APPELLATE COURT
STATE OF CONNECTICUT

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A.C. 37821 AND 37822

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

- VS –

YALE-NEW HAVEN HOSPITAL
DEFENDANT-APPELLEE

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# REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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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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## STATEMENT OF FACTS AND PROCEEDINGS

Clarence Marsala and the appellants admitted the decedent, Helen Marsala, to the appellee's facility with hopes that the appellee would provide her with the best available treatment and keep her alive. Instead, the appellee prematurely ended her life, against her own wishes, and "took her" away from the appellants. App. II, A463.

The appellee depicts the decedent as a terminally ill, unresponsive patient with no hopes of survival. According to the appellee, it ended her life mercifully after it did everything it could to treat her. In reality, the decedent was far from lifeless or hopeless. She responded to stimuli, particularly when the appellants visited her. She squeezed her children's hands. Id., A377. She squeezed and wiggled her toes. Id., A339. She opened and moved her eyes. Id., A340. She followed commands. Id., A578.

Two physicians that treated the decedent also did not rule out the possibility of the decedent's recovery. Dr. Margaret Pisani testified that the decedent could have lived for an uncertain amount of time had she remained on life support. Id., A347-48. Likewise, when asked whether the decedent had no chance of improvement, Dr. Stephen Boyd testified, "I can't ever say zero chance." Id., A613.

In addition, Dr. Louis Hamer, the appellants' expert witness, testified that the decedent "was getting better," and that she may have lived for years had she remained on life support. Id., A528-29. Dr. Hamer noted that the appellee had failed to consider or perform a number of medical tests, which may have

explained the cause of the decedent's decreased mental status and led to her treatment and recovery. A509 (noting appellee failed to check the decedent for hepatic encephalopathy, and that "not a whole lot ha[d] been done to look for infections"); A527 (noting that the appellee had failed to perform a brain biopsy, and that "there's more that [the appellee] could have done" before terminating the decedent's life support).

It is uncertain how long the decedent would have lived. She may have been alive today. What is certain is that she wanted to remain on life support, and the appellants repeatedly conveyed that information to the appellee. The appellee, without giving the appellants a chance to transfer her care, ignored them and killed their mother, crushing any hope for her recovery and survival.

## ARGUMENT

The appellants are claiming that the appellee caused them severe emotional distress by terminating the decedent's life support: (1) despite the appellants repeatedly informing the appellee that the decedent wanted to remain on life support; and (2) without giving the appellants an opportunity to transfer her to another facility. Appellants' Br. at 6-8, 13-14. The appellants' claims are not based on the appellee's mere removal of the decedent's life support. They are not claiming injuries on behalf of the decedent. They are not claiming that they suffered harms because the appellee acted contrary to their personal wishes. The appellants suffered severe emotional distress because the appellee ignored their unambiguous directions to keep the decedent on life support, in accordance with her wishes, and failed to give them any chance to transfer her care.

## I. THE APPELLANTS RAISED NIED CLAIMS

To establish an NIED claim, a defendant must owe a legal duty to a plaintiff. The appellee owed the appellants a legal duty to abide by their directions to keep the decedent on life support, in accordance with her wishes, and to provide them with an opportunity to transfer her care before permanently terminating her life support. See Appellants' Br. at 5-11.

The appellee does not challenge the appellants' legal duty analysis. Instead, it argues that our state Legislature and our Supreme Court have rejected the claim that hospitals owe a duty to family members in regard to a patient's end-of-life care. Appellee's Br. at 12-16. That blanket argument is untenable.

### A. General Statutes § 19a-571 (a) Required the Appellee to Consult with the Appellants Concerning the Decedent's Wishes for Her End-of-Life Care, and to Act Accordingly

General Statutes § 19a-571 (a) provides that an attending physician "shall determine the wishes of [a] patient by consulting any statement made by the patient directly to . . . the patient's next of kin . . . and any other person to whom the patient has communicated his [or her] wishes," where there is no living will. Prior to 1991, § 19a-571 permitted family members to veto a patient's end-of-life care wishes. The 1991 amendment to § 19a-571 prohibited family members of patients from overriding the patients' wishes. See *Valentin* v. *St. Francis*, 2005 WL 3112881, at *3 (Conn. Super. Ct. Nov. 7, 2005).

Here, the appellants were instructing the appellee to keep the decedent on life support in accordance with her wishes. The decedent did not have a living will, and did not instruct her attending physicians as to her end-of-life care.

Under § 19a-571 (a), the appellee was required to ascertain the decedent's wishes for her end-of-life care from the appellants, and to act in accordance with those wishes. Far from rejecting a legal duty, our state Legislature has enacted legislation compelling hospitals to consult with family members in regard to an incapacitated patient's wishes about his or her end-of-life care.

**B. *Murillo* and *Mendillo* are Inapposite**

The appellee cites *Murillo* v. *Seymour Ambulance Ass'n, Inc.*, 264 Conn. 474 (2003) and *Mendillo* v. *Board of Education*, 246 Conn. 456 (1998), for the proposition that hospitals do not owe a duty to a patient's family members for his or her end-of-life care. Both cases are inapposite.

In *Murillo*, our Supreme Court ruled that, as a matter of public policy, a hospital did not owe a legal duty to a patient's sibling, who sustained injuries after fainting when she saw a medical technician insert an intravenous needle into the patient's arm. *Murillo* v. *Seymour Ambulance Ass'n, Inc.*, supra, 264 Conn. 478. In reaching its conclusion, the Court performed the same legal duty analysis that the appellants discussed in their brief. Id., 480–82; Appellants' Br. at 5-11.

*Murillo* is distinguishable. The plaintiff in *Murillo* alleged injuries based on actions by the hospital solely directed at the patient; namely, injecting the patient with an IV. Here, the appellee's actions were directed at the appellants – the appellee removed the decedent's life support <u>despite being continuously told by the appellants that she wanted to remain on life support, and did not provide the appellants with an opportunity to transfer her care before killing her</u>. This is not a case where a plaintiff's injuries were solely based on actions committed against a

third party. Furthermore, *Murillo* heavily relied on *Maloney* v. *Conroy*, 208 Conn. 392 (1988), which has since been superseded. *Murillo* v. *Seymour Ambulance Ass'n, Inc.*, supra, 264 Conn. 481; Appellants' Br. at 16.

*Mendillo* is equally unavailing. *Mendillo* concerned a claim for loss of parental consortium. See generally *Mendillo* v. *Board of Education*, supra. The appellants are not asserting loss of parental consortium claims here. Our Supreme Court's analysis in *Mendillo* does not apply here.

### C. Assuming *Arguendo* that the Appellants did not Raise NIED Claims, They Alleged Sufficient Facts to Plead Bystander Emotional Distress

"Pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Sharp Electronics Corp.* v. *Solaire Development, LLC*, 156 Conn. App. 17, 34 (2015). The appellants sufficiently alleged claims of bystander emotional distress. Appellants' Br. at 17-18.

#### 1. The Appellants Sufficiently Alleged that They Experienced a Contemporaneous Sensory Perception of the Decedent's Death

The appellants' complaint alleged that Gary Marsala learned of the appellee's intent to terminate the decedent's life support on the day that she was killed. App. I, A19. On that basis, it is apparent that Gary had a contemporaneous perception of her removal from life support. It is also reasonable to infer that Gary informed the remaining appellants of the appellee's intentions, causing them to experience similar contemporaneous perceptions. See *Sharp Electronics Corp.* v. *Solaire Development, LLC*, supra, 156 Conn.

App. 35 (allegations in complaint, and inferences stemming therefrom, established cause of action for breach of contract).

The appellee cites *Pike* v. *Bugbee*, 115 Conn. App. 820 (2009), for the proposition that the foregoing inferences are too speculative. Appellee's Br. at 19. Failing to plead a child's age to establish a cause of action dependent on the child's minority is patently insufficient. Inferring that the appellants had a contemporaneous perception of the decedent's murder, based on Gary's knowledge of the appellee's intentions on the day it occurred, is reasonable.

Further, the appellee asserts that the evidence produced during discovery on the appellants' IIED claims established that none of the appellants were present at the appellee's facility for any of its tortious acts. Appellee's Br. at 20. Removing the decedent's breathing tube, placing the BiPAP on her, entering her "Do Not Resuscitate" order, administering morphine to her, and permanently removing all of her life support systems took place over the course of four days, from July 20, 2010 to July 24, 2010. The evidence shows that some of the appellants were present at the hospital and observed the decedent during that timeframe. Even if some of the appellants did not personally view the appellee commit any specific tortious act, they nonetheless satisfied the contemporaneous sensory perception element of bystander emotional distress. See *infra* at 9-10; Appellants' Br. at 28.

### 2. The Appellants Sufficiently Alleged that They Suffered Severe and Debilitating Emotional Distress

The appellants' complaint alleged that they suffered severe emotional distress; loss of opportunity to say goodbye; depression; loss of sleep; stress;

anxiety; and pain and suffering. App. I, A22. Those allegations set forth specific injuries suffered by the appellants. They were not conclusory statements of law. Whether those injuries were "severe and debilitating" is an issue for trial. See *infra* at 10-12. The allegations were sufficient to establish the element of severe and debilitating emotional distress.

## II. THE APPELLANTS RAISED IIED CLAIMS

### A. The Appellee's Conduct was Directed at the Appellants

An IIED claim requires that a defendant's conduct be directed at a plaintiff, either intentionally or recklessly. A bystander emotional distress claim involves conduct directed at a third party. Here, the appellants conveyed the decedent's end-of-life care wishes to the appellee. The appellee disregarded the appellants' instructions and terminated the decedent's life support without giving the appellants an opportunity to transfer the decedent's care. That conduct targeted the appellants. See *Di Teresi* v. *Stamford Health Systems, Inc.*, 142 Conn. App. 72, 86 n.17, 86–87 (2013); Appellants' Br. at 13-14.

The appellee cites to the Restatement (Third) of Torts (2010) to argue that, in order for the appellants to establish IIED claims, it must have acted with the specific purpose of causing the appellants emotional distress. Appellee's Br. at 24-25. Despite the name, a claim of IIED does not require a defendant to intentionally cause a plaintiff emotional distress. The first element of IIED requires a showing that the defendant "intended to inflict emotional distress *or that [it] knew or should have known that emotional distress was the likely result of [its] conduct.*" (Emphasis added; internal quotation marks omitted.) *Di Teresi* v.

*Stamford Health Systems, Inc.*, supra, 142 Conn. App. 86. The appellants claim that the appellee knew or should have known that its conduct would likely have caused the appellants emotional distress. Appellants' Br. at 6-7, 13-14, 20.

**B. The Appellants Established IIED Claims**

**1. The Appellee's Conduct was Extreme and Outrageous**

The appellee removed the decedent's life support and gave her morphine, which gradually suffocated her. The appellee failed to give the appellants a chance to transfer the decedent's care. It failed to consider all of the available treatment options or perform all of the relevant medical tests. It failed to abide by the appellants' instructions to keep the decedent alive, as she had wanted. It blatantly ignored the decedent's signs of life and potential for recovery. Appellants' Br. at 21-23.

The appellee asserts that it initially extubated the decedent to see whether her mental condition would improve. Appellee's Br. at 30-31. There was no medical basis supporting that opinion. There was no medical evidence suggesting that an intubated patient's mental status could improve via extubation. Dr. Hamer testified that extubating the decedent was not going to help her mental status. App. II, A522. Unsurprisingly, extubation did not improve the decedent's mental condition. Appellee's App. at AA3. The appellants and Clarence made it clear that she was to be reintubated if extubation did not help her. Appellee's Br. at 31-32.

Staying on life support was what the decedent wanted. App. II, A309. The appellee claims that there was no evidence indicating that it knew of the

decedent's wishes to remain on life support. Appellee's Br. at 32. The record belies that assertion. Clarence testified that he explicitly told the appellee, on multiple occasions, that the decedent did not want her life support terminated. App. II, A312. The appellants also explicitly conveyed her wishes to the appellee. Id., A312, A438-39. Aside from a baseless notation in the Ethics Committee report, there is virtually no evidence supporting the appellee's claim that it was unaware of the decedent's end-of-life care wishes.

The appellee admits that it did not seek to transfer the decedent's care prior to removing her life support. Appellee's Br. at 33. It justifies its failure by asserting that the decedent was not a proper candidate for transfer. Id. That argument is contradicted by the testimony of Dr. Hamer, who testified that the decedent could have been transferred to his facility. App. II, A532. In addition, the appellee never made any assessment as to the decedent's condition for a possible transfer. The appellee did not investigate whether other facilities would have been willing to accept the decedent. Dr. Pisani testified that she did not call another facility or make any efforts to transfer the decedent's care. A360.

The appellee further justifies its failure to transfer the decedent's care by asserting that it did not prevent Clarence or the appellants from transferring the decedent's care. Appellee's Br. at 33. That argument ignores General Statutes § 19a-580a, which requires a hospital to "take all reasonable steps" to transfer the care of a patient to another facility if the hospital is unwilling to comply with the end-of-life care wishes of the patient. In addition, the Ethics Committee report stated that the appellee had left Clarence a mere voicemail regarding its

decision to terminate the decedent's life support. App. II, A544. There is no evidence as to the contents of that voicemail. The appellee can only speculate as to whether the voicemail contained all of the pertinent information concerning the appellee's decision.[1] The appellee did not seek to confirm that Clarence received the voicemail. It did not seek to contact the appellants. The decedent was killed the next day, even after Clarence went to the appellee's facility to demand that they keep her alive. The appellee did not give the appellants, or Clarence, any chance to transfer the decedent's care.

#### 2. The Appellee's Conduct Caused the Appellants' Distress

The appellants' severe emotional distress was caused by the appellee's extreme and outrageous conduct, not by the death of their mother alone. The appellants' statements in their affidavits were not conclusory or insufficient. Appellee's Br. at 34. The appellants attested to the specific acts committed by the appellee that caused their distress. See App. II, A277-A296. The appellee also overlooks the deposition testimonies of the appellants, which illustrate that the appellee caused their severe emotional distress. Appellants' Br. at 23-24.

### C. Assuming *Arguendo* that the Appellants did not Raise IIED Claims, They Established Bystander Emotional Distress

#### 1. All of the Appellants, Except for Tracey Marsala, had a Contemporaneous Sensory Perception of the Decedent's Death

The appellee claims that the appellants failed to observe the acts leading to the termination of the decedent's life support and, therefore, failed to satisfy

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[1]Given the restrictions created by the Health Insurance Portability and Accountability Act (HIPAA), it is unlikely that the appellee left a detailed voicemail setting forth its decision.

the contemporaneous sensory perception element of bystander emotional distress. Appellee's Br. at 26-27. That argument is meritless. A claim of bystander emotional distress does not require a simultaneous observation of the relevant tortious conduct. See *Clohessy* v. *Bachelor*, 237 Conn. 31, 52 (1996). Gary, Kevin, Michael, and Randy were all aware that the appellee wanted to terminate the decedent's life support. They all became aware of the appellee's removal of her life support, and the decedent's resulting death, by the following morning. It is reasonable to infer that they observed her shortly thereafter. That evidence is sufficient to satisfy the contemporaneous sensory perception element of bystander emotional distress. See Appellants' Br. at 28; cf. *Valentin* v. *St. Francis*, supra, 2005 WL 3112881, at *2 n.3 (rejecting bystander liability where plaintiff neither witnessed tortious conduct nor was *"immediately aware of [the decedent's] death"*) (emphasis added).

### 2. The Appellants Suffered Severe and Debilitating Emotional Distress

Pursuant to *Squeo* v. *Norwalk Hosp. Ass'n*, 316 Conn. 558, 585 (2015), "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." This standard does not require evidence of a psychiatric diagnosis. Id., 587. *Squeo* also did not set forth formal requirements for establishing "severe and debilitating emotional distress." A plaintiff is not required to show that he or she is taking medications or permanently unable to work. As the Court in *Squeo* stated, "the law ensures that resources will not be

spent litigating fraudulent or spurious claims and that liability will be imposed on defendants only for those emotional harms that are truly substantial." Id.

The appellants were not simply saddened by losing their mother. They were devastated and infuriated. This is not a case where a child suffered the loss of a parent through the ordinary course of life and experienced the natural grief associated therewith. The appellants transferred their mother to the appellee's facility for her to get better and to remain alive. They knew she wanted to remain on life support. They expected the appellee to keep her on life support. They told the appellee to keep her on life support. The appellee disregarded everything the appellants said and killed their mother without providing them with any opportunity to see her or transfer her care. The excruciating pain of learning of the decedent's death and observing her thereafter under those circumstances was nothing like the natural grief that arises after losing a loved one. Appellants' Br. at 24-26, 29-30.

The appellee argues that Gary and Kevin[2] were able to continue working, thereby mitigating the emotional distress they suffered. Appellee's Br. at 28-29. There is no requisite amount of time that an individual must miss to be considered "unable to work." Gary Marsala was forced to miss a week of work due to the decedent's death. App. II, A378. Further, Kevin Marsala was fired from his job shortly after the decedent's death. He testified that he was "preoccupied thinking about her a lot of [the] time and thinking about the situation" at the time he was fired. Id., A399.

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[2]Neither Michael, Randy, nor Tracey was employed at the time of the decedent's death.

The appellee also cites the appellants' decisions not to seek psychiatric help as a sign that their emotional distress was not severe and debilitating. Appellee's Br. at 28-29. Seeking psychiatric help, or considering seeking it, is a strong indicator of emotional distress. Failure to seek psychiatric help does not evince that an individual is not suffering severe mental anguish. Some people, like Gary Marsala, may believe that they can handle their severe emotional distress. See App. II, A378 (Gary testifying that he did not seek psychiatric help because he "just figured [he could] deal with it [himself] . . . ."). Others, like Randy Marsala, may be too proud to seek help. See App. II, A463 (Randy testifying that he did not seek help because "that's not me").

*Squeo* is also distinguishable. In *Squeo*, the plaintiffs did not submit any evidence to demonstrate a genuine issue of material fact as to their severe and debilitating emotional distress. *Squeo* v. *Norwalk Hosp. Ass'n*, supra, 316 Conn. 597. Deposition transcripts and interrogatory responses submitted by the defendant constituted the only evidence concerning the plaintiffs' emotional distress. Id. The primary reason that *Squeo* rejected bystander liability was because the plaintiffs had failed to submit any evidence showing that their son's death, and its surrounding circumstances, had "left them emotionally disabled." Id., 600.

Here, the appellants submitted affidavits and depositions that, at a minimum, raised a genuine issue of material fact as to the severity of their emotional distress. Appellants' Br. at 24-26, 29-30. *Squeo* was a "close question," even with the plaintiffs' lack of evidence. *Squeo* v. *Norwalk Hosp.*

*Ass'n*, supra, 316 Conn. 599. It is far more certain that the appellants did establish severe and debilitating emotional distress.

## CONCLUSION

For the foregoing reasons, the appellants respectfully request that this Court grant their requested relief. Appellants' Br. at 27 n.13,[3] 30.

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

[3]The appellants reiterate that they should be permitted to supplement the record on remand if this Court were to conclude that the present record does not establish genuine issues of material fact concerning the contemporaneous sensory perception element and severe and debilitating emotional distress element of bystander emotional distress. The appellants filed the underlying action with the intent of pursuing NIED and IIED claims. They did not anticipate submitting evidence to prove the distinct elements of bystander emotional distress. Had they consciously been pursuing bystander emotional distress claims, the appellants would have submitted additional affidavits, provided additional testimony during their depositions, and/or submitted additional records aimed to prove the foregoing elements. The appellants will suffer undue prejudice if they cannot submit evidence in support of the bystander emotional distress claims that they never anticipated raising.

## CERTIFICATION

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

Jeffrey R. Babbin, Esq.
Tadhg A.J. Dooley, Esq.
Wiggin & Dana LLP
PO Box 1832
New Haven, CT 06508-1832
*Email: jbabbin@wiggin.com*
*tdooley@wiggin.com*
*T (203) 498-4400*
*F (203) 782-2889*

Dated at Bridgeport, Connecticut this 11th day of January, 2016.

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