COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.: 2282 CV 1197

DARLENE SMITH, as Personal Representative of the Estate of SANDRA BIRCHMORE,
Plaintiff

v.

MATTHEW FARWELL, WILLIAM FARWELL, ROBERT DEVINE and JOSHUA HEAL, Individually And THE TOWN OF STOUGHTON and THE STOUGHTON POLICE DEPARTMENT,
Defendants

DEFENDANT, MATTHEW FARWELL'S ANSWER AND CLAIM OF JURY TRIAL TO PLAINTIFF'S SECOND AMENDED COMPLAINT

NATURE OF ACTION

The Defendant denies any allegations against him contained in this section of the Plaintiff's Second Amended Complaint.

JURISDICTION AND VENUE

A. The Defendant admits the allegations contained in Paragraph A of the Plaintiff's Second Amended Complaint.

B. The Defendant admits the allegations contained in Paragraph B of the Plaintiff's Second Amended Complaint.

PARTIES

1. The Defendant admits the allegations contained in Paragraph 1 of the Plaintiff's Second Amended Complaint.

2. The Defendant admits the allegations contained in Paragraph 2 of the Plaintiff's Second Amended Complaint.

3. The Defendant is without sufficient information to either confirm or deny the allegations contained in Paragraph 3 of the Plaintiff's Second Amended Complaint.

4. The Defendant is without sufficient information to either confirm or deny the allegations contained in Paragraph 4 of the Plaintiff's Second Amended Complaint.

5. The Defendant is without sufficient information to either confirm or deny the allegations contained in Paragraph 5 of the Plaintiff's Second Amended Complaint.

6. The Defendant admits the allegations contained in Paragraph 6 of the Plaintiff's Second Amended Complaint.

7. The Defendant admits the allegations contained in Paragraph 7 of the Plaintiff's Second Amended Complaint.

FACTS

8. The Defendant denies the allegations contained in Paragraph 8 of the Plaintiff's Second Amended Complaint.

9. The Defendant denies the allegations contained in Paragraph 9 of the Plaintiff's Second Amended Complaint.

10. The Defendant denies the allegations contained in Paragraph 10 of the Plaintiff's Second Amended Complaint.

11. The Defendant admits the allegations contained in Paragraph 11 of the Plaintiff's Second Amended Complaint.

12. The Defendant denies the allegations contained in Paragraph 12 of the Plaintiff's Second Amended Complaint.

13. The Defendant denies the allegations contained in Paragraph 13 of the Plaintiff's Second Amended Complaint.

14. The Defendant denies the allegations contained in Paragraph 14 of the Plaintiff's Second Amended Complaint.

15. The Defendant is without sufficient information to either confirm or deny the allegations contained in Paragraph 15 of the Plaintiff's Second Amended Complaint.

16. The Defendant denies the allegations contained in Paragraph 16 of the Plaintiff's Second Amended Complaint.

COUNT I
Wrongful Death v. Defendants, M. Farwell, W. Farwell, Devine and Heal

17. The Defendant repeats and realleges his answers to Paragraphs 1 through 16 as if fully stated herein.

18. The Defendant admits the allegations contained in Paragraph 18 of the Plaintiff's Second Amended Complaint.

19. The Defendant denies the allegations contained in Paragraph 19 of the Plaintiff's Second Amended Complaint.

20. The Defendant denies the allegations contained in Paragraph 20 of the Plaintiff's Second Amended Complaint.

21. The Defendant denies the allegations contained in Paragraph 21 of the Plaintiff's Second Amended Complaint.

COUNT II
Negligence vs. Defendants, M. Farwell, W. Farwell, Devine and Heal

22. The Defendant repeats and realleges his answers to Paragraphs 1 through 21 as if fully stated herein.

23. The Defendant denies the allegations contained in Paragraph 23 of the Plaintiff's Second Amended Complaint.

24. The Defendant denies the allegations contained in Paragraph 24 of the Plaintiff's Second Amended Complaint.

25. The Defendant denies the allegations contained in Paragraph 25 of the Plaintiff's Second Amended Complaint.

26. The Defendant denies the allegations contained in Paragraph 26 of the Plaintiff's Second Amended Complaint.

27. The Defendant denies the allegations contained in Paragraph 27 of the Plaintiff's Second Amended Complaint.

COUNT III
Negligence v. Defendant, Devine

The Defendant, Matthew Farwell, files no answer to Count Three, Paragraphs 28 through 32 as said Count and Paragraphs do not assert any allegations against him. To the extent, if any, the allegations are meant to apply to the defendant, Matthew Farwell, the defendant denies.

COUNT IV
Negligent Hiring vs. Stoughton PD

The Defendant, Matthew Farwell, files no answer to Count Four, Paragraphs 33 through 40 as said Count and Paragraphs do not assert any allegations against him. To the extent, if any, the allegations are meant to apply to the defendant, Matthew Farwell, the defendant denies.

COUNT V
Negligent Supervision vs. Stoughton PD

The Defendant, Matthew Farwell, files no answer to Count Five, Paragraphs 41 through 46 as said Count and Paragraphs do not assert any allegations against him. To the extent, if any, the allegations are meant to apply to the defendant, Matthew Farwell, the defendant denies.

COUNT VI
Assault and Battery vs. Defendants, M. Farwell, W. Farwell, Devine and Heal

47. The Defendant repeats and realleges his answers to Paragraphs 1 through 46 as if fully stated herein.

48. The Defendant denies the allegations contained in Paragraph 48 of the Plaintiff's Second Amended Complaint.

49. The Defendant is without sufficient information to either confirm or deny the allegations contained in Paragraph 49 of the Plaintiff's Second Amended Complaint.

50. The Defendant denies the allegations contained in Paragraph 50 of the Plaintiff's Second Amended Complaint.

51. The Defendant is without sufficient information to either confirm or deny the allegations contained in Paragraph 51 of the Plaintiff's Second Amended Complaint.

52. The Defendant denies the allegations contained in Paragraph 52 of the Plaintiff's Second Amended Complaint.

COUNT VII
Negligent Infliction of Emotional Distress v. Defendants, M. Farwell, W. Farwell, Devine, Heal and Stoughton and PD

53. The Defendant repeats and realleges his answers to Paragraphs 1 through 52 as if fully stated herein.

54. The Defendant denies the allegations contained in Paragraph 54 of the Plaintiff's Second Amended Complaint.

55. The Defendant denies the allegations contained in Paragraph 55 of the Plaintiff's Second Amended Complaint.

56. The Defendant denies the allegations contained in Paragraph 56 of the Plaintiff's Second Amended Complaint.

COUNT VIII
Negligent Infliction of Emotional Distress, Sandra Birchmore v. Defendants M. Farwell, W. Farwell, Devine, Heal, Stoughton and PD

57. The Defendant repeats and realleges his answers to Paragraphs 1 through 56 as if fully stated herein.

58. The Defendant denies the allegations contained in Paragraph 58 of the Plaintiff's Second Amended Complaint.

59. The Defendant denies the allegations contained in Paragraph 59 of the Plaintiff's Second Amended Complaint.

60. The Defendant denies the allegations contained in Paragraph 60 of the Plaintiff's Second Amended Complaint.

61. The Defendant denies the allegations contained in Paragraph 61 of the Plaintiff's Second Amended Complaint.

62. The Defendant denies the allegations contained in Paragraph 62 of the Plaintiff's Second Amended Complaint.

COUNT IX
42 USC § 1983 Violation v. M. Farwell, W. Farwell, Devine, Heal, Stoughton, PD

63. The Defendant repeats and realleges his answers to Paragraphs 1 through 62 of the Plaintiff's Second Amended Complaint.

64. The Defendant admits the allegations contained in Paragraph 64 of the Plaintiff's Second Amended Complaint.

65. The Defendant admits the allegations contained in Paragraph 65 of the Plaintiff's Second Amended Complaint.

66. The Defendant denies the allegations contained in Paragraph 66 of the Plaintiff's Second Amended Complaint.

67. The Defendant denies the allegations contained in Paragraph 67 of the Plaintiff's Second Amended Complaint.

68. The Defendant denies the allegations contained in Paragraph 68 of the Plaintiff's Second Amended Complaint.

69. The Defendant denies the allegations contained in Paragraph 69 of the Plaintiff's Second Amended Complaint.

70. The Defendant denies the allegations contained in Paragraph 70 of the Plaintiff's Second Amended Complaint.

71. The Defendant is without sufficient information to either confirm or deny the allegations contained in Paragraph 71 of the Plaintiff's Second Amended Complaint.

72. The Defendant denies the allegations contained in Paragraph 72 of the Plaintiff's Second Amended Complaint.

73. The Defendant denies the allegations contained in Paragraph 73 of the Plaintiff's Second Amended Complaint.

COUNT X
Civil Conspiracy v. M. Farwell, W. Farwell, Devine, Heal

74. The Defendant repeats and realleges his answers to Paragraphs 1 through 73 as if fully stated herein.

75. The Defendant admits the allegations contained in Paragraph 75 of the Plaintiff's Second Amended Complaint.

76. The Defendant denies the allegations contained in Paragraph 76 of the Plaintiff's Second Amended Complaint.

77. The Defendant denies the allegations contained in Paragraph 77 of the Plaintiff's Second Amended Complaint.

78. The Defendant denies the allegations contained in Paragraph 78 of the Plaintiff's Second Amended Complaint.

79. The Defendant denies the allegations contained in Paragraph 79 of the Plaintiff's Second Amended Complaint.

80. The Defendant denies the allegations contained in Paragraph 80 of the Plaintiff's Second Amended Complaint.

81. The Defendant denies the allegations contained in Paragraph 81 of the Plaintiff's Second Amended Complaint.

FIRST DEFENSE

And further answering, the defendant says that the plaintiff's Second Amended Complaint fails to set forth facts constituting a cause of action, and therefore the plaintiff cannot recover.

SECOND DEFENSE

And further answering, the defendant says that the plaintiff's decedent's own negligence caused or contributed to the death alleged, and therefore the plaintiff cannot recover.

THIRD DEFENSE

And further answering, the defendant says that the plaintiff's decedent was more than 50 percent negligent in causing or contributing to the death alleged, and therefore the plaintiff either cannot recover or any verdict or finding in the plaintiff's favor must be reduced by the percentage of negligence attributed to the said plaintiff's decedent.

FOURTH DEFENSE

And further answering, the defendant says that the plaintiff's decedent's alleged injuries and subsequent death were caused by persons other than the defendant, his agents, servants or employees, and the plaintiff's decedent's alleged injuries and subsequent death were caused by persons for whose conduct the defendant is not responsible, and therefore the plaintiff cannot recover.

FIFTH DEFENSE

And further answering, the defendant says that the negligence of the defendant did not cause the death of the decedent and therefore, the plaintiff cannot recover.

SIXTH DEFENSE

And further answering, the defendant says that the plaintiff is not the proper person or entity entitled to recover damages under the Massachusetts Wrongful Death Statute and therefore the plaintiff's complaint should be dismissed.

SEVENTH DEFENSE

And further answering, the defendant says that he was not acting in concert with any of the other defendants in the planning or carrying out of the alleged assault upon the plaintiff's decedent and therefore cannot be held vicariously liable for their conduct.

EIGHTH DEFENSE

And further answering, the defendant says that the plaintiff's decedent's alleged injuries, if any, were the result of the criminal intervening acts of third parties for whose conduct the defendant was not legally responsible and therefore the plaintiff cannot recover.

NINTH DEFENSE

And further answering, the defendant says that he owed no duty of care to the plaintiff's decedent and therefore the plaintiff cannot recover.

TENTH DEFENSE

And further answering, the defendant says that the plaintiff cannot provide objective evidence of physical harm to the plaintiff's decedent and therefore, the plaintiff's claim for negligent infliction of emotional distress must be dismissed.

WHEREFORE, the defendant demands judgment against the plaintiff, and further demands that said action be dismissed.

AND, FURTHER, the defendant claims a trial by jury on all the issues so triable.

The Defendant,
Matthew Farwell,
By his attorney:

/s/ Brian F. Welsh

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March 9, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon the parties to this action by electronically mailing a copy thereof to the following counsel of record:

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT DEPARTMENT
C.A. No.: 2282CV1197

DARLENE SMITH as the PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA BIRCHMORE
Plaintiff

v.

MATTHEW FARWELL, WILLIAM FARWELL, ROBERT DEVINE, And JOSHUA HEAL Individually, THE TOWN OF STOUGHTON, and THE STOUGTON POLICE DEPARTMENT,
Defendants

DEFENDANT, WILLIAM FARWELL'S MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS

NOW COMES Defendant, William Farwell ("W. Farwell"), by and through his attorneys at Boyle | Shaughnessy Law, P.C., and hereby submits the following Memorandum of Law in support of his Motion to Dismiss.

I. BACKGROUND

A. Factual Allegations

Darlene Smith as the Personal Representative of the Estate of Sandra Birchmore ("Plaintiff") alleges that Sandra Birchmore's (hereinafter "Decedent") body was discovered at her apartment on February 4, 2021, by the Canton Police Department, with paramedics pronouncing her dead on the scene. (Second Amended Complaint at ¶8.) Plaintiff claims that Decedent's death was the "culmination of a near decade long scheme of grooming and repeated assaults from a young age by certain police officers employed by the [Stoughton Police

Department.] (Second Amended Complaint at ¶ 9.) Allegedly, despite Decedent's difficult home life, the loss of her grandmother and mother, and significant mental and emotional problems, she deeply respected police officers; and, as a result of this admiration, she joined the Stoughton Police Explorer's Program (hereinafter "Program") in her early teenage years. (Second Amended Complaint at ¶10.) Plaintiff claims that through the Program, Decedent met Defendants Robert Devine, Matthew Farwell and W. Farwell. (Second Amended Complaint at ¶ 10.) Plaintiff claims that defendant Devine was the head of the Program, and Matthew and W. Farwell both worked within the Program in their individual capacities as officers and educators. (Second Amended Complaint at ¶11.)

Matthew Farwell was seen on video surveillance at the Decedent's apartment approximately four days prior to the discovery of Decedent's body and, upon information and belief, was the last individual to see Decedent alive. (Second Amended Complaint at ¶12.) Plaintiff references the Stoughton Police Internal Investigation Report (hereinafter "Report"), in stating that the report revealed Matthew Farwell had known the Decedent since she was 13, due to her involvement in the Program, and began a sexual relationship with her when she was 15. (Second Amended Complaint at ¶12.) The Stoughton Police Department Internal Investigation (hereinafter "Investigation") further revealed that Matthew Farwell had a continuous sexual relationship Decedent while she was still a minor and that Matthew Farwell had used some kind of location sharing application to track and determine Decedent's location. (Second Amended Complaint at ¶12.)

The Investigation determined by a preponderance of the evidence that Defendants W. Farwell and Matthew Farwell had similar sexual relationships with Decedent, and that both had repeated contacts of a sexual nature and otherwise with the Defendant while on duty. (Amended

Complaint at ¶13.) The Investigation further determined that Robert Devine, Matthew Farwell, and W. Farwell had sexual relationships with Decedent, and that Devine effectively established the Farwells as his understudies in using their position and influence to engage in inappropriate behaviors with minors during the Program and with the Decedent while on duty. (Amended Complaint at ¶14.) Further, Plaintiff alleges that Defendant Heal gave Decedent a cat in exchange for a sexual act at the Animal Control Office of the Stoughton Police Department. (Second Amended Complaint at ¶15.) Heal had known Decedent since 2015, and had known of Matthew Farwell's sexual relationship with the Decedent. (Second Amended Complaint at ¶15.) Ultimately, Plaintiff alleges that the foregoing constituted an ongoing pattern of abuse and behavior over the near decade-long relationship that "created and exacerbated the underlying trauma, mental, and emotional distress suffered by Decedent that ultimately overwhelmed Decedent's will to live and, in turn, caused her death." (Second Amended Complaint at ¶16.)

B. Procedural History

On December 29, 2022, Plaintiff filed a Complaint and Request for Jury Trial in this Court. (See Complaint (Paper 1).) On January 9, 2023, Plaintiff filed an Amended Complaint and Request for Jury Trial. (See Amended Complaint (Paper 3).) Finally, on February 2, 2023, Plaintiff filed a Second Amended Complaint and Request for Jury Trial in this Court. (See Second Amended Complaint and Request for Jury Trial (Paper 5).) The Second Amended Complaint asserts counts against W. Farwell for Wrongful Death (Count I); Negligence (Count II); Assault and Battery (Count VI); Negligent Infliction of Emotional Distress by the Decedent's Family (Count VII); Negligent Infliction of Emotional Distress by the Estate (Count VIII); Violations of 42 USC § 1983 (Count IX); and, Civil Conspiracy (Count X). (*Id.* at ¶¶17-81.)

On May 1, 2023, the codefendant, Joshua Heal filed an answer to the Plaintiff's amended complaint and asserted cross-claims against W. Farwell sounding in contribution and indemnification.

II. ARGUMENT

A. Standard of Review

This Court can and should dismiss a complaint which fails to state a claim upon which the requested relief can be granted. *See* Mass. R. Civ. P. 12(b)(6). In ruling on a motion to dismiss, the court takes as true "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor...." *Marram v. Kobrick Offshore Fund*, Ltd., 442 Mass. 43, 45 (2004). However, the facts alleged in the complaint must be sufficient to demonstrate a plausible entitlement to the requested relief. As held in *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-36 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)):

> "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions.... Factual allegations must be enough to raise a right to relief above the speculative level... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)..." What is required at the pleading stage are factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief, in order to "reflect[ ] the threshold requirement of [Fed. R. Civ. P.] 8(a)(2) that the 'plain statement' possesses enough heft to 'sho[w] that the pleader is entitled to relief.'"

B. Plaintiff's Wrongful Death Claim (Count I) Should be Dismissed Because Plaintiff does not Allege any Duty Owed by W. Farwell to Decedent, nor the Requisite Causation

"Wrongful death" is not an action in and of itself, but must be grounded in one of the several actions listed in the statute which are delineated as (1) negligence causing the death of a person; (2) a willful, wanton, or reckless act causing the death of a person under circumstances that the deceased could have recovered damages for personal injuries if his or her death had not

resulted; (3) negligent operation by a common carrier of passengers, causing the death of a passenger; (4) operating a common carrier of passengers and causing the death of a passenger by a willful, wanton, or reckless act under circumstances that the deceased could have recovered damages for personal injuries if his or her death had not resulted; and (4) breach of warranty under the Uniform Commercial Code that results in injury to a person that causes death. *See* M.G.L. c. 229, § 2. Therefore, a claim for wrongful death must be based on the defendant's negligence, an intentional reckless act, or breach of warranty.

A claim for wrongful death may take the form of any typical negligent, intentional, or reckless action including medical malpractice, motor vehicle accidents, accidental shootings, sale of alcohol to an intoxicated adult, failure to warn of an inherently dangerous product design, and suicide of a decedent.

In cases where suicide of a decedent is the basis for a wrongful death claim, Massachusetts courts have stated that the plaintiff must show either that the defendant had a duty to prevent the suicide or that as a consequence of a physical impact, death resulted from an uncontrollable impulse or was accomplished in a delirium or frenzy. *See Nelson v. Mass. Port Auth.*, 55 Mass. App. Ct. 433 (2002) (two bases for liability for another's suicide are that defendant's negligence was cause of decedent's uncontrollable suicidal impulse or that decedent was in defendant's custody and defendant had knowledge of decedent's suicidal ideation); *Estate of Halloran v. United States*, 268 F. Supp. 2d 91 (D. Mass. 2003) (in wrongful death action under statute, as in any negligence action, to state claim plaintiff must show defendant owed duty of care to plaintiff, defendant breached duty, and breach was proximate cause of plaintiff's injury); *Poyser v. United States*, 602 F. Supp. 436 (D. Mass 1984) (in medical malpractice action

plaintiff had burden of showing that physician owed deceased duty of care, that he or she breached duty, and that breach caused decedent's subsequent death).

Here, Plaintiff's claim must fail as to any alleged negligence as she fails to allege any duty owed the Decedent. *See Dzung Duy Nguyen v. Massachusetts Inst. of Tech.*, 479 Mass. 436, 448 (2018) ("Generally, there is no duty to prevent another from committing suicide"); *Cremins v. Clancy*, 415 Mass. 289, 296 (1993) ("we do not owe others a duty to take action to rescue or protect them from conditions we have not created.")

Even assuming a duty exists, Plaintiff's claim must still fail as she does not allege the requisite causation. *See Carney v. Tranfaglia*, 57 Mass. App. Ct. 664 (2003) (suicide may be viewed as independent intervening cause between anterior act of negligence and death). Causation cannot lie when the Decedent knew of the consequences of her actions, and willfully chose to do them herself and was not afflicted with an "uncontrollable impulse" caused in any manner by W.Farwell. *See Daniels v. New York, N.H. & H.R. Co.*, 183 Mass. 393 (1903) (finding no liability where railroad accident occurred in August and plaintiff's decedent took own life in October; liability for death by suicide exists only when it results from uncontrollable impulse, or is accomplished in delirium or frenzy caused by collision and without conscious volition to produce death.); *Nelson v. Massachusetts Port Auth.*, 55 Mass. App. Ct. 433, 436 (2002) (allowing Defendant's motion for summary judgment on claim for wrongful death by suicide where Defendant did not cause decedent's "uncontrollable suicidal impulse" nor had custody of the Defendant and knowledge of her suicidal ideation.)

In the present case, Plaintiff has not alleged the requisite causation to Decedent's suicide for any negligent or intentional act committed by W. Farwell. The Report relied upon by Plaintiff in her Second Amended Complaint by reference is also devoid of facts suggesting any causation

between Plaintiff's suicide and the acts of W. Farwell. The last contact W. Farwell had with Decedent according to the Report was on December 21, 2020, where he allegedly engaged in consensual sexting with Decedent, when she was of legal age. Decedent could not have been overcome by an "uncontrollable suicidal impulse" based on the actions of W. Farwell when her alleged suicide occurred nearly two months after their last communication.

Accordingly, Count I of Plaintiff's Second Amended Complaint must be dismissed as to Defendant W. Farwell.

C. Plaintiff's Negligence Claim (Count II) Should be Dismissed as to W. Farwell Because Plaintiff Similarly Does not Allege any Duty Owed by W. Farwell to Decedent, nor the Requisite Causation

It is well established law in Massachusetts that in order to succeed on a claim for negligence, the Plaintiffs must prove that: (1) the Defendant owed a legal duty of care; (2) the Defendant breached that duty (3) the Plaintiffs suffered damages; and, (4) the breach was the proximate cause of the Plaintiffs damages. *See Santos v. U.S. Bank Nat. Ass'n.*, 89 Mass.App.Ct. 687, 699 (2016). Regarding a defendant's duty of reasonable care to a plaintiff to prevent the plaintiff's suicide, the law in Massachusetts is that "[g]enerally, there is no duty to prevent another from committing suicide." *Nguyen v. MIT*, 479 Mass. at 448. Massachusetts courts have consistently held that "we do not owe others a duty to take action to rescue or protect them from conditions we have not created." *Id.* (*quoting Cremins v. Clancy*, 415 Mass. 289, 296 (1993)).

Although limited exceptions to the general rule of no duty to prevent a Decedent's suicide exist, they typically involve special relationships in a custodial setting. *See Slaven v. Salem*, 386 Mass. 885, 888 (1982); Restatement (Second) of Torts §314A (1965). The Supreme Judicial Court has not extended a special relationship regarding the duty to prevent suicide absent a showing of a Defendant's knowledge of the Decedent's suicidal intent. *See Nguyen v. MIT*, 479 Mass. at 453.

Thus, for the Plaintiff in this case to prevail on a negligence claim against W. Farwell, the Plaintiff must make plausible allegations that (1) a special relationship existed between Decedent and W. Farwell giving rise to an affirmative duty of W. Farwell to prevent Decedent's suicide, and (2) that W. Farwell had actual knowledge of Decedent's suicidal intentions.

The Plaintiff's Second Amended Complaint fails to meet this standard. The Plaintiff does not allege any specific facts which could plausibly lead to the conclusion that W. Farwell had a special relationship giving rise to a duty to prevent Decedent's suicide, nor is there any allegation that W. Farwell had actual knowledge of her suicidal intention.

The allegations Plaintiff uses to support her claim that W. Farwell owed a special duty to Decedent are conclusory allegations that W. Farwell owed Decedent a duty due to both their involvement in the Program years prior to the decedent's death. (Second Amended Complaint at ¶¶ 22-27.) It is important to note that there is no allegation that Decedent was a minor at the time of her suicide, and in fact Decedent was years past the age of majority at the time of her death. Massachusetts cases do not support the contention that by virtue of being involved in a youth police program, a police officer owes a special continuing duty of care to the Program participants years after the participants have ended their involvement in the Program.

Further, even if a special duty was found to be owed by W. Farwell to Decedent, the four corners of the Second Amended Complaint and the referenced Report do not allege one iota of evidence that W. Farwell knew of Decedent's suicidal ideations.

Plaintiff's failure to allege the existence of a special duty on the part of W. Farwell to Decedent and the complete lack of facts supporting that W. Farwell knew of Decedent's suicidal ideations mandate that Count II of Plaintiff's Second Amended Complaint be dismissed as to W. Farwell.

D. Plaintiff's Assault and Battery Claim (Count VI) Must be Dismissed as the Second Amended Complaint Sets Forth No Specific Allegations Regarding Decedent's State Of Mind

The Second Amended Complaint sets forth no allegations of fact as to W. Farwell regarding whether Decedent experienced a harmful or offensive contact or that she was otherwise in "imminent fear or apprehension of a harmful or offensive contact." *See Doe v. Fournier*, 851 F. Supp. 2d 207, 227, (D. Mass. 2012) (applying Mass law) (battery is defined as harmful or offensive touching); Restatement, Second, Torts § 21 (stating that the tort of assault consists of the intentional creation of an apprehension of immediate physical harm by means of an overt gesture.) As Plaintiff has failed to allege these essential elements of the causes of action for assault and battery as against the Decedent, Count VI must be dismissed.

Paragraph 48 of the Second Amended Complaint alleges that W. Farwell "intentionally caused harmful and offensive contacts with Ms. Birchmore, a minor at the time, and that contact with the Plaintiff, which continued after her participation in the Program, directly resulted in the death of Ms. Birchmore." (Second Amended Complaint at ¶ 48.) However, the Second Amended Complaint is devoid of any dates or ages supporting that Decedent was a minor at the time of any alleged contact by W. Farwell and does not contain any facts suggesting that any sexual contact or conversation caused the Decedent harm or offense. In fact, the Report which Plaintiff relies upon in her Second Amended Complaint contains no evidence that W. Farwell had any explicit contact with Decedent prior to April 19, 2020, when Decedent would have been approximately 23 years old. Also, glaringly missing from the Report are any facts or findings that any acts by W. Farwell caused the decedent to be offended or harmed. Plainly, the course of contact between W. Farwell and Decedent suggests nothing more than a consensual relationship between two consenting adults.

Ultimately, The Second Amended Complaint lacks any specific allegations of fact as to any conversations or acts of W. Farwell or the state of mind of the Decedent in response to these acts. Otherwise, the Second Amended Compalint does not rise above the level of speculation. *See Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

For the foregoing reasons, Plaintiff's Assault and Battery Claim (Count VI) must be dismissed as to W. Farwell.

E. Plaintiff's Negligent Infliction of Emotional Distress Claim by Decedent's Family (Count VII) Should be Dismissed Because Decedent's Family is not a Party and the Second Amended Complaint Sets Forth No Physical Harm Manifested by Objective Symptomology.

Decedent's Estate is the only party to this action. Therefore, only the Estate may recover damages. As Count VII alleges negligent infliction of emotional distress as to Decedent's family, this count should be dismissed for lack of subject matter jurisdiction and lack of standing. S*ee Abate v. Fremont Inv. & Loan*, 470 Mass. 821, 828 (2015) ("Standing may be considered under either rule 12(b)(1) or rule 12(b)(6)"); (Second Amended Complaint at ¶ 56.)

Even if Decedent's family had standing on this claim, no family member is alleged to have witnessed the death or saw Defendant soon after the death as required for a third party negligent infliction of emotional distress claim and should be dismissed for failure to state a claim upon which relief can be granted. *Migliori v. Airborne Freight Corp.*, 426 Mass. 629, 632 (1998) ("Only a bystander plaintiff who … 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.")

Accordingly, W. Farwell moves to dismiss Count VII pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and pursuant to Rule 12(b)(6) for failure to state a claim upon which

relief can be granted on a theory that Decedent's family members were not bystanders who witnessed her death and therefore each has failed to state a claim. *See Migliori*, *supra* at 632.

Moreover, Count VII is also legally insufficient as the Complaint fails to allege physical harm manifested by objective symptomatology, an essential element of a negligent infliction of emotional distress claim. *See Sullivan v. Bos. Gas Co.*, 414 Mass. 129, 132, 605 N.E.2d 805, 807 (1993) (holding that physical harm manifested by objective symptomology is an essential element for recovery under a theory of negligent infliction of emotional distress.) Plainly, within the four corners of the Second Amended Complaint, nor the referenced Report, are there are any allegations of medical evidence or care to support the element of a manifestation of objective symptomatology. *Id.*

Pursuant to the foregoing, Plaintiff's Claim for Negligent Infliction of Emotional Distress as to Decedent's Family (Count VII) should be dismissed.

F. Plaintiff's Negligent Infliction of Emotional Distress Claim by the Estate Should be Dismissed Because the Second Amended Complaint is Devoid of Any Allegations of Physical Injury by Decedent Manifesting Itself in Objective Symptomology.

Just as with Count VII, Count VIII should be dismissed because it fails to state a claim upon which relief can be granted. First, as explained in Sections II(B) and II(C) above, W. Farwell owed no duty to Decedent. *See Nguyen*, at 488. It has long been settled that Individuals "do not owe others a duty to take action to rescue or protect them from conditions we have not created." *Id.* The allegations of Count VIII, like Count VII set forth a number of legal conclusions but fail to allege legally sufficient facts upon which relief can be granted. *See Schaer, supra* and *Iannacchino supra* at 636. More particularly, the Complaint fails to allege that Decedent's emotional distress manifested itself by objective symptomatology *See Cote*, *supra*.

As such, Plaintiff's claim for Negligent Infliction of Emotional Distress by the Estate Should be dismissed.

G. Plaintiff's Claim for Violations of 42 U.S.C. § 1983 (Count IX) Must be Dismissed because at all Times Alleged in the Second Amended Complaint, W. Farwell was not Operating Under Color of Law

W. Farwell did not act under color of the law during any time the allegations alleged in the Second Amended Complaint are alleged to have taken place. The Second Amended Complaint contains no allegations that W. Farwell exercised a power pursuant to state law when he allegedly exchanged explicit material with Decedent or engaged in sexual intercourse with her. The alleged facts that W. Farwell was a police officer and was involved in the Program, are insufficient to establish that W. Farwell was acting "under color of law." In *Martinez v. Colon*, the plaintiff police officer was shot by a fellow officer while both of them were on duty. 54 F.3d 980, 982 (1st Cir. 1995). The defendant was mishandling his pistol in a dangerous way and pointing it at the plaintiff, and during this behavior, defendant shot the plaintiff. *Id.* at 982. The court ruled in favor of the defendant, holding that a §1983 claim was not supported because the defendant was not acting under the color of law, as he was not exercising any power pursuant to state law when the incident occurred. *Id.* at 988. The misconduct on behalf of the Defendant was determined to be a "personal frolic," and the facts that defendant was an on-duty police officer during this incident did not cause or contribute to his actions. *Id.* at 987.

Therefore, although W. Farwell was a police officer, and the Report alleges facts showing that W. Farwell may have been on duty when explicit text messages were exchanged between he and Decedent, W. Farwell did not exercise any power pursuant to state law through these actions.

Furthermore, "acting under the color of state law," a requirement for § 1983 liability, does not hinge on whether the police officer is in uniform, on or off duty, the location of the

incident, or whether the officer crossed the bounds of his public duty in committing the act. *See Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir.1975) (whether a police officer is uniformed is not controlling); *Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir.1994) (holding that "whether an officer was on or off duty when the challenged incident occurred" is not dispositive as to § 1983 liability); *Delcambre v. Delcambre*, 635 F.2d 407, 408 (5th Cir.1981) (per curiam) (holding that an officer's assault on a member of the public which occurred at the police station was not conduct under color of law); *Monroe v. Pape*, 365 U.S. 167, 172 (discussing that whether officer over-stepped his role as police officer was not dispositive as to liability.)

In the present case, there are no allegations in the Second Amended Complaint alleging what power under state law W. Farwell exercised in his course of communication or interactions with the Decedent, a requirement to invoke jurisdiction under §1983. Paragraph 67 alleges, "The abuse, grooming and sexual assault all took place and was facilitated by virtue of the Officers' position as police officers and the educators within the Program." The mere fact that W. Farwell was a police officer does not give rise to him operating "under the color of law." *See Delacambre supra* at 508.

In Paragraph 70 of the Second Amended Complaint, the Plaintiff alleges "The Officers' sexual assault of Ms. Birchmore as a minor all occurred while the Officers operated "under the color of the law." The legal definition of "assault" is the imminent fear or apprehension of a harmful or offensive contact. There is no allegation that Decedent suffered an imminent fear of a harmful or offensive contact from W. Farwell at any point throughout the course of their relationship.

Wherefore, this Court must dismiss Count IX of the Plaintiff's Second Amended Complaint because there are no factual allegations alleging an exercise of the power of state law.

H. Plaintiff's Claim for Civil Conspiracy (Count X) Must be Dismissed Because Plaintiff Does Not Allege that Defendants Worked in Concert to Exercise a Peculiar Power of Coercion Over Decedent

There are two types of civil conspiracy recognized in Massachusetts: (1) conspiracy to commit a tort or the concerted action doctrine, and (2) peculiar power of coercion. *See Daly v. Town of Sandwich*, 99 Mass. App. Ct. 1112 (2021).

To establish a claim under the first form, a plaintiff must show, "an underlying tortious act in which two or more persons acted in concert and in furtherance of a common design or agreement." *See Bartle v. Berry*, 80 Mass. App. Ct. 372 (2011). It is not sufficient to prove two actors acted jointly in committing a tort; evidence must be shown that the defendants acted together to injure the plaintiff. *See Gutierrez v. Massachusetts Bay Transp. Auth.*, 437 Mass. 396, 415 (2002). This means defendants must have engaged in a common plan where all participants knew of the plan and its purpose and took active steps to encourage the achievement of that purpose. *See Daly*, 99 Mass. App. Ct. at *3.

As Discussed in Section I(B) above, Plaintiff does not allege facts showing the commission of an underlying tortious act, because W. Farwell owed no duty to Plaintiff, and the Second Amended Complaint does not set forth any alleged facts showing causation between the actions of W. Farwell and Decedent's suicide. In fact, as explained above, the Amended Complaint does not allege any tort claims.

The second form of civil conspiracy claim – peculiar power of coercion – is an independent theory of tort, only appropriate if there is no underlying basis for tort liability. *Id.* This type of civil conspiracy is a "very limited cause of action in Massachusetts." *See Jurgens v. Abraham*, 616 F. Supp. 1381, 1386 (D. Mass. 1985). The claim requires a plaintiff to show that the defendants exercised "some peculiar power of coercion" over the plaintiff "possessed by the

defendants in combination which any individual standing in a like relation to the plaintiff would not have had" through "force of numbers." *See Fleming v. Dan*, 304 Mass. 46, 50 (1939); *Guitierrez v. Massachusetts Bay Transp. Authy.*, 437 Mass. 396, 415 (2002).

In the present case, Plaintiff fails to allege that W. Farwell acted in concert with the other Defendants. The sole reference to any "conspiracy" between the Defendant is found in Paragraph 14 of the Second Amended Complaint, which states "[The Stoughton Police Internal Affairs Investigation] determined that not only did [Matthew Farwell, W. Farwell and Joshua Heal] have sexual relationships with Ms. Birchmore, but that Devine effectively established the Farwells as his understudies in using their position and influence to engage in inappropriate behaviors with minors during the Program and with Decedent while on Duty." However, Plaintiff misreads the Report. The relevant portion of the report which Plaintiff references states "The investigation shows that grooming behavior took place between *Matthew Farwell* and Sandra Birchmore and that Robert Devine was engaged in the grooming of Matthew Farwell and William Farwell as his understudies." *See* IA Report at pg. 5.[1] The report therefore does not allege that W. Farwell engaged in any conspiracy with the other Defendants as to Decedent. While the Report does mention that Devine groomed both Farwells as his understudy, it does not allege any facts suggesting what Devine was grooming the Farwell's for.

Other than that discussed above, neither the Report nor the Second Amended Complaint allege any facts suggesting that the Defendants worked in concert with a common plan to injure or otherwise abuse Decedent. Therefore, Count X of Plaintiff's Complaint must be dismissed as to W. Farwell.

I. Count XI of Defendant/Third Party Plaintiff's, Joshua Heal, Cross Claim Must be Dismissed Where it does Not State a Claim for Common Law Indemnification.

[1] The IA Report is referenced but not included as an Exhibit, pursuant to Defendant Joshua Heal's Motion to Seal and Impound Case File and Docket.

Defendant Joshua Heal does not have a right to common law indemnity as a co-defendant. The right to common-law indemnity arises only "where the party seeking indemnification did not join in the negligent act but is nonetheless exposed to derivative or vicarious liability by reason of the negligence of another." *See Ace Am. Ins. Co. v. Riley Bros.,* 31 Mass. L. Rep. 308 (2013), *citing Greater Boston Cable Corp. v. White Mountain Cable Construction Corp.*, 414 Mass. 76, 79, 604 N.E.2d 1315 (1992); *Fireside Motor, Inc. v. Nissan Motors Corp.*, 395 Mass. 366, 369, 479 N.E.2d 1386 (1985); and *Stewart v. Roy Bros.*, 358 Mass. 446, 265 N.E.2d 357 (1970). *See also Ferreira v. Chrysler Grp. LLC,* 468 Mass. 336, 344, 13 N.E.3d 561, 567 (2014) ("the 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."). A party that is found negligent is not entitled to indemnity. *Rathbun v. W. Mass. Elec. Co.,* 395 Mass. 361, 364, 479 N.E.2d 1383, 1385 (1985) ("The general rule is that a person who negligently causes injury to a third person is not entitled to indemnification from another person who also negligently caused that injury.").

"The principles of derivative and vicarious liability are necessary to sustain a common-law indemnity claim. Vicarious liability applies only where the agent has committed a wrongful act, the liability of the principle arises simply by operation of law, and is thus, only derivative of the wrongful act of the agent." *Larson v. Landvest, Inc.,* 19 Mass. L. Rep. 479 (2005), *citing Elias v. Unisys Corp.,* 410 Mass. 479, 481, 573 N.E.2d 946 (1991). Here, Heal does not allege (nor could he in good faith) the existence of a principal-agent relationship between himself and W. Farwell. In the absence of any allegation that Heal could be *vicariously* liable for W. Farwell's acts by virtue of the parties' legal relationship, there can be no common-law indemnity claim as a matter of law.

Thus, there is no scenario, as a matter of law, under which Heal could be held liable to the Plaintiff *and* be entitled to indemnity to W. Farwell who is unaffiliated with Heal. As the cases above make clear, only a blameless party that is also vicariously liable by virtue of the parties' legal relationship can seek indemnification. Again, there is no allegation by Heal that there is any legal relationship (principal-agent; employer/employee) under which Heal could be liable for W. Farwell's actions. Under the facts alleged in the crossclaim if Heal is found liable to the Plaintiff, that means, by definition, that he was at fault for his own acts, not W. Farwell's. Thus, Heal cannot seek indemnity from W. Farwell, and Count XII of Heal's Cross Claim should be dismissed.

J. Count XII of Defendant/Third Party Plaintiff's, Joshua Heal, Cross Claim Must be Dismissed Because there has been no Judgment or Settlement of Plaintiff's Claims Against Him.

The right of contribution can be found in Massachusetts General Laws, Chapter 231B (the "Contribution Statute"). Section 1 of the Contribution Statute, provides, in relevant part:

> (a) Except as otherwise provided in this chapter, where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> (b) The right of contribution shall exist only in favor of a joint tortfeasor, hereinafter called tortfeasor, who has paid more than his pro rata share of the common liability, and his total recovery shall be limited to the amount paid by him in excess of his pro rata share. No tortfeasor shall be compelled to make contribution beyond his own pro rata share of the entire liability.

G.L. c. 231B, §1.

Section 3(d) of the Contribution Statute provides:

> (d) If there is no judgment for the injury against the tortfeasor seeking contribution, his right of contribution shall be barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while

> action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

G.L. c. 231B, §3(d)

First, as stated above, neither the Plaintiff's Second Amended Complaint nor Heal's cross claims assert facts which would support a claim that W. Farwell committed a tort and therefore W. Farwell cannot be considered a tortfeasor under the statute. For this reason alone, the codefendant's claim for contribution should be dismissed.

Second, Sections 1 and 3 of the Contribution Statute provide that a right of contribution exists where only where there has been a judgment, or a party has settled and paid more than its pro rata share and discharged common liability. As the Appeals Court noted in *Spirito v. Hyster New Eng., Inc.,* 70 Mass. App. Ct. 902 (2007), a party has "no right to proceed with a contribution claim…until it paid [Plaintiffs] more than its pro rata share and discharged the common liability." *Id.* at 903, citing G. L. c. 231B, §§ 1, 3(*d*)(2). *See also Robertson v. McCarte*, 13 Mass. App. Ct. 441, 443 (1982) (a right to contribution exists only for a tortfeasor who has settled with the claimant and discharged by payment the *common liability*.") (emphasis in the original). Here, Heal fails to state a contribution claim because he does not allege to have made a payment and discharged the common liability to the Plaintiff. Unless and until that happens, Heal's Count XII against W. Farwell should be dismissed as premature.

III. CONCLUSION

WHEREFORE and for the foregoing reasons, the Court should dismiss all claims that Plaintiff brings against W. Farwell pursuant to Mass. R. Civ. P. 12(b)(6) and 12(b)(1). Additionally, for the foregoing reasons, the Court should dismiss all cross-claims of Defendant/Third Party Plaintiff, Joshua Heal pursuant to Mass. R. Civ. P. 12(b)(6).

Respectfully Submitted,
DEFENDANT,
WILLIAM FARWELL,
BY HIS ATTORNEYS,

DATED: May 4, 2023.

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CERTIFICATE OF SERVICE

Pursuant to Mass. R. Civ. P. 5(a) and/or Sup. Ct. R. 9A, We, the undersigned, do hereby certify that a copy of the foregoing document has been served via email and/or first class mail on all parties or their representatives in this action as listed below this 4th day of May, 2023.

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

NORFOLK SUPERIOR COURT
DOCKET #2282CV1197

DARLENE SMITH as the PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA BIRCHMORE

V.

MATTHEW FARWELL, WILLIAM FARWELL, ROBERT DEVINE, and JOSHUA HEAL Individually, THE TOWN OF STOUGHTOH, and THE STOUGHTON POLICE DEPARTMENT

MEMORANDUM IN SUPPORT DEFENDANT ROBERT DEVINE'S MOTION TO DISMISS ALL COUNTS AND CLAIMS AGAINST HIM

Now comes the Defendant, Robert Devine and moves that the complaint against him be dismissed. As reasons therefore the Defendant, Robert Devine submits that pursuant M.R.Civ.P. 12(b)(6), the plaintiff has failed to properly state claims against him.

Pursuant M.R.Civ.P. 12(b)(6) the Defendant's motion is appropriate when the plaintiff has failed to plead a claim sufficiently recognizable under Massachusetts law or the applicable law (e.g., federal law) providing the right of action. In *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008), the Supreme Judicial Court adopted the "clarified standard" of the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to evaluate motions to dismiss under Rule 12(b)(6). Under that standard, [w]hile a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the

assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . . What is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect[ ] the threshold requirement of [Fed. R.Civ. P.] 8(a)(2) that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief.

When deciding Rule 12(b)(6) motions, the court will take the allegations of the complaint as true and draw every reasonable inference in favor of the plaintiff. *Galiastro v. Mortg. Elec. Registration Sys., Inc.*, 467 Mass. 160, 164 (2014) (citing *Lopez v. Commonwealth*, 463 Mass. 696, 700 (2012)). The court does not accept as true, however, legal conclusions masked as factual allegations in a complaint. *Schaer v. Brandeis* Univ., 432 Mass. 474, 477 (2000). Nor does the court consider factual assertions the defendant makes in its Rule 12(b)(6) motion to dismiss. *Fraelick v. PerkettPR*, 83 Mass. App. Ct. 698, 700 (2013). If the face of the complaint and its incorporated materials conclusively demonstrate an affirmative defense, dismissal is appropriate. *State Room, Inc. v. MA-60 State Assocs., L.L.C.*, 84 Mass. App. Ct. 244, 248 (2013). When a Rule 12(b)(6) motion is made to dismiss a complaint alleging fraud, the Rule 9(b) requirements of pleading with particularity must also be considered in determining the sufficiency of the complaint. *Equip. & Sys. for Indus., Inc. v. Northmeadows Constr. Co., Inc.*, 59 Mass. App. Ct. 931, 932 (2003).

Argument:

The Second Amended Complaint and Demand for Jury Trial is devoid of any specific facts drawing the Defendant, Robert Devine into the labels and conclusions raised by the Plaintiff. The complaint incorporates no materials. The Second Amended Complaint is wholly unsupported by facts. Plaintiff drafted the Second Amended Complaint to give the

impression that Sandra Birchmore was involved in some sort of sexual encounter with Devine and others. The complaint tries to pull on the heart strings of its reader by inferring the outrageous allegation that Sandra Birchmore was some sort of underaged sex toy passed around between police officers.

However, there is not a single date identified by Plaintiff in the complaint to support this or any of its claims. There is not a single witness who is cited to having seen any event. Not even a year is provided for any act(s) for which labels and conclusions are speculated. Plaintiff raised the term "grooming" but provides absolutely no dates on which it is alleged that Devine engaged in inappropriate activity. The complaint is devoid of facts concerning what Devine actually did that constitutes the label "grooming."

The Second Amended Complaint claims an "ongoing pattern of sexual abuse and behavior" but gives no supporting dates for that alleged conduct. Absent from the Second Amended Complaint is the age of the decedent at any particular point in time. More importantly is the absence of the fact that the decedent, was an adult for more than 5 years at the time of her passing at age 23. It is clear that Plaintiff is trying to hide the basic fact that Ms. Birchmore was an adult at the time of her untimely passing on February 2, 2021. There are no facts presented that Devine did anything to or against Ms. Birchmore, at any specific time, while she was a minor or an adult.

There are no facts presented to support a claim of a deliberate indifference to training or that it was obvious there needed to be more or different training.

There are facts to support a claim that subordinates were hired with deliberate indifference toward the possibility that deficient performance of their tasks eventually may contribute to a civil rights deprivation. In-fact, Devine had no hiring authority.

There are no facts to support a claim that a Devine failed to exercise due care in the selection of an employee, evidence that the he knew or should have known that an employee who was hired was unfit and posed a danger to others and that such a failure proximately caused the injury of which the plaintiff complains.

The Second Amended Complaint presents no set of facts that support its speculative allegations against Devine and must be dismissed as to the Defendant, Robert Devine.

Respectfully submitted,
Defendant, Robert Devine,
by his Attorney

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Dated: March 1, 2023