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Darlene Smith v. Matthew Farwell, *et al*.

Norfolk Superior Court Action No. 2282CV01197

Amended Decision and Order Regarding Defendants' Motions to Dismiss (Docket Entry Nos. 18.0, 25.0, 28.0, and 32.0):

In February 2021, twenty-three year old Sandra Birchmore ("Ms. Birchmore") tragically took her own life in Canton, Massachusetts. On December 29, 2022, Ms. Birchmore's aunt, Darlene Smith ("Plaintiff" or "Ms. Smith") filed this civil action as the personal representative for Ms. Birchmore's estate. The named defendants are Matthew Farwell ("M. Farwell"), William Farwell ("W. Farwell"), Robert Devine ("Devine"), Joshua Heal ("Heal"), the Town of Stoughton (the "Town"), and the Town of Stoughton Police Department (the "Stoughton P.D.") (collectively, "Defendants").[1] At all relevant times, Defendants M. Farwell, W. Farwell, and Devine were police officers employed by the Stoughton P.D., and defendant Heal was the Town's Animal Control Officer.

In her Second Amended Complaint and Demand for Jury Trial ("Amended Complaint," Docket Entry No. 5.0), Plaintiff alleges that Ms. Birchmore was a troubled youth who "deeply respected authority figures, most notably police officers," and that each of the individual Defendants took advantage of Ms. Birchmore by engaging in sexual relations with her beginning, in some instances, when she was under sixteen years of age. In particular, Plaintiff asserts that Defendants M. Farwell, W. Farwell, and Devine cooperatively "groomed" Ms. Birchmore, from an early age, for their joint sexual exploitation. Defendant Heal is alleged also to have had sex with Ms. Birchmore, while she was an adult, knowing that she was involved in ongoing sexual relationships with Defendants M. Farwell, W. Farwell, and Devine. The Town is a defendant because it hired and employed the individual Defendants, some of whom allegedly engaged in sexual conduct with Ms. Birchmore while on duty.

Plaintiff's Amended Complaint officially contains a total of ten counts. Her specific allegations and claims against the Defendants are that: (1) Defendants M. Farwell, W. Farwell, Devine, and Heal are liable, on account of their "continuous pattern of grooming and abusive behavior over many years," for Ms. Birchmore's wrongful death

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[1] The Stoughton P.D. is not an independent legal entity that is subject to suit, but rather a department of the Town. Therefore, all claims alleged against the Stoughton P.D. actually are directed against the Town, and the Court treats them as such for purposes of this memorandum and order. See *St. George Greek Orthodox Cathedral of Western Mass.* v. *Fire Dept. of Springfield*, 462 Mass. 120, 121 n.1 (2012) (in action against Springfield Fire Department and City of Springfield, court treated entities as "a single defendant (city)"; *Henschel* v. *Worcester Police Dep't*, 445 F.2d 624, 624 (1st Cir. 1971) (explaining that "the Police Department [is not] a suable entity"); *Stratton* v. *City of Boston*, 731 F. Supp. 42, 46 (D. Mass. 1989) ("[T]he [Boston] Police Department is not an independent legal entity. It is a department of the City of Boston.").

(Count I), and for negligently failing to protect Ms. Birchmore from sexual exploitation when she was a minor (Count II); (2) Defendant Devine is separately liable for negligently failing to protect Ms. Birchmore as the head of the Stoughton P.D.'s "Explorer Program" for children, in which Ms. Birchmore participated as a teenager (Count III); (3) Defendant Town is liable for negligently hiring defendants M. Farwell and W. Farwell as police officers (Count IV) and for negligently supervising Defendants M. Farwell, W. Farwell, and Devine as Stoughton P.D. employees (Count V); (4) Defendants M. Farwell, W. Farwell, Devine, and Heal are liable for committing assault and battery on Ms. Birchmore on multiple occasions (Count VI); (5) all Defendants are liable for negligently inflicting significant emotional distress on Ms. Birchmore's family (Count VII); (6) all Defendants are liable for negligently inflicting significant emotional distress on Ms. Birchmore during her lifetime (Count VIII); (7) all Defendants are liable for violating Ms. Birchmore's civil rights "under color of law" in violation of 42 U.S.C. § 1983 (Count IX); and (8) Defendants M. Farwell, W. Farwell, Devine, and Heal are liable for jointly conspiring to "coerce and manipulate [Ms. Birchmore] into engaging in illicit sexual activities, oftentimes during the scope of their employment [or] while on duty...." (Count X).

Plaintiff filed her present Complaint on or about February 2, 2023. Defendants W. Farwell, Devine, Heal, and the Town responded by filing separate motions to dismiss all of Plaintiff's claims against them under Mass. R. Civ. P. 12(b)(1) and/or 12(b)(6). Defendant Heal also filed a motion to sever claims and a motion for separate trial. No motion to dismiss has been filed by Defendant M. Farwell.

The Court conducted an in-person hearing on the parties' motions on November 1, 2023. All of the parties, through their respective attorneys, appeared. Upon consideration of the written submissions received and the oral arguments of counsel, the Court rules as follows for the reasons explained below:

1. Defendant Heal's motion to dismiss Plaintiff's claims against him is **ALLOWED** as to all counts. The Court takes no action on Defendant Heal's other motions at this time, as they are effectively mooted by the Court's decision to allow his motion to dismiss;

2. Defendant Devine's motion to dismiss Plaintiff's claims against him is **ALLOWED** as to Count VII (negligent infliction of emotional distress) and **DENIED** as to all other counts;

3. Defendant W. Farwell's motion to dismiss Plaintiff's claims against him is **ALLOWED** as to Count VII (negligent infliction of emotional distress) and

DENIED as to all other counts. His motion to dismiss Defendant Heal's cross-claims also is **ALLOWED**;

4. Defendant Town's motion to dismiss Plaintiff's claims against it is **ALLOWED** as to Count IV (negligent hiring) and **DENIED** as to all other counts; and

5. For reasons of efficiency and consistency, the Court also will **DISMISS**, *sua sponte*, Count VII (negligent infliction of emotional distress) of Plaintiff's Amended Complaint as against Defendant M. Farwell.

Factual Background[2]

As previously noted, this case arises primarily from the alleged multi-year sexual grooming and exploitation of Ms. Birchmore from an early age by three former members of the Stoughton P.D., which Plaintiff claims precipitated Ms. Birchmore's suicide in February, 2021. Ms. Birchmore, who was born in May, 1997, grew up in the Town of Stoughton. During her childhood, she suffered the loss of her mother and her grandmother. She also suffered significant mental and emotional problems, for which she received psychological treatment.

By all accounts, Ms. Birchmore deeply admired authority figures, particularly police officers.[3] In 2011, she joined the Stoughton P.D.'s "Explorers Program" (the "Explorers Program" or the "Program"), which was "run ... like a junior police academy" for young persons between the ages of thirteen and eighteen. Ms. Birchmore was just fourteen years old when she joined the Program. Defendant Devine served as the head of the Explorers Program beginning in 2003, and it was in that capacity that he got to know Ms. Birchmore and became aware of her difficult home life and circumstances. Defendants M. Farwell and W. Farwell were Stoughton P.D. officers who served as instructors in the Explorers Program. They too first became familiar with Ms. Birchmore through the Program.

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[2] The Court takes the facts set forth in Plaintiff's Amended Complaint as true, drawing all reasonable inferences in Plaintiff's favor as Mass. R. Civ. P. 12 requires. The Court also has considered materials that Plaintiff expressly relied upon in framing the Amended Complaint, or that are incorporated by reference in the Amended Complaint, even if they are not physically attached to that pleading. See *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004); *Harhen v. Brown*, 431 Mass. 838, 839 (2000). These materials include, but are not limited to, the Stoughton P.D.'s Internal Affairs investigation report into Ms. Birchmore's death and the conduct of the individual Defendants, which was finalized on August 29, 2022 (the "IA Report"). An unredacted copy of the IA Report has been impounded in this case pending the entry of an appropriate protective order. The Court, of necessity, cites certain non-explicit and non-confidential information contained in the IA Report in this decision and order.

[3] Defendant Devine has described Ms. Birchmore as having "an obsession with police officers." IA Report at 37.

It is central to Plaintiff's claims in this action that Defendants Devine, M. Farwell, and W. Farwell all eventually entered into sexual relationships with Ms. Birchmore. Defendant M. Farwell appears to have been the first as he reportedly took Ms. Birchmore's virginity in April 2013 when she was fifteen years old.[4] Ms. Birchmore's sexual relationship with M. Farwell continued to at least October 2020. Their relationship allegedly came to an end on the evening of February 1, 2021 (*i.e.*, three days before Ms. Birchmore's body was discovered), after they had a "nasty argument" inside her apartment in Canton. That was the last occasion on which anyone saw Ms. Birchmore alive. At the time of her death, Ms. Birchmore was pregnant with what Plaintiff alleges was Defendant M. Farwell's child.

Defendant Devine had a sexual relationship with Ms. Birchmore as well, although the exact timing and duration of their relationship is less clear. Devine reportedly began engaging in inappropriate, suggestive conduct with Ms. Birchmore while she was still a member of the Explorers Program, but, by 2020, he was having full-fledged sexual encounters with her at various locations, including inside his Stoughton P.D. patrol car.[5] Defendant Devine's relationship with Ms. Birchmore appears to have been ongoing at the time of her death.

The precise timing and duration of Defendant W. Farwell's sexual relationship with Ms. Birchmore also is unclear. W. Farwell met Ms. Birchmore when she was a teenage member of the Explorers Program and their relationship became sexual in nature no later than April 2020, at which time he was regularly sending her explicit texts, photographs, and videos, and meeting her for sex in his patrol car and at other places. On at least one occasion, he asked and encouraged Ms. Birchmore also to have sex with "other people at the department." W. Farwell knew that Ms. Birchmore was engaged in sexual relationships with Defendants M. Farwell and Devine, and she shared some of the details of those sexual relationships with him. He also knew, by late 2020, that Ms. Birchmore believed she was carrying M. Farwell's child. As with Defendant Devine, W. Farwell's relationship with Ms. Birchmore appears to have been ongoing at the time of her death.

The history of Defendant Heal's relationship with Ms. Birchmore is different. Heal was never a member of the Stoughton P.D., and he never participated in the Explorers Program. Rather, Heal served, for a time, as the Town's Animal Control Officer, and he

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[4] The exhibits to the IA Report include copies of numerous sexually-explicit text messages between Defendant M. Farwell and Ms. Birchmore in which he acknowledges, among other things, taking her virginity on or about April 10, 2013. IA Report, Exhibit 2.

[5] The exhibits to the IA Report include copies of various Facebook messages between Defendant Devine (using the alias of "Marty Riggs") and Ms. Birchmore in which Devine asks her for sex acts and discusses rendezvous locations. IA Report, Exhibit 30.

first met Ms. Birchmore when she came to the local animal shelter sometime in 2019 to adopt a cat. Heal and Ms. Birchmore became friends and, over time, she began to confide in him about intimate details of her life, including her sexual relationships with Defendants M. Farwell, W. Farwell, and Devine. Heal eventually had a single, consensual, sexual encounter with Ms. Birchmore, when she was an adult, after closing hours at the animal shelter. That is the full extent of Heal's sexual relationship with Ms. Birchmore. And while Plaintiff alleges that Heal's single, consensual, sexual encounter with Ms. Birchmore when she was an adult contributed to her suicide, she does not allege (and there is no evidence in the record) that Heal ever cooperated or conspired with the other Defendants to sexually exploit Ms. Birchmore, or to "groom" her for later sexual exploitation, while she was a teenager. See Amended Complaint, ¶¶ 20-21 ("Devine, M. Farwell, and W. Farwell's years-long pattern of grooming and abuse, beginning when Ms. Birchmore was a minor, over the duration of the Program and beyond, *together with Heal's later abuse*, further exacerbated the Decedent's underlying mental health issues and difficult home life," and eventually "resulted in her alleged suicide.") (emphasis added).

On February 4, 2021, members of the Canton Police Department (the "Canton P.D.") conducted a well-being check of Ms. Birchmore at her apartment because she had not reported to work for several days. IA Report, Exhibit 1. Upon entering the apartment, Canton P.D. personnel found her, unresponsive, in a bedroom with a strap tied around her neck that was attached to a closet door. *Id.* Responding paramedics pronounced her dead at the scene. *Id.*

Discussion

1. The Applicable Legal Standard.

The standard for resolving a motion to dismiss filed pursuant to Mass. R. Civ. P. 12(b)(6) is well-settled. In order to "state a claim upon which relief can be granted," a party's pleading must include "[f]actual allegations [sufficient] ... to raise a right to relief above the speculative level ... [based] on the assumption that all the allegations in the ... [pleading] are true (even if doubtful in fact) ...." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008) ("*Iannacchino*") (internal quotation marks and citation omitted). The information the Court may consider in evaluating a Rule 12(b)(6) motion generally is limited to "the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000) (internal quotation marks and citation omitted). The Court also must take as true "such

inferences that may be drawn [from the allegations of the claim or counterclaim] ... in the [claimant's] ... favor ..." *Nader* v. *Citron*, 372 Mass. 96, 98 (1977).

Having in mind the foregoing standard, the Court addresses below the legal viability of each of the claims challenged by Defendants.

2. Count I Alleging Wrongful Death Against Defendants W. Farwell, Devine, and Heal.

Count I of Plaintiff's Amended Complaint alleges, in relevant part, that Defendants W. Farwell, Devine, and Heal (along with Defendant M. Farwell) wrongfully caused Ms. Birchmore's death by engaging in a "continuous pattern of grooming and abusive behavior over many years" that "ultimately overcame Ms. Birchmore's will to live and resulted in her alleged suicide." Amended Complaint, ¶ 21. Under G.L. c. 229, §§ 1 to 11, the Massachusetts Wrongful Death Act, an individual is liable for wrongful death where his or her negligence or willful, wanton, or reckless actions cause the death of another person. See G.L. c. 229, § 2. "In addition to wrongfulness, it must be shown that defendant's conduct was a but-for cause of [plaintiff's] injury ... and that defendant's conduct was a substantial legal factor in bringing about the alleged harm to the plaintiff." *Davis* v. *United States*, 670 F.3d 48, 53 (1st Cir. 2012).

In moving to dismiss Plaintiff's wrongful death claim, W. Farwell contends that Plaintiff has failed to put forward factual allegations that plausibly suggest he owed Ms. Birchmore any duty or that establish the requisite causation. Defendant Devine similarly contends that the Amended Complaint fails to allege sufficiently specific facts to support Plaintiff's wrongful death claim.

These arguments are unavailing. Plaintiff has explicitly alleged in her Amended Complaint that W. Farwell and Devine used their official positions as police officers involved with the Explorers Program "to engage in inappropriate behaviors with minors during the Program and with [Ms. Birchmore] while on duty." Amended Complaint, ¶ 14. The IA Report, which is incorporated by reference into the Amended Complaint, further states that W. Farwell and Devine were observed engaging in inappropriate physical contact with Ms. Birchmore when she participated in the Explorers Program as a minor. IA Report at 26. The Court reads these allegations, taken together, to plausibly suggest that both W. Farwell and Devine, through their involvement in the Explorers Program, had a sufficiently "special relationship" with Ms. Birchmore to give rise to a duty of care to protect her from foreseeable harm, including Defendants' own misconduct. See *Brown* v. *Knight*, 362 Mass. 350, 352 (1972) (individuals paid to take control or custody of a child have duty to protect child from foreseeable harm) ("*Brown*"). See also *Nguyen*

v. *MIT*, 479 Mass. 436, 448-449 (2018) ("We have ... recognized that special relationships may arise in certain circumstances imposing affirmative duties of reasonable care...."). Cf. *Alter* v. *City of Newton*, 35 Mass. App. Ct. 142, 145 (1993) ("Because of the relationship between a school and its students, the city had a duty of care to the plaintiff to provide her with reasonably safe school premises.").

As previously noted, Plaintiff's Amended Complaint also alleges, consistent with the IA Report, that W. Farwell and Devine's "continuous pattern of grooming and abusive behavior ... ultimately overcame Ms. Birchmore's will to live and resulted in her alleged suicide." Amended Complaint, ¶ 21. Fairly read, these additional allegations plausibly suggest that W. Farwell and Devine's conduct "was the cause of the decedent's uncontrollable suicidal impulse," which is a recognized basis for "permitting recovery under negligence principles" for a person's suicide. See *Nelson* v. *Mass. Port Authority*, 55 Mass. App. Ct. 433, 435 (2002) ("*Nelson*"). For these reasons, W. Farwell and Devine's motions to dismiss Plaintiff's claim for wrongful death must be denied.

The outcome is different, however, with respect to Defendant Heal. Unlike W. Farwell and Devine, Heal was an Animal Control Officer who, by Plaintiff's own admission at oral argument, had no involvement with the Stoughton P.D.'s Explorers Program and whose only alleged misdeed was having consensual sex with Ms. Birchmore on one occasion when she was an adult. A sexual or romantic relationship between two people is not, by itself, sufficient to create a "special relationship" that imposes a duty of care on the part of one partner to protect the other partner from foreseeable harm. See, e.g., *DeCambra* v. *Carson*, 953 A.2d 1163, 1166 (2008) (No fiduciary duty or special relationship existed between girlfriend and her live-in boyfriend, who was killed by girlfriend's ex-boyfriend at girlfriend's home, so as to give rise to a duty on the part of girlfriend to prevent harm"). Thus, Defendant Heal differs from the other individual Defendants in that he had no legal duty to protect Ms. Birchmore from foreseeable harm, including any harm she might inflict upon herself. Accordingly, Heal's motion to dismiss Plaintiff's wrongful death claim against him must be allowed. See, e.g., *Coughlin* v. *Titus & Bean Graphics, Inc.*, 54 Mass. App. Ct. 633, 641 (2002) ("*Coughlin*") (plaintiff's wrongful death and negligence claims properly dismissed on summary judgment where, "[a]s matter of law, [the defendant] owed the victim no legal duty.").

3. Count II Alleging Negligent Failure to Protect Ms. Birchmore on the Part of Defendants W. Farwell, Devine, and Heal.

Count II of Plaintiff's Amended Complaint alleges, in relevant part, that Defendants W. Farwell, Devine, and Heal (along with Defendant M. Farwell) negligently failed in their duty to protect Ms. Birchmore "by undertaking inappropriate actions against Ms.

Birchmore over the course of several years." Amended Complaint, ¶ 25. The reasoning set forth above with respect to Plaintiff's wrongful death claim against Defendants W. Farwell, Devine, and Heal applies with equal force to this negligence claim. Specifically, the allegations of Plaintiff's Amended Complaint plausibly suggest that Defendants W. Farwell and Devine, acting in their roles as police officers and participants in the Stoughton P.D.'s Explorers Program, had a duty to protect Ms. Birchmore from foreseeable harm and that their repeated breach of that duty over a period of years ultimately caused Ms. Birchmore's alleged suicide. Thus, dismissal of Plaintiff's negligence claim against W. Farwell and Devine is not warranted. See *Brown*, 362 Mass. at 352; *Nelson*, 55 Mass. App. Ct. at 435.

Conversely, because Defendant Heal had no legal duty to protect Ms. Birchmore from harm, Plaintiff's negligence claim against Heal must be dismissed. See *Coughlin*, 54 Mass. App. Ct. at 641.

4. Count III Alleging Negligent Failure to Protect Ms. Birchmore on the Part of Defendant Devine.

Count III of Plaintiff's Amended Complaint alleges, in relevant part, that Defendant Devine, "as head of the [Explorers] Program breached [his] duty to Ms. Birchmore by failing to protect her from the conduct of the Farwells...." Amended Complaint, ¶ 31. Devine contends that Count III must be dismissed because the Amended Complaint fails to set forth sufficient factual allegations to support this claim.

The Court disagrees. As previously mentioned, Plaintiff's Amended Complaint incorporates the IA Report by reference. The IA Report contains firsthand information from at least one person who directly observed Defendants M. Farwell, W. Farwell and Devine engage in inappropriate physical contact (*i.e.*, hugging, kissing, and unspecified "inappropriate contact in a closet") with minor girls in the Explorers Program. IA Report at 26. The IA Report also contains information indicating that Devine was aware of Ms. Birchmore's pregnancy by M. Farwell. *Id.* at 28. These facts, in-and-of-themselves, are sufficient to support Plaintiff's claim that Devine negligently failed in his duty to protect Ms. Birchmore from sexual exploitation by Defendants M. Farwell and W. Farwell. The Court, as a result, will deny Devine's motion to dismiss Count III.

5. Count IV Alleging Negligent Hiring by the Town.

Count IV of Plaintiff's Amended Complaint alleges, in relevant part, that the Town was negligent in hiring Defendants M. Farwell and W. Farwell to be members of the Stoughton P.D. Amended Complaint, ¶ 39. This claim is barred under Section 10(b) of

the Massachusetts Torts Claims Act, G.L. c. 258, § 1 *et seq.* ("MTCA"), which precludes the imposition of civil liability on governmental entities and employees based on the exercise or performance of a "discretionary function or duty." G.L. c. 258, § 10(b). Massachusetts law is clear that, "[i]n the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion." *City of Cambridge* v. *Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304-305 (1997). Thus, the Town's decision to hire M. Farwell and W. Farwell was the exercise of a discretionary function for which the Town cannot be held liable in tort. See *id.* The Court will allow the Town's motion to dismiss Count IV as a result.

6. Count V Alleging Negligent Supervision by the Town.

Count V of Plaintiff's Amended Complaint alleges, in relevant part, that: (a) through the Explorers Program, the Town "provided M. Farwell, W. Farwell, and Devine access to the highly vulnerable population of minors including Ms. Birchmore"; (b) the Town "had a duty to protect those children from foreseeable harms which could be inflicted by its employees"; and (c) the Town "breached this duty by failing to protect [Ms. Birchmore] from the harms suffered over the duration of the [Explorers] Program and thereafter." Amended Complaint, ¶¶ 44-46. The Town contends that this claim is barred by Section 10(j) of the MTCA, which precludes the imposition of civil liability on governmental entities and employees based on,

> an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer.

G.L. c. 258, § 10(j). According to the Town, its alleged negligent supervision of Defendants M. Farwell, W. Farwell, and Devine in their roles as police officers was not the "original cause" of Ms. Birchmore's alleged suicide and no inference of causation can be drawn from Plaintiff's Amended Complaint.

The Court disagrees. Section 10(j) of the MTCA does not apply in the circumstances of this case because Plaintiff has plausibly alleged that Ms. Birchmore's death was "originally caused" not by the "tortious conduct of a third person," but by the Town's *own employees*. It is the alleged affirmative acts of M. Farwell, W. Farwell, and Devine in grooming and sexually abusing Ms. Birchmore over a period of years that Plaintiff claims "ultimately overcame Ms. Birchmore's will to live and resulted in her alleged suicide." Amended Complaint, ¶ 21. Such "affirmative action" by governmental

personnel does not fall within the exception contained in Section 10(j). See *Serrell* v. *Franklin County*, 47 Mass. App. Ct. 400, 405 (1999) (reversing entry of summary judgment for defendant under MTCA on the basis that plaintiff sought "to hold the county liable not only for what [its] correctional officers failed to do, but what they did do....").

The Court also is persuaded that the allegations of Plaintiff's Amended Complaint, combined with the information contained in the IA Report that the Complaint incorporates by reference, provide facts sufficient to permit a jury to reasonably infer that the Town actually was negligent in its supervision of M. Farwell, W. Farwell, and Devine. In addition to evidence that these three Defendants all openly engaged in inappropriate physical contact with young, female participants in the Explorers Program (IA Report at 26), Plaintiff also has come forward with evidence that other Stoughton P.D. personnel were aware, prior to Ms. Birchmore's death, that Ms. Birchmore was involved in an "on again – off again" sexual relationship with M. Farwell (*id.* at 41). Viewing these facts, and others, in the light most favorable to Plaintiff, the Court concludes that Plaintiff has, at the very least, raised her negligent supervision claim "above the speculative level...." See *Iannacchino*, 451 Mass. at 636. Accordingly, the Court will deny the Town's motion to dismiss Count V.

7. Count VI Alleging Assault and Battery of Ms. Birchmore by Defendants W. Farwell, Devine, and Heal.

Count VI of Plaintiff's Amended Complaint alleges, in relevant part, that Defendants W. Farwell, Devine, and Heal (along with Defendant M. Farwell), by their previously-referenced conduct, committed "sexual assault and battery" on Ms. Birchmore.[6] A claim for civil assault lies where the defendant commits "an act done with the intention of causing 'a harmful or offensive contact with the person of the other ..., or an imminent apprehension of such a contact [if] ... the other is thereby put in such imminent apprehension.'" *Guzman* v. *Pring-Wilson*, 81 Mass. App. Ct. 430, 434 (2012), quoting Restatement (Second) of Torts § 21(1) (1965). A claim for civil battery exists where the defendant engages in an intentional touching that was offensive to the victim, meaning "without consent." *Gallagher* v. *South Shore Hospital, Inc.*, 101 Mass. App. Ct. 807, 834 (2022), quoting *Commonwealth* v. *Cohen*, 55 Mass. App. Ct. 358, 359 (2002).

W. Farwell argues that Count VI must be dismissed as against him because the Amended Complaint does not allege anything more than a sexual relationship between consenting adults and because the Complaint contains no specific allegations regarding

[6] Assault and battery is not a single civil tort. The Court, therefore, interprets Plaintiff's claim for "assault and battery" as asserting separate claims for civil assault and civil battery.

Ms. Birchmore's state of mind. Devine likewise argues that Count VI must be dismissed as against him because the Amended Complaint does not allege facts sufficient to establish that he ever committed an assault and/or battery on Ms. Birchmore.

Neither Defendant's arguments regarding Count VI are persuasive. The allegations of Plaintiff's Amended Complaint, combined with the contents of the incorporated IA Report, provide substantial and oftentimes graphic factual support for the proposition that W. Farwell and Devine (along with Defendant M. Farwell) engaged in a continuous pattern of grooming and abusive behavior directed towards Ms. Birchmore, beginning when she was a minor and eventually becoming overtly sexual in nature. Whether Ms. Birchmore, who purportedly suffered from "significant mental and emotional problems" throughout her life (Amended Complaint, ¶ 10), had the capacity to consent to any of Defendants' conduct presents an issue of fact that cannot be resolved at the motion to dismiss stage. See *Commonwealth* v. *Burke*, 390 Mass. 480, 482 (1983) ("The capacity to consent to sexual touching ... is an issue of fact"). See also *Fraelick* v. *PerkettPR, Inc.*, 83 Mass. App. Ct. 698, 708 (2013) (tort claim that "requires an assessment of [defendant's] state of mind" not properly resolved on a motion to dismiss, but rather "should be evaluated on the basis of a factual record"). For these reasons, the Court will deny W. Farwell and Devine's motions to dismiss Count VI.

Once again, the outcome is different with respect to Plaintiff's assault and battery claim against Defendant Heal. As previously noted, Heal's only alleged misdeed was having consensual sex with Ms. Birchmore on a single occasion when she was an adult. Massachusetts law holds that consensual contact between adults does not constitute either an assault or a battery. See *Commonwealth* v. *Askins*, 18 Mass. App. Ct. 927, 929 n.1 (1984) ("The words 'assault and battery,' have a well understood common law signification" that precludes "consensual acts."). Accordingly, Heal's motion to dismiss Count VI as it pertains to him must be allowed.

8. Count VII Alleging Negligent Infliction of Emotional Distress on Ms. Birchmore's Family by All Defendants.

Count VII of Plaintiff's Amended Complaint seeks compensation for the emotional distress that all of the Defendants allegedly inflicted on the family of Ms. Birchmore through their purported negligence. Amended Complaint, ¶¶ 54-56. This claim cannot succeed as a matter of law. "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 negligent infliction of emotional distress] for which relief may be granted." *Migliori* v. *Airborne Freight Corp.*, 426 Mass. 629, 632 (1998).

In this case, it is undisputed that Ms. Birchmore died alone by an apparent suicide in her apartment in Canton on or after February 1, 2021, and that her death subsequently was discovered by members of the Canton P.D., not by any members of her immediate family. IA Report, Exhibit 1. Because the undisputed facts do not support a claim for negligent infliction of emotional distress on Ms. Birchmore's family, Count VII will be dismissed against all Defendants.

9. Count VIII Alleging Negligent Infliction of Emotional Distress on Ms. Birchmore by All Defendants.

Count VIII of Plaintiff's Amended Complaint seeks compensation for the emotional distress that all of the Defendants allegedly inflicted on Ms. Birchmore herself through their purported negligence. Amended Complaint, ¶¶ 58-62. To recover for negligent infliction of emotional distress, a plaintiff must demonstrate "(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, 557 (1982) ("*Payton*"). Each of the Defendants has moved to dismiss this claim. The Court addresses each Defendant's motion in turn.

First, Defendant W. Farwell contends that Plaintiff's negligent infliction of emotional distress claim must be dismissed as it pertains to him because the Amended Complaint purportedly does not allege that Ms. Birchmore suffered any "physical harm manifested by objective symptomology." This argument is unpersuasive. The purpose of the "physical harm" requirement is to ensure that plaintiffs can "corroborate their mental distress claims with enough objective evidence of harm to convince a judge that their claims present a sufficient likelihood of genuineness to go to trial." *Sullivan* v. *Boston Gas Co.*, 414 Mass. 129, 137-138 (1993). The Court believes that, in this case, Ms. Birchmore's apparent suicide provides sufficient "objective evidence of harm" to demonstrate a "sufficient likelihood of genuineness" to permit Plaintiff's claim for negligent infliction of emotional distress on Ms. Birchmore to go to trial. *Id.* Accordingly, W. Farwell's motion to dismiss Count VIII will be denied.

Second, Defendant Devine contends that Plaintiff's negligent infliction of emotional distress claim must be dismissed as it pertains to him because the Amended Complaint purportedly "is devoid of any specific facts" which demonstrate that he actually engaged in any grooming or abuse of Ms. Birchmore. This argument conveniently ignores the contents of the IA Report, which is incorporated in the Amended Complaint by reference. As the Court already has explained, the IA Report provides substantial and

frequently detailed factual support for the proposition that Devine (along with Defendants M. Farwell and W. Farwell) engaged in a continuous pattern of grooming and sexually abusive behavior directed towards Ms. Birchmore, beginning when she was a minor. The evidence provided, viewed in the light most favorable to Plaintiff, is more than sufficient to sustain her claim against Devine for negligently inflicting emotional distress on Ms. Birchmore. See *Payton*, 386 Mass. at 557. Accordingly, Devine's motion to dismiss Count VIII also will be denied.

Third, the Town contends that it is immune from Plaintiff's negligent infliction of emotional distress claim under Section 10(j) of the MTCA because its alleged negligence was not the "original cause" of Ms. Birchmore's suicide. The Court previously considered and rejected this argument in deciding the Town's motion to dismiss Plaintiff's negligent supervision claim. See discussion re Count V, *supra*. The same reasoning and the same result apply to Plaintiff's claim against the Town for negligent infliction of emotional distress on Ms. Birchmore. Accordingly, the Town's motion to dismiss Count VIII also will be denied.

Lastly, Defendant Heal's motion to dismiss Count VIII as it pertains to him will be allowed because the Court already has determined that Heal had no legal duty to protect Ms. Birchmore from foreseeable harm and, therefore, cannot be deemed to have acted negligently as a matter of law. See *Coughlin*, 54 Mass. App. Ct. at 641.

10. Count IX Alleging Civil Rights Violations by All Defendants Pursuant to 42 U.S.C. § 1983.

Count IX of Plaintiff's Amended Complaint alleges, pursuant to 42 U.S.C. § 1983 ("Section 1983"), that all Defendants violated Ms. Birchmore's civil rights by grooming and/or sexually abusing Ms. Birchmore over a period of years, or by permitting such conduct to occur, "under the color of law." Amended Complaint, ¶¶ 64-73. Each of the Defendants has moved to dismiss this claim. As before, the Court addresses each Defendant's motion in turn.

First, Defendant W. Farwell contends that Plaintiff's Section 1983 claim must be dismissed as it pertains to him because he did not act "under color of law" and no constitutional violations occurred. The Court disagrees. A defendant acts "under color of law" if he "exercise[s] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West* v. *Atkins*, 487 U.S. 42, 49 (1988) ("*West*"). Here, the Amended Complaint alleges that W. Farwell began his inappropriate conduct towards Ms. Birchmore while he was an "officer[] and educator[]," and she was youthful participant, in the Stoughton P.D. Explorers Program.

Amended Complaint, ¶¶ 11, 14, 20. If proven, these allegations are sufficient to establish that W. Farwell acted "under color of law." *West*, 487 U.S. at 49. Furthermore, sexual assault is a sufficient violation of an individual's federal and constitutional rights to support a claim under Section 1983. See *Bennett* v. *Pippin*, 74 F.3d 578, 586 (5th Cir. 1996) ("*Bennett*") (Sheriff's use of his authority over murder investigation to coerce sex with female suspect violated Section 1983). For these reasons, W. Farwell's motion to dismiss Count IX will be denied.

Second, Defendant Devine contends, much as he has done previously, that Plaintiff's Section 1983 claim must be dismissed as it pertains to him because her Amended Complaint purportedly lacks sufficiently factual allegations to support the claim. The Court again rejects this all-purpose argument for the reasons previously stated. See, e.g., discussion re Count VIII, *supra*. Accordingly, Devine's motion to dismiss Count IX will be denied.

Third, the Town contends that that Plaintiff's Section 1983 claim must be dismissed as it pertains to the Town because the three-year statute of limitations purportedly has expired, Plaintiff purportedly has not alleged any constitutional violation, and there purportedly is no evidence that the Town was "deliberately indifferent" to Ms. Birchmore's rights. None of these arguments, however, provide grounds to dismiss Plaintiff's Section 1983 claim at this time.

For example, the Court cannot presently determine whether Plaintiff's Section 1983 claim is time-barred because the claim potentially is subject to the federal "discovery rule." Under the federal discovery rule,

> accrual [of a tort claim] is delayed until the plaintiff knows, or should know, of [the acts comprising the violation]. Specifically, a plaintiff must, or should, be aware of both the fact of his or her injury and the injury's likely causal connection with the putative defendant.

Ouellette v. *Beaupre*, 977 F.3d 127, 136 (1st Cir. 2020). Whether Ms. Birchmore knew or should have known about her injuries and their causal connection to Defendants' allegedly wrongful conduct is a factual question that is not appropriate for resolution on a motion to dismiss. See *Patsos* v. *First Albany Corp.*, 433 Mass. 323, 329 (2001) ("[F]actual disputes concerning when a plaintiff knew or should have known of his cause[s] of action are to be resolved by the jury") (citation omitted).

Similarly, it is not possible to determine at this early stage of the case whether the Town was "deliberately indifferent" to Ms. Birchmore's rights. "Deliberate indifference" can manifest itself in an "unofficial custom as evidenced by widespread action or inaction," *McElroy* v. *City of Lowell*, 741 F. Supp. 2d 349, 353 (D. Mass. 2010), and, once again, there is evidence in the IA Report that other Stoughton P.D. personnel were aware, well prior to Ms. Birchmore's death, that she was involved in an "on again – off again" sexual relationship with at least M. Farwell. IA Report at 41. Whether the Town's inaction in the face of this information (or any other relevant information it may have possessed) constitutes "deliberate indifference" is another question that the Court cannot resolve on a motion to dismiss. See, e.g., *Watkins* v. *Ghosh*, 2011 WL 5981006, at *5 (N.D. Ill. Nov. 28, 2011) ("Generally, a finding of deliberate indifference is a fact-intensive assessment that cannot be resolved on a motion to dismiss."). For these reasons, the Town's motion to dismiss Count IX will be denied.

Lastly, Defendant Heal's motion to dismiss Count IX as it pertains to him will be allowed because his single, consensual, sexual encounter with Ms. Birchmore when she was an adult cannot be said to have occurred "under color of law" and, therefore, cannot serve as the basis for imposing liability on Heal under Section 1983. See *West*, 487 U.S. at 49.

11. Count X Alleging Civil Conspiracy on the Part of Defendants W. Farwell, Devine, and Heal.

Count X of Plaintiff's Amended Complaint alleges, in relevant part, that Defendants W. Farwell, Devine, and Heal (along with Defendant M. Farwell) unlawfully conspired and "worked in concert with each other ... to coerce and manipulate [Ms. Birchmore] into engaging in illicit sexual activities...." Amended Complaint, ¶ 76. It further alleges that "[t]he actions of the Defendants were particularly coercive due to their position as officers...." *Id.*, ¶ 77.

The Supreme Judicial Court recently has stated that,

> Massachusetts law recognizes two distinct theories of liability under the umbrella term of "civil conspiracy": "concerted action" conspiracy ... and "true conspiracy" based on coconspirators exerting some peculiar power of coercion....

Greene v. *Philip Morris USA Inc.*, 491 Mass. 866, 871 (2023) ("*Greene*") (partial quotation marks and citations omitted). The former theory "applies to a common plan to

commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result." *Id.* The latter theory requires proof that,

> [the] alleged conspirators agreed to accomplish an unlawful purpose or a lawful purpose by unlawful means, and then caused harm to the plaintiff via some peculiar power of coercion that they would not have had, had they been acting independently....

Id. at 875 n.10.

W. Farwell argues that Count X must be dismissed as against him because the Amended Complaint does not allege that there was a common plan among the Defendants to commit a tort or to coerce Ms. Birchmore. Devine similarly contends that Plaintiff's allegations are insufficient to support a claim for civil conspiracy. These arguments, however, ignore the plain language of the Amended Complaint, which, as previously noted, clearly states that W. Farwell, M. Farwell, and Devine "worked in concert with each other ... to coerce and manipulate [Ms. Birchmore] into engaging in illicit sexual activities," and that these Defendants held particular sway over Ms. Birchmore "due to their position as officers." Amended Complaint, ¶¶ 76-77. Defendants' arguments also ignore evidence in the IA Report that M. Farwell actively solicited Ms. Birchmore to have sex with "some people at the department," from which a jury reasonably could infer that M. Farwell, W. Farwell, and Devine coordinated their alleged sexual encounters with Ms. Birchmore. IA Report at 25. Taken together, the allegations and information cited, viewed in the light most favorable to Plaintiff, are sufficient to sustain her claim against W. Farwell and Devine for civil conspiracy. See *Greene*, 491 Mass. at 871, 875 n.10. Accordingly, W. Farwell and Devine's motions to dismiss Count X will be denied.

Defendant Heal, on the other hand, cannot be held liable for civil conspiracy as a matter of law because, by Plaintiff's own admission at oral argument, Heal did not work in concert with, or by agreement with any other Defendant in arranging his single, consensual, sexual encounter with Ms. Birchmore when she was an adult. Accordingly, Heal's motion to dismiss Count X as it pertains to him must be allowed.

12. Other Pending Motions.

The Court will allow W. Farwell's motion to dismiss Heal's cross-claims against him for contribution and indemnification. Heal only could obtain contribution from W. Farwell if he was found to be "jointly liable in tort" with W. Farwell for Ms. Birchmore's injuries (see G.L. c. 231B, § 1(a)), which no longer can occur because the Court is dismissing all of Plaintiff's claims against Heal. Similarly, Heal only could obtain indemnification from W. Farwell if he were found to be derivatively or vicariously liable for W. Farwell's allegedly wrongful acts. See, e.g., *Ferreira* v. *Chrysler Group, LLC*, 468 Mass. 336, 344 (2014) ("[T]he right to indemnity is limited to those cases where the person seeking indemnification is blameless, but is held derivatively or vicariously liable for the wrongful act of another."). But Plaintiff's claims against Heal are based on Heal's own physical interactions with Ms. Birchmore, not W. Farwell's. Thus, Heal has no right to be indemnified by W. Farwell as a matter of law. See *Decker* v. *Black & Decker Mfg. Co.*, 389 Mass. 35, 41 (1983) (defendant's indemnification claim against co-defendant properly dismissed where defendant's liability to injured plaintiff, if any, necessarily would be "as a result of its [own] negligence or breach of warranty").

The Court takes no action on Defendant Heal's motion to sever claims and his motion for separate trial as this decision and order, which dismisses all of Plaintiff's claims against Heal, renders those motions moot.

Order

For the foregoing reasons, Defendant Joshua Heal's motion to dismiss is **ALLOWED** as to all counts of Plaintiff's Amended Complaint.

Defendant William Farwell's motion to dismiss is **ALLOWED** as to Count VII of Plaintiff's Amended Complaint and as to Heal's cross-claims for indemnification and contribution. W. Farwell's motion to dismiss is **DENIED** as to all remaining counts of the Amended Complaint.

Defendant Robert Devine's motion to dismiss is **ALLOWED** as to Count VII of Plaintiff's Amended Complaint. His motion to dismiss is **DENIED** as to all remaining counts of the Amended Complaint.

Defendant Town of Stoughton's motion to dismiss is **ALLOWED** as to Counts IV and VII of Plaintiff's Amended Complaint. The Town's motion to dismiss is **DENIED** as to all remaining counts of the Amended Complaint.

As allowed *sua sponte* by the Court, Count VII also will be **DISMISSED** as to Defendant M. Farwell.

SO ORDERED this 16th day of February, 2024.

Brian A. Davis,
Associate Justice of the Superior Court