

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT
CIVIL ACTION
NO. 2483CV00692PAUL O'KEEFE¹ & others²

v.

C & C HOSPITALITY, LLC d/b/a C. F. MCCARTHY'S & others³**MEMORANDUM AND ORDER ON DEFENDANTS' PARTIAL MOTIONS TO
DISMISS PURSUANT TO MASS. R. CIV. P. 12(b)(6) (Paper Nos: 37, 37.3, 37.4)**

This matter arises out of the January 29, 2022, death of John Joseph O'Keefe, III ("JJ").⁴ Defendant and moving party, Karen Read ("Read"), was previously charged with several crimes in connection with JJ's death. During the pendency of Read's criminal case, plaintiffs Margaret O'Keefe ("Margaret," JJ's mother), John O'Keefe, II ("John," JJ's father), Paul O'Keefe ("Paul," JJ's brother and personal representative of JJ's estate), and Kayley Furbursh ("Kayley," JJ's niece) filed this civil lawsuit asserting claims against Read for Wrongful Death (Count III), Negligent and/or Reckless Infliction of Emotional Distress (Counts X, XI, and XII), and Negligent, Reckless, and/or Intentional Infliction of Emotional Distress (Count XIII).

The plaintiffs also asserted claims for Wrongful Death (Counts I and II), and Negligent Infliction of Emotional Distress (Counts IV, V, VI, VII, VIII, and IX) against C&C Hospitality,

¹ Individually and as Personal Representative of the Estate of John Joseph O'Keefe, III

² John O'Keefe, II, Margaret O'Keefe and Margaret O'Keefe as Grandparent/Guardian of Kayley Furbursh

³ G&S Hospitality, LLC d/b/a C.F. McCarthy's, Waterfall Bar & Grill, LTD d/b/a Waterfall Bar & Grill, and Karen Read

⁴ For purposes of clarity, consistent with the complaint, the court refers to the decedent by the nickname provided by the plaintiffs.

10/3/2025

C.C.: M.D., D.B., T.H., L.R., J.A.D.
J.M.D., C.L.M., D.H., C.E.M., E.L.,
W.K., A.J., D.S., C.W., A.R., C.G., M.P.,

LLC d/b/a C.F. McCarthy's, G&S Hospitality, LLC d/b/a C.F. McCarthy's (collectively, "C.F. McCarthy's") and Waterfall Bar & Grill, LTD d/b/a Waterfall Bar & Grill ("Waterfall"). These defendants are corporate entities that owned bars that allegedly served Read alcohol in the hours leading up to the events at issue.

Read filed a motion to dismiss all emotional distress claims asserted against her. C.F. McCarthy's and Waterfall joined on Read's motion to dismiss, similarly seeking to dismiss the emotional distress claims asserted against them.⁵ For the foregoing reasons, the defendants' motions are **ALLOWED** as to the negligent infliction of emotional distress claim asserted by Kayley and **DENIED** as to Kayley's claims for reckless and/or intentional infliction of emotional distress. The defendants' motions are **DENIED** in all other respects.

BACKGROUND

The following facts are drawn from the plaintiffs' complaint and accepted as true for purposes of this motion.⁶

On January 28, 2022, Read patronized C.F. McCarthy's from 8:51 p.m. through 10:29 p.m. She consumed seven alcoholic drinks during that timeframe. Read then patronized Waterfall from 10:54 p.m. that night through 12:10 a.m. the next morning. She consumed two alcoholic drinks during that timeframe. Her blood was drawn on January 29, 2022, and testing revealed that her blood alcohol content would have been between .13% and .29% after leaving Waterfall.

⁵ C.F. McCarthy's and Waterfall's motions are technically motions for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c), as they previously filed answers to the plaintiffs' complaint. However, a "defendant's rule 12(c) motion is actually a motion to dismiss that argues that the complaint fails to state a claim upon which relief can be granted" (quotations omitted). *Jarosz v. Palmer*, 436 Mass. 526, 529 (2002). Thus, the court will apply the same legal framework for C.F. McCarthy and Waterfall's motions as that used in assessing Read's motion to dismiss.

⁶ The court also considers facts contained in matters of public record, pursuant to *Marram v. Kobrick Offshore Fund, Ltd*, 442 Mass. 43, 45 n.4 (2004). These facts are reserved for discussion below.

revealed that her blood alcohol content would have been between .13% and .29% after leaving Waterfall.

During the timeframe relevant to the instant lawsuit, Read and JJ were in a dating relationship. JJ was with Read that evening, and they had been arguing. After leaving Waterfall, Read got into a motor vehicle with JJ and drove to a residence at 34 Fairview Road in Canton while intoxicated. After arriving at the residence, JJ exited Read's vehicle. Read then drove her vehicle and hit JJ. JJ was knocked to the ground, suffering serious injuries that ultimately led to his death.

Read fled the scene and drove to JJ's residence at 1 Meadows Avenue in Canton. At approximately 4:30 a.m. on January 29, 2022, Read woke up JJ's niece, Kayley, who lived with JJ. Read began discussing JJ's death with Kayley and talked about striking him with her vehicle. "Kayley heard defendant Read say '(JJ) never came home . . . Maybe I did something . . . Maybe a snow plow hit him . . . Maybe I had hit him . . . Maybe I hit him . . . (we) were in an argument . . . Maybe he got hit by a snow plow.'" Complaint, paragraph 150. Read also called multiple people between 4:30 a.m. and 5:00 a.m. on January 29, 2022, while in Kayley's presence. At the time, Read knew Kayley was a vulnerable minor who had previously lost both parents and lived with JJ as her surrogate parent.

Read left JJ's residence at approximately 5:07 a.m. on January 29, 2022. She arrived at 34 Fairview Road at approximately 6:03 a.m. and discovered JJ buried in snow. JJ was pronounced dead at a hospital at 7:50 am. "At relevant times after 7:50 am on January 29, 2022, defendant Read went to the grieving house of JJ, feigned comfort to JJ's family, and used the opportunity to, amongst other things, remove the offending weapon, her vehicle, and/or destroy relevant evidence." Complaint, paragraph 47.

Subsequently, over the course of several years, Read made many public statements. “She knowingly and deliberately changed her story and fabricated a conspiracy knowing the same to be false. She publicly communicated this false ‘narrative’ thereby frustrating Justice for JJ. Such false narrative caused the Plaintiffs aggravated emotional distress.” Complaint, paragraph 52.

DISCUSSION

The defendants argue that the emotional distress claims should be dismissed for multiple reasons: 1) distress claims are subsumed by the wrongful death statute; 2) the plaintiffs’ claimed distress was not contemporaneous with JJ allegedly being struck by Read’s vehicle; 3) there was no extreme or outrageous conduct direct towards the plaintiff that resulted in severe harm; and 4) Kayley’s claims for emotional distress fail as a matter of law. The court will address each of these arguments in turn.

A. Standard of Review

To survive a motion to dismiss for failure to state a claim pursuant to Mass. R. Civ. P. 12(b)(6), a complaint must contain “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.” *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). The factual allegations must be “more than labels and conclusions” and “raise a right to relief above the speculative level.” *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 555. In assessing a complaint under Rule 12(b)(6), the court accepts as true the well-pleaded factual allegations in the complaint and draws all reasonable inferences in the claimant’s favor. See *Fairhaven Hous. Auth. v. Commonwealth*, 493 Mass. 27, 30 (2023).

The extent of the court's review generally is limited to the factual allegations in the complaint and any facts contained in any attached exhibits. See *Eigerman v. Putnam Invs., Inc.*, 450 Mass. 281, 285 n.6 (2007). However, the court also may consider matters of public record, items in the record of the case, and documents cited and relied upon in the complaint. *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000).

B. Wrongful Death Statute and Emotional Distress Claims

The defendants argue that the plaintiffs' emotional distress claims are subsumed by the Massachusetts wrongful death statute, G. L. c. 229, § 2. Among other provisions, the statute identifies the following as recoverable damages:

"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 loss of the reasonably expected net income, 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.

Thus, the wrongful death statute contemplates some degree of emotional distress arising from a decedent's death. It addresses the loss of care, assistance, companionship, comfort, guidance, counsel, and advice, all of which go to the relationship between a decedent and individuals pursuing claims under the statute.

The defendants argue that the independent emotional distress claims asserted by the plaintiffs are redundant to the plaintiffs' wrongful death assertions and consequently should be dismissed. This argument is inconsistent with established Massachusetts case law. In *Cimino v. Milford Keg, Inc.*, 385 Mass. 323 (1982), the Supreme Judicial Court ("SJC") held:

"The defendant's . . . argument that the plaintiff's claim for emotional distress is 'preempted' by the wrongful death action (G.L. c. 229, s 2) misconstrues the common law cause of action for emotional distress. Emotional distress, as the concept has evolved in this Commonwealth, is a severe psychological shock directly resulting from

experiencing or witnessing the effects of a defendant's conduct. . . . A claim for damages based on emotional distress does not include an administrator's claim for loss of consortium-which will be present in every wrongful death action such as this. Since emotional distress is a wrong to the plaintiff distinct from that done to [the decedent] and the statutory beneficiaries of the decedent, it is not a duplicative remedy and is not 'preempted' by the wrongful death statute." (quotations omitted).

Cimino, 385 Mass. at 334.

Here, the plaintiffs' direct emotional distress claims go beyond the mere fact that JJ died. Instead, they point to the alleged wrongs they suffered in their individual capacities. They aver that they suffered such harm in observing JJ just after his death, having Read attend family events in the immediate aftermath of JJ's death, and Read developing a public and false narrative that frustrated justice for JJ. These claims are separate from JJ's death and instead are specific to the distress the plaintiffs assert in their individual capacities, rather than their status as relatives of JJ pursuant to the wrongful death statute.

Therefore, the defendants' motions are **DENIED** as to their arguments regarding emotional distress and the wrongful death statute.

C. Negligent Infliction of Emotional Distress

The defendants argue that none of the plaintiffs have actionable claims for negligent infliction of emotional distress because their alleged distress did not occur contemporaneously with the accident giving rise to JJ's death. This argument is inconsistent with established

Massachusetts case law. In *Stockdale v. Bird & Son, Inc.*, 399 Mass. 249 (1987), the SJC stated:

"In *Dziokonski v. Babineau*, 375 Mass. 555, 568 (1978), we held that 'allegations concerning a parent who sustains substantial physical harm as a result of severe mental distress over some peril or harm to his minor child caused by the defendant's negligence state a claim for which relief might be granted, where the parent either witnesses the accident or soon comes on the scene while the child is still there.' Two years later, in *Ferriter v. Daniel O'Connell's Sons*, 381 Mass. 507, 518, we held that the wife and children of an employee allegedly injured through his employer's negligence could maintain an action for negligent infliction of emotional distress, even though they first observed the employee in a hospital immediately after the accident. We said that '[a]

plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for that shock than a plaintiff who rushes instead to the hospital. So long as the shock follows closely on the heels of the accident, the two types of injury are equally foreseeable.’ *Id.*”

Stockdale, 399 Mass. at 251.

Thus, a family member is entitled to emotional distress damages when they either witness the decedent’s actual injury or “come upon the injured [kin] promptly after the injury.” *Nancy P. v. D’Amato*, 401 Mass. 516, 520 (1988).

The plaintiffs allege that Read discovered JJ buried in the snow at approximately 6:03 a.m. on January 29, 2022, and he was subsequently pronounced dead at a hospital at 7:50 a.m. that day. Margaret, John, and Paul each aver that they “learned of JJ’s admission to [] Hospital immediately and came upon JJ’s body at the Hospital shortly thereafter.” Complaint, paragraphs 82, 88, 95, 102, 109, 116, 123, 131, and 139. Against this backdrop, the complaint alleges sufficient facts that JJ’s parents and brother arrived promptly at the hospital upon learning of JJ’s death and thus have actionable claims for negligent infliction of emotional distress.

Kayley’s negligent infliction of emotional distress claim stands on different footing, however. She alleges that she “learned of JJ’s death or injury when defendant Read woke Kayley up approximately 4:30 am on January 29, 2022.” Complaint, paragraph 147. Further, Kayley alleges she “heard defendant Read say ‘(JJ) never came home . . . Maybe I did something . . . Maybe a snow plow hit him . . . Maybe I had hit him . . . Maybe I hit him . . . (we) were in an argument . . . Maybe he got hit by a snow plow.’” Complaint, paragraph 150. Lastly, Kayley states that, as a result of Read’s conversations in her presence, she “perceived the injuries caused to her guardian, uncle JJ, and perceived the injury producing event.” Complaint, paragraph 151.

Taken together, the complaint does not allege that Kayley learned of JJ’s death or injury at 4:30 a.m., but instead learned he was maybe injured at that time. There are also no averments

regarding when and the circumstances under which she first observed the deceased JJ. Her averments concern her perceptions of JJ's injuries, rather than her actual observations.

The case law cited by the parties addresses scenarios whereby a family member has observed another family member actually being injured or otherwise suffering shock after promptly encountering the injured family member. Kayley cannot make this showing. In making this assessment, the court acknowledges the following case law cited in the plaintiffs' opposition:

“the determination whether there should be liability for the injury sustained depends on a number of factors, such as where, when, and how the injury to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person” (emphasis in original).

Dziokonski, 375 Mass. at 568.

Such language is inapposite here, as the *Dziokonski* court's decision turned on liability for negligent infliction of emotional distress and the parameters for when a family member arrived at the scene of an accident giving rise to a relative's injury. *Stockdale* extended the scope of *Dziokonski* to family members who promptly arrive at a hospital. Neither of these cases, nor any other cases provided by the parties, creates authority to find negligent infliction of emotional distress for family members who learn of a death beyond this prompt timeframe. Thus, *Dziokonski*'s language about when JJ's injury “entered into the consciousness of the claimant” does not support Kayley's claim for negligent infliction of emotional distress.

Therefore, the defendants' motions are **DENIED** as to Margaret, John, and Paul's claims for negligent infliction of emotional distress and **ALLOWED** as to Kayley's claim for negligent infliction of emotional distress.

D. Reckless Infliction of Emotional Distress

The defendants argue that none of the plaintiffs have actionable claims for reckless infliction of emotional distress because there was no extreme or outrageous conduct directed towards them that resulted in severe harm.⁷ In the context of such claims, conduct is “extreme and outrageous” if it “goes beyond all possible bounds of decency, and is regarded as atrocious, and utterly intolerable in a civilized community” (quotations omitted). *Roman v. Trustees of Tufts Coll.*, 461 Mass. 707, 718 (2012). The standard of extreme and outrageous conduct is a high bar. Such conduct means more than “workaday insults, annoyances, or even threats and petty oppressions It means, for example, a high order of reckless ruthlessness or deliberate malevolence that . . . is simply intolerable” (quotations omitted). *Conway v. Smerling*, 37 Mass. App. Ct. 1, 8 (1994).

The plaintiffs allege that Read developed a narrative surrounding JJ’s death, which caused them to suffer emotional distress. In support of their opposition to the instant motions, they have produced a search warrant affidavit, which is a matter of public record that the court may consider in assessing whether the complaint plausibly suggests an entitlement to relief.⁸

According to the search warrant materials, on January 22, 2024, Detective Lieutenant Brian Tully (“Tully”) of the Massachusetts State Police applied for a warrant to seize “[a]ny

⁷ With reference to the defendants’ arguments regarding extreme and outrageous conduct, the plaintiffs’ opposition frames the issue in the context of reckless and/or intentional infliction of emotional distress. In the complaint, however, Margaret, John, and Paul do not assert claims for intentional infliction of emotional distress. Instead, at Counts, X, XI, and XII, they assert claims against Read for negligent and/or reckless infliction of emotional distress. Thus, in ruling upon this motion, the court does not impute an additional cause of action for Margaret, John, and Paul that is not included in the complaint. As discussed below, Kayley is the only plaintiff who asserted a claim for intentional infliction of emotional distress.

⁸ “Under our common law, judicial records are presumptively available to the public.” *Commonwealth v. George W. Prescott Pub. Co., LLC*, 463 Mass. 258, 262 (2012). “[W]hen filed in court, search warrant materials are judicial records to which the public’s presumptive right of access applies once the warrant has been returned.” *Id.* at 263. Thus, once the warrant is returned, it becomes a public document and may be considered by a court when ruling upon a motion to dismiss. See *Schaer*, 432 Mass. at 477.

mobile device capable of communicating and cellphones used by Karen Read.”⁹ He filed a return of the search warrant on January 24, 2024.

Tully submitted an affidavit in support of the search warrant application. The affidavit comprises thirty-one pages and discusses Read’s communications regarding JJ’s death. Briefly stated, the affidavit largely describes actions by a local blogger, Aidan Kearney, who runs a series of social media websites under the name “Turtleboy.”

The affidavit states that Kearney posted articles on social media accounts that reflected personal attacks on civilian witnesses, members of their families, and their friends. The affidavit also states that throughout various postings and videos, Kearney identified several individuals who socialized with JJ and Read, stated that they, not Read, were responsible for JJ’s murder, and encouraged his social media followers to contact and harass these individuals. Additionally, the affidavit references certain comments Kearney directed to the O’Keefe family:

“How much slack are we supposed to give you [John O’Keefe’s family] . . . the time period for the grief, whatever, that we are giving you, like we are not going after you because of the grief, that is expired. It’s expired because you’re trying to send an innocent woman to jail for the rest of her life . . . I don’t feel bad for you anymore.

Plaintiffs’ Opposition, Exhibit A, paragraph 39.

Per the affidavit, Read communicated with Kearney through an intermediary, Natalie Wiweke Berhsneider. Through this intermediary, Read gave Kearney information concerning her case, some of which was potentially not available to the public, which Kearney then used in his social media postings. Read also shared personal information and pictures of many civilian individuals for whom Kearney argued were responsible for JJ’s death.

⁹ The court acknowledges that the substance of the search warrant affidavit is highly disputed. The court’s references to such affidavit are viewed through the lens of a Rule 12(b)(6) motion, which requires the court to view facts and draw inferences in the plaintiffs’ favor.

When applying the plausibility standard required by Rule 12(b)(6), such actions are consistent with the plaintiffs' averments that Read developed a narrative surrounding JJ's death.¹⁰ Kearney unquestionably took extensive efforts in publicizing information regarding the charges against Read, and the affidavit describes Read acting in concert with some of those efforts. Notably, Kearney stated that the time had "expired" for "going after" the O'Keefe family and that the O'Keefe family was involved in a coverup regarding JJ's death. Taken as a whole, in applying the plausibility standard, the complaint and this warrant affidavit set forth sufficient facts that the extensive media attention perpetuated after JJ's death caused the plaintiffs to suffer emotional distress.

Primarily, the defendants' motions set forth generalized legal statements for extreme and outrageous conduct. As to a substantive argument, Read cites to *Polay v. McMahon*, 468 Mass. 379 (2014). *Polay* is arguably similarly because it dealt with "(1) filing false police reports and harassment prevention petitions against the plaintiffs; (2) verbally attacking the plaintiffs; and (3) monitoring and recording the plaintiffs' home on a continuous basis." *Id.* at 386. The SJC in *Polay* held that such action did not rise to the level of extreme and outrageous conduct. The court acknowledges that *Polay* shares parallels as to a dispute between individuals which escalated into allegedly harassing behaviors. However, given the extensive scope of media scrutiny and Read's relationship with Kearney, as alleged in the complaint and search warrant affidavit, the facts of this case rise above those at issue in *Polay* because of their public and pervasive nature.

¹⁰ In making this assessment, the court is not ruling on whether Read's "narrative" was true or false. As with its consideration of the search warrant affidavit, the court is exercising its legal authority regarding the instant motions, which is limited to applying a plausibility standard with facts and inferences viewed in the plaintiffs' favor.

Therefore, the defendants' motions are **DENIED** as to their arguments regarding extreme and outrageous conduct.

E. Claims Asserted by Kayley Furbush

The defendants argue that the complaint does not assert sufficient facts that Kayley suffered emotional distress, and that it does not describe which conduct applies to which claim. As discussed above, Kayley's claim for negligent infliction of emotional distress must be dismissed for failure to state a viable claim. However, consistent with Margaret's, John's, and Paul's claims, Kayley was also plausibly distressed by the public and pervasive nature of Read's alleged false narrative. The alleged facts surrounding Kayley's interactions with Read in the early morning hours on January 29, 2022, can also be plausibly characterized as extreme and outrageous. Such determination supports Kayley's claim for reckless infliction of emotional distress.

Kayley is the only plaintiff who asserted a claim for intentional infliction of emotional distress. A claim for intentional infliction of emotion distress requires sufficient averments that Read "intended to inflict emotional distress or that [she] knew or should have known that emotional distress was the likely result of [her] conduct." *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144–145 (1976). With reference to the specific allegations of the complaint, Read's motion states that "Defendant's questioning what happened during a phone call with third parties, even if in Kayley Furbush's presence, is also not actionable conduct." This does not convey the full scope of what occurred during the early morning hours of January 29, 2022, in the manner alleged in the complaint. Instead, the complaint plausibly pleads that Read made multiple distressing calls about JJ's physical condition, namely being struck by Read's vehicle or

by a snowplow. Moreover, Read made these statements upon waking Kayley up at 4:30 a.m., which plausibly contributed to the distressing nature of that interaction.

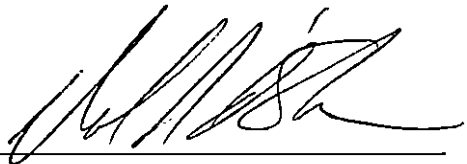
Even if this court were to accept Read's position that she was merely engaging in telephone conversations, "[c]onduct otherwise reasonable may become tortious when directed at an individual known to be particularly susceptible to infliction of emotional distress." *Boyle v. Wenk*, 378 Mass. 592, 596 (1979). At time of this interaction, it can be inferred that Read knew Kayley was a vulnerable minor who previously lost both parents and lived with JJ as her surrogate parent. Given such status, Kayley would be particularly vulnerable to distress caused by an additional loss of a parental figure. Thus, based upon Kayley's vulnerability and susceptibility, Read, at a minimum, knew or should have known that her conduct would cause Kayley to suffer emotional distress. This plausibly supports a claim for intentional infliction of emotional distress.

Therefore, the defendants' motions to dismiss are **DENIED** as to their arguments regarding the sufficiency of Kayley's claims.

ORDER

Wherefore, the defendants' motions are **ALLOWED** as to the negligent infliction of emotional distress claim asserted by Kayley and **DENIED** as to their claims for reckless and/or intentional infliction of emotional distress. The defendants' motions are **DENIED** in all other respects.

October 3, 2025



Daniel J. O'Shea
Justice of the Superior Court