DOCKET NO. AAN-CV-12-6010861-S	:	SUPERIOR COURT
CLARENCE MARSALA, et al.,	:	J.D. OF ANSONIA-MILFORD
v.	:	AT DERBY
YALE-NEW HAVEN HOSPITAL, INC.	:	OCTOBER 30 , 2013

MEMORANDUM OF DECISION

Before the court is the motion of defendant Yale-New Haven Hospital, Inc. (the Hospital) to strike counts one through twenty and counts twenty-three through twenty-five of the plaintiffs' second amended complaint, dated October 22, 2012 (the Complaint).

As alleged in the Complaint, the plaintiffs' decedent, Helen Marsala, was admitted to Griffin Hospital in Derby, Connecticut on April 7, 2010 for surgery on her wrist. Helen then contracted an infection and, while still conscious, was placed on life support. On June 19, 2010, Helen was transferred to the Hospital. Helen died at the Hospital on July 24, 2010, after agents or employees of the Hospital permanently removed her respirator. Helen did not create a living will; however, she expressed her intention "to remain alive if ever on life support."

Shortly after her admission to the Hospital, Helen's husband, Clarence Marsala, and/or Helen filled out financial forms for the Hospital indicating that Helen and her family were below a financial threshold and would be unable to pay for her treatment. On the day of her admission, agents and employees of the Hospital "consulted" with Clarence and Helen's son, Michael Marsala, about removing the ventilator from Helen without replacement if she failed to begin breathing on her own. Clarence and Michael refused and instructed the Hospital never to "pull the plug." Agents and employees continued to discuss removing Helen's ventilator, and Clarence and other members of the family continued to refuse to allow the Hospital to do so.

On or about July 24, 2010, agents or employees of the Hospital informed Helen's son, Gary Marsala, that they were going to permanently remove Helen's respirator that evening, to which Gary objected. Upon learning of the Hospital's plan, Clarence also objected. Nevertheless, the Hospital removed Helen's ventilator, causing her to suffocate and die that night.

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Subsequently, this action was commenced against the Hospital by Clarence, both as administrator of Helen's estate and in his personal capacity, and by Helen's five children, Michael Marsala, Gary Marsala, Tracey Marsala, Kevin Marsala and Randy Marsala. The Hospital now moves to strike the Complaint's counts sounding in negligent infliction of emotional distress, intentional infliction of emotional distress, violation of the Connecticut Unfair Trade Practices Act (CUTPA), violation of Connecticut's Removal of Life Support Systems Act, General Statutes §§ 19a-570, et seq. (the Act), assault and battery, and violation of the right to privacy. As more fully set forth below, the Hospital's motion to strike is granted with respect to the counts sounding in negligent infliction of emotional distress (counts one through six), CUTPA (counts thirteen through nineteen), the Removal of Life Support Systems Act (count twenty), assault and battery (counts twenty-three and twenty-four, respectively), and the right of privacy (count twenty-five). The motion to strike is denied as to the counts sounding in intentional infliction of emotional distress (counts seven through twelve).

Applicable Standards

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action . . . the complaint is not vulnerable to a motion to strike." *Bouchard v. People's Bank*, 219 Conn. 465, 471, 594 A.2d 1 (1991). On the other hand, "[a] motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC v. Ganim*, 303 Conn. 205, 213, 32 A.3d 296 (2011).

"[I]t is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Coe v. Board of Education*, 301 Conn. 112, 116-17, 19 A.3d 640 (2011). "[P]leadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240, 253, 990 A.2d 206 (2010). "Moreover [the court notes] that [w]hat is necessarily implied [in an allegation] need not be expressly alleged." (Internal quotation marks omitted.) Id., 252. This court takes "the facts to be those alleged in the complaint . . . and . . . construe[s] the complaint in the manner most favorable to sustaining its legal

sufficiency." (Internal quotation marks omitted.) *New London County Mutual Ins. Co.* v. *Nantes*, 303 Conn. 737, 747, 36 A.3d 224 (2012).

"In ruling on a motion to strike, the court is limited to the facts alleged in the complaint." *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 580, 693 A.2d 293 (1997). "In ruling on a motion to strike, the trial court is limited to considering the grounds specified in the motion." *Meredith v. Police Commission*, 182 Conn. 138, 140, 438 A.2d 27 (1980).

Negligent Infliction of Emotional Distress (Counts One through Six)

Each of the six family member plaintiffs asserts in a separate count that the Hospital negligently caused them emotional distress by ignoring the wishes of Helen, the decedent, regarding the continuation of life support, as communicated by her next of kin. As a result, plaintiffs allege that the Hospital caused them severe emotional distress, loss of the opportunity to say goodbye, depression, loss of sleep, stress, anxiety, and pain and suffering. The plaintiffs allege that the Hospital engaged in conduct that it knew or should have known involved an unreasonable risk of causing emotional distress to the plaintiffs and that such distress was or should have been foreseeable to the Hospital. Further, the plaintiffs allege that the Hospital engaged in conduct that caused the plaintiffs emotional distress that might result in bodily harm or illness.

Within Connecticut jurisprudence regarding negligent infliction of emotional distress, there are two subsets of case law: where the conduct causing distress is directed to the plaintiff, and where the conduct causing distress is directed towards another (the so-called bystander emotional distress claims). See *Maloney v. Conroy*, 208 Conn. 392, 397-400, 545 A.2d 1059 (1988); *Di Teresi v. Stamford Health Systems*, 142 Conn. App. 72, 79, 63 A.3d 1011 (2013). Accordingly, the court must initially determine whether the individual plaintiffs' counts sound as claims for direct negligent infliction of emotional distress or as claims for bystander emotional distress.

Our Supreme Court first recognized a cause of action for direct negligent infliction of emotional distress in the case of *Montinieri* v. *Southern New England Telephone Co.*, 175 Conn. 337, 345, 398 A.2d 1180 (1978). Since that time, the court has consistently held that "in order to prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm." *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 446, 815 A.2d 119 (2003).

Additionally, in cases such as *Clohessy v. Bachelor*, 237 Conn. 31, 46, 675 A.2d 852 (1996), the Supreme Court also recognized that a bystander can recover for emotional distress under certain circumstances. In order to do so, the court held that the bystander must prove the following elements:

> (1) he or she is closely related to the injury victim, such as the parent or the sibling of the victim; (2) the emotional injury of the bystander is caused by the contemporaneous sensory perception of the event or conduct that causes the injury, or by arriving on the scene soon thereafter and before substantial change has occurred in the victim's condition or location; (3) the injury of the victim must be substantial, resulting in his or her death or serious physical injury; and (4) the bystander's emotional injury must be serious, beyond that which would be anticipated in a disinterested witness and which is not the result of an abnormal response.

Id., 56.

The Supreme Court, however, has carved out an exception to the bystander doctrine, as articulated in *Maloney*: "We hold that a bystander to medical malpractice may not recover for emotional distress and accordingly find no error in the striking of the complaint by the trial court." *Maloney v. Conroy*, supra, 208 Conn. at 394. The Court explained its rationale by observing,

> Because the etiology of emotional disturbance is usually not as readily apparent as that of a broken bone following an automobile accident, courts have been concerned, apart from the problem of permitting bystander recovery, that recognition of a cause of action for such an injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act. W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 54, pp. 359-61. . . .
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> When the complication of liability to a bystander for emotional distress is injected into the scene, the concerns that have placed restrictions upon claims for emotional distress by those directly affected by the negligent act are enhanced. The present case, for example, poses the troublesome question of causation involved in distinguishing the plaintiff's natural grief over the loss of her mother, with whom she had lived for many years and whose death she might well have had to bear even in the absence of malpractice, from the effects upon her feelings of her belief that the suffering and death of her mother were attributable to

the defendants' wrongful conduct. Indeed, § 313 of the Restatement expressly disavows the applicability of the rule of that section, approving a cause of action for emotional distress in behalf of the person directly affected by the unintended wrongful conduct in situations "where the emotional distress arises solely because of harm or peril to a third person, and the negligence of the actor has not threatened the plaintiff with bodily harm in any other way." 2 Restatement (Second), Torts § 313 (2), comment d. This view is consistent with our decision in *Strazza v. McKittrick*, [146 Conn. 714, 719, 156 A.2d 149], where we held that a mother could recover for the injuries she suffered from the fright of hearing a truck crash into the porch where she thought her child was waiting "[t]o the extent that these injuries resulted from fear of injury to herself . . . but she cannot recover for nervous shock resulting from fear of injury to her child."

Maloney, 208 Conn. at 397-399.

As a result of the foregoing, it is necessary to determine if plaintiffs' claims are direct or bystander claims for negligent infliction of emotional distress. The decisions of the Superior Court have generally taken one of two approaches when determining whether a count asserts a direct claim of negligent infliction of emotional distress or a claim for bystander emotional distress. The first looks for the existence of a legal duty owed directly to the plaintiff as opposed to the "indirect" duty owed to a bystander. See *Burnette* v. *Boland*, Superior Court, judicial district of New London, Docket No. CV-085-009111-S (April 23, 2010, *Martin, J.*); *Browne* v. *Kommel*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-08-5006167-S (July 14, 2009, *Pavia, J.*) (48 Conn. L. Rptr. 248, 250); *Gregory* v. *Plainville*, Superior Court, judicial district of New Britain, Docket No. CV-03-0523568-S (August 29, 2006, *Shaban, J.*); *Pattavina* v. *Mills*, Superior Court, judicial district of Middlesex, Docket No. CV-96-0080257-S (August 23, 2000, *Higgins, J.*) (27 Conn. L. Rptr. 521, 527-28).

The second method finds the distinction to be primarily determined by whether a party's emotional distress arises from the apprehension of harm to the party themself or from the apprehension of harm to a third party. If the apprehension is of harm directly to the party, the party asserts a claim for negligent infliction of emotional distress; if the apprehension is of harm to a third party, the claim is for bystander emotional distress. See, e.g., *Hylton* v. *Board of Education*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6002746-S (October 20, 2011, *Adams, J.T.R.*) (52 Conn. L. Rptr. 790, 792); *Zurzola* v. *Danbury Hospital*, Superior Court, judicial district of Danbury, Docket No. CV-02-0347228-S (December 17, 2003, *Upson, J.*) (36 Conn. L. Rptr. 207, 208); *Clark* v. *New Britain Hospital*, Superior Court, judicial district of New Britain, complex

litigation docket, Docket No. X03-CV-99-0496131-S (May 9, 2002, *Aurigemma, J.*); *Doe* v. *Jacome*, Superior Court, judicial district of Danbury, Docket No. CV-98-0331360-S (May 13, 1999, *Stodolink, J.*) (24 Conn. L. Rptr. 591, 593); *Shaham* v. *Wheeler*, Superior Court, judicial district of Danbury, Docket No. 321879 (June 26, 1996, *Moraghan, J.*) (17 Conn. L. Rptr. 232, 233).

In support of their claims, the plaintiffs make the following allegations, which are substantively common to all six counts alleging negligent infliction of emotion distress:

> 30. On or about July 24, 2010, over the objection of Clarence Marsala and Gary Marsala, and without giving the plaintiff, Clarence Marsala, time to transport the decedent, the agents, apparent agents, employees, agent, and/or staff members of the defendant, Yale New Haven Hospital, acting within their scope of their employment with the defendant and in furtherance of the defendant's business, permanently removed the ventilator from the decedent, Helen Marsala, causing her to suffocate and die.
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> 31. The defendant, Yale New Haven Hospital, had a duty to ascertain the wishes of the decedent, Helen Marsala, from her next of kin, Clarence Marsala, prior to removing life support.
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> 32. The defendant, Yale New Haven Hospital, ignored the wishes of the decedent, Helen Marsala, as expressed from her next of kin, Clarence Marsala, prior to removing life support.
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> 33. As a result of the defendant, Yale New Haven Hospital's conduct, through its agents, employees and/or staff members acting within the scope of their employment with the defendant, the plaintiff Clarence Marsala suffered the following serious, painful and permanent injuries: (a) severe emotional distress; (b) loss of opportunity to say goodbye; (c) depression; (d) loss of sleep; (e) stress; (f) anxiety; and (g) pain and suffering.

Complaint, counts 1-6, paras. 30-33 (# 103).

Interpreting these allegations as pleaded, the court finds that the injury that forms the basis of the individual plaintiffs' emotional distress claims was to Helen, whose wishes concerning removal of life support the Hospital was required to ascertain, whose wishes it allegedly ignored, and who suffered the consequences of these acts. Plainly, the plaintiffs do not allege that they were in apprehension of physical harm to themselves.

This finding does not end the inquiry, however, because the plaintiffs argue that the Hospital owed them a direct duty because the damage was foreseeable; see *Maloney v. Conroy*, supra, 208 Conn. at 401 ("it takes no great prescience to realize that friends or relatives of a seriously injured accident victim will probably be affected emotionally in some degree"); and the imposition of a duty is consistent with public policy because, inter alia, "the normal expectation of all individuals is that they have the right to make the life or death decision *and that their family members have a right to be involved in that decision.*" (Emphasis added.) Plaintiffs' Objection to Motion to Strike (# 117), p. 14.

The plaintiffs do not cite any persuasive authority in support of this asserted "right." Under the removal of life support statute, General Statutes § 19a-571 (a), as amended, the role of the family in making the removal of life support is basically limited to conveying the patient's wishes to the health provider. The primary determination is to be made in the first instance by reference to the patient's living will. The family, limited to those members listed as "next of kin" under General Statutes § 19a-570 (9), are only consulted if the patient's wishes are not expressed in the living will and are one of several potential sources for such information. See § 19a-571 (a).[1]

The court finds that the central allegation, that the Hospital ignored Helen's wishes, relates to a violation of a duty owed to Helen, not to the family. As the Supreme Court said in a similar situation,

> It is, however, the consequences to the patient, and not to other persons, of deviations from the appropriate standard of medical care that should be the central concern of medical practitioners. In the case before us, if the defendants should have responded to the various requests the plaintiff alleges she made about her mother's condition, they should be held liable for the consequences of their neglect to the patient or her estate rather than to the plaintiff.

Maloney v. Conroy, supra, 208 Conn. at 402.

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[1] The plaintiffs note that the Superior Court in *Valentin v. St. Francis Hospital & Medical Center*, Superior Court, judicial district of Hartford, Docket No. CV-04-0832314 (November 7, 2005, *Hales, J.T.R.*) (40 Conn. L. Rptr. 371, 376), found a direct duty to the family where they alleged that they had not been notified of the intent to remove life support until after the death of their family member. Here, in contrast, the plaintiffs have pleaded that the Hospital notified the family of the impending removal and that the family advised the Hospital of Helen's wishes in that regard, which the Hospital allegedly ignored.

Accordingly, the plaintiffs' claims should be characterized as arising under the bystander branch of the tort of negligent infliction of emotional distress because the physical harm was inflicted upon Helen and not them, and they have not identified a direct duty violated by the Hospital's alleged behavior. As a result, their claims must be stricken for two different reasons. First, as explicitly pleaded in count twenty-six and evidenced by the attached certificate of good faith, the plaintiffs' claims are essentially for malpractice against the Hospital in its treatment of Helen, and therefore barred under the holding of *Maloney*. Second, the plaintiffs nowhere allege that they witnessed the actual removal of the respirator or the resulting demise of Helen or arrived shortly thereafter, and so cannot satisfy the requirement of "the contemporaneous sensory perception of the event or conduct that causes the injury, or by [arrival] on the scene soon thereafter and before substantial change has occurred in the victim's condition or location," as required by *Clohessy v. Bachelor*, supra, 237 Conn. at 56. The motion to strike counts one through six is granted.

Intentional Infliction of Emotional Distress (Counts Seven through Twelve)

Each of the six family member plaintiffs also asserts in separate counts that the Hospital intentionally inflicted severe emotional distress on them because its agents and employees knew or should have known that terminating Helen's life support would cause them emotional distress, that such behavior constituted extreme and outrageous conduct, and that the plaintiffs suffered severe emotional distress.

The Hospital moves to strike these counts, arguing that plaintiffs have failed to plead facts establishing that the Hospital intended to inflict emotional distress on the plaintiffs, and that its conduct in terminating Helen's life support contrary to her wishes was consistent with Connecticut's removal of life support statute, § 19a-571, and so cannot be considered wrongful. For the reasons set forth below, the court rejects both of these contentions.

The Supreme Court in *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 526-27, 43 A.3d 69 (2012), quoting *Appleton* v. *Board of Education*, 254 Conn. 205, 210-11, 757 A.2d 1059 (2000), reiterated the elements of the tort of intentional infliction of emotional distress as follows:

> In order for the plaintiff to prevail in a case for liability . . . four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the

cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. . . . Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine. . . . Only where reasonable minds disagree does it become an issue for the jury. . . .

Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! . . . Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress.

(Internal quotation marks omitted.)

Further, the Appellate Court in *Gagnon* v. *Housatonic Valley Tourism District Commission*, 92 Conn. App. 835, 847, 888 A.2d 104 (2006), noted that the trial court is authorized to make a preliminary determination as to whether the allegations sufficiently assert a claim for intentional infliction of emotional distress:

[I]n assessing a claim for intentional infliction of emotional distress, the court performs a gatekeeping function. In this capacity, the role of the court is to determine whether the allegations of a complaint . . . set forth behavior that a reasonable fact finder could find to be extreme or outrageous. In exercising this responsibility, the court is not fact finding, but rather it is making an assessment whether, as a matter of law, the alleged behavior fits the criteria required to establish a claim premised on intentional infliction of emotional distress.

(Internal quotation marks omitted.)

In its "gatekeeper" role, this court finds as a matter of law that the Hospital's asserted conduct in allegedly removing Helen's life support and thus ending her life in conscious disregard of her wish to remain on life support is extreme and outrageous, and

that an average member of the community would exclaim "Outrageous!" upon hearing the facts.

Although neither the court nor the litigants have apparently found a case with a comparable fact pattern, several courts have come to the same conclusion in similar circumstances. See, e.g., *Eberl v. Lawrence & Memorial Hospital*, Superior Court, judicial district of New London, Docket No. 560937 (March 7, 2003, *Hurley, J.T.R.*) (denying motion to strike where defendants forcibly held down plaintiff and withdrew blood without plaintiff's consent by repeated stabbing of needle into his arm); *Triano* v. *Fitzpatrick, M.D.*, Superior Court, judicial district of New Britain, Docket No. CV-00-0494828 (February 17, 2000, *Graham, J.*) (26 Conn. L. Rptr. 454, 457) (denying motion to strike where defendant, "who had been treating both of the plaintiffs eyes for four months prior to surgery, who knew that his patient only had vision in his right eye and had consented only to the operation for the left eye, knowingly operated on the sighted right eye, rendering it sightless and causing the plaintiff severe emotional distress"). On its face, terminating a patient's life support with an awareness of her contrary wishes constitutes unacceptable behavior and would readily be considered extreme and outrageous.

Turning to the Hospital's first argument, that the plaintiffs have failed to support their allegations beyond mere legal conclusions that the Hospital "through its agents, apparent agents, employees, and/or other staff members, intended to inflict emotional distress," it is noted that the Hospital has selectively edited the pleading at issue, and misquoted applicable law. As actually pleaded within the Complaint, this paragraph in each of the counts at issue reads: "The defendant, Yale New Haven Hospital, through its agents, apparent agents, employees, and/or staff members intended to inflict emotional distress on the plaintiff . . . *or knew or should have known that emotional distress was the likely result of their conduct*." (Emphasis added.) Complaint, counts 7-12, para. 31 (# 103). As quoted in *Perez-Dickson*, the first element of the tort is that "that the actor intended to inflict emotional distress *or that he knew or should have known that emotional distress was the likely result of his conduct* . . . ." (Emphasis added.) *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. at 483. As pleaded, the allegations of the Complaint satisfy the first element.

Further, the plaintiffs have alleged additional facts which support their allegation that the Hospital knew or should have known that its actions would cause emotional distress, e.g., that the Hospital repeatedly inquired as to whether Helen's life support should be removed, the plaintiffs consistently objected and the Hospital, over their objections and in violation of Helen's wishes concerning the matter, nevertheless

removed life support. Further, the plaintiffs raise a fair inference that, as a health care provider, the Hospital is aware that issues concerning the removal of life support arouse passions and that emotional distress is therefore likely. *Valentin* v. *St. Francis Hospital & Medical Center*, Superior Court, judicial district of Hartford, Docket No. CV-04-0832314 (November 7, 2005, *Hale, J.T.R.*) (40 Conn. L. Rptr. 371, 374) ("In this case, the defendant is a hospital and likely deals with life and death decisions every day involving patients and their families. Recent debates in the press illustrate that the decision to terminate life support is emotionally charged and often controversial with differing points of view leading to bitter disagreements, even within the same family."); see also *Maloney* v. *Conroy*, supra, 208 Conn. at 401, "[I]t takes no great prescience to realize that friends or relatives of a seriously injured accident victim will probably be affected emotionally in some degree." Therefore, the plaintiffs' pleading that the Hospital "knew or should have known" that its behavior would result in emotional distress to the plaintiffs is adequately supported by their allegations, and this basis is not sufficient to grant the Hospital's motion to strike these counts.

The Hospital next asserts that its actions could not rise to the level of being extreme and outrageous because it acted in accordance with the removal of life support statute, § 19a-571 (a). The court finds the Hospital's reliance on this statute at this stage of the pleading to be problematic. Section 19a-571 (a) grants immunity from damages in a civil action or criminal prosecution to a physician or medical facility that withholds or removes life support upon the demonstration that three factors are met, the third being that "the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems." General Statutes § 19a-571 (a) (3).

The Hospital contends that it has complied with this provision and the other requirements of § 19a-571 (a). This position, however, is properly categorized as a special defense, which has not been pleaded in this case because the Hospital has not yet filed its answer. As the Appellate Court noted in *Girard* v. *Weiss*, 43 Conn. App. 397, 416, 682 A.2d 1078 (1996), "[a] motion to strike should not generally be used to assert a special defense because the facts in a plaintiff's complaint must be taken as true for purposes of the motion, without considering contrary facts proffered by a defendant . . . ." Further, "[u]nder our practice, when a defendant pleads a special defense, the burden of proof on the allegations contained therein is on the defendant." *DuBose* v. *Carabetta*, 161 Conn. 254, 262, 287 A.2d 357 (1971). As a result, the court will not grant this motion

to strike on the basis of the Hospital's special defense of its purported compliance with the cited statute, which is not before the court at this stage of the proceedings.[2]

Therefore, construing the plaintiffs' allegations as true and in the light most favorable to them, the court believes that a reasonable fact finder could find that the Hospital's actions were "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"; (internal quotations marks omitted) *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 527; that plaintiffs have adequately alleged the other

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[2] Furthermore, it is difficult to understand how the Hospital could successfully assert that it complied with § 19a-571 of the Removal of Life Support Systems Act for several reasons, including the plain meaning of the statute and of the Act as a whole. Subsection 3 of § 19-571 (a), which grants the physician or health care provider immunity from suit if, inter alia, the physician has "considered the patient's wishes regarding the withholding or withdrawal of life support systems," does not mean that the physician is free to ignore the patient's wishes. On the contrary, the Supreme Court construed this section in the leading case of *McConnell v. Beverly Enterprises-Connecticut*, 209 Conn. 692, 703, 553 A.2d 596 (1989), saying, "[I]f a patient . . . is deemed by his or her physician to be in a terminal condition, life sustaining technology may be removed, in the exercise of the physician's best medical judgment, when that judgment . . . coincides with the expressed wishes of the patient. General Statutes § 19a-571." This interpretation is consistent with other sections of the Act, including General Statutes § 19a-580a, entitled "Transfer of patient when attending physician or health care provider unwilling to comply with wishes of patient," and General Statutes § 19a-580c, entitled "Probate Court jurisdiction over disputes re provisions concerning withholding or withdrawal of life support systems . . . ." If the physician were free to disregard the patient's wishes, it would not have been necessary to provide for transfer in case of disagreement with the patient's wishes or to direct disputes on the issue of withdrawal of life support to the Probate Court's consideration.

Finally, the specter of a health care provider terminating a patient against her will was specifically addressed by the legislature in connection with the passage of the 1991 amendments to § 19a-571 (a). Representative Lawlor stated that, if a doctor proceeded to remove life support without verifying the patient's wishes to forego life support or by attesting that a patient wished to forego life support where the patient had not necessarily so indicated, then the doctor would not enjoy immunity under the statute. 34 H.R. Proc., Pt. 23, pp. 8761-64, remarks of Representative Michael Lawlor.

elements of the tort of intentional infliction of emotional distress, and that the Hospital's purported compliance with the Act is not properly considered in this motion to strike.[3]

For the foregoing reasons, the court denies the Hospital's motion to strike counts seven through twelve.

CUTPA (Counts Thirteen through Nineteen)

Each of the six individual family members as well as Clarence in his role as administrator of Helen's estate also claims that the Hospital violated the Connecticut Unfair Trade Practices Act, General Statutes §§ 42-110a, et seq. (CUTPA), by terminating Helen's life support despite the wishes of Helen to the contrary, allegedly because her family could not pay the Hospital's medical bills. Specifically, the plaintiffs assert that the Hospital knew or should have known the plaintiffs could not afford to pay for Helen's continuing care, thus making the Hospital a creditor. By making the decision to permanently remove the respirator over the objection of plaintiffs, defendant also allegedly placed itself in the position of "being the decedent's surrogate," which created a conflict of interest in that it "gave the defendant a financial incentive in making the decision to permanently remove the decedent's life support . . . ." Complaint, counts 13-19, paras. 36-37. Further, the plaintiffs allege that the Hospital's conduct was immoral, unethical, oppressive and/or unscrupulous, in several specified ways and caused them ascertainable loss.

The Hospital moves to strike these counts, arguing that the plaintiffs' allegations involve the delivery of medical care rather than the entrepreneurial aspects of the medical profession and health care delivery system, and therefore cannot state a CUTPA claim under the holding of *Haynes v. Yale-New Haven Hospital,* 243 Conn. 17, 699 A.2d 964 (1997). Moreover, the Hospital contends that the plaintiffs have failed to allege any "ascertainable loss" as required by the statute.

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[3] At the second oral argument, held on October 22, 2013, and after extensive briefing, the Hospital contended for the first time that the plaintiffs' emotional distress was not sufficiently severe to support their cause of action for emotional distress, citing the standard set forth in *Appleton* v. *Board of Education*, supra, 205 Conn. 210, and referring to the opinion in *Almonte v. Coca-Cola Bottling Co.*, 959 F. Supp. 569, 576 (1997), which granted defendant summary judgment because, inter alia, "the facts alleged in [Almonte's] pleadings and opposition papers, taken in the light most favorable to plaintiff, do not support his claim of severe emotional distress." *Almonte* is inapposite, however, because it involved a motion for summary judgment and not a motion to strike. Because the plaintiffs here have alleged that they suffered severe emotional distress, the court finds the Hospital's argument unpersuasive.

General Statutes § 42-110b (a) provides, in relevant part, that "no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." In *Haynes*, our Supreme Court held that the medical profession is subject to regulation by CUTPA, but only with respect to the business or entrepreneurial aspects of the delivery of health services, and not with respect to malpractice in the performance of medical services. *Id.*, 343 Conn. at 38. The Court explained,

> We appreciate, however, that "[i]t would be a dangerous form of elitism, indeed, to dole out exemptions to our [consumer protection] laws merely on the basis of the educational level needed to practice a given profession, or for that matter, the impact which the profession has on society's health and welfare." *United States* v. *National Society of Professional Engineers*, 389 F. Sup. 1193, 1198 (D.D.C. 1974). A blanket exemption for the medical profession would therefore be improper. *Nelson* v. *Ho*, [222 Mich. App. 74, 83, 564 N.W.2d (1997)]. We thus conclude that the touchstone for a legally sufficient CUTPA claim against a health care provider is an allegation that an entrepreneurial or business aspect of the provision of services is implicated, aside from medical competence or aside from medical malpractice based on the adequacy of staffing, training, equipment or support personnel. Medical malpractice claims recast as CUTPA claims cannot form the basis for a CUTPA violation. To hold otherwise would transform every claim for medical malpractice into a CUTPA claim.

Id., 343 Conn. at 37-38. The Supreme Court in *Janusauskas v. Fichman*, 264 Conn. 796, 809, 826 A.2d 1066 (2003), addressed the principle of an exception for professional services in the provision of health care, stating:

> The practice of medicine may give rise to a CUTPA claim "only when the actions at issue are *chiefly* concerned with 'entrepreneurial' aspects of practice, such as the solicitation of business and billing practices, as opposed to claims directed at the 'competence of and strategy' employed by the . . . defendant." (Emphasis added.) *Ikuno v. Yip*, 912 F.2d 306, 312 (9th Cir. 1990) (applying State of Washington's Consumer Protection Act); see *Haynes* v. *Yale-New Haven Hospital*, supra, 243 Conn. 35-37 (approving of reasoning in *Ikuno*).

Here, the plaintiffs argue that the Hospital's decision to remove Helen's respirator was motivated by the desire to avoid ongoing medical expenses caused by the Marsala family's inability to pay the Hospital's bills, thus implicating the entrepreneurial aspects of the provision of health care. However, there can be no doubt that the care and treatment of Helen were medical actions supervised by physicians and carried out by

medical staff. Even accepting the allegations of the Complaint as true, as we must on a motion to strike, the actions of which Plaintiffs complain, i.e., the termination of Helen's life support, were not "chiefly" entrepreneurial in nature. Rather, they were part and parcel of the Hospital's medical treatment of Helen. In essence, the plaintiffs disagree with the Hospital's decision to terminate Helen's life support. Because this decision was medical in nature, a CUTPA claim is not available to plaintiffs under controlling authority. As a result, the Hospital's motion to strike the CUTPA counts thirteen through nineteen is granted.[4]

Violation of General Statutes § 19a-571 (Count Twenty)

In count twenty, Clarence Marsala, as administrator of Helen's estate, attempts to assert a private cause of action under § 19a-571 against the Hospital, alleging that it violated the act by (1) failing to consider Helen's wishes concerning the withholding or withdrawal of life support before permanently removing her ventilator, (2) failing to provide sufficient time to transport her to another facility, (3) removing the ventilator despite objections from her family members that Helen wished to stay alive if on life support, and (4) failing to obtain Probate Court approval to resolve disputes over Helen's wishes prior to removal of the ventilator.

The Hospital moves to strike this count, claiming that § 19a-571 (a) does not explicitly create a private right of action and that there is nothing in the text of the statute or its legislative history suggesting any intent to create a private cause of action. As more fully set forth below, the court agrees with the Hospital on this issue and finds that no private cause of action for damages is available under § 19a-571.

Statutes have been found to provide a private cause of action when they explicitly allow a party or class to bring a claim against another party. See *Marinos* v. *Poirot*, 308 Conn. 706, 713, 66 A.3d 860 (2013) ("[t]o give effect to [CUTPA's] provisions, § 42-110g (a) of the act establishes a private cause of action, available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b" [internal quotation marks omitted]); *Jarmie* v. *Troncale*, 306 Conn. 578, 622, 50 A.3d 802 (2012) (noting that Connecticut's Dram Shop Act, General Statutes § 30-102, "authorizes a private cause of action against the seller of alcohol to an intoxicated person who causes injury to another person due to his or her intoxication"). If no such cause of action is

[4] Because the court has decided that the professional services exception makes CUTPA inapplicable here, it does not reach the Hospital's contention that the plaintiffs have failed to allege ascertainable loss.

explicitly provided, there is a presumption in this state that private enforcement of the statute does not exist and the burden is on the plaintiff to prove that a private right of action is implicitly created by the statute. *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. at 507.

In order to determine whether a statute implicitly creates a private cause of action, the Supreme Court in *Napoletano* v. *Cigna Healthcare of Connecticut, Inc.*, 238 Conn. 216, 680 A.2d 127 (1996), cert. denied, 520 U.S. 1103, 117 S. Ct. 1106, 137 L. Ed. 2d 308 (1997), identified three factors that a court is to consider in determining whether a private remedy is implicit in a statute not expressly providing one:

> First, is the plaintiff one of the class for whose . . . benefit the statute was enacted . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

(Internal quotation marks omitted.)

Id., 238 Conn. 249.

The Supreme Court in *Gerardi* v. *Bridgeport*, 294 Conn. 461, 469-70, 985 A.2d 328 (2010), explained how the courts are to weigh the *Napoletano* factors in considering the statute before the court:

> [I]n examining [the three *Napoletano*] factors, each is not necessarily entitled to equal weight. Clearly, these factors overlap to some extent with each other, in that the ultimate question is whether there is sufficient evidence that the legislature intended to authorize [these plaintiffs] to bring a private cause of action despite having failed expressly to provide for one. . . . Therefore, although the [plaintiffs] must meet a threshold showing that none of the three factors weighs against recognizing a private right of action, stronger evidence in favor of one factor may form the lens through which we determine whether the [plaintiffs] satisf[y] the other factors. Thus, the amount and persuasiveness of evidence supporting each factor may vary, and the court must consider all evidence that could bear on each factor. It bears repeating, however, that the [plaintiffs] must meet the threshold showing that none of the three factors weighs against recognizing a private right of action. . . .
>
> The stringency of the test is reflected in the fact that, since this court decided *Napoletano*, we have not recognized an implied cause of action despite numerous requests.

Id., 469-70; see also *Provencher* v. *Enfield*, 284 Conn. 772, 790, 936 A.2d 625 (2007) ("the plaintiff has not met his burden of establishing that none of the three *Napoletano* factors militates against the recognition of a private right of action under [General Statutes] § 22-331 and that the factors, when viewed together, demonstrate that the legislature implicitly created such an action").

Here, the administrator seeks to state a claim specifically pursuant to § 19a-571.[5] Examining the statute, the court notes that the statute does not explicitly provide a cause of action to any individual party. Therefore, the existence of an implicit private cause of action must be evaluated using the factors identified in *Napoletano, supra.*

Considering the first *Napoletano* factor, whether Helen was within a class for whose benefit the statute was enacted, the statute on its surface provides civil and

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[5] Section 19a-571 (a) provides in relevant part:

> Subject to the provisions of subsection (c) of this section, any physician licensed under chapter 370 or any licensed medical facility who or which withholds, removes or causes the removal of a life support system of an incapacitated patient shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for such withholding or removal, provided (1) the decision to withhold or remove such life support system is based on the best medical judgment of the attending physician in accordance with the usual and customary standards of medical practice; (2) the attending physician deems the patient to be in a terminal condition or, in consultation with a physician qualified to make a neurological diagnosis who has examined the patient, deems the patient to be permanently unconscious; and (3) the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems. In the determination of the wishes of the patient, the attending physician shall consider the wishes as expressed by a document executed in accordance with sections 19a-575 and 19a-575a, if any such document is presented to, or in the possession of, the attending physician at the time the decision to withhold or terminate a life support system is made. If the wishes of the patient have not been expressed in a living will the attending physician shall determine the wishes of the patient by consulting any statement made by the patient directly to the attending physician and, if available, the patient's health care representative, the patient's next of kin, the patient's legal guardian or conservator, if any, any person designated by the patient in accordance with section 1-56r and any other person to whom the patient has communicated his wishes, if the attending physician has knowledge of such person.