VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

ALICIA MOORE, KATHERINE MOORE, and THE ESTATE OF ADRIAN MOORE, Plaintiffs v. STATE OF VERMONT, DEPARTMENT OF CORRECTIONS, Defendant	Docket No. 22-CV-2119

RULING ON DEFENDANT'S MOTION TO DISMISS

Plaintiffs bring this negligence and wrongful death action arising from the death of Adrian Moore in a car crash several months after he was released from incarceration. They allege that the Department of Corrections' treatment of Mr. Moore while an inmate and failure to provide a proper safety plan upon his release caused his death. The Department moves to dismiss for lack of subject matter jurisdiction, failure to state a claim, and failure to join necessary and indispensable parties.

Facts Alleged in the Complaint

Plaintiffs allege the following facts in the complaint. The court makes no finding as to their accuracy.

Plaintiffs are the sisters and Estate of Adrian Moore. Mr. Moore struggled with mental illness and addiction for most of his adult life. He was diagnosed with schizophrenia, among other conditions. His mental health struggles and troubled childhood led him to commit a series of petty crimes as a teenager and young adult,

culminating in a 5-year prison sentence. He moved between various Vermont correctional facilities during his terms of imprisonment.

From about 2012 until 2017, Moore was incarcerated in Southern State Correctional Facility. The Department of Corrections placed him in solitary confinement for three of the five years he spent in that facility, and did not allow him to interact with other inmates for extended periods of time. The Department's treatment of Moore severely exacerbated his already fragile mental health issues and caused him severe trauma.

While incarcerated, the Department refused to provide Moore with necessary mental health treatment. In October 2017, Moore's sister Katherine was appointed as his guardian. Not long after his release, Moore was incarcerated again from 2017 to 2019. Upon his release in 2019, the Department discharged Moore to a state hospital without any safety planning or notification to his family, and failed to provide him with the proper care and treatment he needed. On September 4, 2020, Mr. Moore died in a car crash "in an apparent suicide." Compl. ¶ 18. Plaintiffs allege that his "apparent suicide was a direct and proximate result of the mental health issues created and/or exacerbated by his treatment at the hand of the [Department of Corrections]." Id. ¶ 19.

Discussion

Plaintiffs bring several claims: Cruel and unusual punishment under the Vermont Constitution (Count I); Negligence (failure to provide necessary medical and mental health care and excessive solitary confinement) (Count II); Negligence (failure to implement safe release) (Count III); Negligent infliction of emotional distress (Count

IV)[1]; Wrongful death (Count V); Intentional infliction of emotional distress (Count VI); and Loss of consortium (Count VII). The Department asserts several grounds for dismissal.

I. Statute of Limitations

The Department first contends that Plaintiffs' personal injury tort claims (Counts I, II, III, IV, and VI) stemming from Moore's 2012 through 2017 incarceration exceed the three-year statute of limitations in 12 V.S.A. § 512(4). This case was filed in June 2022. The Department asserts that the claims stemming from this time period should have been brought by 2020 at the latest. Plaintiffs argue that all pertinent statutes of limitations have been tolled due to Moore's incarceration, mental capacity, and death, and have not yet expired.

The relevant tolling statute provides:

> When a person entitled to bring an action specified in this chapter is a minor, lacks capacity to protect his or her interests due to a mental condition or psychiatric disability, or is imprisoned at the time the cause of action accrues, such person may bring such action within the times in this chapter respectively limited, after the disability is removed.

12 V.S.A. § 551(a); *see also* Tester v. Pallito, No. 2:19-CV-146-CR-JMC, 2020 WL 2813607, at *3 (D. Vt. Mar. 9, 2020), report and recommendation adopted, No. 2:19-CV-146, 2020 WL 2793164 (D. Vt. May 29, 2020) ("Because [plaintiff] was incarcerated at the time his claim accrued, the statute of limitations was tolled for the duration of his initial imprisonment and did not begin to run until his release on parole."). Additionally, if someone "dies before the expiration of the time within which [an] action may be

[1] Plaintiffs appear to have mistakenly numbered two counts as "Count III." The court has renumbered the counts accordingly in this decision.

commenced . . . or dies within 30 days after the expiration of such time[], the period of limitation as to such action shall cease to operate at the date of his or her death," and the person's executor or administrator may bring any surviving claim within two years "[a]fter the issuance of letters testamentary or of administration." 12 V.S.A. § 557(a); Leo v. Hillman, 164 Vt. 94, 103 (1995).

Plaintiffs' personal injury tort claims arising from Moore's first period of incarceration (2012–2017) did not accrue until the Department of Corrections released Moore from that initial period of imprisonment in 2017. Thus, Moore had until three years later to bring those claims, which brings us to sometime in 2020. Mr. Moore died on September 4, 2020, which tolled any statute of limitations that was still running at that time, and gave Mr. Moore's executors two years after their appointment to bring any surviving claims. Plaintiffs filed suit on June 15, 2022. Thus, assuming that Moore's release from prison in 2017 was less than three years before his death (on September 4, 2020), then the personal injury tort claims arising from his first period of incarceration (2012–2017) are timely.

Unfortunately, the court does not know the exact date when Moore was released in 2017, so that issue must await summary judgment. Even assuming Moore was released prior to September 4, 2017, however, Plaintiffs have adequately pled that Moore lacked capacity, which provides an alternative method to toll the statute under 12 V.S.A. § 551. Given "Vermont's extremely liberal notice-pleading standard," which requires only "a bare bones statement that merely provides the defendant with notice of the claims against it," Island Indus., LLC v. Town of Grand Isle, 2021 VT 49, ¶ 24, 215 Vt. 162 (quotations omitted), Plaintiffs' allegations that Mr. Moore "struggled with mental illness . . . for most of his adult life," was "diagnosed with Schizophrenia," was appointed a guardian in 2017,

and "lacked the mental capacity to make sound decisions after his release from incarceration," are sufficient to plead lack of capacity for tolling purposes at this stage of the case. Compl. ¶¶ 5, 14, 42. Whether Moore actually "lack[ed] capacity to protect his . . . interests due to a mental condition or psychiatric disability" is a fact issue that must await summary judgment.[2]

II. Exhaustion of Administrative Remedies

Next, the Department contends that all claims except wrongful death and loss of consortium must be dismissed for lack of subject matter jurisdiction because Plaintiffs fail to allege that Moore exhausted the Department's administrative remedies. "A trial court lacks subject matter jurisdiction to hear a case if a party fails to exhaust administrative remedies." Mullinnex v. Menard, 2020 VT 33, ¶ 8, 212 Vt. 432 (quotation omitted). The Department has established procedures to review inmates' grievances. Id. ¶ 3 (citing 28 V.S.A. § 854). The Department's grievance policy applies to all conditions of confinement, including any "alleged violation of civil, constitutional[,] or statutory rights" and any "matter relating to access to privileges, programs[,] and services, or conditions of care under the authority of the DOC." Ex. A to Mot. to Dismiss, Department of Corrections Directive #320.01, General Guidelines ¶ B(1)(a), (e).[3] The Department argues that Moore should have grieved his alleged excessive segregation and deficient medical care pursuant to the grievance policy.

Plaintiffs respond that Moore did not have the capacity to pursue administrative remedies due to his "mental health disabilities," and that his guardian did not have

[2] Given the court's conclusion on this issue, it need not address the fraudulent concealment argument.

[3] "A court may consider evidence outside the pleadings in resolving a motion to dismiss for lack of subject matter jurisdiction." Mullinnex v. Menard, 2020 VT 33, ¶ 8, 212 Vt. 432.

necessary information to do so on his behalf. Pls.' Opp'n at 5. Relying on federal caselaw, Plaintiffs maintain that "[i]n order for the exhaustion requirement to apply, . . . the administrative remedies in question must actually have been 'available' for the inmate to exhaust." Williams v. Hayman, 657 F. Supp. 2d 488, 496 (D.N.J. 2008) (holding that summary judgment for defendant was inappropriate where unresolved factual issues existed as to whether inmate's disability prevented him from exhausting administrative remedies); *see also* Days v. Johnson, 322 F.3d 863, 868 (5th Cir.2003) (holding that administrative remedies were not "available" to an inmate whose medical condition prevented him from complying with prison grievance system requirements).

While the Vermont Supreme Court has apparently not addressed this precise issue, the federal caselaw cited by Plaintiffs makes sense. An inmate cannot be expected to exhaust administrative remedies if some health condition legitimately prevents him from doing so. As noted above, Plaintiffs allege that Mr. Moore "struggled with mental illness . . . for most of his adult life," was "diagnosed with Schizophrenia," was appointed a guardian in 2017, and "lacked the mental capacity to make sound decisions after his release from incarceration." Compl. ¶¶ 5, 14, 42. These allegations are sufficient at the pleading stage to raise a factual issue as to whether Mr. Moore had the capacity to pursue the relevant administrative remedies, and the Department is not entitled to dismissal on exhaustion grounds.

III. Joinder of Necessary and Indispensable Parties

The Department next contends that Plaintiffs have failed to join two necessary and indispensable parties: Correct Care Solutions, LLC, which contracted with the Department to provide medical and mental health care to Vermont inmates from 2012 through 2015, and Centurion of Vermont, LLC, the Department's medical contractor from

2015 through 2019. The Department seeks either joinder of the absent parties, or dismissal.[4]

Rule 12(b)(7) provides a defense for failure to join a party under Rule 19, which "states pragmatic tests for determining when joinder of parties is necessary in order for the court adequately to dispose of the action and when, where joinder is necessary, the action should be dismissed in the absence of the parties who cannot be joined." Reporter's Note, V.R.C.P. 19. The first step is to decide whether the absent parties are "necessary" under Rule 19(a):

> A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest.

V.R.C.P. 19(a). Thus, the rule provides three separate ways in which a non-party may be deemed necessary.

Plaintiffs allege that the Department failed to provide Moore with the necessary medical and mental health care he needed. Compl. ¶ 26. The Department contends that because the medical contractors were "active participants" in Moore's medical care, complete relief cannot be accord without them and they are necessary parties to be joined if feasible. See Mot. to Dismiss at 9–10. The Department has filed a copy of its contract with Centurion as Exhibit C, which indicates that Centurion agreed to provide medical

[4] Preliminarily, the court notes that dismissal is not a proper remedy here. Even if the medical contractors were necessary parties under Rule 19(a), there is no indication that they could not be joined in this case. Thus, the proper remedy would be joinder rather than dismissal.

care to inmates through January 2019. Although the contractors were responsible for Moore's medical care, the sole fact that the absent parties alone engaged in the alleged misconduct does not make them necessary parties under Rule 19. *See*, *e.g.*, Charest v. Fed. Nat. Mortg. Ass'n, 9 F. Supp. 3d 114, 130 (D. Mass. 2014) (mortgager servicer's absence in plaintiff's suit against Fannie Mae did not prevent court from according complete relief to all parties, even though servicer "engaged in virtually all of the misconduct at issue," where the basis for liability was "the existence of a viable agency relationship between Fannie Mae" and the servicer). Significantly, Plaintiffs also allege that the Department kept him in solitary confinement for extended periods of time. Id. ¶¶ 21, 27, 38, 46. There is no suggestion that the absent medical contractors were responsible for inmates' placements in solitary confinement.

Moreover, Plaintiffs do not request any injunctive relief; rather, they seek only monetary damages. That makes it more likely that complete relief can be afforded even in the medical contractors' absence. *See* Wright & Miller, 7 Fed. Prac. & Proc. Civ. § 1608 (3d ed.) (noting that "money damages may prove to be an appropriate alternative" where injunctive relief "might have a detrimental impact on an absent person"); *see also* Pasco Int'l (London) Ltd. v. Stenograph Corp., 637 F.2d 496, 501–02 (7th Cir. 1980) ("possibility of monetary relief" did not prejudice absent party where absent party "would not be liable for any of those damages and could assert any of his defenses in any indemnity or contribution action brought against him by" the defendant). To the extent the Department suggests that litigating this action in the medical contractors' absence would cause reputational prejudice to the contractors, that is not sufficient to require joinder. *See* id. at 502 ("Any agent will suffer some adverse practical consequences when

his principal is held vicariously liable on account of the agent's conduct, but this is not a sufficient interest for finding the agent indispensable under Rule 19.").

The Department's argument that the medical contractors are necessary parties is also grounded on the potential for indemnification creating "inconsistent and conflicting obligations," Mot. to Dismiss at 10–11, which most courts have rejected as a basis for required joinder. *See* Rochester Methodist Hosp. v. Travelers Ins. Co., 728 F.2d 1006, 1016 (8th Cir. 1984) (possible indemnification did not make non-party required); Equal Emp. Opportunity Comm'n v. Cummins Power Generation Inc., 313 F.R.D. 93, 101–02 (D. Minn. 2015) ("Simply because a party may later bring a claim for indemnification or contribution against a non-party, does not make the non-party necessary."); AEI Income & Growth Fund 24, LLC v. Parrish, No. 04-CV-2655 (JRT/FLN), 2005 WL 713629, at *2 (D. Minn. Mar. 30, 2005) (resolving issue of indemnification of absent party was not "necessary to [the] resolution of this case"), aff'd, 200 F. App'x 621 (8th Cir. 2006) (per curiam); *but see* Dreamweaver Andalusians, LLC v. Prudential Ins. Co. of Am., 234 Cal. App. 4th 1168, 1176 (2015) (potential for federal indemnity action against United States could lead to inconsistent obligations because federal court "might proportion liability differently or make contradictory findings of fact"). Because the medical contractors are not necessary parties under Rule 19(a), their joinder is not required.[5]

[5] Because Centurion and Correct Care are not necessary parties under Rule 19(a), the court need not wade into the Rule 19(b) analysis. The court notes, however, that the Department's contention that it "would face substantial hardship and expense in attempting to obtain relevant discovery from the former medical contractors . . . without access to critical facts or witnesses" is wholly unpersuasive. Mot. to Dismiss at 12. The Department's contract with Centurion contains a rather broad indemnity provision:

> The Party shall defend the State and its officers and employees against all third party claims or suits arising in whole or in part from any act or omission of the Party or of any agent of the Party in connection with the performance of this Agreement. The State shall notify the Party in the event of any such claim or suit, and the Party shall immediately retain

IV. Certificate of Merit

The Department argues that Plaintiffs' negligence claims (Counts II, III, and IV) and wrongful death claim (Count V) must be dismissed for failure to file a certificate of merit required by 12 V.S.A. § 1042. The Department is flat wrong in claiming that such a certificate is required for "all civil actions" for personal injury or wrongful death. Reply at 11. As is apparent from reading the *full* sentence from which the Department partially quotes, the requirement applies only to medical malpractice claims. See 12 V.S.A. § 1042 (addressing claims "in which it is alleged that such injury or death resulted from the negligence *of a health care provider*")(emphasis added); Bittner v. Centurion of Vermont, LLC, 2021 VT 73, ¶ 17, 215 Vt. 475 ("the [certificate of merit] requirement was adopted in response to concerns that health care providers were being burdened by meritless lawsuits and that the eventual dismissal of such suits was an inadequate remedy for the associated professional and personal costs.")(quotations omitted).

"Section 1042 mandates that in all medical malpractice actions for personal injury or wrongful death . . . the attorney or party filing the action must 'file[ ] a certificate of merit simultaneously with the filing of the complaint.'" Quinlan v. Five-Town Health All., Inc., 2018 VT 53, ¶ 5, 207 Vt. 503 (quoting 12 V.S.A. § 1042(a)). The attorney or plaintiff must certify that he or she has "consulted with a qualified expert who, based on

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> counsel and otherwise provide a complete defense against the entire claim or suit.

Ex. C at 11. Clearly, the contract requires the medical contractors to be heavily involved in any such litigation. The contractors would have a strong self-interest in making all critical facts and witnesses available. This is a far cry from cases where non-party sovereign entities pose barriers to discovery. *See*, *e.g.*, State v. Vance, 339 P.3d 245, 252 (Wash. Ct. App. 2014) (collecting cases); Pollock v. Barbosa Grp., Inc., 478 F. Supp. 2d 410, 413 (W.D.N.Y. 2007) (state court lacks jurisdiction to enforce subpoena on federal agency) (citing Smith v. Cromer, 159 F.3d 875, 878 (4th Cir. 1998); Boron Oil Co. v. Downie, 873 F.2d 67, 69–72 (4th Cir. 1989)); *see generally* Alltel Commc'ns, LLC v. DeJordy, 675 F.3d 1100, 1103 (8th Cir. 2012) (discussing challenges posed by subpoenas of third-party sovereign entities).

reasonably available information, has described the applicable standard of care and indicated that there is 'a reasonable likelihood that the plaintiff will be able to show that the defendant failed to meet that standard of care,' thereby causing the plaintiff's injury." Id. (quoting 12 V.S.A. § 1042(a)(2)). Failure to file a certificate of merit "shall be grounds for dismissal of the action without prejudice, except in the rare instances in which a court determines that expert testimony is not required to establish a case for medical malpractice." 12 V.S.A. § 1042(e). The simultaneous-filing requirement is "mandatory and demands strict compliance." Bittner v. Centurion of Vermont, LLC, 2021 VT 73, ¶ 18, 215 Vt. 475 (quotation omitted).

Plaintiffs maintain that the certificate of merit requirement does not apply here because they have not brought a medical malpractice claim. Some of Plaintiffs' allegations arguably stem from medical negligence. For example, Plaintiffs allege that Moore's injuries were caused at least in part by the Department's "refus[al] to provide [him] with necessary mental health treatment" or "fail[ure]" to provide him with the "necessary medical and mental health care he needed." *See* Compl. ¶¶ 13, 17, 26, 37, 45; *see also* Smith v. Friends Hosp., 928 A.2d 1072, 1075–76 (Pa. Super. Ct. 2007) (discussing when a complaint "sounds in medical malpractice" for purposes of Pennsylvania's certificate of merit statute). But other allegations plainly do not encompass medical negligence. For instance, the complaint alleges that the Department's excessive placement of Moore in solitary confinement, as well as its failure to implement a safe release plan or notify Moore's family that he was being released, caused his injuries and death. *See* Compl. ¶¶ 9–12, 21–23, 27, 30–33, 38, 41, 46, 48; Opp'n at 7 ("The gravamen of Plaintiffs' claims is the grossly excessive amount of time DOC forced Mr. Moore to spend in solitary confinement"). Those allegations do not rely on malpractice by a health care provider.

The Department has both a constitutional and statutory duty to provide health care for inmates. Hum. Rts. Def. Ctr. v. Correct Care Sols., LLC, 2021 VT 63, ¶ 19, 215 Vt. 362 ("Where the government takes a person into its custody, the Eighth Amendment obligates it to provide medical care for that person."); 28 V.S.A. § 801(a) ("The Department shall provide health care for inmates in accordance with the prevailing medical standards."). The Department's broad, overarching duty, however, is not necessarily the same as a medical practitioner's more specific duty to provide the degree of knowledge, skill, and care "ordinarily exercised by a reasonably skillful, careful, and prudent health care professional engaged in a similar practice under the same or similar circumstances." 12 V.S.A. § 1908(1). For instance, if the Department wholly failed or refused to provide an inmate access to a doctor, that would not be a traditional medical malpractice claim requiring a certificate of merit. If a medical practitioner misdiagnosed an inmate or gave an inmate the wrong treatment, however, that would obviously require a certificate of merit.

The complaint is not specific enough for the court to sort out exactly which allegations sound in medical negligence and thus require a certificate of merit, and which do not. At this point, the court can only say that to the extent any of the claims allege that a health care provider failed to provide proper treatment or otherwise breached the standard of care as established in 12 V.S.A. § 1908, they must be dismissed for failure to file a certificate of merit. Plaintiffs cannot now cure that error by filing the certificate late. *See* McClellan v. Haddock, 2017 VT 13, ¶ 16, 204 Vt. 252 (plaintiff not permitted to amend complaint to file certificate of merit that he failed to file simultaneously with his original complaint). To the extent Plaintiffs allege that the Department wholly failed or refused provide Moore with medical care, and to the extent the allegations do not otherwise sound

in medical malpractice, those parts of the claim are not subject to dismissal under 12 V.S.A. § 1042. The application of this ruling to specific allegations in the complaint will need to be sorted out in discovery, on summary judgment, or at trial.

V. Negligence and Wrongful Death

Next, the Department argues that Plaintiffs have failed to state cognizable claims for negligence (Count III) and wrongful death (Count V). The Department contends that Plaintiffs do not adequately plead that it owed Mr. Moore a duty of care or that its alleged acts proximately caused Moore's injuries. Specifically, as to duty, the Department asserts that it does not owe a duty of care to an inmate to prevent an alleged suicide at least nine months after his incarceration ended, or to provide a safety plan or notify the inmate's family upon his release to a state hospital. Mot. to Dismiss at 16. As to causation, the Department contends that Mr. Moore's death was far too attenuated from his incarceration. Id. at 17–19.[6]

Preliminarily, the Department suggests that Moore's death was not a suicide, and that it was more likely, or as likely, to have been an accident. Mot. to Dismiss at 15.[7] The complaint describes Mr. Moore's death in a car crash as an "apparent suicide." Compl. ¶¶ 18–19, 43. While the complaint is somewhat contradictory in that it also refers to his

[6] The Department also purports to move for dismissal on Count II (the first negligence claim) and Count IV (NIED) for failure to state a claim. Its arguments for dismissal, however, implicate only Count III (the second negligence claim) and Count V (wrongful death). Thus, the court has no basis to conclude that Counts II and IV fail to state a claim under Rule 12(b)(6).

[7] The Department relies in part on two newspaper articles attached to its motion as Exhibits D and E, but newspaper articles are not "public records" as contemplated by the exception to the general rule that a court may not consider documents extraneous to the complaint when assessing a motion to dismiss for failure to state a claim. *See* V.R.E. 803(8) (records of "a public office or agency"). Nor were these articles relied upon in the complaint. *See* Kaplan v. Morgan Stanley & Co., 2009 VT 78, 186 Vt. 605 (listing types of documents extraneous to complaint that may be considered on motion to dismiss); *see also* Ericson v. City of Meriden, 113 F. Supp. 2d 276, 283 (D. Conn. 2000), aff'd, 55 F. App'x 11 (2d Cir. 2002) (refusing to consider newspaper article on motion to dismiss). Thus, the court does not consider them.

death as a "senseless accident," id. ¶ 55, the allegation of suicide along with the allegations of "exacerbated mental health issues," "severe trauma," and "lasting psychological damage" are sufficient under Rule 12(b)(6). The death certificate is not dispositive. The fact that the certificate listed the cause of Moore's death as "blunt force trauma of torso" and stated that the manner of death "could not be determined" is not inconsistent with an intentional car crash for the purpose of committing suicide.

"Generally speaking, voluntary suicide is viewed as an independent intervening act that breaks the causal chain and severs potential liability." Lenoci v. Leonard, 2011 VT 47, ¶ 17, 189 Vt. 641 (mem.) (citing McKane v. Capital Hill Quarry Co., 100 Vt. 45, 47 (1926)). This is because "the act of suicide is considered to be a deliberate, intentional, and intervening act, which precludes a finding that a given defendant is, in fact, responsible for the harm." Id. Thus, "[m]ost jurisdictions are reluctant to impose liability for suicide even upon defendants who had custodial control over the suicidal individual." Bruzga v. PMR Architects, P.C., 693 A.2d 401, 403 (N.H. 1997) (citing Pretty On Top v. City of Hardin, 182 Mont. 311, 597 P.2d 58 (1979); City of Belen v. Harrell, 93 N.M. 601, 603 P.2d 711 (1979); Johnson v. Grant Hospital, 32 Ohio St.2d 169, 291 N.E.2d 440 (1972); Note, Custodial Suicide Cases: An Analytical Approach to Determine Liability For Wrongful Death, 62 B.U.L.Rev. 177, 177–78 (1982)).

However, courts have recognized at least two exceptions to this general rule against suicide liability. First, liability may exist where "the defendant had a duty to prevent the suicide arising from the defendant's special relationship with the suicidal individual." Lenoci, 2011 VT 47, ¶ 19. Typically, the defendant in these cases "is someone who has a duty of custodial care, is in a position to know about suicide potential, and fails to take measures to prevent suicide from occurring." Id. (quotation omitted). Courts have

imposed this duty "on institutions with control over the persons, such as jails and mental hospitals, and in limited cases on psychiatrists and other trained professionals" with particular expertise or training "to detect mental illness and/or the potential for suicide and the power or control necessary to prevent that suicide." Id. (citations omitted); *see also*, *e.g.*, English v. Griffith, 99 P.3d 90, 94 (Colo. App. 2004) (listing cases and stating that "[s]pecial relationships typically involve circumstances in which the defendant either had a treating or supervisory relationship with the decedent or maintained custodial control over the decedent's environment"); Murdock v. City of Keene, 623 A.2d 755, 756 (N.H. 1993) (recognizing that "a jailer's responsibility to a prisoner includes a duty to prevent the prisoner's own suicide"); Restatement (Second) of Torts § 314A (recognizing a duty of care in the jailer-prisoner context). The problem with imposing such a duty here, of course, is that Moore was no longer in the Department's custody when the suicide occurred, as he had apparently been released over nine months earlier.

In any event, Plaintiffs do not rely on that exception, and they expressly disclaim any duty to *prevent*. *See* Pl.'s Opp'n at 8. Instead, they appear to rely on the second exception to the general rule against suicide liability. "[W]hen an injured person becomes insane, even temporarily, and that insanity prevents one from realizing the nature of one's act or controlling one's conduct, a resulting suicide is regarded either as a direct consequence of the injury and not an intervening force or as a normal consequence of the injury inflicted." Lenoci, 2011 VT 47, ¶ 17 (citing W. Keeton et al., Prosser and Keeton on Torts § 44, at 310–11 (5th ed.1984)); *see also* Restatement (Second) of Torts § 455 (discussing "acts done during insanity caused by negligent conduct"). Courts have described this exception as the "irresistible impulse" doctrine. *See*, *e.g.*, D.C. v. Peters, 527 A.2d 1269, 1276 (D.C. 1987) ("The Restatement's formulation of what has become known

as the 'uncontrollable' or 'irresistible impulse' test has been adopted by several courts"); Truddle v. Baptist Mem'l Hosp.-DeSoto, Inc., 150 So. 3d 692, 697 (Miss. 2014); R.D. v. W.H., 875 P.2d 26, 30 (Wyo. 1994).

Here, Plaintiffs allege that the Department's excessive solitary confinement of Mr. Moore "caused lasting psychological damage," that due to the Department's "wrongful acts" and "lasting psychological damage" he "lacked the mental capacity to make sound decisions after his final release from incarceration," and that Mr. Moore's suicide was a "direct result" of his mental health trauma "at the hands of DOC." Compl. ¶¶ 41–44. Given "Vermont's extremely liberal notice-pleading standard," Island Indus., LLC, 2021 VT 49, ¶ 24, 215 Vt. 162, those allegations are sufficient to plead a wrongful death claim based on suicide under the exception to the general rule against suicide liability as stated in Lenoci, 2011 VT 47, ¶ 17 and the Restatement (Second) of Torts § 455.

The Department suggests that it cannot be liable for Moore's alleged suicide for the sole reason that he was no longer in custody when he died. *See* Def.'s Reply at 7. However, that argument wrongly assumes that Plaintiffs' theory of liability rests on a duty to prevent. Again, Plaintiffs have expressly disclaimed that theory. Their theory is that the Department's alleged constitutional violations (i.e., the excessive placement in solitary confinement) proximately caused his suicide under the irresistible impulse doctrine. The Department also argues that wrongful death claims "require a plaintiff to satisfy the essential elements of a negligence claim," and suggest that such claims cannot arise from a constitutional violation. Mot. to Dismiss at 14; Reply at 7–8. Not so. Our Supreme Court has expressly recognized that "wrongful death actions are not necessarily based on negligent acts, and that Vermont's Wrongful Death act "provides a remedy when death is caused 'by the wrongful act, neglect or default' of another; thus, it is not limited to acts

of negligence." Clymer v. Webster, 156 Vt. 614, 621–22 (1991); *see also* 14 V.S.A. § 1491. Surely, cruel and unusual punishment could constitute a "wrongful act" under the Wrongful Death Act.

The Department relies largely on Lenoci to support its motion to dismiss. There, the mother of a 15-year old girl who committed suicide sued the girl's 18-year old friend, alleging that the friend was negligent in bringing the girl to an apartment party where she had sexual intercourse with a 19-year old man, and that the friend should have intervened to prevent the sexual intercourse. Lenoci, 2011 VT 47, ¶¶ 2, 6. The plaintiff further alleged that the defendant's negligence "caused a delirium or insanity" in the decedent, which proximately caused the suicide. Id. ¶ 6. The Supreme Court affirmed the trial court's grant of summary judgment for the defendant, holding that there was no duty owed under these circumstances because it was not "reasonably foreseeable" that the defendant "could or should have anticipated [that decedent] would suffer emotional distress as a result of the intercourse." Id. ¶ 14. The "only suggestion" that decedent suffered an injury as a result of the intercourse with the 19-year "was the expression of regret found in her suicide note." Id. Nor was there any "evidence that [defendant] ever agreed to supervise and care for" decedent. Id. ¶ 15. As to causation, the Court observed "no evidence of an uncontrollable impulse on [the decedent's] part to commit suicide." Id. ¶ 18.

Critically, Lenoci was decided at the summary judgment stage. This case, of course, is still at the pleading stage. Plaintiffs have pled a former custodial relationship where the Department clearly had both a constitutional and statutory duty to provide Moore with proper care and treatment. Indeed, "the provision of healthcare to incarcerated persons is one of those rare instances in which the Constitution imposes upon the government an affirmative duty to care for and protect individuals." Hum. Rts. Def. Ctr. v. Correct Care

Sols., LLC, 2021 VT 63, ¶ 19, 215 Vt. 362; *see also* 28 V.S.A. § 801(a) ("The Department shall provide health care for inmates in accordance with the prevailing medical standards."). Plaintiffs have also alleged that the Department's unconstitutionally excessive solitary confinement of Moore directly resulted in psychological damage, loss of mental capacity, and subsequent suicide. Again, these allegations are more than enough to raise the "irresistible impulse" doctrine such that the wrongful death claim survives the motion to dismiss.

The Department asserts that the "period of approximately 9 months that passed" between Moore's release from prison and his death "defeats" Plaintiffs' ability to establish proximate causation. Def.'s Reply at 10. The Department observes that "[c]ourts have found lesser periods of time that elapsed between a decedent's release from custody and their death to be dispositive in a plaintiff's failure to satisfy the causation element." Id. Be that as it may, courts have also found that even in the presence of *longer* periods of time, a factual dispute may exist as to causation. *See*, *e.g.*, Young v. Swiney, 23 F. Supp. 3d 596, 599, 614–24 (D. Md. 2014) (denying defendant's motion for summary judgment on wrongful death claim where decedent's psychosis sustained as a result of a car accident allegedly caused decedent's suicide over two years after accident, and finding jury question on issue of proximate causation); Wickersham v. Ford Motor Co., 194 F. Supp. 3d 434, 435, 440–48 (D.S.C. 2016) (finding genuine issue of material fact as to proximate causation in wrongful death claim where decedent committed suicide approximately 18 months after car accident that caused permanent injuries); Exxon Corp. v. Brecheen, 519 S.W.2d 170, 174, 182 (Tex. Civ. App. 1975), rev'd on other grounds, 526 S.W.2d 519 (Tex. 1975) (affirming jury verdict finding that accident was proximate cause of decedent's suicide 34 months later).

Moreover, the cases cited by the Department involved summary judgment decisions rather than dismissal under Rule 12(b)(6). *See* Mroz v. City of Tonawanda, 999 F. Supp. 436, 459 (W.D.N.Y. 1998) ("Plaintiff has not established the existence of a material issue of fact as to the issue of whether . . . there was any causal connection"); Paradies v. Benedictine Hosp., 431 N.Y.S.2d 175, 178 (N.Y. App. Div. 1980) (affirming summary judgment for defendant, and holding that "Plaintiff has failed to present any evidence establishing a causal connection between the alleged acts of negligence and the subsequent suicide"). Clearly, there is no specific time limit when causation automatically falters. Any such specific limit would be arbitrary, given that causation is a fact issue "normally left for the jury to determine." Ziniti v. New England Cent. R.R., Inc., 2019 VT 9, ¶ 16, 209 Vt. 433. While the fact that nine months passed between Moore's incarceration and his suicide might ultimately doom Plaintiffs' wrongful death claim after further factual development, it does not do so at this stage of the case.

As to the Department's contention that it did not have a duty to provide a safety plan or notify Moore's family upon his release to a state hospital, that appears to pertain only to the negligence claim alleged in Count III, captioned "NEGLIGENCE II (Failure to release Mr. Moore properly)." The Department's general duty of care owed to inmates in its custody could potentially encompass a safe release plan and notifying an inmate's family of the release where the inmate has significant mental health issues. Further factual development will shed light on whether the Department might have breached its duty through these alleged inactions.

VI. Loss of Consortium

Lastly, the Department contends that Plaintiffs' loss of consortium claim is "conclusory and speculative" in that they "fail[ed] to allege any evidence to support the

'pecuniary injuries' suffered by them as a result of their brother Moore's death other than burial and funeral expenses." Mot. to Dismiss at 19–20. They further complain that Plaintiffs have "not proffer[ed] any facts to support their claim for lost intellectual, moral and physical training, or the loss of care, nurture and protection beyond the mere existence of the family unit." Id. at 20. Obviously, Plaintiffs need not allege specific "evidence" of damages at this stage of the case. Their loss of consortium claim is sufficient to survive a motion to dismiss.

Order

The Department's motion to dismiss is granted as to the negligence claims to the extent they sound in medical malpractice due to the failure to file a certificate of merit simultaneously with the complaint. The motion is denied in all other respects. The Department shall file its answer within 14 days, and the parties shall file a proposed discovery schedule within 30 days thereafter.

Electronically signed on April 12, 2023 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge