

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
C.A. NO. 2483CV00692

PAUL O'KEEFE, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
JOHN JOSEPH O' KEEFE III; PAUL O'KEEFE,
INDIVIDUALLY; JOHN O'KEEFE II;
MARGARET O'KEEFE; and MARGARET
O' KEEFE AS GRANDPARENT /
GUARDIAN OF KAYLEY FURBUSH,

Plaintiffs,

v.

C&C HOSPITALITY, LLC d/b/a C.F.
MCCARTHY'S; G&S HOSPITALITY, LLC d/b/a
C.F. MCCARTHY'S; WATERFALL BAR &
GRILL, LTD d/b/a WATERFALL BAR & GRILL;
and KAREN READ,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT, KAREN READ'S
MOTION TO DISMISS THE PLAINTIFFS' COMPLAINT
PURSUANT TO M.R.C.P. 12(b)(6)

I. INTRODUCTION

Defendant, Karen Read, hereby files the within Memorandum of Law in support of her Motion to Dismiss Counts X, XI, XII, and XIII of the Plaintiffs' Complaint pursuant to Mass. R. Civ. P. 12(b)(6). The counts sought to be dismissed are as follows:

- Count X (Margaret O'Keefe v. Karen Read) – Negligent and/or Reckless Infliction of Emotional Distress;
- Count XI (John O'Keefe II v. Karen Read) – Negligent and/or Reckless Infliction of Emotional Distress;
- Count XII (Paul O'Keefe v. Karen Read) – Negligent and/or Reckless Infliction of Emotional Distress; and

- Count XIII (Kayley Furbush v. Karen Read) – Negligent, Reckless and/or Intentional Infliction of Emotional Distress.

As a matter of law, the Plaintiffs have not, nor can they state a claim upon which relief can be granted insofar as:

1. Any distress claims are subsumed by the wrongful death statute, G.L. c. 229, §2;
2. None of the plaintiffs can recover for negligent infliction of emotional distress based upon the occurrence of the alleged accident because they were not at the scene, nor did they witness the immediate consequences to the Decedent;
3. The allegations in the Complaint concerning the circumstances of the alleged accident and the Defendant's purported statements and actions in the hours after the alleged accident cannot support a claim of intentional or reckless infliction of emotional distress.

Accordingly and for the foregoing reasons, Counts X, XI, XII, and XIII of the Plaintiffs' Complaint should be dismissed pursuant to Mass. R. Civ. P. 12(b)(6).

II. RELEVANT ALLEGATIONS IN THE PLAINTIFFS' COMPLAINT

The following allegations are taken from the Plaintiffs' Complaint and are presented here in a light most favorable to the Plaintiffs pursuant to the Legal Standard (see Section III, *infra*). They should not be misconstrued as admissions by the Defendant. The Defendant vehemently denies that she is liable to the Plaintiffs, as there was no collision between the Defendant's SUV and John J. O'Keefe III leading to his injury or death.

Plaintiffs allege that on January 29, 2022 between approximately 12:11 and 12:36 a.m., at 34 Fairview Road, Canton, Massachusetts, the Defendant drove her SUV and hit the Decedent, John J. O'Keefe III ("Decedent") while under the influence of alcohol. (*See* Exhibit A – Complaint, ¶¶29, 30, 32). The Plaintiffs allege that the Decedent was knocked down onto the ground in front

of 34 Fairview Road, suffered serious injury, and died. (Exhibit A, ¶34). The Plaintiffs claim the Defendant then fled the scene and returned to the Decedent's residence at 1 Meadows Ave. (Exhibit A, ¶35).

Plaintiffs further allege that at approximately 4:30 a.m. at the Decedent's residence, the Defendant woke up the Decedent's 14-year-old niece, Kayley Furbush, talked about the Decedent's death and hitting the Decedent with her SUV, and involved Kayley Furbush in her frantic calls about the Decedent's death. (Exhibit A, ¶¶39, 147). Plaintiffs claim that Defendant made telephone calls in Kayley Furbush's presence during which the Defendant commented "Maybe I did something... Maybe a snow plow hit him... Maybe I hit him...." (Exhibit A, ¶150).

Plaintiffs allege that at or about 6:03 a.m. on January 29, 2022, the Defendant observed the decedent laying in the ground, buried in the snow, at 34 Fairview Road, Canton. (Exhibit A, ¶44). At or about 7:50 a.m., the Decedent was formally pronounced dead at the Hospital. (Exhibit A, ¶46). Hours after 7:50 a.m., the Plaintiffs claim the Defendant appeared at the Decedent's home, feigned comfort to his family, removed her vehicle and/or destroyed relevant evidence. (Exhibit A, ¶47). They further allege that Defendant knowingly and deliberately changed her story and fabricated a conspiracy knowing the same to be false. (Exhibit A, ¶52).

The Complaint alleges that Margaret O'Keefe is the Decedent's mother; John O'Keefe II is the Decedent's father; Paul O'Keefe is the Decedent's brother; and Kayley Furbush is the Decedent's niece. (Exhibit A, ¶¶ 4, 122, 130, 138). Margaret O'Keefe, John O'Keefe II, and Paul O'Keefe claim that they came upon the Decedent's body at the hospital. (Exhibit A, ¶¶123, 131, 139). All Plaintiffs allege that the Defendant created a false narrative. (Exhibit A, ¶¶126, 134, 142, 160).

III. STANDARD OF REVIEW

Massachusetts Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a Complaint if it fails “to state a claim upon which relief can be granted.” In evaluating the legal sufficiency of a Complaint under Mass. R. Civ. P. 12(b)(6), the Court must accept as true all of the factual allegations in the Complaint and draw all reasonable inferences from it in favor of the plaintiff. See *Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.*, 472 Mass. 549, 553 (2015); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). Nevertheless, the Court need not accept as true any legal conclusions that are presented under the guise of being factual allegations. *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000). To survive a motion to dismiss, a complaint must contain factual allegations which, if true, raise a *right* to relief above the speculative level and are not simply *consistent* with an entitlement to relief. See *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011); *Iannacchino*, 451 Mass. at 636. Additionally, a complaint must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Gentile v. Biogen Idec, Inc.*, 2014 WL 861223, at *1 (Sup. Ct. Feb. 14, 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); see also *Iannacchino*, 451 Mass. at 635-36.

IV. ARGUMENT

A. Margaret and John O’Keefe, II’s Distress Claims Are Subsumed By The Wrongful Death Statute, G.L. c. 229, §2.

The Complaint does not identify that the Decedent passed with a spouse or child, meaning the persons entitled to any wrongful death damages are the next of kin. G.L. c. 229, §1(4). Pursuant to G.L. c. 190B, §2-103, the next of kin are the Decedent’s parents, Plaintiffs Margaret O’Keefe and John O’Keefe II. G.L. c. 190B, §2-103(2); Exhibit A ¶¶2-3.

With respect to claims that may be asserted on behalf of the Decedent's parents as the next of kin, G.L. c. 229, §2, states, in part, "A person who (1) by his negligence causes the death of a person, ... shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to compensation for the ... services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered...." G.L. c. 229, §2.

Here, plaintiffs Margaret O'Keefe and John O'Keefe II allegedly experienced an emotional reaction caused by the death of their son. Exhibit A, ¶¶125, 133. As the next of kin, their claims for loss of consortium are factored into the Decedent's estate's wrongful death claim and may not be duplicated as a part of any claim for emotional distress. See *Stonehill Coll. v. Massachusetts Comm'n Against Discrimination*, 441 Mass. 549, 576 (2004) ("Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable"). The Complaint fails to distinguish or otherwise delineate the alleged harms caused to Margaret O'Keefe and John O'Keefe II between loss of consortium and other emotional distress. Count X and XI of the Complaint should thus be dismissed. See *id*; Exhibit A, ¶52 (alleging the plaintiffs suffered 'aggravated' emotional distress), ¶¶124, 132 (alleging Defendant's negligence caused their son's death as the basis for emotional distress claims).

B. The Plaintiffs' Emotional Distress Claims Fail As A Matter Of Law.

The Complaint titles Counts X, XI, and XII "Negligent and/or Reckless Infliction of Emotional Distress" without providing context for what conduct within each count applies to what claim. See Exhibit A. The elements of reckless infliction of emotional distress are markedly different from that of negligent infliction of emotional distress because reckless infliction of

emotional distress contains the same elements as those for intentional infliction of emotional distress. See *Bowman v. Heller*, 420 Mass. 517, 519 n.2 (1995). To prevail in a claim for the intentional infliction of emotional distress, the Plaintiffs must prove: “(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,’ was ‘beyond all possible bounds of decency’ and was ‘utterly intolerable in a civilized community.’; (3) that the actions of the defendant were the cause of the plaintiff’s distress,; and (4) that the emotional distress sustained by the plaintiff was ‘severe’ and of a nature ‘that no reasonable man could be expected to endure it.’” *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144–45 (1976)(citations omitted)(emphasis supplied). To prevail in a claim for the negligent infliction of emotional distress, the Plaintiffs must prove: “(1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case.” *Payton v. Abbott Labs*, 386 Mass. 540, 556–57 (1982)(emphasis supplied).

The Complaint’s failure to specify the factual allegations in support of the different emotional distress claims warrants dismissal, or at the very least, a more definite statement pursuant to Mass. R. Civ. P. 12(e). That argument aside, Counts X, XI, and XII appear to claim reckless infliction of emotional distress based on the Defendant’s alleged formation of a false narrative, and the negligent infliction of emotional distress based on certain plaintiffs’ observations of the Decedent’s body in the Hospital after 7:50 a.m. on January 29, 2022.

As set forth below, the Complaint fails to present a cognizable claim for emotional distress.

1. The Plaintiffs Cannot Present A Claim For Negligent Infliction Of Emotional Distress Because Their Claimed Distress Was Not Contemporaneous With The Alleged Accident.

No plaintiff directly witnessed the Defendant's alleged negligent conduct, the alleged vehicle strike that is claimed to have occurred between 12:11 a.m. and 12:36 a.m. on January 29, 2022, or the Decedent himself until at least seven hours *after* the incident. See Exhibit A, ¶¶123, 131, 139. Massachusetts recognizes claims for emotional injuries by parents and close relatives arising out of their witnessing an accident to a loved one, but the Plaintiffs must show "(a) substantially contemporaneous knowledge of the outrageous conduct and (b) a severe emotional response." *Nancy P. v. D'Amato*, 401 Mass. 516, 522 (1988). "Only a bystander plaintiff who is closely related to a third person directly injured by a defendant's tortious conduct, and suffers emotional injuries as the result of witnessing the accident or coming upon the third person soon after the accident, states a claim for which relief may be granted." *Migliori v. Airborne Freight Corp.*, 426 Mass. 629, 632 (1998). The close proximity of time between the alleged harmful event and a plaintiff's claim for emotional distress must be near instantaneous. See *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 327, 341-42 (1983)(mother who learned of her son's passing by telephone seven hours after the event and was not at the scene of the event could not pursue a claim for emotional distress).

Here, Margaret, Paul, and John O'Keefe II each allege that sometime after the Decedent was transported to the Hospital, at least seven (7) hours after the alleged vehicle strike based on the factual averments, they observed their adult son/brother's body in the Hospital. Exhibit A, ¶¶123, 131, 139. There is no allegation that any plaintiff observed the alleged vehicle strike itself or that the Plaintiffs were within the vicinity of 34 Fairview Road when it occurred. See *Cohen*, 389 Mass., at 341-42. Moreover, the Plaintiffs' claimed shock was not experienced 'immediately' after the occurrence, but rather at least seven hours later, removing it from the scope of requisite

temporal proximity. See *Migliori*, 426 Mass., at 632-33 (courts “have imposed relational, temporal, and spatial limits on the scope of liability for emotional harm”); *Ferriter v. Daniel O’Connell’s Sons, Inc.*, 381 Mass. 507, 518-19 (1980)(“shock occurred immediately after the accident.”).

The Complaint contains no allegation that plaintiff Kayley Furbush directly observed the alleged conduct that caused the Decedent’s death, nor did she observe the Decedent at any point thereafter. See Exhibit A. The alleged perception of death, as alleged, was based on conversations with the Defendant and there is no precedent for one to claim emotional distress as a bystander merely by learning via conversation that a loved one has been injured or passed away. See *Cohen*, 389 Mass. at 341-42.

Because the Complaint fails to present a claim that the Plaintiffs’ claimed emotional reactions occurred contemporaneously with the alleged tortious conduct or immediately after, their negligent infliction of emotional distress claims have no legal basis and should be dismissed.

2. The Claim For Reckless Infliction Of Emotional Distress Fails Because There Was No Extreme Or Outrageous Conduct Directed Toward The Plaintiffs That Resulted In Severe Harm.

Plaintiffs each allege that the Defendant outrageously created a false narrative. Exhibit A, ¶¶126, 134, 142, 160. There are no allegations that the claimed conduct was performed by the Defendant with such reckless design to cause emotional suffering to the Plaintiffs. See Exhibit A. The Defendant’s statements in which she questioned and/or denied striking the Decedent with her vehicle (allegedly creating a false narrative) or speculated that a snowplow may have struck the Decedent, do not rise to the level of intent toward the Plaintiffs. See *Nancy P. v. D’Amato*, 401 Mass. 516, 520–21 (1988). Moreover, putting aside that she was (successfully) defending herself against unproven and false criminal charges pending in the Norfolk Superior Court, the Plaintiffs’

claim that the Defendant's conduct after the accident was extreme or outrageous fails as a matter of law. See *Polay v. McMahon*, 468 Mass. 379, 386 (2014)(finding that allegations of verbal attacks, filing false police reports, and harassment petitions did not rise to the level of extreme or outrageous and the person bringing suit must show that the petitioning activities lacked any reasonable factual support or arguable basis in law). "Liability cannot be predicated on 'mere insults, indignities, threats, annoyances, petty oppressions or other trivialities' nor even is it enough 'that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.'" *Quinn v. Walsh*, 49 Mass. App. Ct. 696, 706-07 (2000)(quoting *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 456, 466 (1997)(citations omitted)). The Complaint contains no factual averment that identifies the substance of the alleged false narrative, and how it was outside the bounds of all possible decency and utterly intolerable in a civilized community such that the Plaintiffs may pursue an emotional distress claim. See Exhibit A. Without requisite factual averments, the Complaint fails to present a cognizable claim for reckless infliction of emotional distress. See *Polay*, 468 Mass., at 379.

3. Kayley Furbush's Claims For Emotional Distress Fail As A Matter of Law.

Within Count XIII, the Plaintiff, Kayley Furbush, asserts multiple claims for emotional distress but does not ascribe what conduct applies to what type of claim (i.e. negligent versus reckless versus intentional inflictions of emotional distress). See Exhibit A, ¶¶145-162. Plaintiffs allege that the Defendant spoke to a third person on a speakerphone in Kayley Furbush's presence, waking her up in the process, notifying her that something may have happened to the Decedent, and inferring that Kayley Furbush perceived the Decedent's death. Exhibit A, ¶¶150-152. The Plaintiffs also allege that the Defendant feigned concern for the family and drove her SUV away

from the Decedent's residence after the Decedent was declared dead. Exhibit A, ¶156. Finally, Plaintiffs again allege that the Defendant created a false narrative. Exhibit A, ¶160. For the reasons previously stated and as set forth below, the Complaint fails to state any cognizable claim for emotional distress upon which relief can be granted to Kayley Furbush.

The Defendant's alleged conduct identified in Count XIII, feigning sincerity and driving her SUV away from property that the Defendant allegedly did not own or control, does not rise to the level of conduct that would be considered so outrageous and extreme that it would be considered utterly intolerable in a civilized community. See *Foley v. Polaroid Corp.*, 400 Mass. 82, 99 (1987). Moreover, the Defendant's questioning what happened during a phone call with third parties, even if in plaintiff Kayley Furbush's presence, is also not actionable conduct. See *id.* To the extent the Complaint repeats and restates various elements to establish a claim for emotional distress, actual factual averments are necessary in support of these elements to prevent this Motion to Dismiss. See *Polay*, 468 Mass., at 388 ("the complaint contains only the conclusory statement that 'the emotional distress suffered by the [p]laintiffs was severe and of such a nature that no reasonable person could be expected to endure it.' This statement does not constitute an allegation of fact but rather a recitation of the element of severe emotional distress."). For the above reasons, the Plaintiff, Kayley Furbush's claims for intentional, reckless, or negligent infliction of emotional distress, fail as a matter of law and must be dismissed.

V. CONCLUSION

For the reasons stated above, the Defendant, Karen Read, respectfully requests that this Honorable Court ALLOW this Motion and enter an Order dismissing Counts X, XI, XII, and XIII of the Plaintiffs' Complaint.

Respectfully submitted,

The Defendant,
Karen Read,
By her attorneys,

/s/ William L Keville, Jr.

William L. Keville, Jr., BBO: #546525
Christopher D. George, BBO: #670428
Marissa K. Palladini, BBO: #713518
Melick & Porter, LLP
One Liberty Square, 7th Floor
Boston, MA 02109
Telephone: (617) 523-6200
Facsimile: (617) 523-8130
wkeville@melicklaw.com
cgeorge@melicklaw.com
mpalladini@melicklaw.com

Dated: July 9, 2025

CERTIFICATE OF SERVICE

I, William L. Keville, Jr., hereby certify that on this day, I forwarded notice of the foregoing document(s) by electronically mailing a copy thereof, to the following:

Counsel for Plaintiffs

Marc Diller, Esq.
Daniel Buck, Esq.
Diller Law, LLP
50 Congress Street, Suite 410
Boston, MA 02109
marc@dillerlaw.com
dbuck@dillerlaw.com

Counsel for Defendants, C&C Hospitality, LLC d/b/a C.F. McCarthy's and G&S Hospitality, LLC d/b/a C.F. McCarthy's

Tamara Smith Holtslag, Esq.
Lincoln A. Rose, Esq.
PEABODY & ARNOLD LLP
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
tsmith@peabodyarnold.com
lrose@peabodyarnold.com

Counsel for Defendant, Karen Read

Charles Waters, Esq.
Damon M. Seligson, Esq.
Aaron Rosenberg, Esq.
Sheehan Phinney Bass and Green PA
28 State Street, 22nd Floor
Boston, MA 02109
cwaters@sheehan.com
dseligson@sheehan.com
arosenberg@sheehan.com

Counsel for Defendant, Waterfall Bar & Grill, LTD d/b/a Waterfall Bar & Grill

David F. Hassett, Esq.
John M. Dealy, Esq.
Casey L. McCaffrey, Esq.
Hassett & Donnelly, P.C.
446 Main Street, 12th Floor
Worcester, MA 01608
dhassett@hassettdonnelly.com
jdealy@hassettdonnelly.com
cmccaffrey@hassettdonnelly.com

Counsel for Defendant, Waterfall Bar & Grill, LTD d/b/a Waterfall Bar & Grill

John A. Donovan, III, Esq.
SLOANE AND WALSH, LLP
One Boston Place
201 Washington Street, Ste 1600
Boston, MA 02108
Tel: 617-523-6010
Fax: 617-227-0927
jdonovan@sloanewalsh.com

/s/William L Keville, Jr.

William L. Keville, Jr.

Dated: July 9, 2025