

STATE OF VERMONT
RUTLAND COUNTY, SS

Pamela Lenoci, Admix.
Plaintiff

v.

Kayla Leonard
Defendant

ORIGINAL PAPER
RUTLAND SUPERIOR COURT
NOV 14 2008

SUPERIOR COURT
Docket No. 604-8-08 Rdcv

DECISION ON MOTION TO DISMISS

Defendant Kayla Leonard has moved to dismiss the complaint under V.R.C.P. 12(b)(6). The complaint arises out of the death of Alexandra Brown, and asserts claims for negligent infliction of emotional distress, invasion of privacy, and wrongful death. Plaintiff opposes the motion to dismiss as it pertains to the claims for negligent infliction of emotional distress and wrongful death, but does not oppose dismissal of the claim for invasion of privacy.

Motions to dismiss are not favored, and are rarely granted. *Gilman v. Maine Mutual Fire Ins. Co.*, 2003 VT 55, ¶ 14, 175 Vt. 554 (mem.). The purpose of a motion to dismiss is to test the law of the case, not the facts which underlie the complaint. *Kane v. Lamothe*, 2007 VT 91, ¶ 14, 182 Vt. 241. In considering a motion to dismiss, the court assumes all factual allegations in the complaint to be true and gives the benefit of all reasonable inferences to the non-moving party. *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999). A motion to dismiss should not be granted unless it is beyond doubt that there exist no facts or circumstances which would entitle the plaintiff to relief. *Assoc. of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 446-47 (1985).

In addition, “courts should be especially reluctant to dismiss on the basis of pleadings when the asserted theory of liability is novel or extreme.” *Assoc. of Haystack Property Owners*, 145 Vt. at 447. In particular, courts should remain mindful that when the asserted theory of liability is extreme “or even far-fetched,” it is even more important “that the conceptual legal theories be explored and assayed in the light of actual facts, not a pleader’s supposition.” *Id.* (quoting *Shull v. Pilot Life Ins. Co.*, 313 F.2d 445, 447 (5th Cir. 1963)). It is against this legal backdrop that the court analyzes the two remaining theories of recovery.

First, claims for negligent infliction of emotional distress in Vermont require the party seeking damages to either suffer an impact from an outside physical force or be in the zone of danger of an act negligently directed at her by the defendant, and thereby be subjected to a reasonable fear of immediate personal injury. *Brueckner v. Norwich Univ.*,

169 Vt. 118, 125 (1999). Underpinning a claim for negligent infliction of emotional distress is an act of negligence, which either causes an outside physical force to make an impact upon the injured party or by the injured party being in the zone of danger of a negligent act directed by the defendant at the injured party.

In this case, Plaintiff alleges that the decedent suffered a physical impact by virtue of the statutory rape predicated upon her not by the defendant, but rather by an unknown male party-goer. The court questions whether the crime asserted here (statutory rape) encompasses the type of physical impact contemplated in a negligent infliction of emotional distress theory. No cases of similar holding have been brought to the attention of the court, and the claim appears to be novel.

Furthermore, the negligence (if any) is alleged to have been committed not by the person allegedly responsible for the impact, but by another person (Ms. Leonard) in failing to prevent the impact from occurring. Whether Ms. Leonard had a duty to prevent such an impact is a novel question which the parties have hotly contested. Taken together, the novel questions presented by this claim for negligent infliction of emotional distress appear to this court to be the type of legal questions better explored in the light of the actual facts of the case, rather than decided on the basis of the allegations contained in the complaint. Cf. *Assoc. of Haystack Property Owners*, 145 Vt. at 447.

Second, Plaintiff's claim for wrongful death is based on a similar theory of legal duty, and requires the court to determine whether Ms. Leonard owed a duty to the decedent to prevent her from consuming alcohol and engaging in sex. Negligence, of course, requires that there be a legal duty owed by defendant to plaintiff, along with proof that the duty was breached, that such breach was the proximate cause of plaintiff's harm, and that plaintiff have suffered actual loss or damage. *Langle v. Kurkul*, 146 Vt. 513, 517 (1986). The existence of a duty is central to a negligence claim, and is primarily a question of law. *Denis Bail Bonds, Inc. v. State*, 159 Vt. 481, 487 (1993).

The imposition of a legal duty, however, is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Denis Bail Bonds*, 159 Vt. at 487 (quoting W. Prosser & W. Keeton, *The Law of Torts* § 53, at 358 (5th ed. 1984)). In other words, the facts underlying the claim are profoundly important, and the facts in the present complaint are not sufficiently developed to permit the court to engage in the kind of detailed analysis necessary to determine whether or not a legal duty exists. However, "such specificity is not required at the pleading state. Under our liberal pleading rules, it is sufficient against a motion to dismiss to allege that defendant acted negligently and as a result plaintiff was injured." *Endres v. Endres*, 2006 VT 108, ¶ 5, 180 Vt. 640 (mem.) (internal quotations omitted). Questions of duty and causation must be resolved on the facts of the particular case, rather than as an abstract statement of law. For these reasons, the court concludes that the existence of a legal duty in this case should be resolved on the basis of the actual facts in the case, rather than the allegations in the complaint. Cf. *Assoc. of Haystack Property Owners*, 145 Vt. at 447.

Accordingly, the motion to dismiss is denied with respect to the claims for negligent infliction of emotional distress and wrongful death.

ORDER

Defendant's Motion to Dismiss (MPR #1), filed Aug. 27, 2008, is *granted* as to the claim for invasion of privacy and *denied* as to the claims for negligent infliction of emotional distress and wrongful death.

Dated at Woodstock, Vermont this 13 day of November, 2008.



Hon. Harold E. Eaton,
Superior Court Judge