VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-00340

Betty Gile, Executor, et al v. 300 Pearl Street Operations LLC ind & dba Burlington Health & Rehab, et al

DECISION ON MOTION TO DISMISS

Laura O. Potvin, a resident of Burlington Heath & Rehab, died on August 9, 2020 after a series of falls at the facility. Plaintiff Betty R. Gile, the executor of Ms. Potvin's estate, now brings this action against the facility and related corporate entities asserting claims for negligence, breach of contract, a survivor's action, and wrongful death, as well as punitive damages. Defendants move to dismiss pursuant to Rule 12(b)(6). The court grants the motion as to one of the Defendants, but otherwise denies it.

Background

As alleged in the Amended Complaint, Defendant 300 Pearl Street Operations, LLC is engaged in the ownership, operation, and management of Burlington Health & Rehab, a nursing home facility located at 300 Pearl Street in Burlington, and is also the licensee of that facility. Defendant 300 Pearl Street Property, LLC owns the real property on which the facility sits. Genesis Healthcare, Inc. is "engaged in the ownership, operation, and management of Burlington Health & Rehab . . . by virtue of a Certificate of Need issued by the Green Mountain Care Board."

Ms. Potvin was a resident of Burlington Heath & Rehab from June 5, 2020 until her death on August 9, 2020. At the time of her admission, Ms. Potvin required physical therapy due to weakness and skilled nursing care due to seizures and altered mental status. During her stay at the facility, Ms. Potvin suffered a series of falls and resulting injuries, including a "particularly serious" fall on August 8th that resulted in a facial laceration and skin tear to her left elbow. She was taken to the hospital after that fall, where she died the next day from a subdural hematoma and blunt impact to her head. Ms. Gile alleges that Defendants' negligence caused Ms. Potvin's injuries and death.

Discussion

First, Defendants contend that the Amended Complaint fails to allege sufficient facts against Defendant Genesis Healthcare, Inc. They are right. The Amended Complaint alleges merely that Genesis is "engaged in the ownership, operation[,] and management of Burlington Health & Rehab . . . by virtue of a Certificate of Need." Am. Compl. ¶ 6. This fails to allege sufficient facts to support veil-piercing. *See Amis v. 300 Pearl Street Operations*, No. 359-419 Cncv (July 10, 2019) (Toor, J.) (granting motion to dismiss defendant Genesis on virtually identical factual allegations). Ms. Gile can always move to amend her complaint and add Genesis as a party if warranted as discovery proceeds.

Defendants next seek to dismiss the wrongful death claim (Count IV). According to Vermont's wrongful death statute:

> The court or jury before whom the issue is tried may give such damages as are just, with reference to the pecuniary injuries resulting from the death, to the spouse and next of kin, as the case may be. In the case where the decedent is a minor child, the term pecuniary injuries shall also include the loss of love and companionship of the child and for destruction of the parent-child relationship in an amount as under all the circumstances of the case, may be just.

14 V.S.A. § 1492(b). Ms. Gile alleges that Ms. Potvin's "next of kin are entitled to recover of defendants for their pecuniary losses, including, without limitation, loss of society, comfort, affection and companionship, emotional distress, financial loss[,] and destruction of the parent-child relationship." Am. Compl. ¶ 45. Defendants argue that this allegation fails to identify the next of kin sufficiently. They argue further that Ms. Gile has failed to alleged any pecuniary losses recoverable by adult children for the loss of a parent. Defs' Mot. to Dismiss at 5–6.[1]

This argument fails. Preliminarily, the Amended Complaint identifies Ms. Potvin's next of kin as her children plainly enough through reference to the "parent-child relationship." Am. Compl. ¶ 45. Moreover, the statute does not limit the damages that adult children can recover for the wrongful death of a parent to strictly economic damages. "The wrongful death statute is remedial in nature, being designed to allay the harsh common law rule denying liability due to the death of the victim, and must

[1] Confusingly, Defendants assert that in *Amis*, the court "rejected the claim that pecuniary losses were recoverable by adult children for the loss of a parent." Defs' Mot. to Dismiss at 5 (citing Entry Order, *Amis v. 300 Pearl Street Operations*, No. 359-419 Cncv (Jan. 29, 2021)) (Ex. D). The court presumes that this assertion was an unintentional error. In that entry order, the court—while noting that the defendants' motion to dismiss was "somewhat hard to follow"—in fact dismissed the family members' claim for emotional distress for the death of a parent. Indeed, the suggestion that pecuniary losses are not recoverable would be completely at odds with the statute. The colorable issue is instead whether the statute limits the recovery of adult children to purely economic losses only; the court presumes that is the issue Defendants meant to raise, and frames its discussion accordingly.

therefore be construed liberally." *State v. Oliver*, 151 Vt. 626, 629 (1989). Consistent with this teaching, our Supreme Court has recognized the modern trend toward construing wrongful death statutes to permit recovery for damages historically not considered pecuniary in nature and, thus, held that "[t]he term 'pecuniary injuries' " in the statute "does not limit recovery to purely economic losses." *Dubaniewicz v. Houman*, 2006 VT 99, ¶¶ 7–8, 180 Vt. 367 (quotations omitted). Moreover, the Court has explicitly held that the wrongful death statute does not foreclose an award of loss-of-companionship damages to parents of an adult decedent. *Clymer v. Webster*, 156 Vt. 614, 622–30 (1991) ("the Legislature passed the 1976 amendment, not to limit the damages available to the relatives of adult decedents, but rather to further the remedial purposes of the WDA by developing the definition of pecuniary injuries"). The logical extension of *Clymer* and *Dubaniewicz* is to allow recovery to adult children of a decedent. *See also Allen v. Southwestern Vermont Medical Center, Inc.*, No. 334-9-10 Bncv, 2011 WL 8472897 (Vt. Super. Ct. Nov. 28, 2011) (Hayes, J.) (holding that adult daughter of decedent was "entitled to attempt to prove grief, mental anguish and suffering to the extent that it relates to loss of love and companionship of her father and destruction of the parent-child relationship").

Next, Defendants seek to dismiss the survival claim because the action was filed after Ms. Potvin's death. This argument fails. "Vermont's survival statutes, 14 V.S.A. §§ 1451–1453, abrogate the harsh common law rule that personal tort actions die with the person of the plaintiff or the defendant. Section 1453 authorizes the executor or administrator of an estate to prosecute the cause of action the decedent had, or would have had if death had not ensued." *Whitchurch v. Perry*, 137 Vt. 464, 468 (1979) (citing W. Prosser, Handbook of the Law of Torts § 126 (1971); *Berry v. Rutland R.R.*, 103 Vt. 388, 391 (1931)). Section 1453 provides:

> The causes of action mentioned in sections 1451 and 1452 of this title shall survive. Actions based thereon may be commenced and prosecuted by or against the executor or administrator. When the actions are commenced in the lifetime of the deceased, after death the same may be prosecuted by or against the executor or administrator where by law that mode of prosecution is authorized.

14 V.S.A. § 1453. Section 1451 lists actions for damages to real or personal property and those that survive under the common law. Section 1452 addresses personal injury:

> In an action for the recovery of damages for a bodily hurt or injury, occasioned to the plaintiff by the act or default of the defendant or defendants, if either party dies during the pendency of the action, the action shall survive and may be prosecuted to final judgment by or against the executors or administrators of the deceased party. When there are several defendants in the action, and one or more, but not all, die, it

> shall be prosecuted against the surviving defendant or defendants, and against the estate of the deceased defendant or defendants.

14 V.S.A. § 1452. Defendants contend that the specific references to "plaintiff," "deceased party," and "prosecution" of an action (rather than an action's "commencement") in § 1452 mean that personal injury actions survive only if commenced during the plaintiff's life. Defs.' Mot. to Dismiss at 7–8. This is a crabbed reading of the survival statutes. Section 1452 is permissive rather than limiting. It merely allows actions for personal injury to survive when a party dies during the course of existing personal injury litigation; it does not limit the survival of such actions to cases where the plaintiff filed suit before death. This reading is consistent with § 1453. *See Baldauf v. Vermont State Treasurer*, 2021 VT 29, ¶ 19 (in construing statutes, "[w]e will not interpret a single word or phrase in isolation from the entire statutory scheme. Instead, we read and construe together subsections of a statute that were drafted as part of an overall statutory scheme.") (citations and quotations omitted); *In re Mountain Top Inn & Resort*, 2020 VT 57, ¶ 61, 212 Vt. 554 ("Legislative intent is most truly derived from a consideration of not only the particular statutory language, but from the entire enactment, its reason, purpose and consequences.") (quotation omitted); *see also Whitchurch*, 137 Vt. at 468–69 ("In this case, the allegation is that bodily injury resulting in death was occasioned by the defendants' negligence. That cause of action is within 14 V.S.A. s 1453.").[2]

Defendants also assert that the negligence claim (Count I) and the survival claim (Count III) are redundant, and that one of them should be dismissed. Redundancy does not mandate dismissal. There is no harm in having both claims stated at this stage. The court can limit the issues at trial, if necessary. Moreover, a plaintiff is "entitled to plead alternative grounds for recovery, even if they are inconsistent." *GEICO Ins. Co. v. Bernheim*, 2013 VT 77, ¶ 18, 195 Vt. 73 (citing V.R.C.P. 8(e)(2)).

As to the contract claim (Count II), Defendants assert that it merely recasts the negligence claim and improperly seeks personal injury damages. In the Amended Complaint, Ms. Gile alleges that Defendants were contractually obligated to provide Ms. Potvin with a reasonably safe environment in which she was treated with respect and dignity and that complied with all applicable laws and regulations. Am. Compl. ¶¶ 33, 35. She alleges further that Defendants expressly or implicitly promised that they were authorized and able to provide appropriate care for Ms. Potvin and that they would in fact provide such care. *Id*. ¶ 34. She claims that they breached these contractual promises by

[2] *Whithouse* did not directly address the argument Defendants raise here. Notably, however, the personal injury action in *Whithouse* was commenced by the Administrator of a minor child's estate after the child's death. *Whithouse*, 137 Vt. at 464.

failing to properly monitor Ms. Potvin and failing to provide appropriate interventions or adequate toileting assistance for her, and that these breaches caused Ms. Potvin to suffer personal injury, substantial emotional distress, and pain and suffering, and to incur expenses. *Id*. ¶¶ 28–32, 36–38.

In a breach of contract action, "[t]wo types of damages are recoverable: direct damages that naturally and usually flow from the breach itself, and special or consequential damages, which must pass the tests of causation, certainty and foreseeability." *Smith v. Country Vill. Int'l, Inc.*, 2007 VT 132, ¶ 9, 183 Vt. 535 (quotation omitted). "Consequential losses include such items as injury to person or property resulting from defective performance." Restatement (Second) of Contracts § 347 cmt. c (1981); *see also id*. illus. 4. On these alleged facts, the personal injury damages that Plaintiff seeks could certainly be seen as consequential—if not direct—damages. To the extent Defendants contend that the contract claim merely recasts the negligence claim, a plaintiff is "entitled to plead alternative grounds for recovery, even if they are inconsistent." *GEICO*, 2013 VT 77, ¶ 18 (citing V.R.C.P. 8(e)(2)).[3] There is no reason to dismiss the contract claim at this stage.

Lastly, Defendants argue that the punitive damages claim is supported by nothing more than conclusory allegations and references to negligence. "An award of punitive damages requires a showing of two essential elements—wrongful conduct that is outrageously reprehensible and malice, defined variously as bad motive, ill will, personal spite or hatred, reckless disregard, and the like." *Beaudoin v. Feldman*, 2018 VT 83, ¶ 18, 208 Vt. 169 (quotations omitted). Ms. Gile alleges that Defendants were on notice of the dangers presented to residents prone to falls and the ways to protect such residents, that they failed to institute such safeguards, and that their failures were "wanton and malicious." Am. Compl. ¶ 47. Based on how the facts develop through discovery, the court on summary judgment or a jury at trial might very well conclude that punitive damages are not warranted. Nevertheless, the claim is sufficient to survive a motion to dismiss. *See Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575 ("the threshold a plaintiff must cross in order to meet our notice-pleading standard is exceedingly low") (quotation omitted).

[3] The cases cited by Defendants are inapposite because they involve either the legal malpractice context, *see Lefebvre v. Cawley*, No. 2009-194, 2010 WL 286731, at *2 (Vt. Jan. 15, 2010) (unpub. mem.); *Deptula v. Kane*, No. 2008-139, 2008 WL 4906905, at *2 (Vt. Nov. 2008) (unpub. mem.), or the landlord-tenant context, *see Favreau v. Miller*, 156 Vt. 222, 228–30 (1991) and, in any event, do not hold that personal injury damages are never recoverable as consequential damages in a breach of contract action.

ORDER

The court grants the motion to dismiss as to Defendant Genesis Healthcare, Inc., but denies it in all other respects.

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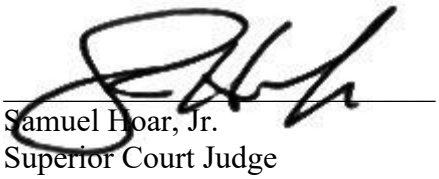

Samuel Hoar, Jr.
Superior Court Judge