561, at *8 (Conn. Sup. Ct. Sept. 6, 2000).

Much like the standard for extreme and outrageous conduct, the threshold for the severity of compensable emotional distress is extremely high. Intentional infliction claims are not intended for the emotions that everyone experiences at one time or another. *See* Restatement, comment (j). Rather, "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Id.*; *see also, Almonte v. Coca-Cola Bottling Co.*, 959 F. Supp. 569, 575 (D. Conn 1997). In order to meet this threshold a plaintiff must provide evidence that the emotional distress he experienced was "***to an extraordinary degree.***" *Almonte*, 959 F. Supp. at 576 (emphasis added).

The Amended Complaint and the affidavits submitted by the plaintiffs characterize the emotional distress that each individual plaintiff allegedly experienced in one word: "severe." Amended Compl. Counts 7 – 12, ¶ 32. Courts have stricken IIED claims for such insufficient pleading. *See, Witt v. Yale-New Haven Hosp.*, 51 Conn. Supp. 155 (Sept. 30, 2008) (granting motion to strike claim of IIED based on plaintiff only pleading that the emotional distress he experienced was "severe"). Additionally, the Hospital has deposed each of the individual

plaintiffs and none was able to provide any detail to support the argument that the alleged emotional distress was severe or differed from the distress one would expect to experience after a loved one passed away.

None of the individual plaintiffs testified that he or she sought medical care or counseling for the alleged emotional distress or missed time from work or otherwise explained how the distress was "severe." *See* Randy Dep. at 46:13-15; Gary Dep. at 56:6-8; Michael Dep. 44:19-21; Kevin Dep. 74:23-25. For example, in addition to his previously-excerpted testimony about the increased burden he feels for having to care for Tracey alone, Mr. Marsala testified that he is "emotionally shook up about all of it and it's always on [his] mind." Clarence Dep. at 100: 4-5. He also testified that "every time [he] do[es] something in the house, cook, or clean or – this always comes back to her and it's a great emotional strain on me." *Id.* at 92:11-14. Gary testified that he thinks about his mother's death every day – that he "didn't get a chance to say goodbye," that he still picks up the phone sometimes to call her, and that he "get[s] angry once in a while." Gary Dep. at 54: 25-55:25. Randy testified that the conduct in question made him "upset and mad and angry." Randy Dep. at 47:15. Michael testified that this incident has upset him in "[a] lot of ways. One, not being able to say goodbye. Two, angry, depressed a little bit, crying constantly, speaking to God all the time. Yeah." Michael Dep. at 44:16-18. Likewise, Kevin testified that he spent a lot of time crying and sometimes has pains in his chest, and that it wears on him that he could not do anything for her. Kevin Dep. 74:13-22. Tracey, as previously excerpted, said that as a result of the conduct in question she was "very unhappy." Tracey Dep. at 48:7.

The individual plaintiffs subsequently submitted identical affidavits, each of which state that the emotional distress he or she experienced "caused me to suffer shock, amazement,

depression, confusion, anger, sadness, grief and disappointment." Affidavit of Gary Marsala at ¶ 13; Affidavit of Randy Marsala at ¶ 13; Affidavit of Kevin Marsala at ¶ 13; Affidavit of Tracey Marsala at ¶ 13; Affidavit of Michael Marsala at ¶ 13; Affidavit of Clarence Marsala at ¶ 14. In addition, Mr. Marsala averred that his emotional distress affects his ability to sleep. Affidavit of Clarence Marsala at ¶ 14. There remains, however, no evidence before the Court that any plaintiff experienced any physical manifestation of his or her alleged emotional distress (except for Mr. Marsala who averred that he has trouble sleeping), or that any individual plaintiff suffered emotional distress to an extraordinary degree.

"Connecticut courts have held that emotional distress is severe where it reaches a level which no reasonable person could be expected to endure." *Almonte v. Coca-Cola Bottling Co.*, 959 F. Supp. 569, 575 (D. Conn. 1997) (internal quotation marks omitted). In *Almonte* the Court determined that "[t]he symptoms described by the plaintiff—sleeplessness, depression, anxiety—are no doubt common among employees who have been fired, regardless of the circumstances." *Id.* at 575-76. Similarly, the symptoms described by each individual plaintiff here are no doubt common among a surviving spouse and children, regardless of the circumstances surrounding the loved one's death. Though *Almonte* stopped just short of requiring physical manifestations of such symptoms, the Court granted defendants' motion for summary judgment after holding that "[a]bsent some evidence that the plaintiff suffered these symptoms to an ***extraordinary degree*** . . . the facts alleged in his pleadings and opposition papers, taken in the light most favorable to the plaintiff, do not support his claim of severe emotional distress." *Id.* at 576 (emphasis added).

Here, each individual plaintiff avers to the exact same manifestation of his or her emotional distress. Even Tracey, who did not learn about any alleged role the Hospital played in her mother's death until three and a half years later, has provided sworn testimony that she felt

all the same emotions as did her brothers and father who were contemporaneously aware of the events. Further, no plaintiff has provided any evidence that he or she suffered to an extraordinary degree. There is not specific testimony about how this distress manifested itself in the individual plaintiffs' lives; no individual plaintiff sought counseling, missed extended time from work, or had any physical manifestation or bodily harm (except for Mr. Marsala who has difficulty sleeping). The individual plaintiffs' conclusory statements about their alleged emotional distress in their affidavits do not depict the type of distress that is compensable in a claim of intentional infliction; these emotions are what reasonable people feel when a loved one dies, not distress so severe that no reasonable person could be expected to endure.

II. The Hospital Is Entitled To Judgment On The Claims Of Medical Malpractice And Derivative Loss Of Consortium.

The operative Complaints contain a wrongful death claim and two medical malpractice claims filed on behalf of the Estate, and two loss of consortium claims on behalf of Mr. Marsala. Because several of these Counts are duplicative, and the Wrongful Death Statute, § 52-555, provides the exclusive remedy for a personal injury action resulting in death, judgment should enter for the Hospital on Counts 26 and 27 of the Amended Complaint and Count 1 of the Second Complaint.

Plaintiffs' claims to recover for the death of Mrs. Marsala are governed by General Statutes § 52-555, which provides, in pertinent part:

> In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses . . . .

Conn. Gen. Stat. § 52-555. For over a century, it has been the law in Connecticut that "[w]hen one, as the result of injuries inflicted, suffers during life, and death later results, there are not two

independent rights of action. There is but one liability, and that is for all the consequences of the wrongful act including the death." *Kling v. Torello*, 87 Conn. 301, 87 A. 987, 988 (1913). As the Supreme Court explained:

> [i]n any action by the estate of the victim pursuant to [General Statutes] § 52-555, of course, the damages suffered before his death are one of the elements of 'just damages' to be awarded and must be sought in that action rather than in a separate suit under the survival-of-actions statute. . . . [T]here cannot be a recovery of damages for death itself under the wrongful death statute in one action and a recovery of antemortem damages, flowing from the same tort, in another action.

Ladd v. Douglas Trucking Co., 203 Conn. 187, 190-91 (1987). In other words, "[o]ur wrongful death statute covers both ante-mortem elements of damages, such as pain, suffering and medical expenses, and also damages for the death itself . . . ." *Prates v. Sears-Roebuck & Co.*, 19 Conn. Supp. 487, 488 (1955).

In this action, the Estate seeks relief in three different counts. *See* Amended Complaint, Count 26 (Medical Malpractice based on General Statutes § 52-555); Amended Complaint, Count 21 (Wrongful Death based on General Statutes § 52-555); and Second Complaint, Count 1 (Medical Malpractice). The law permits the Estate a single recovery for a personal injury resulting in death: a wrongful death claim codified at General Statutes § 52-555. Thus, the Hospital is entitled to judgment on Count 1 of the Second Complaint and Count 26 of the Amended Complaint.[12]

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[12] Plaintiffs argue that the decisions in *Michelson v. Katz*, 2005 WL 1971295 (Conn. Supp. July 26, 2005) and *Saperstein v. Danbury Hospital*, 2010 WL 760402 (Conn. Supp. Jan. 27, 2010) authorize them to pursue each of these claims. Neither case, however, supports their argument. Indeed, the *Michelson* decision cited by plaintiffs was vacated on re-argument, and provides no support for plaintiffs' claims. *Michelson v. Katz*, CV-044001359, 2005 WL 2852003 (Conn. Supp. Ct. Oct 5, 2005). Neither of these cases authorizes the simultaneous pursuit of wrongful death and medical malpractice actions.

Similarly, Mr. Marsala has claimed a loss of consortium pursuant to General Statutes § 52-555a in both Counts 22 and 27 of the Amended Complaint. Loss of consortium claims are derivative of an injured spouse's claim and cannot proceed if the injured spouse's claim is legally insufficient. *See Hopson v. St. Mary's Hosp.*, 176 Conn. 485, 494 (1979) ("because a consortium action is derivative of the injured spouse's cause of action, the consortium claim would be barred when the suit brought by the injured spouse has been terminated by settlement or by an adverse judgment on the merits"). Here, because the Estate's medical malpractice claims are barred, so too is Mr. Marsala's loss of consortium claim derived from that medical malpractice claim (*see* Amended Complaint, Count 27).

CONCLUSION

For all the aforementioned reasons, the Hospital respectfully requests that the Court enter judgment in its favor on the Second Complaint (CV-12-6011711-S) and Counts 7, 8, 9, 10, 11, 12, 26 and 27 of the Amended Complaint (CV-12-6010861-S, Doc. No. 107).

DEFENDANT,
YALE-NEW HAVEN HOSPITAL

By: /s/ Penny Q. Seaman

Penny Q. Seaman
Benjamin W. Cheney
Wiggin and Dana LLP
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
Juris No. 067700
pseaman@wiggin.com
bcheney@wiggin.com

CERTIFICATION

This is to certify that a copy of the foregoing was served via electronic mail this 12th day of September 2014, on the following counsel of record:

Jeremy C. Virgil, Esq.
Zeldes, Needle & Cooper, P.C.
PO Box 1740
Bridgeport, CT 06601-1740
jvirgil@znclaw.com

/s/ Penny Q. Seaman
Penny Q. Seaman

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DOCKET NO.: AAN-CV12-6010861-S	:	SUPERIOR COURT
CLARENCE MARSALA, ET AL.	:	JUDICIAL DISTRICT OF MILFORD/ANSONIA
v.	:	AT MILFORD
YALE-NEW HAVEN HOSPITAL, INC. d/b/a YALE NEW HAVEN HOSPITAL	:	NOVEMBER 17, 2014
DOCKET NO.: AAN-CV12-6011711-S	:	SUPERIOR COURT
CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	JUDICIAL DISTRICT OF MILFORD/ANSONIA
v.	:	AT MILFORD
YALE-NEW HAVEN HOSPITAL, INC. d/b/a YALE NEW HAVEN HOSPITAL	:	NOVEMBER 17, 2014

PLAINTIFFS' OBJECTION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs, Clarence Marsala, Michael Marsala, Gary Marsala, Tracey Marsala, Kevin Marsala, Randy Marsala, and Clarence Marsala, Administrator of the Estate of Helen Marsala, hereby object to the Motions for Partial Summary Judgment[1] filed by Defendant Yale New Haven Hospital, Inc. d/b/a Yale New Haven Hospital.

This is a case involving very serious allegations that Defendant, knowingly against the wishes of Plaintiffs' decedent, Helen Marsala, unilaterally made the decision to remove her from life support and cause her death. Further, Plaintiffs allege that Defendant did not give the plaintiff family members *any* opportunity or

[1] The Motion for Summary Judgment is Entry#140.00 of Docket No. 12-6010861 and Entry #129.00 of Docket No. CV12-6011711. The Motions seek the same relief.

make *any* effort to transport their mother/wife so that she could prolong her life as was her wish; nor did Defendant give Plaintiffs the opportunity to resolve the life or death dispute in Probate Court. That is because the decision to remove Helen Marsala from life support, the communication of that decision to Plaintiffs, and the execution of that decision, which resulted in her death, all occurred within a fourteen-hour window. Hospitals simply do not have the right to terminate life support against a patient's wishes. Only the patient has the right to make that decision.

As discussed below, there are genuine issues of material fact as to whether Defendant should have known that Defendant's intentional removal of a breathing tube and/or refusal to provide life sustaining measures to Helen Marsala would cause Plaintiffs severe emotional distress because such lack of treatment was: against Helen Marsala's wishes; over the objection of Helen Marsala's family; and done without affording Helen Marsala's family the opportunity to transfer Helen Marsala or resolve the issue in Probate Court. Additionally, there is a material issue of fact as to whether Plaintiffs may assert a medical malpractice claim for ante-mortem damages along with a wrongful death action for post-mortem damages.

FACTUAL BACKGROUND

Before Helen Marsala became ill, she had conversations with her husband, Clarence Marsala, indicating that he was to make decisions regarding life support on her behalf if she could no longer make them herself. She also indicated that she wanted to remain on life support in the event she was incapacitated. Helen had never created a living will. Clarence and Helen's next of kin knew of her decision to remain alive if ever on life support.

On or about April 7, 2010, while Helen Marsala was being treated at Griffin Hospital, she was placed on life support. During her stay at Griffin Hospital, agents, employees and/or staff at Griffin Hospital consulted Plaintiffs about removing life support from the decedent. Plaintiffs unambiguously refused to remove life support from the decedent.

On or about June 19, 2010, Plaintiffs, expressly in an effort to continue life support, had Helen Marsala transferred to Yale New Haven Hospital. Numerous times during her stay, staff members and/or clergy working at Yale New Haven Hospital had conversations with several members of the decedent's family regarding the permanent removal of life support from the decedent. Every family member unambiguously objected, insisted the ventilator be replaced, and instructed Defendant to never "pull the plug."

In every instance that Plaintiffs objected to Defendant's suggestion that the decedent be removed from life support, Defendant took no further action, until the date of Helen Marsala's passing. On or about July 24, 2010, without involving Plaintiffs in the process, Defendant unilaterally made the decision to permanently remove the ventilator from the decedent. That same day, Defendant informed Helen Marsala's son, Gary Marsala, of Defendant's decision, who objected and reported the information to Clarence Marsala. That same day, Clarence Marsala rushed to Yale New Haven Hospital and objected to Defendant's decision. Yet it was too late. On July 24, 2010, Helen Marsala suffocated and died without Plaintiffs having the opportunity to transport Helen Marsala or seek redress in Probate Court.

Previously, the Court (*Lee, J.*) ruled on Defendant's Motion to Strike and, in doing so, made the following findings:

> As alleged in the Complaint, the plaintiffs' decedent, Helen Marsala, was admitted to Griffin Hospital in Derby, Connecticut on April 7, 2010 for surgery on her wrist. Helen then contracted an infection and, while still conscious, was placed on life support. On June 19, 2010, Helen was transferred to the [Defendant] Hospital. Helen died at the Hospital on July 24, 2010, after agents or employees of the Hospital permanently removed her respirator. Helen did not create a living will; however, she expressed her intention "to remain alive if ever on life support."
>
> Shortly after her admission to the Hospital, Helen's husband, Clarence Marsala, and/or Helen filled out financial forms for the Hospital indicating that Helen and her family were below a financial threshold and would be unable to pay for her treatment. On the day of her admission, agents and employees of the Hospital "consulted" with Clarence and Helen's son, Michael Marsala, about removing the ventilator from Helen without replacement if she failed to begin breathing on her own. Clarence and Michael refused and instructed the Hospital never to "pull the plug." Agents and employees continued to discuss removing Helen's ventilator, and Clarence and other members of the family continued to refuse to allow the Hospital to do so.
>
> On or about July 24, 2010, agents or employees of the Hospital informed Helen's son, Gary Marsala, that they were going to permanently remove Helen's respirator that evening, to which Gary objected. Upon learning of the Hospital's plan, Clarence also objected. Nevertheless, the Hospital removed Helen's ventilator, causing her to suffocate
> and die that night.

See Entry # 117.50 of Docket No. 12-6010861, attached as Exhibit A, P. 1.

Defendant is moving for summary judgment as to Counts Seven through Twelve (intentional infliction of emotional distress); Count Twenty-Six (medical

malpractice); and Count Twenty-Seven (loss of consortium) of the Second Amended Complaint, Dated October 22, 2012 (Entry #107.00 of Docket No. 12-6010861).[2] Defendant is moving for summary judgment as to Count One (medical malpractice); of the Complaint, Dated October 22, 2012 (of Docket No. 12-6011711).[3] Plaintiffs hereby object.

LAW AND ARGUMENT

I. PLAINTIFFS' INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS (COUNTS SEVEN THROUGH TWELVE)[4]

A. There are genuine issues of material fact regarding Plaintiffs' claims of intentional infliction of emotional distress.

"In order for the plaintiff to prevail in a case for liability under ... [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

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[2] Defendant is not moving for summary judgment on Count Twenty-One (wrongful death) and Count Twenty-Two (loss of consortium).

[3] On October 22, 2012, Clarence Marsala, as Administrator of the Estate of Helen Marsala, filed a Second Amended Complaint to assert a medical malpractice claim. See Count Twenty-Six of Second Amended Complaint, Dated October 22, 2012, Entry #107.00 of Docket No. 12-6010861. At the same time, on October 22, 2012, Clarence Marsala, as Administrator of the Estate of Helen Marsala, filed an additional one-count-action, asserting an identical claim of medical malpractice. See Complaint, dated October 22, 2012, of Docket No. 12-6011711. On June 30, 2014, the Court (*Brazzel-Massaro, J.*) consolidated the two-actions. See Entry #133.01 of Docket No. 12-6010861. On October 30, 2013, the Court (*Lee, J.*) struck certain Counts of the Second Amended Complaint, Dated October 22, 2012 (Entry #107.00 of Docket No. 12-6010861) sounding in: negligent infliction of emotional distress (Counts One though Six); CUTPA (Counts Thirteen through Nineteen); the Removal of Life Support Systems Act (Count Twenty); Assault and Battery (Counts Twenty-Three and Twenty-Four, respectively); and the Right of Privacy (Count Twenty-Five). See Entry # 117.50 of Docket No. 12-6010861 attached as Exhibit A.

[4] All of these Counts are contained in the Second Amended Complaint, Dated October 22, 2012, Entry #107.00 of Docket No. 12-6010861.

severe.... Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine.... Only where reasonable minds disagree does it become an issue for the jury." (Citation omitted; internal quotation marks omitted.) *Gagnon v. Housatonic Valley Tourism District Commission,* 92 Conn.App. 835, 846 (2006).

Defendant's administration of continuous respiratory suppressing medications while refusing to re-intubate Helen Marsala, who was in serious respiratory distress, over the explicit, emphatic and specific objections of Plaintiffs resulting in her death, was intentional, extreme, outrageous, criminal, and obvious; and certain to cause Plaintiffs' severe emotional distress.

i. Defendant's refusal to re-intubate Helen Marsala was extreme and outrageous because Defendant was administering respiratory suppressing medications and removing all treatments that maintained Helen Marsala's airway over all of Plaintiffs' objections to continue life-support measures.

"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.) *Appleton v. Board of Education*, 254 Conn. 205, 210–11, 757 A.2d 1059 (2000).

Defendant's lack of treatment of Helen Marsala is extreme and outrageous for the following eight-reasons, to be addressed below: 1) Helen Marsala's wishes were to remain on life support; 2) Plaintiffs did not want Helen Marsala's intubation and life saving measures to be discontinued; 3) it is patently absurd that Defendant claims that the best course of treatment for Helen Marsala was to not treat her and place her on Comfort Care measures; 4) the cause of Helen Marsala's decreased mental status was never diagnosed; 5) Dr. Margaret Pisani and Dr. Andrew Boyd testified that Helen Marsala had a possibility of recovering; and Plaintiffs' pulmonology and critical care expert, Dr. Louis Hamer, testified that, with reintubation, she would have lived for a long time; 6) Dr. Pisani did not make any efforts to transfer Helen Marsala; 7) Plaintiffs' expert, Dr. Louis Hamer, described Defendant's treatment of Helen Marsala as euthanasia; and 8) Defendant never provided Plaintiffs with the opportunity to resolve the life or death dispute with the Probate Court.

1. Helen Marsala's wishes were to remain on life support.

First, Helen Marsala's wishes were to remain on life support. She did not want the plug to ever be pulled. There was no ambiguity. There were no questions about this. The records and the testimony are uniform on this point. Clarence Marsala, testified:

Q. And tell me what those conversations, tell me what you recall from those.

A. Well, primarily what it was, there's times when you go in the hospital nowadays anyway, that's the first thing they want to bring up, a living will. And I told them we would never do that. I would

never do it when I went and she would never do it for various reasons, and the main reason being Tracey.[5] You know, we wanted to live as long as we could live and promising each other we would never do that to each other, no.

Q. So you and your wife talked about the fact that if you ended up on life support, you wanted to be maintained on life support?

A. Absolutely.

Q. Because then Tracey could take care of you?

A. No. No. We would take care of her.

Q. Well, how would you take care of Tracey if you were on life support?

A. Well, I don't know if I'd be home. I don't know where I would be. But at least one of us, and if she wasn't, she's got four brothers that can. I was talking about us, her and I.

Q. You and Helen?

A. That's right.

Q. But you have a recollection of talking with Helen and having her tell you that if she ended up on life support, she would want you to terminate that support?

A. Not at that time we didn't discuss that. We had discussed that for ten years.

Q. And you felt the same way.

A. Absolutely.

Q. Why?

A. Because you can always come home. You can always be cured, in my opinion. And as far as I'm concerned, I was hoping my wife and I would live for a hundred. But I would never do anything to pull a plug on her. She knew that. I knew that. The hospital bugged me to death with that and I told – they sent a clergyman to talk with me one time, whoever he was, and I told him the same thing. And no,
we never wanted that, we never will and don't ever do it.

See Deposition of Clarence Marsala attached as Exhibit B, P. 46, L. 19-25; P. 47, L. 1-25; and P. 48, L. 1-12.

2. Plaintiffs did not want Helen Marsala's intubation and life saving measures to be discontinued.

Second, Helen Marsala's family (the Plaintiffs) believed that Helen Marsala's life support should be maintained. Clarence Marsala testified that he told Defendant

[5] Tracey is deaf and mostly blind.

about Helen Marsala's concerns regarding continuing treatment and not "pulling the plug." He described a "family meeting" between his sons, Yale and himself:

> A. **They were more or less trying to convince my two kids, you know, bring them up to date because they couldn't get anywhere with me because I just said don't ever do that, don't ever pull the plug. So I guess they wanted family there and got their feelings and they got it. *And both of them reiterated that, no, don't ever pull the plug.* Don't ever do that.**
> Q. Did they tell you anything about her diagnosis?
> A. **Well, they said that she probably wouldn't recover and the best thing for her to be – you know, to let her go. That was their professional opinion. And I had told them once again at all of the discussions that me and my wife had about that many, many times. *I promised her and she promised me, and I will never tell you to pull the plug, never.***
> Q. Okay. Do you remember telling them that you and your wife were still deciding about end-of-life issues?
> A. **No.**

(emphasis added). *See* Deposition of Clarence Marsala attached as Exhibit B, P. 59, L. 21-25; P. 60, L. 1-22. Clarence testified that he and his wife spoke and agreed upon the idea that ending life saving measures was against their religious beliefs. *Id.* at P. 105, l. 24-5; and P. 106, L. 1-5.

Even as of the night of Helen Marsala's passing, Clarence Marsala spoke with a physician about the removal of the ventilator being against the law and against Helen Marsala's wishes.

> A. The night that she died. I was at the hospital, went to see my wife, then I asked to see the doctor. ... And he said how he was going to pull the plug. I hate using that term but –
> Q. And that's not what he said?
> A. **No. He said disconnect the ventilator, I guess, the breathing tube. We're going to take her off and we've been doing that, putting her back on this and that. But tonight we're taking her off. If she makes it, she makes it. I said, whoa, that's – isn't that against the law to do that? He said yes but the ethics committee can overrule.**

And I said overrule anything you want but don't ever, ever, ever do it. That it was my conversation with him.

Came home – Gary was with me. Came home. I must have got home 11 o'clock. I don't really know the time. But sometime after 12 the phone rang and said your wife passed away. I immediately called my son Gary and my son Randy.

See Deposition of Clarence Marsala attached as Exhibit B, P. 68, L. 10-25; P. 69, L. 1-10.

Clarence Marsala's impression, upon leaving the Hospital, was that the ventilator would remain on Plaintiff's decedent. He questioned why the Hospital would kill his wife:

Q. And when you left was it your understanding that he had changed his mind?
A. In my wildest imagination would I believe that he would do that.
Q. You thought not?
A. No. Who would kill somebody?

See Deposition of Clarence Marsala attached as Exhibit B, P. 70, L. 22-25; P. 71, L. 1-2.

Notably, Defendant was aware that Clarence Marsala did not consent to the lack of re-intubation. Dr. Pisani admitted:

Q. Okay. Would you have a note that reflected that in the records if Mr. Marsala had consented?
A. Well, in this case, we probably know that he didn't consent because we have the Ethics Committee note saying that it was against his wishes.

See Deposition of Dr. Pisani attached as Exhibit C, P. 107, L. 8-15. "[The husband] states that he still wants her to be intubated if necessary." *See* 7/23/10 YNHH Bioethics Committee Meeting Note attached as Exhibit D; *see also* 7/26/10 YNHH Discharge Summary attached as Exhibit E (Husband continued to "insist that

aggressive measures be undertaken to resuscitate her."). Further, Dr. Pisani was aware of Clarence Marsala's children and believed she spoke to his son. *See* Deposition of Dr. Pisani attached as Exhibit C, P. 64, L. 1-8.

3. *It is patently absurd that Defendant claims that the best course of treatment for Helen Marsala was to not treat her and place her on Comfort Care measures.*

Third, Defendant's argument that refusing to treat Helen Marsala was the best course of treatment is patently absurd. In paragraph 10 of Dr. Pisani's affidavit she indicated that not re-intubating Plaintiff's decedent was the best course of treatment. (Dr. Pisani at ¶10). In paragraph 15, however, the affidavit states that "the recommendation of the Ethics Committee at [*sic*] Mrs. Marsala's care should not be escalated, comfort care only should be provided." Comfort care was defined by Dr. Pisani as not taking any measures to prolong the patient's life. *See* Deposition of Dr. Pisani attached as Exhibit C, P. 33, L. 10-19. The refusal to re-intubate was not to save the patient's life. See Deposition of Dr. Pisani attached as Exhibit C, P. 77, L. 18-25; and P. 78, L. 1-6.; Bioethic Committee Note attached as Exhibit D ("[t]he bioethics committee recommends that there be no further escalation of care (meaning no intubation or pressors) considering this is not in the best interest of the patient and we are not providing care that would achieve the patient's goal of going home");[6] and Discharge Summary attached as Exhibit E (The Ethics Committee recommended no escalation of care and the care was changed to provide comfort

[6] The Bioethic Committee Note was marked as Exhibit 3 at Dr. Pisani's deposition.

measures).[7] Further, Dr. Pisani at her deposition explained that the refusal to re-intubate was because "there was nowhere to go with her treatment." *See* Deposition of Dr. Pisani attached as Exhibit C, P. 73, L. 10-18.

Dr. Pisani's affidavit, itself, also lacks all credibility. Dr. Pisani testified:

Q. Okay. And did you prepare the affidavit that you signed?
A. The attorneys prepared the affidavit and I reviewed it.
Q. And did you make any changes to it?
A. I don't think so. I mean, just grammar changes.
Q. Did you review any medical records before signing the affidavit?
A. No, they went through the records and put the record information in.
Q. You yourself never reviewed the records that that material was taken from?
A. Mm-mm.
(PLAINTIFF'S EXHIBIT 2 FOR IDENTIFICATION Received and Marked.)[8]
Q. Is this the affidavit that you signed?
A. Yes.
Q. And you didn't go back and check the medical records before signing the affidavit, to make sure that the information contained within was accurate?
A. No.
Q. Was this affidavit made exclusively based on your personal knowledge?
A. No, it was made based on the medical record.
Q. But you didn't review the medical record?
A. That's what I have lawyers for.

See Deposition of Dr. Pisani attached as Exhibit C, P. 94, L. 9-25; and P. 95, L. 1-9; *see also* P. 96, L. 13-21 (Dr. Pisani testified that the attorneys, not her, checked the medical records in drafting the affidavit). Dr. Pisani testified that she has not seen Helen Marsala's medical records, since she took care of Helen Marsala, and she did

[7] The Discharge Summary was marked as Exhibit 8 at Dr. Pisani's deposition.
[8] Dr. Pisani's affidavit, in support of the Motion for Summary Judgment was marked at her deposition as Exhibit 2.

not remember what Clarence Marsala's wishes were related to the resuscitation of Helen Marsala. *Id.*, P. 55, L. 7-16; P. 75, L. 13-21; and P. 84, L. 11-18.

Dr. Pisani's affidavit is contradictory, confusing and only raises issues of material facts. Dr. Pisani affirmed that Helen Marsala's mental status may improve when the ventilator was discontinued (see Dr. Pisani Aff. ¶10) and, yet, at deposition, she testified that if Helen Marsala had been re-intubated there was no chance of improved mental status. *See* Deposition of Dr. Pisani attached as Exhibit C, P. 86, L. 16-20. Yet, Helen Marsala was showing neurological signs, on July 21, 2010, (two-days before the Bioethics Committee Meeting). Specifically, Dr. Pisani documented that the patient "[o]pens eyes spontaneously, intermittently follows commands." *See* Page 34 of Yale Records attached to Dr. Pisani's Affidavit, attached as Exhibit F.[9] Despite said neurological signs, Dr. Pisani's plan, in part, was to discuss taking Helen Marsala off of ventilation and "making her [Do Not Intubate]." *Id.* On July 24, 2010, Helen Marsala was alert and intermittently following commands with movement of her upper extremities. *See* Page 31 of Yale Records attached Dr. Pisani's Affidavit, attached as Exhibit F. Additionally, on July 24, 2010, the date of Helen Marsala's death, a nursing note indicates that "[p]atient is alert and oriented x3, pupils normal size and reactive, speech is clear and understandable or developmentally appropriate, no impairment in all extremities . . . ." *See* Page 13 of 26 of Yale Nursing Notes attached as Exhibit G.

4. The cause of Helen Marsala's decreased mental status was never diagnosed.

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[9] The Yale records attached to Dr. Pisani's affidavit were marked as Exhibit 3A at Dr. Pisani's deposition.

Fourth, Dr. Pisani's actions in refusing to administer intubation and, instead, instituting Comfort Care is outrageous considering that the cause of Helen Marsala's decreased mental status was not diagnosed. Dr. Pisani testified that she was never able to determine why Helen Marsala had a decreased mental status. *See* Deposition of Dr. Pisani attached as Exhibit C, P. 58, L. 22-24. Dr. Andrew Boyd, an intern working at the intensive care unit, under the supervision of Dr. Pisani, was deposed. Similar to Dr. Pisani, Dr. Boyd testified there was not a definitive diagnosis for the patient regarding her lack of mental status. He stated:

> Q. You said there was a lot of attention paid to her mental status. What did you mean?
>
> **A. One of the things that was difficult about Mrs. Marsala's case was why she did not have a greater level of conciseness [*sic*] than she did. And so the doctors, ICU doctors, spent a lot of time thinking about that on rounds, discussing that on rounds and discussing it with consultants to see if there were possible diagnosises that we could give her that we could try to treat and thereby improve her mental status.**

See Deposition of Dr. Andrew Boyd attached as Exhibit H, P. 38, L. 9-21.

Plaintiffs' pulmonology and critical care expert, Dr. Louis Hamer, opined that the patient's altered mental status was never diagnosed. He testified that certain treatments were not done to diagnose the altered mental status, before Defendant's decision to not reintubate her and not provide life saving measures. He stated:

> Q. And what was the likelihood that Ms. Marsala would have recovered sufficiently to be able to take care of her adult daughter?
>
> **A. Well, that's a really hard question to answer because we don't have a diagnosis. There's no diagnosis as to why she had an altered mental status. So, if the person doesn't know the diagnosis, how can they possibly opine on what the treatment would have been or whether the treatment would have been effective. The number one**

step is getting a diagnosis.

Q. And what should have been done to get a diagnosis?

A. **Well, one thing that jumped right out at me was the fact that one of her x-rays had described possible cirrhosis and that she has an elevated ammonia level of 43, and hepatic encephalopathy is one of the things that's in the differential for toxic metabolic encephalopathy, and that was never really addressed.**

See Exhibit Y, P. 88, L. 18-25; and P. 89, L. 1-10; *see also Id.* at P. 160, L. 17-21.

Dr. Louis Hamer opined that Defendant improperly determined that reintubating Helen Marsala and instituting life saving measures was futile. He opined to this in the context of Defendant failing to arrive at a diagnosis for Helen Marsala. He testified:

A. **. . . but I can tell you that it falls below the standard of care for deciding that someone -- that the treatment is futile because futility is a higher standard. Futility means that we have to be certain that the person cannot recover, and how can we be certain if we don't know what the diagnosis is.**

See Exhibit Y, P. 93, L. 1-7.

5. Dr. Pisani and Dr. Boyd testified that Helen Marsala had a possibility of recovering; and Plaintiffs' expert, Dr. Louis Hamer testified that, with reintubation, she would have lived for a long time.

Fifth, Defendant's refusal to re-intubate Plaintiff's decedent is outrageous considering that Dr. Pisani believed that re-intubation could have prolonged the patient's death. Dr. Pisani testified as follows:

Q. And did Mrs. Marsala, if she had been re-intubated, have any chance of recovery?

A. **Define what you mean by "recovery."**

Q. Well, if she had been intubated, would her passing have been delayed?

. . . .

A. **It could have been.**

See Deposition of Dr. Pisani attached as Exhibit C, P. 84, L. 19-25 (objection omitted). Similarly, Dr. Boyd was unwilling to testify that Helen Marsala had no chance of recovery. *See* Deposition of Dr. Boyd attached as Exhibit H, P. 81-83.

Also, Plaintiffs' expert, Dr. Louis Hamer, testified that the treatment of Helen Marsala did not have to end at Yale New Haven Hospital. Rather, Dr. Hamer opined that Helen Marsala could have been transferred to a long-term acute care facility for further treatment.[10] He explained that a "[l]ong-term acute care is for a patient similar to Helen Marsala, who would be on a ventilator, who isn't doing well, who needs further time potentially for rehab or to be weaned from a ventilator, and those are called long-term acute care facilities." *See* Exhibit Y, P. 47, L. 20-25; and P. 48, L. 1. Dr. Hamer stated:

> Q. What kind of facility would have been required to take care of Ms. Marsala after July 20th, 2010?
> **A. She certainly could have gone to one of these long-term acute care facilities.**

Id., P. 144, L. 6-9. Dr. Hamer went on to state that Defendant "could have called me. I would have taken her." *Id.* at P. 184, L. 13-24; *see also Id.* at P. 48, L. 2-6. Dr. Hamer's testimony is a reference to Kindred Hospital. Kindred Hospital is "an acute care hospital for people that have to stay a longer period of time than a couple of weeks" (*Id.* at P. 51, L. 7-19), where Dr. Hamer has privileges and can admit patients. *Id.* at P. 184, L. 13-24; *see also Id.* at P. 48, L. 2-6.

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[10] Dr. Hamer stated that there is a long term acute care facility in Manchester, New Hampshire. *See* Exhibit Y, at P. 185, L. 20-23. In Connecticut, there are multiple long-term-acute-care hospitals including but not limited to: Hospital for Special Care, Gaylord Specialty Healthcare, and multiple facilities associated with Kindred Healthcare.

Dr. Louis Hamer went on to testify that if Helen Marsala had been reintubated then she would have lived for a long time. He based this testimony on the fact that Helen Marsala was getting better at Yale New Haven Hospital. He stated:

Q. Are you able to say to a reasonable degree of medical probability that Ms. Marsala would have lived for a month if she had been reintubated on July 24th?

A. I believe so, yes.

Q. Okay. And what's the basis for that?

A. The basis is that she was surviving as it was, you know, for six weeks in worse conditions, under worse circumstances, and she probably would have continued to survive had she continued to receive the dialysis and the mechanical ventilation. She would have probably lived a long time like that, yes.

Q. Well, she was getting worse, right?

A. No. I think she was getting better.

Q. And what evidence is there in the record that she was getting better?

A. She was able to be taken off the ventilator. Okay? She had completed treatment for the Morganella pneumonia. The ischemic colitis was no longer causing any bloody diarrhea. She – let's see. She had completed treatment for the C. diff that she supposedly had at the other hospital. She completed treatment for the fungal illness. The main thing that was not getting better was the mental status.

See Exhibit Y, P. 167, L. 9-25; and P. 168, L. 1-6.

Dr. Louis Hamer went on to state that if Helen Marsala had been placed on a ventilator and/or underwent a tracheotomy then she could have lived on for years. He stated:

Q. And how long could she have remained on the ventilator if she was reintubated on July 24th?

A. Years. I mean, Christopher Reeve lived for years on a ventilator. Stephen Hawking has been on a ventilator most of his adult life. So, people can live for years and years on a ventilator.

Q. Stephen Hawking has lived on oral intubation for

years?

A. No. He has a trach. He has a tracheostomy.

Q. And how about Reeve?

A. He also had a tracheostomy.

Q. She didn't have a trach?

A. Because they chose not to put one in. Her husband asked for it.

See Deposition of Dr. Louis Hamer attached as Exhibit Y, P. 169, L. 3-16. Dr. Hamer further stated that even with a tracheotomy, Helen Marsala would not necessarily need to be institutionalized. *Id.* at P. 170, L. 1-6.

6. Dr. Pisani did not make any efforts to transfer Helen Marsala.

Sixth, despite the possibility of prolonging Plaintiffs' life, Dr. Pisani did not make any efforts to transfer Plaintiff's decedent and, therefore, any opportunity to further treat was taken away. Dr. Pisani testified:

Q. And you don't know whether or not another facility would have taken her as a transfer because you never called another facility?

A. I did not call another facility.

See Deposition of Dr. Pisani attached as Exhibit C, P. 133, L. 18-21.

7. Plaintiffs' expert, Dr. Louis Hamer, described Defendant's treatment of Helen Marsala as euthanasia.

Seventh, Plaintiffs' expert, Dr. Louis Hamer, opined that he has never seen, in his career, a patient treated like this; in which physicians have intentionally euthanized a patient. He stated:

Q. The part that I'm having trouble understanding is what is the basis for your opinion that it is the practice of hospitals that are not subject to the Texas Advance Directives Act to notify a patient's surrogate of a right to counsel in connection with end of life decision making?

. . . .

A. **Okay. Let me point this out. I've never encountered physicians that have intentionally euthanized a patient before. Okay? So, my opinion is based on what a reasonably prudent physician would do in the same or similar circumstances based on my education, training and experience, and I cannot imagine a reasonably prudent physician administering lethal medications to a patient who expressly asked that it not be done. I just can't -- it's the first time I've ever seen it.**

Q. (BY MS. SEAMAN) So, you have no basis to state as you sit here today that it is the practice --

A. **I didn't say that.**

Q. That's what I'm trying to get. I understand --

A. **This is going around in circles.**

Q. I know.

A. **Because how could I have that much experience when this is the first time I've ever seen anyone have the audacity to do it?**

See Deposition of Dr. Louis Hamer attached as Exhibit Y, P. 196, L. 14-25; and P. 197, L. 1-14 (objection omitted). Dr. Hamer believed that Defendant euthanized Helen Marsala. He explained, as follows:

Q. Okay. And what is it that causes you to believe that?

A. **There's several things. Okay? I define euthanasia as the bringing about of someone's death for the purposes of alleviating their suffering, and there's several things that lead me to believe that this is a case of euthanasia.**

Q. And what is that?

A. **First of all, they're going against the family's wishes and not only the family's wishes but the actual patient's wishes because she had multiple discussions with her husband and other family members, saying that they wanted to stay alive at all costs to care for their handicapped daughter.**

So, those were her wishes. They're not the wishes of her husband or an adult child or someone else with ulterior motives. Those are her actual wishes. So, the fact that it's against the patient's wishes

removes it from comfort care and brings it into the area of euthanasia.

Second of all, we're administering morphine, and we're administering it as a continuous drip, not just on an as-needed basis. We're continuously infusing it from the time that they decide she's going to be comfort care until the time that she passes.

And morphine is a very potent respiratory depressant, and this woman was just removed from the ventilator. So, she had respiratory problems. So, we're giving a drug to a patient that we know has difficulty breathing that causes cessation of respiration. So, that hastens her death. So, that is euthanasia.

And then, thirdly, we decide that we're not going to use BiPAP. BiPAP isn't even usually considered heroic measures. It's just a mask that goes over the face that assists in breathing.

And the reason that we're not going to administer BiPAP is because there's a little bit of a sore next to the nose. Well, which would the person rather have, irritation of their sore next to their nose or a death because they don't breathe? I think most people would take the sore next to their nose. So, the fact that they're not even giving BiPAP, now, that's really, really trying to hasten her death.

Q. Is that it or is there more?

A. Let me just look because -- I'm just looking to see if any benzodiazapines were administered along with the morphine.

Well, there's also this issue that her blood count is dropping and they are not giving blood transfusion or addressing that but I think that probably just goes along with the general idea that we're not going to treat her any more, we're going to let her die.

Id. at P. 77, L. 19-25; P. 78, L. 1-25; and P. 79, L. 1-21; *see also Id.* at P. 162, L. 8-17.

Dr. Louis Hamer opined that not only was the treatment by way of morphine drip against Helen Marsala's wishes and the family's wishes, but it actually brought on Helen Marsala's death. He stated:

Q. (BY MS. SEAMAN) I understand that.

A. **And I think that a physician, just like anyone else, has an obligation to obey and abide by the law. Okay? So, I think that's one deviation.**

Another important deviation is the continuous morphine drip was given, and that hastened her death, and they knew that that wasn't what she wanted and what her family wanted but yet they chose to hasten her death, and I think that that's a deviation from the standard of care.

I think failure to institute BiPAP was a deviation from the standard of care because under the pretense of, you know, comfort and not irritating that sore that she had, they weren't going to use the BiPAP but I would contend that not being able to breathe is pretty uncomfortable, too.

See Exhibit Y, P. 162, L. 18-25; and P. 163, L. 1-8.

8. Defendant never provided Plaintiffs with the opportunity to resolve Helen Marsala's life or death dispute with the Probate Court.

Eighth, the extreme and outrageous nature of Defendant's conduct is reflected in the fact that Defendant never provided Plaintiffs with the opportunity to resolve the life or death dispute with the Probate Court. The Probate Court retains jurisdiction over disputes regarding the withdrawal of life support systems. Judge Lee recognized this, commenting that "[i]f the physician were free to disregard the patient's wishes, it would not have been necessary to provide for transfer in case of disagreement with the patient's wishes or to direct disputes on the issue of withdrawal of life support to the Probate Court's consideration." *See* Exhibit A, P. 8, Fn.2.

Plaintiffs' expert, Dr. Louis Hamer, testified as to protecting the rights of the patient/family in the context of end-of-life decision making. Dr. Hamer established

that there was a documented disagreement (Exhibit Y, P. 180, L. 6) between the Yale New Haven Hospital Ethics Committee and Clarence Marsala regarding the end-of-life-care of Helen Marsala. In discussing this disagreement, Dr. Hamer explained:

> Q. Right.
> **A. It doesn't say anywhere, "We understand Mr. Marsala's position," or, "We're considering his position when we're making this decision." It doesn't give deference to him at all. It just calls him in denial and difficult to get a hold of and, you know, it doesn't say anything positive about him.**

Id., P. 180, L. 7-13. In light of the disagreement, Dr. Hamer explained the steps in the process to make sure that the rights of the patient/family were protected. He stated that "I think that due process is so important because it protects an individual who has a minority opinion from being overwhelmed by people who feel differently." *See* Exhibit Y, P. 148, L. 12-17. He explained that if the Ethics Committee was unable to contact Mr. Marsala that "[t]hey go to the probate court and they file for – in Connecticut, I guess it's called a conservatorship but in Texas, it's called a guardianship." Id., P. 180, L. 22-25; P. 181, L. 1. Dr. Hamer believed that Defendant failed to go to Probate Court and also failed to communicate to Mr. Marsala what his due process rights were. Dr. Hamer explained:

> Q. Okay. Other than the writing, would you agree that notifying him on July 20th, notifying him of the ethics committee, the opportunity for a second opinion, would that be consistent with standard practice in other hospitals --
> **A. No.**
> Q. -- throughout the country?
> **A. No, because the most important thing is helping him get a transfer if he wants it, and the other**

important thing is telling him, you know, that he can get an attorney, that he can go to the probate court.
And I find it hard to believe that a Dr. Pisani told him that because she didn't seem like she really understood that herself. So, it's unlikely that she told him that, I think.

See Exhibit Y, P. 187, L. 7-21.

It has long been recognized that individuals have the right to "bodily self-determination" or "bodily autonomy," supported by a constitutional right to privacy. *See, e.g., Union Pacific Ry. Co. v. Botsford,* 141 U.S. 250, 251 (1891) ("No [legal] right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."). Our Supreme Court has noted that the "common law right, and its roots in our legal tradition, have a long and impressive pedigree." *Stamford Hosp. v. Vega*, 236 Conn. 646, 664-65 (1996). "The right of one's person is a right of complete immunity to be let alone." *Foody v. Manchester Mem'l Hosp.,* 40 Conn. Supp. 127, 132 (Super. Ct. 1984)(attached as Exhibit I). "To deny the exercise because the patient is unconscious or incompetent would be to deny the right. It is incumbent upon the state to afford an incompetent the same panoply of rights and choices it recognizes in competent person." *Id.*

Notably, in order to provide hospitals with immunity in the limited situation where patients wish to remove life support and exercise their individual right-to-die, Connecticut enacted the Removal of Life Support Systems Act, General Statutes §§ 19a-570 through 19a-575, by which the legislature authorized the removal of life

support under statutorily specified circumstances. *See McConnell v. Beverly Enterprises-Connecticut,* 209 Conn. 692, 696-97 (1989) (noting that "the legislature cognizant of a common law right of self-determination and of a constitutional right to privacy, sought to provide a statutory mechanism to implement these important right."). General Statutes § 19a-571 was enacted to provide guidelines for appropriate decision-making in situations where patients seek to invoke their right to remove medical treatments that artificially prolong life. *See Id.*; *Law v. Camp*, 116 F. Supp. 2d 295, 304 (D. Conn. 2000) *aff'd,* 15 F. App'x 24 (2d Cir. 2001) ("The only logical construction of this statute is that it was enacted to implement a terminal patient's common law rights to self-determination and privacy.").

Connecticut's Removal of Life Support Systems Act was enacted in 1985, shortly after Connecticut's first right-to-die case, *Foody v. Manchester Mem'l Hosp.*, 40 Conn. Supp. 127 (Super. Ct. 1984). In *Foody*, the family of a semicomatose patient brought an action for a permanent injunction restraining the defendant hospital from using artificial devices to prolong the patient's life. The Court granted the injunction, recognizing: (1) the patient's right to decide to terminate life support where the patient's prognosis was extremely poor; (2) that the family could lawfully act as the patient's substitute decision maker; and (3) that the hospital would not be subject to liability in the event the family decided to terminate life support. *Id.* at 140-41. Shortly after the *Foody* decision, the legislature enacted General Statutes § 19a-571, which provided immunity to hospitals that removed life support based on the decedent's wishes, but only where: (1) the decision to remove life support was based on the best medical judgment of the attending physician; (2) the patient's attending

physician deemed "the patient to be in a terminal condition"; (3) the attending physician obtain the informed consent of the patient's next of kin prior to removing a life support system; and (4) the physician "considered the patient's wishes as expressed by the patient directly, through his next of kin or legal guardian...." General Statutes § 19a-571 (Supp. 1985). The legislation was intended to provide relief from liability for hospitals that honored their patients' wishes to withhold or withdraw life support. In essence, it was right-to-die legislation.

In 1991, General Statutes § 19a-571 was amended in the wake of the Connecticut Supreme Court decision in *McConnell v. Beverly Enterprises-Connecticut* and the U.S. Supreme Court decision in *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 277 (1990). *See* P.A. 91-283; 34 H.R. Proc., Pt. 23, 1991 Sess., pp. 288-456 (Rep. Lawlor noted that "we really are not changing the law regarding the withdrawal of a life support system. We're only conforming our statutes to what is now the law in Connecticut based on the *McConnell* case and throughout the nation, based on the *Cruzan* case.").[11] These cases concluded that a State may require clear and convincing evidence of an incompetent's wishes to withdraw life support and States were not required to accept the judgment of family members absent proof that their views reflected those of the patient. Again, these decisions were intended to protect an individual's right-to-die. *See* Rep. Lawlor remarks from the April 16, 1991 Committee (Judiciary) Hearing Transcript, attached hereto at Exhibit K ("The third weakness in the existing statute is its creation of a virtual veto power for the next of kin. ***That again distorts the role of the patient***

[11] The May 31, 1991 House Session Transcript is attached hereto at Exhibit J.

and the right of the patient himself or herself to control decisions until the end of his or her life.") (emphasis added.).

As a result of these decisions, General Statutes § 19a-571 was amended in 1991 by removing subsection (3), which required the attending physician to obtain the informed consent of the patient's next of kin prior to removing life support. Yet the amendment maintained the precise language used in the 1985 version of the statute that the physician must "consider[] the patient's wishes." *See* General Statutes §§ 19a-571; 19a-571 (Supp. 1985). The amendment absolutely did not remove an individual's right to "bodily self-determination," "bodily autonomy" or right to privacy. Nor did it grant medical providers the right to make the decision as to the removal of life support. That right remains with the patient, Helen Marsala.

The case of *McCurdy v. Jones*, Superior Court, judicial district of New London, Docket No. CV–08–5009093–S (August 9, 2011, *Martin, J.*)(attached as Exhibit L) is instructive as to both the procedural posture of the instant action and the extreme and outrageous prong of IIED. In *McCurdy*, the plaintiff brought a claim against the defendant, an employee of a state agency, for negligent and intentional infliction of emotional distress arising out of inappropriate sexual comments made during a phone call. Similar to the instant action, the *McCurdy* Court initially denied the defendant's motion to strike the intentional infliction of emotional distress count. In finding that there was a genuine issue of material fact as to whether the conduct was extreme and outrageous, the Court stated that: "Judges are reluctant to reconsider questions or issues that have already been decided. *Brown & Brown, Inc. v. Blumenthal,* 288 Conn. 646, 656, 954 A.2d 816 (2008). Thus, '[w]here a matter has

previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance.' (Internal quotation marks omitted.) *Id.* In this case, the court already determined, albeit implicitly, that the defendant's conduct, as alleged in the complaint, could constitute extreme and outrageous conduct. There is nothing presented by the defendant warranting a reconsideration of that ruling. Thus, the defendant is not entitled to summary judgment on this ground." *McCurdy v. Jones*, *supra*, at 4, Fn.2.

In ruling on the motion for summary judgment, the *McCurdy* Court sought guidance from its initial decision, denying the motion to strike. So to should this Court review the denial of Defendant's Motion to Strike the IIED claim, by Judge Lee. In ruling on Defendant's Motion to Strike, Judge Lee held that "the Hospital's asserted conduct in allegedly removing Helen's life support and thus ending her life in conscious disregard of her wish to remain on life support is extreme and outrageous, and that an average member of the community would exclaim 'Outrageous!' upon hearing the facts." See Exhibit A, P. 7. Additionally, he held that "[o]n its face, terminating a patient's life support with an awareness of her contrary wishes constitutes unacceptable behavior and would readily be considered extreme and outrageous." *Id.*

ii. Defendant should have known that Plaintiffs' severe emotional distress was the likely result of refusing to re-intubate Plaintiffs' decedent.

This prong of the IIED analysis regards whether "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 . . ." (Internal quotation marks omitted.) *Gagnon v. Housatonic Valley Tourism District Commission*, 92 Conn.App. 835, 846 (2006).

In this case, Defendant intentionally extubated Helen Marsala and disregarded Helen Marsala's family's objection to such extubation. Defendant knew that by extubating Helen Marsala, who had respiratory issues, Helen Marsala would likely need further treatment to maintain her airway in the form of: re-intubation, bilevel positive airway pressure (BiPAP), and/or some type of treatment to maintain Helen Marsala's airway. On July 22, 2010, Defendant noted "Patient faces reintubation or family decision regarding not to provide this therapy given her continued critical illness....". *See* Page 38 YNHH Nursing Records, dated July 22, 2010, attached as Exhibit M.

Defendant intentionally entered an order prohibiting re-intubation, over the objection of Helen Marsala's family. Defendant intentionally removed Helen Marsala's BiPAP, which was providing oxygen and keeping Helen Marsala's airway open, over the objection of Helen Marsala's family. Notably, Dr. Pisani testified that Helen Marsala may have required BiPAP following extubation. *See* Deposition of Dr. Pisani attached as Exhibit C, P. 29, L. 17-18. Defendant entered an order that Helen Marsala's care should not be escalated and comfort care only should be provided, over the objection of Helen Marsala's family. *See* Bioethic Committee Note attached as Exhibit D. Dr. Pisani testified that the "Ethics Committee felt that it – we did not need to provide ongoing intubation . . ." *See* Deposition of Dr. Pisani attached as

Exhibit C, P. 78, L. 1-2. Defendant administered pain medication that suppresses respiration in a continuous drip at an increasing dosage/amount until Helen Marsala died by way of suffocation. Helen Marsala's death occurred once she stopped being able to breathe and all measures to maintain her air way and respiration had been denied and/or removed.

Plaintiffs' expert, Dr. Louis Hamer, testified as to the standard of care and defined Defendant's failure to treat Helen Marsala as an intentional act. Dr. Hamer testified as follows:

> **A. I would say the standard of care is what a reasonably prudent physician would do in the same or similar circumstances, and it's a term that's used in negligence cases, and negligence means it's a mistake. That's what negligence is, a mistake.**
>
> **It doesn't apply to intentional actions. Okay? Someone that breaks into a house can't say, "Well, this is the standard of care for breaking into a house. Well, the other robbers were doing this, so, I was doing it, too, therefore, it's okay." No, it doesn't apply to intentional actions.**
>
> **And this isn't a mistake. This is intentional. Even by their own admissions, they agree that they were withdrawing care against the family's wishes, and by their own admission, they administered a morphine drip, which causes respiratory depression and probably helped lead to the person's death.**

See Exhibit Y, P. 75, L. 2-18. Dr. Hamer stressed that the lack of treatment of Helen Marsala was against her wishes and amounted to a battery. *Id.* at P. 80, L. 14-17. Dr. Hamer testified that he has never, in his career, seen a patient treated like this, in which physicians have intentionally euthanized a patient. *Id.* at P. 196, L. 14-25; and 197, L. 1-14.

A reasonable person in Defendant's position should have known that the intentional removal of all life sustaining treatment from Helen Marsala, against unambiguous and vehement objection by every family member and without providing Plaintiffs the opportunity to transport her, would cause severe emotional distress to Plaintiffs. Defendant should have known that, given the sensitive nature of the life or death situation, severe emotional distress was the likely result of not re-intubating Helen Marsala. *See* discussion *supra*. In ruling on the Motion to Strike, Judge Lee commented that Defendant knew or should have known that Plaintiffs' severe emotional distress was likely to result from failing to re-intubate Helen Marsala. He stated:

> "the Hospital is aware that issues concerning the removal of life support arouse passions and that emotional distress is therefore likely. *Valentin v. St. Francis Hospital & Medical Center,* Superior Court, judicial district of Hartford, Docket No. CV-04-0832314 (November 7, 2005, *Hale, J.T.R.*)(40 Conn. L. Rptr. 371, 374)('In this case, the defendant is a hospital and likely deals with life and death decisions every day involving patients and their families. Recent debates in the press illustrate that the decision to terminated life support is emotionally charged and often controversial with differing points of view leading to bitter disagreements, even within the same family.')[attached as Exhibit N]; *see also Maloney v. Conroy, supra*, 208 Conn. At 401, '[I]t takes no great prescience to realize that friends or relatives of a seriously injured accident victim will probably be affected emotionally in some degree.' Therefore the plaintiffs' pleading that the Hospital 'knew or should have known' that its behavior would result in emotional distress to the plaintiffs is adequately supported by their allegations, and this basis is not sufficient to grant the Hospital's motion to strike these counts.

See Exhibit A, P. 10.

Defendant inappropriately relies on *Hendrickson v. Frick*, Superior Court, Judicial District of Middlesex, Docket No.: 93-66630 (Apr. 14, 1994, *Higgens, J.*)(attached as Exhibit O. The *Hendrickson* case involves a Trial Court granting a motion to strike a parent's IIED claims because the sexual assault of a minor was not directed toward the minor's parent. In relying on the *Hendrickson* case, Defendant inappropriately focuses on the lack of intent by Defendants. Yet, this is not the end of the inquiry. Rather, the focus is broader and should question whether Defendants should have known that emotional distress was the likely result of his conduct.

Most notable is that the analysis underpinning the *Hendrickson* decision was not found persuasive by Judge Lee. *See* Exhibit A. Instead, Judge Lee ruled that "plaintiffs have alleged additional facts which support their allegation that the Hospital knew or should have known that its actions would cause emotional distress, *e.g.* that the Hospital repeatedly inquired as to whether Helen's life support should be removed, the plaintiffs consistently objected and the Hospital, over their objections and in violation of Helen's wishes concerning the matter, nevertheless removed life support." *Id.* at P. 10-11. [12] The factual evidence shows that: Clarence Marsala did not consent to the withdrawal of intubation and/or life saving measures (*see*

[12] Additionally, Defendant relies upon *DiTeresi v. Stamford Health System, Inc.* 142 Conn. App. 72 (2013), a case involving IIED claims stemming from the allegedly inadequate response of the defendant hospital to report a sexual crime committed against one of its vulnerable patients. The patient's daughter brought an IIED claim, amongst other claims. The Appellate Court upheld the trial court's granting of summary judgment as to the IIED claim. The analysis of the Appellate Court largely focused on whether the conduct at issue could be fairly characterized as extreme and outrageous. The Appellate Court wrote numerous paragraphs regarding the Hospital's investigation of the sexual crime as not being extreme and outrageous. Defendant's counsel selected one sentence out of said paragraphs in which the Appellate Court indicated that there was no evidence that the hospital intended to inflict emotional distress. Notably the Appellate Court did not analyze whether the hospital "knew or should have known that emotional distress was the likely result of its conduct." The *DiTeresi* Court did not enter into such an analysis most likely because the IIED claim failed to identify a genuine issue of material fact as to the extreme and outrageous requirement.

Deposition of Clarence Marsala attached as Exhibit B, P. 59, L. 21-25; P. 60; L. 1-22) and Defendant was aware that Clarence Marsala did not consent to the lack of re-intubation. *See* Deposition of Dr. Pisani attached as Exhibit C, P. 107, L. 8-15; 7/23/10 YNHH Bioethics Committee Meeting Note attached as Exhibit D ("[The husband] states that he still wants her to be intubated if necessary"); and 7/26/10 YNHH Discharge Summary attached as Exhibit E (Husband continued to "insist that aggressive measures be undertaken to resuscitate her.").[13]

iii. Defendant's conduct was the cause of Plaintiffs' severe emotional distress.

This prong of the IIED analysis regards whether: "the defendant's conduct was the cause of the plaintiff's distress . . . " (Internal quotation marks omitted.) *Gagnon v. Housatonic Valley Tourism District Commission,* 92 Conn.App. 835, 846 (2006).

The most powerful and impactful testimony regarding causation was elicited from Helen Marsala's daughter, Tracey. Defendant's counsel deposed Tracey, who is deaf and mostly blind, with the aid of a sign language interpreter. Tracey testified that she was very close with her mother. *See* Deposition of Tracey Marsala attached as Exhibit P, P. 11, L. 14-16. Tracey testified that she misses her mother (*Id.* at P. 13, L. 16-17) and that since the passing of her mother, Tracey feels alone (*Id.* at P. 13 and P. 14, L. 3-4). Ultimately, Tracey testified that, as a result of Defendant

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[13] Defendant's final argument on Pages 16-17 of its Memorandum of Law in Support of Summary Judgment is that "a physician in Dr. Pisani's situation in the future would be forced to listen to the patient's family about how to treat her rather than rely on her medical training to determine the best possible court of treatment." It is not that Dr. Pisani would be "forced to listen to the patient's family." Rather, it is that Dr. Pisani should transfer the patient if she is unwilling to treat. The public policy ramifications of the instant issue, which are limited to its facts are not as broad as Defendant portrays.

removing Helen Marsala's life support: "I was very unhappy. Yale was wrong." *Id.* at P. 16, L. 24-25; and 17, L. 1-7. Tracey believed that Yale was wrong and that such negligence caused her severe emotional distress.

Clarence Marsala also testified as to his sadness as a result of Defendant failing to re-intubate Helen Marsala, over Mr. Marsala's objection. Specifically, Mr. Marsala testified:

> **As long as I had my wife .... I've never worried about my children. Now I can't make a move, you know. I've got to always put Tracey in front of me.**
>
> **I realize regardless of what happened I'd have still been in that boat. I understand that. But I mean, to ask me how much it changed my life now, it brought me from a person who could do whatever he wanted whenever he wanted to a person who can't do nothing unless I – I either got to take Tracey. Not that I – don't misunderstand me that I regret taking Tracey. But the whole idea is naturally Tracey was a lot more comfortable with her mother as far as going and visit because they would stay for hours, whatever. You know. And she never refused to go or anything.**
>
> **But with me it's just a whole different life thing. It just changed my life. But I understand that could have happened anyway. *But they took that from me. They took from me.***

See Deposition of Clarence Marsala attached as Exhibit B, P. 98, L. 12-25; P. 99, L. 1-7 (emphasis added).

By stating that "they took that from me. They took from me," Clarence Marsala places blame on Defendant; *i.e.* Defendant's actions in failing to re-intubate Helen Marsala caused Mr. Marsala's severe emotional distress. Similarly, Helen Marsala's son, Michael Marsala, testified as to causation, by stating: "[y]eah. I was upset. I was crying. How could they?" See Deposition of Michael Marsala attached as Exhibit Q, P. 37, L. 14-18. Again, Michael's severe emotional distress was the result of Defendant's lack of treatment.

Likewise, Helen Marsala's son, Randy, testified as to causation. Randy testified that he choose not to remember the time of day he was told of Helen Marsala's passing because "it's my mother and Yale took her and I got a problem with that." *See* Deposition of Randy Marsala attached as Exhibit R, P. 44; and P. 45, L. 1. Similarly, as to causation, Helen Marsala's son, Kevin, stated ". . . I let her down in the sense that, you know, I couldn't do anything for her and they did it and I couldn't do anything about it. It wears on me everyday." *See* Deposition of Kevin Marsala attached as Exhibit S, P. 74, L. 19-22. Similarly, Helen Marsala's son, Gary, testified that he was shocked and upset (*See* Deposition of Gary Marsala attached as Exhibit T, P. 48, L. 21-24), which was related to his belief that "no matter what she want[ed] to stay on life support." *Id.* at P. 48, L. 6-7. Again, Randy, Kevin and Gary believe that their severe emotional distress was causally related to the lack of treatment by Defendant.

It is an offensive and unwarranted conclusion for Defendant to argue that the emotional distress suffered by Plaintiffs is merely due to the death of a loved one; as opposed to due to Defendant's negligent treatment. Plaintiffs have signed and submitted individual affidavits in which they affirm that their severe emotional distress was causally related to the negligent treatment of Defendant; as opposed to the natural grieving of losing a loved one. *See* attached as Exhibit U. To the extent there is any ambiguity in the evidence, as to causation, the trial court should view the evidence in the light most favorable to Plaintiffs. *Romprey v. Safeco Ins. Co. of America*, 310 Conn. 304, 312–13 (2013) ("[i]n deciding a motion for summary

judgment, the trial court must view the evidence in the light most favorable to the nonmoving party.")

iv. Plaintiffs suffered severe emotional distress.

This prong of the IIED analysis regards whether: "the emotional distress sustained by the plaintiff was severe." (Internal quotation marks omitted.) *Gagnon v. Housatonic Valley Tourism District Commission,* 92 Conn.App. 835, 846 (2006). The injury recoverable in a claim for intentional infliction of emotional distress is limited to "mental distress of a very serious kind." (Internal quotation marks omitted.) *Muniz v. Kravis,* 59 Conn.App. 704, 708, 207 (2000). In determining what this entails, "trial courts apply the standard set forth in the Restatement. The Restatement provides that '[emotional distress] includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.'" *Le v. Saporoso,* Superior Court, judicial district of Hartford, Docket No. CV 09 5028391 (October 19, 2009, *Domnarski, J.*)(attached as Exhibit V), quoting 1 Restatement (Second), Torts § 46, comment (j), pp. 77–78 (1965).

The case of *McCurdy v. Jones*, Superior Court, judicial district of New London, Docket No. CV–08–5009093–S (August 9, 2011, *Martin, J.*)(attached as Exhibit L) is again instructive as to defining severe emotional distress. In *McCurdy*, there was "evidence indicating that the plaintiff's injuries were more severe than mere embarrassment or humiliation. In fact the injuries are characterized in the plaintiff's deposition as 'anxiety,' 'mental stress,' 'undue stress,' 'aggravation' and 'mental anguish.' . . . the plaintiff stated in her response to the defendant's interrogatories

that, because of the alleged incident, she has 'issues trusting people of authority' and that she will not be alone in a room with a man whom she does not know because of the degree of discomfort it causes her. . . . The court therefore finds that the defendant has failed to make a showing sufficient to compel the court to find that the emotional distress suffered was not severe as a matter of law." *Id.* at 5 (citations omitted).

In contrast to the injuries found to be insufficient in the McCurdy case, Plaintiffs have shown, through deposition testimony and affidavit (attached as Exhibit U) that they have suffered severe emotional distress due to Defendant refusing to re-intubate Helen Marsala, which was against the wishes of Helen Marsala as well as her family.

Clarence Marsala testified as follows, upon questioning, regarding his damages:

> Q. That you miss her?
> **A. That I miss her and that would remind me. And stuff with the soap operas, same thing. The fact that we spent so much time together talking, whatever. And then just thinking how could they kill my wife in my opinion, never giving me a chance to say good-bye, my kids, my grand – I can't handle that.**

See Deposition of Clarence Marsala attached as Exhibit B, P. 92, L. 15-22.

As stated above, Clarence Marsala's damages are inextricably linked to Defendant's decision to not re-intubate and; rather, kill Helen Marsala. Mr. Marsala is unable to describe his damages without also placing said damages in the context of Defendant unilaterally not re-intubating Helen Marsala. He stated:

> Q. . . . . But with respect to the decision by the people at Yale to terminate the life support, how have you been injured by that?

A. **Emotionally most of all how I've been injured by that and, you know, the fact that they – it's constantly on my mind how could they do that, how could they deprive me of seeing my wife of 57 years, to say good-bye, getting my children, getting my grandchildren, you'd better go see your grandmother, blah, blah. How could they think to do that. That amazes me until today.**

Q. Okay. Anything else that you can think of?

A. **That I'm emotionally shook up about all of it and it's always on my mind.**

See Deposition of Clarence Marsala attached as Exhibit B, P. 99, L. 17-25; and P. 100, L. 1-5. Further, Mr. Marsala signed an affidavit, indicating that the cessation of life saving measures was against his and Helen Marsala's religious beliefs. *See* affidavit attached as Exhibit U; *see also* Deposition of Clarence Marsala, attached as Exhibit B, P. 105, l. 24-5; and P. 106, L. 1-5. In Clarence's affidavit, he affirms as to his severe emotional distress in the form of shock, amazement, depression, confusion, anger, sadness, grief and disappointment. *Id.* He indicates that such severe emotional distress was not because of the natural loss of his wife and; rather, was due to Defendant's negligent treatment of his wife. *Id.* He further testified that it affects him on a daily basis and affects his ability to sleep. *Id.*

Similarly, Helen Marsala's children signed affidavits as to their respective severe emotional distress in the form of shock, amazement, depression, confusion, anger, sadness, grief and disappointment. *See* affidavits attached as Exhibit U. They all affirm that such severe emotional distress was not because of the natural loss of their mother and; rather, was due to Defendant's negligent treatment of their mother. *Id.*

Helen Marsala's children also testified as to their respective severe emotional distress at deposition. These individuals were visibly disturbed during their

depositions. Often, during the depositions, necessary breaks were taken due to tears from sadness or the need to calm down their anger.

Helen Marsala's only daughter, Tracey, testified that she was very close with mother. *See* Deposition of Tracey Marsala attached as Exhibit P, P. 11. Regarding the death of Helen Marsala and how it affected Tracey, Tracey testified that: "I was not happy. I was very depressed. I was angry. I was very sad. It was a very serious situation. I missed her." *Id.* at P. 16, L. 20-23.

Helen Marsala's son, Randy, at deposition, questioned, "[o]nce again, I'll ask you, what would you do if someone took your mother? How would it make you feel? Not good; right? You know, it's my mom. There ain't no amount of money that's going to make it go away. She ain't ever coming back." *See* Deposition of Randy Marsala attached as Exhibit R, P. 47, L. 17-23. He also explained his severe emotional distress in that he has "feelings as far as Yale took her away and it makes me upset and mad and angry." *Id.* at 47, L. 14-16.

Helen Marsala's son, Kevin, testified that he misses his mother, he has pains in his chest and it wears on him every day that "I couldn't do anything for her and they did it and I couldn't do anything about it." *See* Deposition of Kevin Marsala attached as Exhibit S, P. 74, L. 11-22. Kevin also stated:

Q. How did you learn that your mom had passed away?
A. On the following Monday morning, which was a Sunday, my father had called me up and told me that Mommy was gone. And then he proceeded to tell me that when he was at the hospital that night that they, the doctor told him that they were going to pull the plug on her and it really didn't matter what he said. And he said, you know, please don't do that. And he didn't think they would in a million years. And an hour and a half later they called him up and said that they did. So then he called me the next morning and he

discussed this with me. And, you know, I was going crazy. I mean, it was ridiculous. Mad, furious, upset that they would do something
like that.

See Deposition of Kevin Marsala attached as Exhibit S, P. 68, L. 8-23.

Similarly, Helen Marsala's son, Michael, testified Defendant's lack of treatment of his mother affected him in "[a] lot of ways. One, not being able to say goodbye. Two, angry, depressed a little bit, crying constantly, speaking to God all the time. Yeah." *See* Deposition of Michael Marsala attached as Exhibit Q, P. 44, L. 16-18.

Similarly, Helen Marsala's son, Gary, testified that "first I was shocked and then upset. And I could see my wife and daughter visually getting upset. So a bunch of emotions running around, basically." *See* Deposition of Gary Marsala attached as Exhibit T, P. 48, L. 21-24. Gary's grieving is severe in light of the fact that "no matter what she want[ed] to stay on life support." *Id.* at P. 48, L. 6-7.

Because each of the respective family members affirmed and testified that their severe emotional distress is causally related to Defendant's lack of treatment of Helen Marsala, and not the mere passing of a loved one, their remain genuine issues of material fact as to Plaintiffs' IIED claims.

B. Judge Lee's decision on Defendant's Motion to Strike is the law of the case.

Admittedly, Judge Lee struck Plaintiffs' negligent infliction of emotional distress ("NIED") claims, based on *Maloney v. Conroy*, 208 Conn. 392, 402 (1988). *See* Exhibit A, P. 6. However, importantly, Judge Lee, also found that under *Maloney v. Conroy*, *supra*, Plaintiffs' IIED claims were properly plead. In permitting the viability of the IIED claims, he stated: ". . . *see also Maloney v. Conroy*, *supra*, 208 Conn. At

401. '[I]t takes no great prescience to realize that friends or relatives of a seriously injured accident victim will probably be affected emotionally in some degree.'" *See* Exhibit A, P. 5. Judge Lee's ruling on the viability of the IIED claim is the law of the case and the law of the case doctrine[14] should prevent the Court from reopening the issue as to whether the holding of *Maloney v. Conroy*, *supra*, should act as a bar to Plaintiffs' IIED claims. [15] As discussed above discovery has only confirmed the allegations that were held sufficient. Summary judgment on these counts should therefore be denied.

C. The Appellate Court, in *DiTeresi v. Stamford Health System*, 142 Conn. App 72 (2013) held that IIED counts should not be assessed under a bystander emotional distress analysis.

DiTeresi v. Stamford Health System, 142 Conn. App 72, 86-89 (2013) held that an IIED claim is not limited by the bystander emotional distress analysis. *DiTeresi* held that IIED is only subject to the 4-prong test.[16]

At a fundamental level a bystander emotional distress claim, by definition, cannot involve an intentional act. They are two separate and distinct theories that do

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[14] "In essence [the doctrine] expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . . New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored. . . . Where a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance." (Citations omitted; internal quotation marks omitted.) *Breen* v. *Phelps*, 186 Conn. 86, 99, 439 A.2d 1066 (1982). Once established, the law of the case should not be disturbed unless cogent and compelling reasons justify rehearing. *United States v. Quintieri*, No. 01- 1013, 2002 WL 31255606, at *3 (Oct. 9, 2002 2d Cir.).

[15] If Defendant sought to reargue the Court's decision on the Motion to Strike, Defendant should have filed a timely Motion to Reargue, Pursuant to Practice Book § 11-12. "'[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts.'" (Internal quotation marks omitted.) *Jaser v. Jaser*, 37 Conn. App. 194, 202 (1995).

[16] This 4-part analysis of *Gagnon v. Housatonic Valley Tourism District Commission*, 92 Conn.App. 835, 846 (2006) is cited and relied upon in Page 6 of this Objection.

not overlap. Rather, the prongs and analysis of a bystander emotional distress claim simply do not require that the action be intended. The whole nature of a bystander emotional distress is that: 1) the plaintiff is related to the victim; 2) the plaintiff is present at the scene and is aware that it is causing injury to the victim; and 3) the plaintiff suffers severe emotional distress. The analysis has nothing to do with intent. All of the public policy rationale behind the bystander limitations do not apply to intentional acts of this nature.

All of the cases cited by Defendant did not have the benefit of the Appellate Court's guidance in *DiTeresi, supra*. *Lawrence v. Sniffen*, Superior Court, judicial branch of Stamford-Norwalk at Stamford (Feb. 21, 1991; *Ryan, J*) solely analyzed whether the claim was a viable bystander emotional distress claim. The case did not go into an IIED analysis of the claim. Accordingly, this case is not on point to the instant situation. *Jackson v. Kos*, Superior Court, judicial district of New Haven, Docket No.: 11-6019945 (Jul. 27, 2012; *Young, J.*) was decided on the 4-prongs of IIED. The analysis mentions bystander emotional distress without analysis or reliance.

The analysis of *Montanaro v. Baron*, Superior Court, judicial district of New Haven, Docket No. 06-5006991 (Mar. 28, 2008; *Robinson, J.*) should not be followed because it is at odds with the more recent analysis of IIED claims and bystander emotional distress claims by the Appellate Court, in *DiTeresi, supra*. In *Montanaro*, the daughter, Danielle, was being treated by defendant, Dr. Baron, and Danielle's mother, Lisa, was present. Dr. Baron commented that Lisa was mentally ill, during the examination of Danielle. The Court, in analyzing the daughter's IIED claim, found

that the claim was not, by its nature, an IIED claim. The Court found that, instead, the claim was a bystander emotional distress claim and that the claim factually failed to meet the criteria of such a claim. The *Montanaro* analysis is contrary to *DiTeresi*, which held that an IIED claim is not limited by the bystander emotional distress analysis.

IIED claims are only subject to a 4-prong analysis, as set forth in *DiTeresi*.

D. Conclusion

The 4-prong analysis for IIED claims have been met: 1) Defendants intended to not re-intubate over the objection of Helen Marsala and Plaintiffs and Defendant should have known that Plaintiffs severe emotional distress was the likely result; 2) Defendant's failure to treat Helen Marsala was extreme and outrageous in light of the following eight-reasons: Helen Marsala's wishes were to remain on life support; Plaintiffs did not want Helen Marsala's intubation and life saving measures to be discontinued; it is patently absurd that Defendant claims that the best course of treatment for Helen Marsala was to not treat her and place her on Comfort Care measures; the cause of Helen Marsala's decreased mental status was never diagnosed; Dr. Margaret Pisani and Dr. Andrew Boyd testified that Helen Marsala had a possibility of recovering and Plaintiffs' expert, Dr. Hamer, testified that, with reintubation, she would have lived a long time; Dr. Pisani did not make any efforts to transfer Helen Marsala; Plaintiffs' expert, Dr. Louis Hamer, described Defendant's treatment of Helen Marsala as euthanasia; and Defendant never provided Plaintiffs with the opportunity to resolve the life or death dispute with the Probate Court; 3) Defendant's' failure to treat Helen Marsala was the cause of Plaintiffs' severe

emotional distress; and 4) the emotional distress sustained by Plaintiffs was severe. The bystander emotional distress analysis is not applicable to Plaintiffs' IIED claim, pursuant to the holding of *DiTeresi*, and Judge Lee. Summary Judgment should be denied as to Plaintiffs' claims for IIED.

II. PLAINTIFFS' MEDICAL MALPRACTICE CLAIM[17] AND LOSS OF CONSORTIUM CLAIM[18]

Connecticut's Wrongful Death Statute does not preclude Plaintiffs from recovering for Helen Marsala's antemortem injuries under a medical malpractice theory.

In analyzing the statute of limitations of the wrong death statute, General Statutes § 52-555, the Court (*Stevens, J.*) distinguished antemortem injuries and postmortem injuries. The Court stated that "[a]ntemortem claims [are] not governed by [C.G.S.] § 52-555," Connecticut's Wrongful Death Statute." *Mickelson v. Katz*, Superior Court, judicial district of Milford, Docket No.: 04-4001359 (*Stevens, J.*; July 26, 2005) attached as Exhibit W.

The Court further held that, because the statute of limitations of a wrongful death claim is distinct from the statute of limitations of a medical malpractice claim, they must also have different damages associated with each cause of action. "Consequently, because the executrix's claims in both actions are divided into ante-mortem and post-mortem claims, the statute of repose for the former appears to be governed by General Statutes §52-584 and the statute of repose for the latter

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[17] The Medical Malpractice Claim is found in Count Twenty-Six of Second Amended Complaint and Count One of Complaint, dated October 22, 2012. See Entry #107.00 of Docket No. 12-6010861.

[18] The Loss of Consortium Count is found in Count Twenty-Seven of Second Amended Complaint, dated October 22, 2012, of Docket No. 12-6011711.

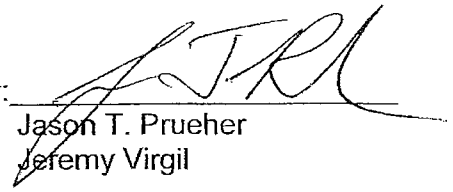
appears to be governed by General Statutes §52-555." *Saperstein v. Danbury Hospital,* Superior Court, judicial district of Danbury, Docket No.: 06-075007185 (*Stevens, J.*; Jan. 27, 2010) (attached as Exhibit X), *citing Doucette v. Bouchard*, 28 Conn.Sup. 460, 265 A.2d 618 (1970).

General Statutes "§ 52-555 provides the jurisdiction basis for postmortem claims" only. *Mickelson*, supra, at *2. Consequently, allegations "that as a result of the defendants' negligence, the decedent suffered "severe, painful and permanent injury" and "great fear and anxiety and distress of mind" . . . express antemortem, as compared to postmortem injuries" resulting from the defendant's medical malpractice, and remain "viable" alongside a concurrently plead wrongful death claim. *Id.*

In this action, Plaintiffs allege that, "as a result of the defendant, [YNHH]'s conduct", plaintiffs' decedent "suffer[ed] the following serious, painful, and permanent injuries: . . . c) fear of death; d) stress; e) anxiety; and f) pain and suffering." Second Amended Complaint, Count 26, ¶ 31c-f. Consistent with *Mickelson*, these allegations "express antemortem, as compared to postmortem injuries" resulting from Defendant's alleged malpractice. Accordingly, they are viable under a medical malpractice theory.

WHEREFORE, for the foregoing reasons Defendant's Motion for Summary Judgment should be denied in its entirety.

PLAINTIFFS

By: 
Jason T. Prueher
Jeremy Virgil

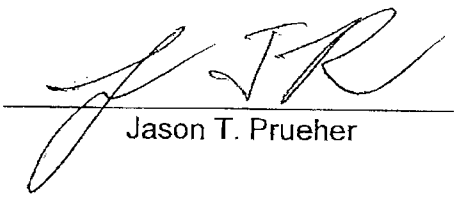
Zeldes, Needle & Cooper, P.C.
1000 Lafayette Blvd., 5th Floor
Bridgeport, CT 06604
Tel: (203) 333-9441
Fax: (203) 333-1489
Juris No. 69695

Their Attorneys

CERTIFICATION

This is to certify that a copy of the foregoing was sent via U.S. Mail, postage prepaid, this 17th day of November. 2014 to the following counsel of record:

Penny Q. Seaman, Esq.
Benjamin W. Cheney, Esq.
Wiggin & Dana LLP
PO Box 1832
New Haven, CT 06508-1832



Jason T. Prueher

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

[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).

DOCKET #A.C. 37822

AAN-CV12-6010861	:	APPELLATE COURT
CLARENCE MARSALA, ET AL	:	STATE OF CONNECTICUT
v.	:	JUDICIAL DISTRICT OF ANSONIA/MILFORD
YALE-NEW HAVEN HOSPITAL INC d/b/a YALE NEW HAVEN HOSPITAL	:	AT MILFORD
	:	MARCH 19, 2015

AAN-CV12-6011711-S	:	APPELLATE COURT
CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	STATE OF CONNECTICUT
v.	:	JUDICIAL DISTRICT OF ANSONIA/MILFORD
YALE-NEW HAVEN HOSPITAL, INC. d/b/a YALE NEW HAVEN HOSPITAL	:	AT MILFORD
	:	MARCH 19, 2015

PRESENT: Honorable Charles Lee/Honorable Theodore Tyma

JUDGMENT

On August 7, 2012 Clarence Marsala, Michael Marsala, Gary Marsala, Tracey Marsala, Kevin Marsala, Randy Marsala, and Clarence Marsala, Administrator of the Estate of Helen Marsala initiated suit against the Defendant (hereinafter "The First Action"). See Docket # CV12-6010861.

On October 22, 2012 the Plaintiffs filed a Second Amended Complaint in the First Action alleging the following counts: One through Six (negligent infliction of emotional distress); Seven through Twelve (intentional infliction of emotional distress); Thirteen through Nineteen

(CUTPA); Twenty (breach of General Statutes Sec. 19a-571); Twenty-One (wrongful death); Twenty-Two (loss of consortium claim pursuant to the breach of General Statutes Sec 19a-571); Twenty-Three (assault); Twenty-Four (battery); Twenty-Five (breach of the decedent's right to privacy) Twenty-Six (medical malpractice); Twenty-Seven (loss of consortium pursuant to General Statutes Sec 52-555a). See entry #107 of Docket # CV12-6010861.

At the same time on October 22, 2012, Clarence Marsala, as Administrator of the Estate of Helen Marsala, filed an additional one count action, asserting an identical claim of medical malpractice (hereinafter "The Second Action"). See Complaint of Docket # CV12-6011711.

On June 30, 2014, the Court (Brazzel-Massaro, J) consolidated the First Action and the Second Action. See Entry #133.01 of Docket # CV12-6010861.

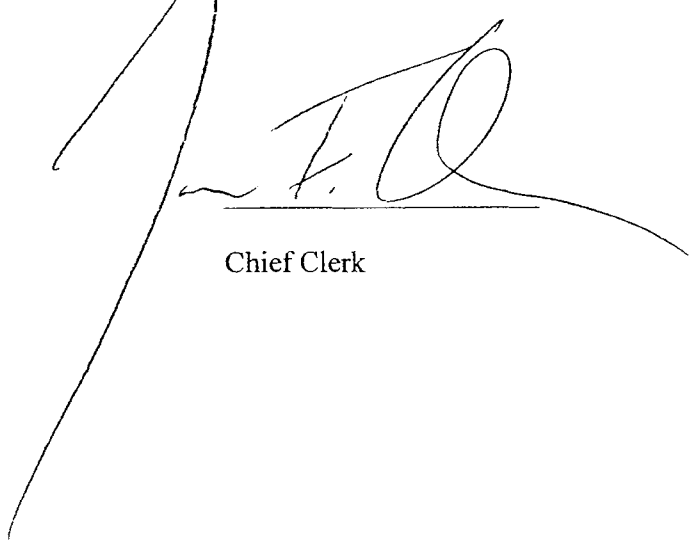
On October 30, 2013, the Court (Lee, J) granted the Defendant's Motion to Strike, in part, striking the following counts in the first action: One through Six (negligent infliction of emotional distress); Thirteen through Nineteen (CUTPA); Twenty (breach of General Statutes Sec 19a-571); Twenty-Three (assault); Twenty-Four (battery); and Twenty-Five (breach of Decedent's right of privacy). See Entry #'s 116.10, 117.10 and 117.50 of Docket # CV12-6010861.

On April 24, 2014 the Defendant filed an answer in the Second Action. See Entry #116.00 of Docket # CV12-6011711. On April 25, 2014, Defendant filed an Answer in the First Action. See Entry #132.00 of Docket # CV12-6010861.

On March 19, 2015, the Court (Tyma, J) granted the Defendant's Motion for Summary Judgment, in part, entering judgment as to the following counts in the First Action: Seven through Twelve (intentional infliction of emotional distress). See Entry #'s 140.10 and 140.20 of Docket # CV12-6010861. Additionally on March 19, 2015, the Court (Tyma, J) entered

judgment as to the entire Complaint in the Second Action. See Entry # 129.10; 129.20 and 129.30 of Docket # CV12-6011711.

BY THE COURT



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JD-SC-28 Rev. 12-09
P.B. §§ 3-8, 62-8, 63-3, 63-4, 63-10
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☐ To Supreme Court ☒ To Appellate Court

Name of case *(State full name of case as it appears in the judgment file)*

Clarence Marsala, Administrator of the Estate of Helen Marsala, et al v. Yale New Haven Hospital, Inc. d/b/a Yale New Haven Hospit

Classification
☒ Appeal ☐ Cross appeal ☐ Joint appeal ☐ Amended appeal ☐ Stipulation for reservation ☐ Corrected/amended appeal form ☐ Other *(Specify)*

Trial Court History

Tried to: ☐ Court ☐ Jury
Trial court location: **Milford/Ansonia**

Trial court judges being appealed: **Theodore Tyma and Charles Lee**
List all trial court docket numbers, including all location prefixes: **AAN-CV12-6011711; AAN-CV12-6010861**
All other trial court judge(s) who were involved with the case:

Judgment for *(Where there are multiple parties, specify any individual party or parties for whom judgment may have been entered.)*
☐ Plaintiff ☒ Defendant ☐ Other:

Judgment date of decision being appealed	Date of issuance of notice on any order on any motion which would render judgment ineffective	Date for filing appeal extended to
3/19/15		

Case type
☐ Juvenile — Termination of Parental Rights ☐ Juvenile — Order of Temporary Custody ☐ Juvenile — Other
☒ Civil/Family: Major/Minor code **T28** ☐ Habeas Corpus ☐ Workers compensation ☐ Other
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Appeal

Appeal filed by *(Where there are multiple parties, specify the name of the individual party or parties filing this appeal.)*
☒ Plaintiff(s) **All** ☐ Defendant(s) ☐ Other

From *(the action which constitutes the appealable judgment or decision)*: **##129.10; 129.20; 129.30 of DN AAN-CV12-6011711-S**
##116.10; 117.10; 117.50; 140.10; 140.20 of DN AAN-CV12-6010861-S

If to the Supreme Court, the statutory basis for the appeal *(Connecticut General Statutes section 51-199)*

Appearance

By *(Signature of attorney or self-represented party)*	Telephone number	Fax number	Juris number *(If applicable)*
▶	203-333-9441	203-333-1489	425280

Type name and address of person signing above *(This is your appearance; see Practice Book section 62-8)*: **Jeremy C. Virgil, 1000 Lafayette Blvd, Bridgeport CT 06601**
E-mail address: **jvirgil@znclaw.com**

"X" one if applicable
☐ Counsel or self-represented party who files this appeal will be deemed to have appeared **in addition to** counsel of record who appeared in the trial court under Practice Book section 62-8.
☐ Under Practice Book section 3-8, counsel or self-represented party who files this appeal is appearing **in place of:**

Name of counsel or self-represented party | Juris number *(If applicable)*

Certification (Practice Book section 63-3)

I certify that a copy of this appeal was mailed or delivered to all counsel and self-represented parties of record as required by Practice Book section 62-7 on: **4/6/15**
Signed *(Individual counsel/self-represented party)* ▶
** Attach a list with the name, telephone number and fax number of each counsel and self-represented party and the address where the copy was mailed or delivered.*

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☐ Entry Fee Paid ☐ No Fees Required ☐ Fees, Costs, and Security waived by Judge *(enter judge's name below)*

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Judge | Date waived

Signed *(Clerk of trial court)* | Date

The clerk of the original trial court, if different from this court, was notified on _____ that this appeal was filed.
In habeas matters, a copy of this endorsed appeal was provided to the Office of the Chief State's Attorney, Appellate Bureau, on _____.

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The following documents must be filed with the Appellate Clerk when filing the endorsed appeal form; Practice Book sections 63-3 and 63-4.
1. Preliminary Statement of the Issues
2. Preliminary Designation of Pleadings
3. Court Reporter's Acknowledgment/Certification re transcript
4. Docketing Statement
5. Statement for Preargument Conference (form JD-SC-28A)
6. Draft Judgment File
7. Constitutionality Notice (if applicable)
8. Sealing Order form, if any
9. List of counsel of record in trial court (DS1 received from clerk)
10. Proof of receipt of the copy of the endorsed appeal form by the original trial court clerk or the clerk of the court or courts where the case was transferred, if the case was in more than one trial court

Certification

I certify that a copy of the endorsed appeal and all documents to be given to the Appellate Clerk with the endorsed Appeal form were mailed or delivered to all counsel and self-represented parties of record* as required by Practice Book section 63-3 on:
Signed *(Individual counsel or self-represented party)* ▶
** Attach a list with the name, telephone number and fax number of each counsel and self-represented party and the address at which the copy was mailed or delivered.*

A.C.	:	
DOCKET NO.: AAN-CV12-6010861-S	:	SUPERIOR COURT
CLARENCE MARSALA, ET AL.	:	JUDICIAL DISTRICT OF MILFORD/ANSONIA
v.	:	AT MILFORD
YALE-NEW HAVEN HOSPITAL, INC. d/b/a YALE NEW HAVEN HOSPITAL	:	APRIL 6, 2015
DOCKET NO.: AAN-CV12-6011711-S	:	SUPERIOR COURT
CLARENCE MARSALA, ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA	:	JUDICIAL DISTRICT OF MILFORD/ANSONIA
v.	:	AT MILFORD
YALE-NEW HAVEN HOSPITAL, INC. d/b/a YALE NEW HAVEN HOSPITAL	:	APRIL 6, 2015

CERTIFICATION

This is to certify that a copy of the Endorsed Appeal Form (the Appeal Form; and the confirmation of efiling) and all supporting documents (Electronic Docket Sheets) have been mailed and/or sent via electronic mail this 6th day of April, 2015 to the following counsel of record in accordance with Practice Book §§60-4; 62-7; 63-3.

Penny Q. Seaman, Esq.
Benjamin W. Cheney, Esq.
Wiggin & Dana LLP
PO Box 1832
New Haven, CT 06508-1832
T (203) 498-4400
F (203) 782-2889
Email: PSeaman@wiggin.com
Email: BCheney@wiggin.com

Jeremy C. Virgil

A.C. _____	:	
DOCKET NO.: AAN-CV12-6010861-S	:	SUPERIOR COURT
	:	
CLARENCE MARSALA, ET AL.	:	JUDICIAL DISTRICT
	:	OF MILFORD/ANSONIA
	:	
v.	:	AT MILFORD
	:	
YALE-NEW HAVEN HOSPITAL, INC.	:	
d/b/a YALE NEW HAVEN HOSPITAL	:	APRIL 15, 2015
DOCKET NO.: AAN-CV12-6011711-S	:	SUPERIOR COURT
	:	
CLARENCE MARSALA,	:	
ADMINISTRATOR OF THE ESTATE OF	:	JUDICIAL DISTRICT
HELEN MARSALA	:	OF MILFORD/ANSONIA
	:	
v.	:	AT MILFORD
	:	
YALE-NEW HAVEN HOSPITAL, INC.	:	
d/b/a YALE NEW HAVEN HOSPITAL	:	APRIL 15, 2015

DOCKETING STATEMENT

The Plaintiff/Appellant hereby provides the following docketing statement pursuant to *Practice Book* §63-4(a)(3):

(A) The names and address of all parties to the appeal and their trial and appellate counsel and the names and addresses of all persons having a legal interest in the cause on appeal:

1) Plaintiffs/Appellants

Clarence Marsala
22 Greenwood Circle
Seymour, CT 06483

Michael Marsala
22 Greenwood Circle
Seymour, CT 06483

Gary Marsala
15 Glen Circle
Seymour, CT 06483

Tracey Marsala
22 Greenwood Circle
Seymour, CT 06483

Kevin Marsala
66 Georgeshill Road
Newtown, CT 06473

Randy Marsala
114 Foxton Cove
Beacon Falls, CT 06403

2) Plaintiffs/Appellants Trial and Appellate Counsel

Jeremy C. Virgil, Esq.
Zeldes, Needle & Cooper, P.C.
1000 Lafayette Blvd, Suite 500
P.O. Box 1740
Bridgeport, CT 06601-1740
T (203) 333-9441
F (203) 333-1489

3) Defendant/Appellee

Yale-New Haven Hospital, Inc.
d/b/a Yale New Haven Hospital
20 York Street
New Haven, CT 06510

4) Defendant/Appellee Trial Counsel

Penny Q. Seaman, Esq.
Wiggin & Dana LLP
PO Box 1832
New Haven, CT 06508-1832
T (203) 498-4400
F (203) 782-2889

(B) There are no pending appeals which arise from the same controversy as the cause on appeal nor involve issues closely related to those presented by the appeal.

(C) There were exhibits at trial.

(D) This was not a criminal case.

PLAINTIFFS / APPELLANTS,

By: _____
Jason T. Prueher

Zeldes, Needle & Cooper, P.C.
1000 Lafayette Blvd., 5th Floor
Bridgeport, CT 06604
Tel: (203) 333-9441
Fax: (203) 333-1489
Email: jprueher@znclaw.com
Juris No. 69695

Their Attorney

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, postage prepaid, and/or sent via electronic mail this 15th day of April, 2015, to the following counsel of record:

Penny Q. Seaman, Esq.
Benjamin W. Cheney, Esq.
Wiggin & Dana LLP
PO Box 1832
New Haven, CT 06508-1832
T (203) 498-4400
F (203) 782-2889
Email: PSeaman@wiggin.com
Email: BCheney@wiggin.com

Jason T. Prueher

AC 37822

CLARENCE MARSALA, ET AL.	:	APPELLATE COURT
VS.	:	
YALE-NEW HAVEN HOSPITAL	:	MAY 6, 2015

MOTION TO DISMISS APPEAL

Pursuant to Practice Book § 66-8, defendant-appellee Yale-New Haven Hospital ("the Hospital") moves to dismiss portions of the appeal filed jointly by the plaintiffs-appellants on April 6, 2015. The Court lacks appellate jurisdiction over the appeal to the extent it was filed on behalf of plaintiff Clarence Marsala in both of his capacities: (1) as administrator of the Estate of Helen Marsala, and (2) individually on his own behalf. The motion is not addressed to the appeal to the extent it was filed on behalf of plaintiffs Michael, Gary, Tracey, Kevin, and Randy Marsala, as the case is finished as to them in the trial court. But, as discussed below, Clarence Marsala still has claims pending in the trial court. He cannot now pursue an interlocutory appeal of a partial disposal of his claims against the Hospital in either of his capacities as a plaintiff.

A. Brief History

This is a personal injury action arising from the death of Helen Marsala at Yale-New Haven Hospital in July 2010. Plaintiffs are Clarence Marsala, as administrator of the Estate of Helen Marsala ("the Estate"), Clarence Marsala in his individual capacity as the spouse of Helen Marsala, and their five adult children, Michael, Kevin, Gary, Randy and Tracey Marsala.

The operative complaint in this action, the Second Amended Complaint ("Complaint"), was filed on October 22, 2012, attached to a motion for leave to amend the

complaint. *See* Exhibit A. The motion was granted on December 3, 2012. *See* Exhibit B. On October 30, 2013, the trial court (Lee, J.) granted in part the Hospital's motion to strike. *See* Exhibit C. No plaintiff repleaded in response to that decision. Later, on March 19, 2015, the trial court (Tyma, J.) granted in part the Hospital's summary judgment motion. *See* Exhibit D. The two decisions will be discussed in more detail in the following section of this motion. As a result of those decisions, what remains of the 27-count Complaint are only claims asserted by the Estate (through its administrator Clarence Marsala) for wrongful death and medical malpractice and derivative claims for loss of consortium brought by Clarence Marsala.[1]

B. Factual Basis for Motion

Set forth here is a listing of the claims of each plaintiff in the operative Complaint and whether a claim has been disposed of or is still pending in the trial court.

Clarence Marsala, as administrator of the Estate of Helen Marsala

Nineteenth Count – Connecticut Unfair Trade Practices Act

Stricken by Judge Lee

Twentieth Count – Violation of Conn. Gen. Stat. § 19a-571

Stricken by Judge Lee

Twenty-first Count – Wrongful Death (Conn. Gen. Stat. § 52-555)

Still pending in trial court

[1] This appeal is from Superior Court docket no. AAN-CV12-6010861-S. There is a second, related appeal (no. AC 37821) from Superior Court docket no. AAN-CV12-6011711-S. The two cases were consolidated in the trial court for coordinated proceedings but kept their separate identities under Practice Book § 9-5(c). The complaint in the second action asserted only a single count by the Estate, which was disposed of by Judge Tyma's summary judgment decision. Thus, there is a final judgment on the entire complaint in the second action, and the appeal of that judgment in AC 37821 is properly before this Court.

Twenty-third Count – Assault

Stricken by Judge Lee

Twenty-fourth Count – Battery

Stricken by Judge Lee

Twenty-fifth Count – Right to privacy

Stricken by Judge Lee

Twenty-sixth Count – Medical malpractice (Conn. Gen. Stat. § 52-555)

Still pending in trial court

Clarence Marsala in his individual capacity

First Count – Negligent infliction of emotional distress

Stricken by Judge Lee

Seventh Count – Intentional infliction of emotional distress

Summary judgment for defendant by Judge Tyma

Thirteenth Count – Connecticut Unfair Trade Practices Act

Stricken by Judge Lee

Twenty-second Count – Loss of consortium [wrongful death] (Conn. Gen. Stat. § 52-555)

Still pending in trial court

Twenty-seventh Count – Loss of consortium [medical malpractice] (Conn. Gen. Stat. § 52-555)

Still pending in trial court

Michael Marsala

Second Count – Negligent infliction of emotional distress

Stricken by Judge Lee

Eighth Count – Intentional infliction of emotional distress

Summary judgment for defendant by Judge Tyma

Fourteenth Count – Connecticut Unfair Trade Practices Act

Stricken by Judge Lee

Gary Marsala

Third Count – Negligent infliction of emotional distress

Stricken by Judge Lee

Ninth Count – Intentional infliction of emotional distress

Summary judgment for defendant by Judge Tyma

Fifteenth Count – Connecticut Unfair Trade Practices Act

Stricken by Judge Lee

Tracey Marsala

Fourth Count – Negligent infliction of emotional distress

Stricken by Judge Lee

Tenth Count – Intentional infliction of emotional distress

Summary judgment for defendant by Judge Tyma

Sixteenth Count – Connecticut Unfair Trade Practices Act

Stricken by Judge Lee

Kevin Marsala

Fifth Count – Negligent infliction of emotional distress

Stricken by Judge Lee

Eleventh Count – Intentional infliction of emotional distress

Summary judgment for defendant by Judge Tyma

Seventeenth Count – Connecticut Unfair Trade Practices Act

Stricken by Judge Lee

Randy Marsala

Sixth Count – Negligent infliction of emotional distress

Stricken by Judge Lee

Twelfth Count – Intentional infliction of emotional distress

Summary judgment for defendant by Judge Tyma

Eighteenth Count – Connecticut Unfair Trade Practices Act

Stricken by Judge Lee

To sum up, both the Estate (through its administrator Clarence Marsala) and Clarence Marsala individually have claims still pending in the trial court. The claims of the other plaintiffs have all been disposed of.

C. Legal Grounds for Motion

A party may appeal only from a final judgment in the trial court. *See* Conn. Gen. Stat. § 52-263; Practice Book § 61-1. "[A]ppeals to the Appellate Court or to this [Supreme] court must ordinarily await the rendering of a final judgment in the trial court." *Balf Co. v. Spera Construction Co.*, 222 Conn. 211, 212 (1992). Here, Clarence Marsala as administrator of the Estate and Clarence Marsala individually have *not* appealed from a final judgment. They have claims that remain pending in the trial court, including claims by the Estate for wrongful death and medical malpractice and claims by Clarence Marsala for loss of consortium. The appeal as to them must be dismissed in its entirety, and they must

await a final resolution of all of their claims before they can challenge the disposition of some of their claims on appeal.

The appeal can therefore only go forward only as to the claims of plaintiffs Michael, Gary, Tracey, Kevin, and Randy Marsala. Practice Book § 61-3 treats as a final judgment a court order that disposes of all claims by or against a party in a complaint.[2] Judge Tyma's summary judgment ruling disposed of the last remaining claims in the Complaint asserted by Michael, Gary, Tracey, Kevin, and Randy Marsala.[3] They are the only plaintiffs for which there is final judgment in the trial court.

This situation is analogous to *Decorso*, 118 Conn. App. at 621 n.10, where a plaintiff asserted claims against three defendants, two defendants obtained summary judgment on the remaining claims against them, the third defendant obtained only partial summary judgment, and the plaintiff appealed from the summary judgment ruling as to all three defendants. The defendant who had claims remaining against her in the trial court moved to dismiss the appeal as to herself, and the Appellate Court granted the motion, allowing the plaintiff's appeal to go forward only with respect to the two defendants for which the case was at an end in the trial court.

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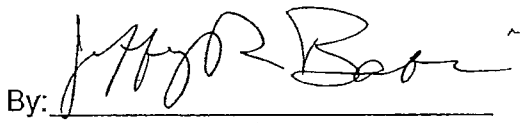
[2] Section 61-3 provides in relevant part: "A judgment disposing of only a part of a complaint, counterclaim, or cross complaint is a final judgment if that judgment disposes of all causes of action in that complaint, counterclaim, or cross complaint brought by or against a particular party or parties."

[3] Although no party moved for judgment on the counts previously stricken by Judge Lee, once Judge Tyma granted summary judgment on the remaining claims asserted by Clarence's and Helen's children, the lawsuit was at an end as to those plaintiffs and there was a final judgment that could be appealed. *See Decorso v. Calderaro*, 118 Conn. App. 617, 623-24 (2009).

As our Supreme Court has instructed, "[b]ecause the lack of a final judgment is a jurisdictional defect, we must dismiss the appeal." *Stroiney v. Crescent Lake Tax District*, 197 Conn. 82, 86 (1985) (footnote omitted).

WHEREFORE, the Hospital respectfully requests that the Court grant this motion and dismiss the appeal filed by Clarence Marsala on behalf of the Estate of Helen Marsala and on his own behalf.

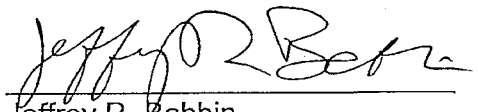
DEFENDANT-APPELLEE
YALE-NEW HAVEN HOSPITAL

By: 

Jeffrey R. Babbin
Wiggin and Dana LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400 (tel.)
(203) 782-2889 (fax)
Juris No. 67700

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with all of the provisions of the Connecticut Rules of Appellate Procedure § 66-3.



Jeffrey R. Babbin

CERTIFICATION

I hereby certify that on this 6th day of May, 2015, a copy of the foregoing motion and accompanying exhibits was served by first-class mail, postage prepaid, and by e-mail upon all counsel and pro se parties of record as follows:

Jeremy C. Virgil, Esq.
Zeldes, Needle & Cooper, P.C.
P.O. Box 1740
Bridgeport, CT 06601-1740
(203) 332-5775 (tel.)
(203) 333-1489 (fax)
jvirgil@znclaw.com

Jeffrey R. Babbin

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A.C. 37822	:	APPELLATE COURT
CLARENCE MARSALA, ET AL	:	STATE OF CONNECTICUT
v.	:	
YALE-NEW HAVEN HOSPITAL	:	MAY 15, 2015

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS APPEAL

The trial court decision on summary judgment being appealed in this action was issued in two cases: (1) *Clarence Marsala, et al. v. Yale-New Haven Hospital*, judicial district of Ansonia/Milford, docket no. CV-12-6010861, and *Clarence Marsala, et al. v. Yale-New Haven Hospital*, judicial district of Ansonia/Milford, docket no. CV-12-6011711.[1] Memorandum of Decision, dated March 19, 2015 (attached to Defendant's Motion to Dismiss Appeal as Exhibit D); Defendant's Motion to Dismiss Appeal, dated May 6, 2015, at 2, n. 1.

Because the trial court decision being appealed from was issued in two cases, Plaintiffs filed one set of appeal papers pertaining to both cases. Clarence Marsala, in his individual capacity and as the Administrator of his deceased wife's estate, was made a party to the appeal because summary judgment adverse to all of Mr. Marsala's claims in the second case (Superior Court docket no. 6011711) entered through the March 19, 2015 decision on summary judgment applicable to both cases. *See* Memorandum of Decision, Exhibit D to Defendant's Motion to Dismiss Appeal, last page. There is thus a final judgment on all claims in the 6011711 case being appealed by Clarence Marsala.

After Plaintiffs filed the appeal in both cases, separate Appellate Court docket numbers were assigned to each case. Plaintiffs do not dispute that Clarence Marsala, in

[1] The appeal in this action (docket no. CV-12-6010861) is also from a ruling on a Motion to Strike issued solely in this action. *See* Exhibit C to Defendant's Motion to Dismiss Appeal.

his individual and representative capacities, is not an appropriate appellant in the above-captioned appeal, because he continues to pursue claims in the trial court in this action. Plaintiffs' response to Defendants' Motion to Dismiss Appeal is being filed simply to clarify that (i) Clarence Marsala, in his individual and representative capacities, is appealing from a final judgment in the companion appeal of Superior Court docket no. CV-12-6011711, Appellate Court docket no. A.C. 37821, and (ii) the remaining Plaintiffs in this appeal, A.C. 37822, are appealing from a final judgment entered through the March 19, 2015 Memorandum of Decision that completely disposed of all of their claims, and thus this appeal should not be dismissed as to the other Plaintiffs.

It must be noted, however, that if the trial court's April 29, 2015 order (#175.10, Tyma, J) staying the entire case with docket number CV-6010861-S is not reversed when/if Plaintiffs motion for reargument is heard then the Plaintiffs will seek to have all of the appellate issues heard now and/or petition for an interlocutory appeal.

PLAINTIFFS / APPELLANTS,

By: _____
Jeremy C. Virgil

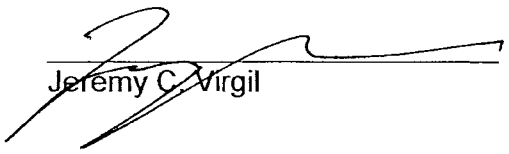
Zeldes, Needle & Cooper, P.C.
1000 Lafayette Blvd., 5th Floor
Bridgeport, CT 06604
Tel: (203) 333-9441
Fax: (203) 333-1489
Email: jvirgil@znclaw.com
Juris No. 69695

Their Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been mailed and/or sent via electronic mail this 15th day of May, 2015 to the following counsel of record in accordance with Practice Book §§60-4; 62-7; and 63-3.

Penny Q. Seaman, Esq.
Benjamin W. Cheney, Esq.
Wiggin & Dana LLP
PO Box 1832
New Haven, CT 06508-1832
T (203) 498-4400
F (203) 782-2889
Email: PSeaman@wiggin.com
Email: BCheney@wiggin.com



Jeremy C. Virgil

APPELLATE COURT

STATE OF CONNECTICUT

AC 37822

CLARENCE MARSALA ET AL.

V.

YALE NEW HAVEN HOSPITAL

JUNE 10, 2015

O R D E R

THE MOTION OF THE DEFENDANT-APPELLEE, FILED MAY 6, 2015, TO DISMISS APPEAL, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **O R D E R E D** GRANTED ONLY IN THAT THE APPEAL IS DISMISSED AS TO CLARENCE MARSALA INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF HELEN MARSALA.

BY THE COURT,

RENE L. ROBERTSON
TEMPORARY ASSISTANT CLERK-APPELLATE

NOTICE SENT: June 11, 2015
HON. THEODORE R. TYMA
WIGGIN & DANALLP
ZELDES, NEEDLE & COOPER
CLERK, MILFORD SUPERIOR COURT
AAN CV12-6010861-S
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