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

BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

STATEMENT OF THE ISSUES

TABLE OF AUTHORITIES

Statutes

Cases

Connecticut Supreme Court

Connecticut Appellate Court

Connecticut Superior Court

STATEMENT OF PROCEEDINGS AND FACTS

This consolidated appeal stems from two complaints filed against the defendant-appellee, Yale-New Haven Hospital, Inc., concerning appalling actions it committed that caused the death of Helen Marsala (the decedent). App. I, A15, A49. The decedent was the wife of Clarence Marsala and the mother of Michael, Gary, Tracey, Randy, and Kevin Marsala (the appellants). App. I, A15-16.

The first complaint was filed by Clarence, both individually and as administrator of the decedent's estate, and the appellants in their individual capacities. App. I, A15. The operative complaint[1] contained twenty-seven counts raising claims of, inter alia, negligent infliction of emotional distress (NIED), intentional infliction of emotional distress (IIED), wrongful death, medical malpractice, and loss of consortium. App. I, A15-48. The second complaint[2] was filed by Clarence, solely as administrator of the decedent's estate, and contained one count of medical malpractice. App. I, A49.

On March 22, 2013, the appellee filed a motion to strike most of the counts in the first complaint. App. I, A59. Importantly, the appellee asked the court to strike the appellants' NIED and IIED claims. Id. The trial court, *Lee, J.*, granted the motion in part, striking the NIED claims but preserving the IIED claims. App. I, A117-127.

Subsequently, on August 28, 2014, the appellee filed a motion for partial summary judgment as to, inter alia, the appellants' IIED claims. App. I, A149.

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[1]The initial complaint was filed on August 7, 2012. The complaint was subsequently amended for the first time on August 31, 2012, and for the second time on October 22, 2012. App. I, A1-2.

[2]The second complaint was filed on October 22, 2012. App. I, A49.

The trial court, *Tyma, J.*, granted the motion as to the IIED claims. App. I, A233-242. This consolidated appeal followed, wherein the appellants in this appeal are Michael, Randy, Tracey, Gary, and Kevin Marsala. Although he is named in this appeal, Clarence Marsala is not a party to it.[3]

The following additional facts are relevant here. On April 7, 2010, the decedent was admitted to Griffin Hospital in Derby to undergo wrist surgery. App. I, A228. The decedent's wrist subsequently became infected, requiring her to be placed on life support. Id. She lost consciousness and went into a coma at some point thereafter. App. II, A307. The decedent did not have a living will; however, she had previously expressed to Clarence and the appellants her adamant desire to remain alive if she were ever to be placed on life support. App. I, A227-28; App. II, A371.

The decedent was treated at Griffin Hospital from April 7, 2010 to June 19, 2010. App. I, A228. On multiple occasions during that interval, the staff at Griffin Hospital consulted with Clarence about removing the decedent from life support, but he unequivocally rejected those requests. Id. Believing that the appellee would respect the decedent's wishes and provide her with better care, Clarence transferred the decedent to the appellee's facility on June 19, 2010. App. I, A228; App. II, A426.

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[3]On June 10, 2015, this Court dismissed the first of the consolidated appeals as to Clarence Marsala, individually and as administrator of the decedent's estate. App. I, A275. Consequently, the only appeal to which Clarence is a party is the second of the consolidated appeals, which pertains to the medical malpractice claim in the second complaint. However, Clarence is not pursuing his claim in the second appeal. Therefore, the only appeal presently before this Court is the first of the consolidated appeals, with Michael, Randy, Tracey, Gary, and Kevin Marsala serving as the appellants.

When she first arrived at the appellee's facility, the decedent relied on a breathing tube to stay alive. App. I, A228; App. II, A339. The appellee, after consulting with Clarence and Michael Marsala, conducted weaning trials to test whether the decedent was capable of breathing independently.[4] App. I, A228; App. II, A341. The weaning trials were conducted over several weeks, during which the decedent's breathing tube was temporarily shut off, then restarted when the decedent experienced difficulty breathing without it. App. I, A228. During that same interval, the appellee repeatedly approached Clarence and several of the appellants about removing the breathing tube permanently, regardless of whether the decedent could breathe on her own. Id. Clarence and the appellants unambiguously refused that request each time, and expressly instructed the appellee not to "pull the plug." Id.

On July 21, 2010, the appellee permanently removed the decedent's breathing tube. App. I, A228; App. II, A544. The decedent continued to experience severe difficulty breathing on her own, leading the appellee to place a BiPAP on her.[5] App. I, A228; App. II, A544.

On July 23, 2010, the appellee's bioethics committee convened to discuss the decedent's condition and the termination of her life support. App. I, A543. The committee concluded that further care of the decedent would not be in her "best interest" and recommended terminating the decedent's life support, in spite

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[4]During weaning trials, the machine powering a patient's breathing tube is shut off while the breathing tube remains in place. App. II, A341.

[5]A BiPAP (Bilevel Positive Airway Pressure) is a mask worn by a patient that provides pressurized air to the patient to keep his or her airways stable. App. II, A344.

of its knowledge that the decedent and the appellants wanted the decedent to remain on life support. App. I, A544. The following day, on July 24, 2010, despite the appellants' explicit instructions, the appellee ordered the decedent's treating physicians to remove her BiPAP and forego any additional life support measures. App. I, A229. The appellee informed Gary Marsala of its decision later that day. Id. Gary, shocked by the decision, expressly objected, then relayed the appellee's intentions to Clarence, who went to the appellee's facility and vehemently protested its decision. App. I, A229; App. II, A314. After speaking with the appellee's staff, Clarence left the facility convinced that the appellee would not terminate the decedent's life support. App. II, A315.

Despite the repeated, unambiguous objections lodged by Clarence and the appellants from the moment that the decedent was transferred to the appellee's facility, and without providing Clarence or the appellants with any opportunity to transport the decedent to another facility, the appellee removed the decedent's BiPAP and administered respiratory suppressing medications shortly after Clarence left the facility. App. I, A229; App. II, A589-91. The appellee's actions killed the decedent by suffocation. App. I, A229; App. II, A542.

ARGUMENT

I. THE TRIAL COURT SHOULD HAVE DENIED THE APPELLEE'S MOTION TO STRIKE THE APPELLANTS' NIED CLAIMS

A. Standard of Review

"Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, [appellate] review of the court's ruling on the [appellee's motion] is plenary. . . . [An

appellate court takes] the facts to be those alleged in the complaint that has been stricken and [it construes] the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Mueller* v. *Tepler*, 312 Conn. 631, 646–47 (2014). "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).

B. The Appellants Raised NIED Claims

In their operative complaint, the appellants pleaded sufficient facts to establish claims of NIED.[6] App. I, A15-28. Judge Lee, however, determined that they had failed to state causes of action for NIED because the appellee did not owe a duty of care to them, and they did not allege that their emotional distress resulted from an apprehension of harm to themselves. App. I, A119-122.

This Court should reverse the trial court's judgment because (1) the appellee owed a duty of care to the appellants, and (2) alleging an apprehension of harm to oneself is not a prerequisite to establishing an NIED claim.

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[6]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. The Appellee Owed a Duty of Care to the Appellants

"Our Supreme Court has stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Internal quotation marks omitted.) *Di Teresi* v. *Stamford Health System, Inc.*, 142 Conn. App. 72, 79–80 (2013). Under that test, the appellee owed the appellants a duty of care.

i. The Appellee Knew or Should Have Known that the Appellants Would Suffer Emotional Distress Due to Its Conduct

The first part of the test requires a determination that the actor knew or should have known that the victims would suffer emotional distress as a result of its conduct. "[I]t takes no great prescience to realize that friends or relatives of a seriously injured . . . victim will probably be affected emotionally in some degree." (Internal quotation marks omitted.) *Di Teresi* v. *Stamford Health System, Inc.*, supra, 142 Conn. App. 81. As a hospital, the appellee knew or should have known that determinations concerning life support are made under great duress in stressful environments. See *Valentin* v. *St. Francis*, 2005 WL 3112881, at *5 (Conn. Super. Ct. Nov. 7, 2005) (decisions to terminate life support are "emotionally charged" and "often controversial"). Here, the decedent, through the appellants, expressed an unambiguous desire to remain on life support and the

appellants instructed the appellee on multiple occasions never to terminate her life support. The appellee blatantly disregarded those instructions and the decedent's own wishes. Furthermore, the appellee failed to provide the appellants with time to find other accommodations for the decedent before terminating her life support. It is difficult to fathom how the appellee could have failed to foresee the appellants' severe emotional distress under those dire circumstances.

ii. Public Policy Favors Recognition of the Appellee's Duty of Care

The second part of the test requires a determination that the recognition of a duty of care would promote public policy. The Connecticut Supreme Court has articulated four public policy factors it considers before recognizing a duty of care: "(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." (Internal quotation marks omitted.) *Jarmie* v. *Troncale*, 306 Conn. 578, 603 (2012). All four factors support recognition of the appellee's duty of care.

a. The Appellee was Expected to Honor the Decedent's Wishes

The first public policy factor concerns the normal expectations of the participants in the relevant activity. The normal expectation of all participants is that a hospital will protect and preserve the life of its patient and honor that patient and his or her family's desire for treatment and/or life support. When a

patient is incapacitated, absent a living will, it is expected that the hospital will consult his or her family members and act in accordance with the wishes expressed thereby.

These expectations were codified into General Statutes §§ 19a-571 et seq. Physicians and hospitals are required by § 19a-571 (a) to determine the wishes of a patient concerning the withholding or withdrawal of life support from the next of kin and/or family, where there is no living will. Pursuant to General Statutes § 19a-580, hospitals that will not act in accordance with the wishes of the patient as expressed by his or her family must take all reasonable steps to transfer the incapacitated patient to a medical provider that will act in accordance with those wishes.

The first public policy factor favors imposition of a duty. The participants expect the hospital would abide by the law and honor the patient's wishes, whether communicated directly or through the patient's family members.

b. Recognizing a Duty of Care Would Encourage Hospitals to Honor Their Patients' Wishes

The second public policy factor concerns the benefits of encouraging the underlying activity. Courts and commentators have identified four public interests in life support termination cases: "(1) the preservation of life; (2) the prevention of suicide; (3) the protection of innocent third parties; and (4) the maintenance of the ethical integrity of the medical profession." *McConnell* v. *Beverly Enterprises-Connecticut*, 209 Conn. 692, 716 (1989) (*Healey, J.,* concurring). Recognizing a duty of care here would promote the foregoing interests. Had the appellee

respected the decedent's wishes, as expressed through the appellants, then the decedent may have been alive today and the appellants would have avoided the misery and grief they have suffered as a result of the appellee's actions.

Concerning the integrity of the medical profession, recognizing a duty of care in this case would create disincentives for hospitals to become surrogate decision makers for their patients. Judge Hale discussed these concerns in the Connecticut superior court case *Valentin* v. *St. Francis*, supra, 2005 WL 3112881, at *7:

> "'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. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1991 Sess., p. 1307–08, remarks of Representative Richard P. Tulisano; and G. Anand, 'Who Gets Health Care? Rationing in an Age of Rising Costs; Life Support: The Big Secret in Health Care: Rationing is Here; With Little Guidance Workers On Front Lines Decide Who Gets What Treatment; Nurse Micheletti's Tough Calls,' Wall St. J., September 12, 2003, p. A1. 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.')."

For these reasons, recognizing a duty of care in this case would encourage hospitals to honor their patient's wishes.

c. The Chance of Increased Litigation is Minimal

The third public policy factor concerns the possibility of increased litigation. The duty of care being discussed here would extend only to a patient's next of kin and solely in cases in which a patient does not have a living will. Therefore, the class of potential plaintiffs is limited. Furthermore, the recognition of a duty of care here would likely discourage hospitals from violating that duty and creating a reason for litigation. For these reasons, the chance of increased litigation is minimal.

d. Connecticut Case Law Supports Recognition of a Duty of Care

The fourth public policy factor concerns case law in other jurisdictions. It does not appear that other courts have addressed the issues in this appeal. However, two Connecticut superior court cases weigh in favor of finding a duty of care here.

In *Valentin* v. *St. Francis*, a hospital terminated the life support of a patient who did not have a living will and had not expressed his wishes regarding life support to his attending physician. *Valentin* v. *St. Francis*, supra, 2005 WL 3112881, at *1 (see App. II, A621). The hospital had failed to contact and

consult with the patient's daughter before terminating the patient's life support. Id. The daughter filed an action claiming NIED, which the hospital moved to strike. Id. The court denied the motion to strike, concluding that the hospital had a duty to contact the daughter and consult with her regarding the termination of her father's life support. Id., at *8.

In *O'Connell v. Bridgeport Hospital,* a hospital removed a patient from life support without contacting his wife, who had left instructions with the hospital as to where and how she could be reached while she was out-of-state. *O'Connell v. Bridgeport Hospital*, 2000 WL 728819, at *5 (Conn. Super. Ct. May 17, 2000) (*Skolnick, J.*) (see App. II, A615). The wife filed a claim of NIED, which the hospital moved to strike. Id. The court, in denying the motion to strike, noted that the hospital "should have realized that its conduct involved an unreasonable risk of causing the [plaintiff's] distress." Id. Together, these cases support recognition of a duty of care in this matter.

The foregoing analysis illustrates that (1) an ordinary person in the appellee's position would anticipate that its conduct would lead to the appellants' harm, and (2) public policy favors recognizing a duty of cared owed by the appellee to the appellants in this case. Therefore, as a matter of law, the appellee owed the appellants a duty of care.

2. An Apprehension of Harm to Oneself is Not a Prerequisite to Stating a Cause of Action for NIED

In addition to concluding that the appellee did not owe a duty to the appellants, Judge Lee determined that the appellants did not allege that their emotional distress resulted from an apprehension of harm to themselves. App.

II, A120. Such an allegation is not a prerequisite to the establishment of an NIED claim. See *Di Teresi* v. *Stamford Health System, Inc.*, supra, 142 Conn. App. 79–80. As Judge Lee noted, his conclusion that the appellants did not allege an apprehension of harm to themselves "[did] not end the inquiry," because they had raised the argument that the appellee owed them a duty of care. A121. There was simply no reason for the appellants to allege an apprehension of harm to themselves to establish their NIED claims.

For all of the foregoing reasons, this Court should reverse the trial court's judgment striking the appellants' NIED claims.

II. THE TRIAL COURT SHOULD HAVE DENIED THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS TO THE APPELLANTS' IIED CLAIMS

A. Standard of Review

"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.' A party moving for summary judgment is held to a 'strict standard.' . . . To satisfy [its] 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]. . . . [Appellate] review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228 (2015).

B. The Appellants Established Claims of IIED

The appellants stated causes of action for IIED in their operative complaint, and Judge Lee rejected the appellee's request to strike those claims. App. I, A122-27. Subsequently, in its motion for summary judgment, the appellee argued that the appellants failed to establish IIED claims. App. I, A158. Judge Tyma agreed with the appellee on the basis of his conclusion that the appellee's conduct was directed at the decedent, not at the appellants. App. I, A239.

This Court should reverse the trial court's summary judgment order because a review of the record illustrates that the appellee's conduct underlying the appellants' IIED claims was directed at the appellants. The appellee's decision to terminate the decedent's life support did not occur in a vacuum; rather, the appellee terminated her life support after it had repeatedly asked the appellants for permission to remove the decedent's life support, after the appellants had repeatedly rejected those requests, and after the appellants had

unambiguously instructed the appellee to keep the decedent on life support indefinitely. In total disregard of the decedent's wishes and the appellants' directions, the appellee unilaterally terminated the decedent's life support and killed her. Further, the appellee at no time offered the appellants an opportunity to remove the decedent from its facility before taking her life. The appellants were the target of the foregoing deplorable conduct.

In addition, this court's holding in *Di Teresi* v. *Stamford Health Systems, Inc.* is instructive. In that case, the daughter of a patient filed a lawsuit against a hospital asserting, inter alia, a claim of IIED. *Di Teresi* v. *Stamford Health Systems, Inc.*, supra, 142 Conn. App. 74–76. The basis of the IIED claim was the hospital's failure to report to her, in a timely manner, a sexual assault committed against the patient. Id., 86. This court held that the trial court had improperly categorized the daughter's claim as a bystander emotional distress claim and proceeded to analyze it as an IIED claim based on the hospital's conduct toward the daughter. Id., 86 n.17, 86–87. Likewise, this Court should conclude that the appellee's conduct targeted the appellants and reverse the trial court's summary judgment order as to the appellants' IIED claims.

III. THE APPELLANTS' CLAIMS SHOULD HAVE SURVIVED THE APPELLEE'S MOTIONS EVEN IF THE CLAIMS SOUNDED IN BYSTANDER EMOTIONAL DISTRESS

As argued in parts I and II of this brief, the appellants maintain that they raised claims of NIED and IIED, respectively. However, Judge Lee concluded that the appellants had raised claims of bystander emotional distress couched as

NIED claims, while Judge Tyma determined that they had raised claims of bystander emotional distress couched as IIED claims. App. I, A122, A241.

In striking the appellants' NIED claims, Judge Lee concluded that the appellants had raised claims of bystander emotional distress, premised on conduct amounting to medical malpractice, rather than claims of NIED. App. I, A122. Consequently, Judge Lee struck the appellants' claims because (1) bystander emotional distress claims premised on medical malpractice were precluded under *Maloney* v. *Conroy*, 208 Conn. 392 (1988), and (2) the appellants had failed to allege sufficient facts to plead the second element of bystander emotional distress. Id.

Regarding the appellants' IIED claims, however, Judge Lee determined that the appellants had sufficiently alleged causes of action for IIED. App. I, 122-127. In its motion for summary judgment, the appellee rehashed its argument that the appellants' IIED claims were actually bystander emotional distress claims. App. I, A158. Judge Tyma agreed with the appellee and rendered summary judgment in the appellee's favor on those claims on the sole basis that the claims were precluded under *Maloney*. App. I, A241-42.

Assuming *arguendo* that the appellants' claims were bystander emotional distress claims, those claims should have survived the appellee's motion to strike[7] and motion for summary judgment[8] because *Maloney* has been overruled by *Squeo* v. *Norwalk Hosp. Ass'n*, 316 Conn. 558 (2015). In addition, the

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[7]See part I. A. of this brief for the standard of review for a motion to strike.

[8]See part II. A. of this brief for the standard of review for a motion for summary judgment.

appellants pleaded sufficient facts in their operative complaint to establish causes of action for bystander emotional distress.

A. *Maloney* Has Been Overruled

Judge Lee and Judge Tyma both relied heavily on *Maloney* v. *Conroy* in rendering their respective judgments. In *Maloney*, the Connecticut Supreme Court denied recognition of a claim for "nervous shock and mental anguish caused by the sight of injury or threatened harm to another." *Maloney* v. *Conroy*, supra, 208 Conn. 402. Importantly, *Maloney* stated that "a bystander to medical malpractice may not recover for emotional distress." Id., 393.

Maloney, however, has been explicitly overruled. In *Squeo* v. *Norwalk Hosp. Ass'n*, 316 Conn. 558 (2015), decided after the judgments rendered by Judge Lee and Judge Tyma, the Connecticut Supreme Court clarified that its prior decision in *Clohessy* v. *Bachelor*, 237 Conn. 31 (1996), had overruled *Maloney* and that, under *Clohessy*, a claim of bystander emotional distress caused by medical malpractice was a cognizable cause of action under limited circumstances. *Squeo* v. *Norwalk Hosp. Ass'n*, supra, 316 Conn. 570. Specifically, *Squeo* adopted the following rule: "[B]ystander claims arising from medical malpractice are cognizable only in those rare cases in which the medical mistake is the result of gross negligence such that it would be readily apparent and independently traumatizing to a lay observer."[9] Id., 578. Therefore, *Maloney* does not operate to preclude the appellants' claims.

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[9]In *Squeo*, the plaintiffs raised claims of professional negligence and bystander emotional distress, alleging that a hospital negligently discharged their son, who had been admitted to undergo an emergency psychiatric examination.

Further, it is apparent that the appellee's conduct amounted to "gross negligence." In *Squeo*, the Connecticut Supreme Court noted that it could not conclude, as a matter of law, that a hospital could not have demonstrated "gross negligence" by discharging a patient who, having been admitted to undergo a psychiatric examination, proceeded to commit suicide shortly thereafter. *Squeo* v. *Norwalk Hosp. Ass'n*, supra, 316 Conn. 581. Likewise, the appellee's unilateral decision to terminate the decedent's life support, against the decedent's wishes and over the appellants' objections, and without providing the appellants with an opportunity to transfer the decedent out of its facility, demonstrated "gross negligence."

B. The Appellants Alleged Sufficient Facts to Establish Claims of Bystander Emotional Distress

In addition to concluding that *Maloney* precluded the appellants' claims, Judge Lee determined that the appellants had failed to plead sufficient facts to allege the second element of bystander emotional distress. App. I, A122. Stating a claim of bystander emotional distress requires pleading that (1) the bystander is closely related to the victim, (2) the bystander experiences emotional distress caused by the contemporaneous sensory perception of the conduct that causes the accident or injury, or by arriving on the scene soon thereafter and before substantial change has occurred in the victim's condition or location, (3) the victim dies or sustains serious physical injury, and (4) the bystander experiences severe emotional distress. *Squeo* v. *Norwalk Hosp.*

Squeo v. *Norwalk Hosp. Ass'n*, supra, 316 Conn. 562. After his discharge, the son went home and hanged himself in the plaintiffs' front yard. Id.

Ass'n, supra, 316 Conn. 582. The appellants specifically alleged facts to establish elements 1, 3 and 4 above. App. I, A15-28.

Furthermore, the appellants sufficiently pleaded the second element. The appellants explicitly alleged that the appellee told Gary Marsala on July 24, 2010 that the decedent's life support would be terminated later that evening. App. I, A19. The foregoing allegation leads to the reasonable inference that Gary was aware of the decedent's removal from life support and impending death on the night of July 24, 2010, or that he saw the decedent shortly after her death. It further leads to the reasonable inference that Gary, as any sibling would, informed the other appellants of the appellee's decision, leading to their own contemporaneous perceptions of the appellee's conduct. Moreover, the allegations pleaded by the appellants lead to the reasonable inference that all of the appellants rushed to see their mother soon after they learned of her murder.

For all of the foregoing reasons, this Court should reverse the trial court's judgments as to the appellee's motion to strike and motion for summary judgment.

IV. WHETHER CONSTRUED AS CLAIMS OF IIED OR BYSTANDER EMOTIONAL DISTRESS, THE APPELLANTS' CLAIMS SHOULD HAVE SURVIVED SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST

According to its preliminary counterstatement of the issues, the appellee contends that this Court may affirm Judge Tyma's judgment on the alternative ground that the appellants failed to prove that they suffered severe emotional distress, which is an element of both IIED and bystander emotional distress. That claim is meritless because the record demonstrates that the appellants

suffered severe emotional distress, and therefore a genuine issue of material fact exists as to that element. Moreover, there are also genuine issues of material fact as to the other elements of IIED and bystander emotional distress.[10]

In any event, the appellee's claim should not be reviewed by this Court because Judge Tyma did not render summary judgment on the basis of any determination concerning the elements of IIED or bystander emotional distress.

A. This Court Should Only Address Claims Decided by the Trial Court

As a preliminary matter, this Court should not address the appellee's claim because the trial court did not consider it. Judge Tyma's sole basis for rendering summary judgment was his reliance on *Maloney* v. *Conroy*. He made no determinations concerning any element of IIED[11] or bystander emotional distress. An appellate court should not affirm the judgment of a trial court on alternative grounds that were not considered by the trial court. See *Kiewlen* v. *Meriden*, 317 Conn. 139, 156 (2015) (declining to address party's alternative ground for affirming trial court's judgment where alternative ground was not decided by trial court). Therefore, this court should decline to address the appellee's claim.

B. There are Genuine Issues of Material Fact as to Each Element of IIED

In the event that this court considers the appellee's claim, there exist genuine issues of material fact as to all of the IIED elements and, therefore, the

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[10]See part II. A. of this brief for the standard of review for a motion for summary judgment.

[11]In concluding that the appellants raised bystander emotional distress claims rather than IIED claims, Judge Tyma made a threshold determination that the appellee's conduct was directed at the decedent, not at the appellants; however, he did not reach the elements of IIED.

appellee was not entitled to summary judgment. Specifically, there was evidence in the record illustrating that (1) the appellee intended to inflict emotional distress, or knew or should have known that emotional distress was the likely result of its conduct; (2) its conduct was extreme and outrageous; (3) its conduct was the cause of the appellants' distress; and (4) the emotional distress sustained by the appellants was severe. See *Perez–Dickson* v. *Bridgeport*, 304 Conn. 483, 526–27 (2012).

1. The Appellee Knew or Should Have Known That Emotional Distress was the Likely Result of Its Conduct

The first element of IIED requires a showing that the appellee knew or should have known that its conduct was likely to lead to the appellants' emotional distress. Here, the appellee intentionally terminated the decedent's life support and murdered her in spite of the wishes of the decedent and the appellants. App. II, A438-39. As discussed in part I. B. 1. i. of this brief, a reasonable person in the appellee's position would or should have known that the intentional removal of all life support from the decedent, against unambiguous and vehement objection by the appellants and without providing the appellants with the opportunity to transport her out of its facility, would cause the appellants emotional distress. The appellee knew or should have known that, given the sensitive nature of the life or death situation, emotional distress was the likely result of terminating the decedent's life support. In fact, in ruling on the appellee's motion to strike, Judge Lee commented that "the [appellee] is aware that issues concerning the removal of life support arouse passions and that emotional distress is therefore likely." App. I, A125.

For these reasons, the appellee knew or should have known that emotional distress was the likely result of its intolerable conduct.

2. The Appellee's Conduct was Extreme and Outrageous

The second element of IIED requires a showing that the appellee's conduct was extreme and outrageous. "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 (2000).

The appellee's killing of the decedent was extreme and outrageous for a number of reasons. First and foremost, the appellee's termination of the decedent's life support was incongruent with the decedent's own wishes. There is no ambiguity whatsoever that Clarence and the appellants informed the appellee numerous times that the decedent had expressed her desire to remain on life support. App. II, A309, A438-39.

Second, the appellants likewise wanted the decedent to remain on life support. The appellee was well aware of their wishes. App. II, A438-39, A462.

Third, the appellee's conclusion that the best course of treatment for the decedent was to end her life was absurd. App. II, A544. Although she was in a coma, the decedent was showing neurological and physical activity a few days before the bioethics committee convened. Specifically, one of the decedent's physicians documented that the decedent "[o]pen[ed] [her] eyes spontaneously, intermittently follow[ed] commands." App. II, A578. She was also documented as being alert and intermittently following commands with movement of her upper extremities. App. II, A575. Moreover, on the day that the appellee terminated her life support, a nursing note indicated that the decedent was "alert and oriented x3, pupils normal size and reactive, speech [was] clear and understandable or developmentally appropriate, no impairment in all extremities . . ." App. II, A595. The appellee killed the decedent despite those obvious signs of life.

Fourth, two of the decedent's physicians did not rule out the possibility of the decedent recovering from her ailments had she remained on life support. App. II, A347, A612-13. In addition, the appellants' expert witness believed that the decedent may have recovered with additional life support. App. II, A528.

Fifth, the appellee did not make any efforts to transfer the decedent, or provide the appellants with any opportunity to transfer her, prior to terminating her life support. Consequently, the decedent was not given the chance to be treated, and potentially recover, at another facility. App. II, A360.

Sixth, Dr. Louis Hamer, the appellants' expert, described the appellee's killing of the decedent as "euthanasia." App. II, A506. He noted that no formal diagnosis was ever made for the decedent's condition, and that the appellee failed to perform other available treatments. App. II, A508, A529. Furthermore, he stated that the decedent could have been transferred to a long term acute care hospital. App. II, A532.

Last, in ruling on the appellee's motion to strike, Judge Lee held that "the [appellee's] asserted conduct in allegedly removing [the decedent's] life support and thus ending her life in conscious disregard of her wish to remain on life support [was] extreme and outrageous, and . . . an average member of the community would exclaim 'Outrageous!' upon hearing the facts." App. I, A123-24. 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." App. I, A124.

For these reasons, the appellee's conduct was extreme and outrageous.

3. The Appellee's Conduct Caused the Appellants' Severe Emotional Distress

The third element of IIED requires a showing that the appellee's conduct caused the appellants' severe emotional distress. All of the appellants submitted affidavits explicitly asserting that their severe emotional distress was not caused by the general grief associated with the loss of a loved one, but rather stemmed directly from the appellee's horrific conduct. App. II, A277-96. Furthermore, each appellant testified during his or her respective deposition that their severe emotional distress was caused by the appellee. Tracey Marsala frankly stated

that the appellee's conduct made her "very unhappy. [The appellee] was wrong." App. II, A483. Michael Marsala firmly believed that "[the appellee] pretty much killed [his] mother" and, upon hearing of his mother's death, stated that "[he] was upset. [He] was crying. How could [the appellee]?" App. II, A422, A437. Randy Marsala couldn't remember the time of day that he learned of his mother's death because "it's [his] mother and [the appellee] took her and [he had] a problem with that." App. II, A463. Kevin Marsala felt that he "let [the decedent] down in the sense that, you know, [he] couldn't do anything for her and [the appellee] did it and [he] couldn't do anything about it. It wears on [him] every day." App. II, A399. Gary Marsala asserted that "no matter what [the decedent] want[ed] to stay on life support." App. II, A376.

For these reasons, the appellee's conduct caused the appellants' emotional distress.

4. The Appellants Suffered Severe Emotional Distress

The fourth element of IIED requires a showing that the appellants suffered severe emotional distress. Decisions concerning the removal of an individual from life support are inherently emotional. It follows that family members of an individual on life support would suffer severe emotional distress under the circumstances of this case. See *Valentin* v. *St. Francis*, supra, 2005 WL 3112881, at *5 (decisions to terminate life support are "emotionally charged" and "often controversial").

During discovery, the appellants submitted to depositions during which they emotionally described the devastating impacts caused by the appellee's

murder of their mother. The appellants were visibly distraught as they relived the tragic events surrounding her death, and oftentimes needed breaks to calm their emotions before continuing with their testimonies.

The severe emotional distress suffered by the appellants becomes apparent upon review of their respective depositions. Tracey Marsala, who is deaf, mostly blind, and must speak with the assistance of a sign language interpreter, was very close with the decedent. App. II, A471-72, A477. Through the interpreter, Tracey testified that she felt "depressed" and "angry" when she learned of the decedent's death. App. II, A482. The decedent helped her cook, clean, and perform other daily tasks that she now has the burden of carrying out alone. App. II, A476. In addition, Tracey felt no desire to take what had become an annual vacation to Kansas after the decedent's passing, and generally had no interest in leaving her home. App. II, A478-79. She immensely missed the decedent, and felt alone without her mother's companionship. App. II, A480.

Michael Marsala was upset that he did not have the opportunity to say goodbye to the decedent. App. II, A444. He felt depressed, angry, he cried constantly, and spoke to God all the time following her death. Id. He firmly believed that the appellee was responsible for the decedent's death and that it had "killed [his] mother." App. II, A422. He had considered seeking professional help to cope with his grief. App. II, A444.

Randy Marsala chose not to remember the time of day that he was told of the decedent's passing because "[the decedent was] my mother and [the appellee] took her and I got a problem with that." App. II, A463. He felt that the

appellee "took" the decedent away, which made him "upset and mad and angry." App. II, A464. When asked by the appellee why the appellee's role in the decedent's death made him angry, Randy heatedly replied "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." Id.

Kevin Marsala was "going crazy" upon hearing of the decedent's death. App. II, A397. According to Kevin, "it was ridiculous. [I was] [m]ad, furious, upset that [the appellee] would do something like that." Id. "It [wore] on [him] every day" that he could not have done anything to help the decedent, and sometimes he experienced pains in his chest simply by thinking about what the appellee did. App. II, A399. In addition, he believed that the grief he suffered played a role in his recent loss of employment. Id.

Gary Marsala felt shocked and upset by the decedent's death. App. II, A376. He regretted not having had the opportunity to say goodbye to her. App. II, A378. He used to speak with the decedent on a daily basis and occasionally still picks up the phone to call her only to be violently reminded of what the appellee did to her. Id.

For these reasons, as expressed through the appellants' affidavits and emotional depositions, the appellants suffered severe emotional distress.

The foregoing analysis illustrates that the record contains genuine issues of material fact as to all of the IIED elements and, therefore, the appellee was not entitled to summary judgment.

C. There are Genuine Issues of Material Fact as to Two Elements of Bystander Emotional Distress

In addition, there are genuine issues of material fact as to two of the elements of bystander emotional distress;[12] specifically, whether (1) the appellants' emotional distress was caused by the contemporaneous sensory perception of the appellee's conduct that caused the decedent's death, or by arriving on the scene soon thereafter and before substantial change had occurred in the decedent's condition or location, and (2) the appellants experienced severe emotional distress as a result of the appellee's conduct.[13] *Squeo* v. *Norwalk Hosp. Ass'n*, supra, 316 Conn. 582.

1. Most of the Appellants Were Aware of the Decedent's Murder or Observed Her Shortly Thereafter

The second element of bystander emotional distress is met by showing that a bystander's emotional distress was caused either by (1) a contemporaneous sensory perception of the defendant's conduct causing the victim's death, or (2) arriving at the scene of the conduct soon after the conduct occurred, but before the victim's condition or location is substantially changed. *Squeo* v. *Norwalk Hosp. Ass'n*, supra, 316 Conn. 582.

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[12]The record contains concrete evidence of the remaining elements of bystander emotional distress; namely, that (1) the appellants are related to the decedent and (2) the decedent died. *Squeo* v. *Norwalk Hosp. Ass'n*, supra, 316 Conn. 582.

[13]The appellants conducted discovery and formulated their legal strategy on the assumption that they had properly raised claims of IIED, not bystander emotional distress. If this Court were to conclude that the record before it does not show that genuine issues of material fact exist as to the elements of bystander emotional distress, it should remand the matter and permit the appellants to supplement the record with additional evidence geared toward the elements of bystander emotional distress. The appellants would suffer undue prejudice otherwise.

Here, the appellants were not present at the time that the appellee killed the decedent. However, Gary Marsala learned of the appellee's intentions on the day that the decedent died. App. II, A375. That leads to the reasonable inference that he immediately notified the other appellants, except for Tracey Marsala,[14] of the appellee's intentions. In addition, on July 22, 2010, two days before the decedent's death, an attending physician noted that unidentified family members expressed their desires to "continue [the decedent's] current level of care . . . ." App. II, A580. For these reasons, it is reasonable to infer that all of the appellants, except for Tracey, were aware that the appellee was intending to terminate the decedent's life support despite their objections and the decedent's wishes.

Furthermore, the evidence in the record illustrates that all of the appellants, minus Tracey, learned of the decedent's killing soon after it occurred. Clarence, who learned of the decedent's death hours after the appellee had terminated her life support, notified Gary, Randy, and Michael as soon as he found out about the decedent's passing; App. II, A314, A437; and he notified Kevin the morning after. App. II, A397. That leads to the reasonable inference that the appellants, except for Tracey, traveled to see their mother and observed the aftermath of the appellee's conduct soon after her death.

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[14]Tracey knew of the decedent's passing soon after it occurred, but she did not learn that the appellee's appalling conduct caused the decedent's death until February, 2014. App. II, A473-74.

For these reasons, the appellants, except for Tracey, had a contemporaneous perception of the appellee's conduct and observed the decedent shortly after her death.

2. The Appellants Suffered Severe Emotional Distress

Before discussing this element, it is important to note that *Squeo* clarified the analysis used in determining whether bystanders were entitled to damages via a claim of bystander emotional distress. Specifically, under *Squeo*, "a bystander cause of action will lie only when the bystander's psychological injuries are both severe and debilitating, such that they warrant a psychiatric diagnosis or otherwise substantially impair the bystander's ability to cope with life's daily routines and demands." *Squeo* v. *Norwalk Hosp. Ass'n*, supra, 316 Conn. 585.

The record illustrates that there is more than sufficient evidence, as detailed in part IV. B. 4. of this brief, to show that the appellants endured the severe emotional distress contemplated under *Squeo*. Following the decedent's death, Tracey Marsala, who is almost completely blind and deaf, had to complete all of her daily routines by herself without the decedent's aid. App. II, A479-80. Kevin Marsala experienced chest pains and likely lost his job due to his grief. App. II, A399. The decedent's death weighed on Gary Marsala's mind daily, and he oftentimes forgetfully attempted to call the decedent before being painfully reminded of the events leading to her murder. App. II, A378. Michael Marsala considered seeking professional help to cope with the decedent's passing. App. II, A444. Randy Marsala blocked the entire incident out of his mind. App. II, A463. Furthermore, each of the appellants submitted affidavits attesting to the

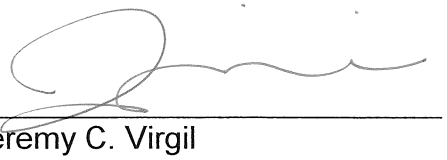
severe emotional distress that they experienced as a result of their mother's murder. App. II, A277-96.

The foregoing analysis demonstrates that there are genuine issues of material fact as to each element of bystander emotional distress and, therefore, the appellee was not entitled to summary judgment.

CONCLUSION

For the foregoing reasons, the appellants respectfully request that this Court reverse the judgment of the trial court (*Lee, J.*) granting the appellee's motion to strike the appellants' NIED claims and the judgment of the trial court (*Tyma, J.*) rendering summary judgment in favor of the appellee on the appellants' IIED claims, and remand the matters to the trial court to either (1) enter orders denying both motions or (2) conduct further proceedings on both motions.

PLAINTIFFS / APPELLANTS,



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CERTIFICATION

In accordance with Practice Book § 67-2 (g), the undersigned certifies that the brief and appendices being electronically filed with the Appellate Court (1) do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law, and (2) have been electronically delivered to the last known email address of the following counsel of record:

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