

STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 67-2-16 Wrcv

Sheldon et al vs. Pastor et al

DECISION AND ORDER GRANTING MOTION TO DISMISS (#6)

Count 1, Personal Injury - Other (67-2-16 Wrcv)

Count 2, Personal Injury - Other (67-2-16 Wrcv)

Title: Motion to Dismiss (Motion 6)
Filer: Ruth E. Clough
Attorney: Robin O. Cooley
Filed Date: July 19, 2016

Response filed on 08/09/2016 by Attorney Sharon Gentry for party 2 Co-counsel
Response filed on 08/24/2016 by Attorney Robin O. Cooley for Defendant Ruth E. Clough
Response filed on 09/09/2016 by Attorney Thomas W. Costello for Plaintiff Willis S. Sheldon
Response filed on 12/21/2016 by Attorney William L. Gagnon for Defendant Adel V. Pastor
Response filed on 12/22/2016 by Attorney Thomas W. Costello for Plaintiff Willis S. Sheldon
Response filed on 12/22/2016 by Attorney William L. Gagnon for Defendant Adel V. Pastor

The motion is GRANTED.

Defendant Clough seeks dismissal of all claims stated against her in the amended complaint under V.R.C.P. 12(b)(6), because the complaint fails to state a claim upon which relief may be granted. The motion to dismiss is granted as to the claims asserted by the Estate of Dezirae Sheldon against Ms. Clough (i.e., wrongful death and survival). The motion to dismiss is also granted as to the claims of Willis Sheldon against Defendant Clough.

The following is a summary of the factual allegations in the complaint. The court makes no findings in this decision as to whether the allegations are true or false. The issue before the court on this motion to dismiss under V.R.C.P. 12(b)(6) is whether the factual allegations, if proven at trial, are sufficient to state a claim upon which relief may be granted.

Facts Alleged

Defendant Clough is an attorney. She represented Willis Sheldon ("Father") in a juvenile proceeding involving his minor child, Dezirae Sheldon. The juvenile proceeding involved an allegation by the Vermont Department of Children and Families ("DCF") that Dezirae was a child in need of care or supervision ("CHINS"). Dezirae was living with her mother at the time that the juvenile proceeding was commenced. Plaintiffs allege, and there is no dispute, that Dezirae was represented by a separate Vermont attorney in the juvenile proceeding.

The allegations in the amended complaint are somewhat murky regarding the precise sequence of events, but it is clear that Plaintiffs allege that Dezirae was removed from her mother's care and placed in DCF custody at the time of the filing of the juvenile proceeding. Later, during the pendency of the juvenile proceeding, Dezirae was returned to her mother's care, but it is not clear from the allegations whether the decision to return Dezirae to her mother was a placement decision made by DCF, or a decision of the court. Nevertheless, Plaintiffs allege that the placement of Dezirae back into her mother's care exposed her to a significant risk of harm for a variety of reasons, including dangerous conditions in the mother's home. Plaintiffs allege that soon after Dezirae was returned to her mother's care, she suffered very serious injuries that led to her death at the hands of a man who was living in the mother's home and who was subsequently charged with homicide.

Plaintiffs allege that Defendant Clough, Father's lawyer, was negligent because she did not take a variety of steps that Plaintiffs allege a reasonably competent attorney would have taken to investigate and then report to Father regarding the dangers Dezirae would be exposed to if she was returned to her mother's care. Plaintiffs allege the Defendant Clough failed to properly inform Father regarding the facts of the case and regarding steps that he could take to protect Dezirae from harm.

Plaintiffs also make the same allegations against Dezirae's lawyer. Plaintiffs allege that Dezirae's lawyer was negligent because she did not take a variety of steps that Plaintiffs allege a reasonably competent attorney would have taken to investigate and then report to Dezirae's representative, presumably Dezirae's Guardian Ad Litem, regarding the dangers Dezirae would be exposed to if she was returned to the mother's care. Plaintiffs allege that Dezirae's lawyer failed to properly inform Dezirae's representative about the facts of the case and about steps that could be taken to protect Dezirae from harm.

On the issue of damages, Plaintiffs allege that Dezirae suffered physical injury, physical pain, mental anguish, physical pain and suffering, medical expenses, and death. With respect to Father, Plaintiff alleges that Father suffered the permanent loss of the love and companionship of Dezirae, and the permanent destruction of his parent-child relationship with Dezirae.

Decision

When ruling on motions to dismiss, the court must assume that all the facts alleged in the complaint are true and determine whether on those facts the complaint states a legal claim upon which relief may be granted. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5 n.1, 184 Vt. 1. The court will only dismiss a claim where "it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Id.* "The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it." *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002) (citations omitted).

The claims against Defendant Clough may be divided into two categories. First, there are claims for wrongful death and survival advanced by the Estate of Dezirae Sheldon ("Estate"). These claims benefit the next of kin of the decedent in the case of the wrongful death action and the decedent's heirs in the case of the survival action. They are grounded on the allegation that Defendant Clough was negligent in the performance of legal work for Father, and that her negligence was a proximate cause of Dezirae's injuries and death. Significantly, there is no allegation that Attorney Clough formed an attorney-client relationship with the decedent.

Second, there is the individual claim of Father against Defendant Clough. The essence of this claim is the allegation that Defendant Clough was Father's lawyer in a juvenile proceeding and that she

was negligent in the performance of her legal work for him. Plaintiff-Father contends that Defendant Clough's negligence was a proximate cause of the physical injuries suffered by Dezirae, including her death, as well as the permanent destruction of Father's relationship with his daughter, Dezirae.

1. Claims of the Estate of Dezirae Sheldon against Defendant Clough

The Estate's claims for wrongful death and survival are grounded in negligence. Plaintiff alleges that Ms. Clough was negligent and that her negligence was a proximate cause of Dezirae's injuries and death. The elements of a negligence claim are duty, breach, causation, and damages. See *Ainsworth v. Chandler*, 2014 VT 107, ¶ 11, 197 Vt. 541, 546 (quoting *Demag v. Better Power Equipment, Inc.*, 2014 VT 78, ¶ 6 197 Vt. 176, 179). The first element of the Estate's negligence claims requires a showing that Ms. Clough owed a legal duty of care to Dezirae. Ms. Clough argues that she represented Father, not Dezirae, and that she did not owe a legal duty of care to Dezirae. Defendant argues that her sole legal duty of care was to Father, citing *Boree v. Gravel*, 174 Vt. 486 (2002) and *Andrewski, et al. v. Devine, et al.*, 720 N.Y.S.2d 423 (2001). In response to this argument, the Estate argues that Defendant Clough owed a legal duty of care to Dezirae under the Restatement (Second) of Torts § 324A.

The Restatement (Second) of Torts provides that a person who undertakes to provide services to another may be subject to liability for "physical harm" to a third person if he/she "should recognize" that the services provided "are necessary for the protection of the third person" and if: (a) her failure to exercise reasonable care increases the risk of such harm; (b) she has undertaken to perform a duty owed by the other to the third person; or (c) the harm is suffered because of reliance of the other, or the third person upon the undertaking. Restatement (Second) of Torts § 324A. The threshold requirements for liability under Section 324A are that the defendant has undertaken to provide services to another, that the services to be provided are necessary to protect a third person from physical harm, and that the defendant should recognize that the services are necessary to protect a third person.

In the instant case, taking the facts alleged by the Estate as true, Defendant Clough undertook to provide legal services to Father. The question is whether under §324A, assuming the truth of all the facts alleged by Plaintiff, a reasonable juror could find that Clough's legal services to Father were necessary to protect Dezirae from physical harm. The allegations are that Dezirae was represented by her own Vermont attorney in the juvenile proceedings. Dezirae's lawyer had all the same obligations to investigate the facts and to advocate for Dezirae as Defendant Clough had with respect to Father. See Vermont Rules of Professional Conduct, Preamble (setting forth an attorney's responsibilities to the client). Notably absent from the Plaintiff's Complaint is any allegation of a fact or circumstance that would have interfered with Dezirae's lawyer's ability to investigate the case on her behalf such that Father's attorney's legal work could somehow be considered "necessary" to protect Dezirae. Nor is there any allegation that the parties or counsel entered into a common defense agreement, or other similar agreement, dividing responsibility for legal tasks between the lawyers. On the facts alleged, there is no basis to conclude that Ms. Clough's legal services for Father were necessary to protect Dezirae from physical harm.

Importantly, Plaintiff alleges that at the time of the alleged negligent legal representation in this case, Dezirae was in the care and custody of DCF; therefore, DCF was charged with legal responsibility to protect Dezirae from physical harm. See 33 V.S.A. § 104(b)(9) (providing that the Department may "[s]upervise and control children under its care and custody and provide for their care, maintenance, and education"); 33 V.S.A. 101 ("It is the policy of the State of Vermont that . . . The programs of the Department for Children and Families shall be designed to strengthen family life for the care and

protection of children . . . and to provide substitute care of children only when family, with the use of available resources, is unable to provide the necessary care and protection to ensure the right of any child to sound health[.]”). Under these circumstances, taking all the Plaintiff factual allegations as true, the court concludes that no reasonable juror could possibly conclude that Ms. Clough’s legal services for Father were necessary to protect Dezirae from physical harm.

In addition, the Plaintiff’s allegations do not support the conclusion that any one of the other elements required under Section 324A are present in this matter. There are no allegations that support the conclusion that poor legal work by Defendant Clough on behalf of Father somehow increased the risk of harm to Dezirae. The allegations do not support the conclusion that Defendant Clough undertook to perform a duty that Father owed to Dezirae. Also, the allegations do not support the conclusion that Dezirae, or Dezirae’s representative, relied upon Father’s lawyer to protect Dezirae from physical harm.

Further, the court concludes that application of Section 324A to the facts alleged in the instant case would be contrary to public policy. Such a rule would drive a wedge between the attorney and the client. Absent agreement between the lawyer and the client to the contrary, an attorney’s legal duty of care and loyalty is limited to his or her client. Any other rule is likely to cause divided loyalties and create conflicts of interest. Father is entitled to a lawyer who is completely focused on his interests, not the interests of a third party. Similarly, Dezirae is entitled to a lawyer who is completely focused on her interests, not the interests of her mother or her father, or others. Absent the presence of facts that have not been alleged in this case, application of Section 324A to cases of this sort would have the impact of interfering with the right of every party in a CHINS proceeding to receive separate and independent legal representation without divided loyalties and conflicts of interest. See V.R.F.P. 6.

For all these reasons, the Court is persuaded that on the facts alleged in the amended complaint, Defendant Clough did not owe a legal duty of care to the juvenile, Dezirae Sheldon. The amended complaint fails to state a cause of action for the Estate of Desirae Sheldon against Defendant Clough for wrongful death and survival. The Estate’s claims for wrongful death and survival against Defendant Clough are dismissed. See V.R.C.P. 12(b)(6).

2. Claims of Father against Defendant Clough

Finally, we turn to the claim of Father individually against Defendant Clough. Father’s claims against Defendant Clough are grounded in negligence. The elements of a negligence claim are duty, breach, causation, and damages. See *Ainsworth*, 2014 VT 107, ¶ 11, 197 Vt. 541, 546. Father alleges, and it is not disputed, that Defendant Clough was Father’s attorney. This allegation is sufficient to establish that Defendant Clough owned a legal duty of care to Father based on the existence of an attorney-client relationship. Plaintiff has alleged facts which, if true, could support a finding that Defendant Clough breached her duty of care to Father (e.g., failure to investigate facts and inform Father regarding legal rights).

The precise nature of Defendant Clough’s argument in support of dismissal of Father’s individual claims is not crystal clear to the Court. The court’s interpretation of the briefing is that Ms. Clough had no legal duty to Dezirae and that the absence of a duty owed to Dezirae, given the nature of the damages claimed by Father, defeats Father’s individual claims against Defendant Clough.

Ordinarily, an injured plaintiff in a negligence case is required to show that the defendant owed a legal duty to the plaintiff, not that the defendant owed a duty to a third party. However, in this case, Father alleges that he has suffered the loss of his parent-child relationship with Dezirae and the loss of the love and affection that he previously enjoyed with Dezirae. This type of claim is commonly known as

a loss of consortium claim. See *Hay v. Medical Center Hospital*, 145 Vt. 533 (1985); see also *Mears v. Colvin*, 171 Vt. 655, 657 (2000). Our law is clear that claims for loss of consortium are “derivative” claims. They are completely dependent on the success of the underlying tort claims of the injured family member. See *Derosia v. Book Press, Inc.*, 148 Vt. 217, 220 (1987) (citing *Hay*, 145 Vt. at 539). As set forth above, the court has already ruled that the claims of Dezirae’s Estate against Defendant Clough will be dismissed because Defendant Clough did not owe a legal duty of care to Dezirae. Accordingly, because Father’s claims for loss of consortium against Defendant Clough are derivative of the Estate’s claims against Ms. Clough, and because the Estate’s claims will be dismissed, Father’s individual claims for loss of consortium must be dismissed, as well.

Order

1. Defendant Ruth E. Clough’s Motion to Dismiss (#6) is GRANTED.
2. The claims of the Estate of Dezirae Sheldon against Defendant Ruth E. Clough are DISMISSED for failure to state a claim upon which relief may be granted. V.R.C.P. 12(b)(6).
3. The claims of Willis Sheldon against Defendant Ruth E. Clough are DISMISSED for failure to state a claim upon which relief may be granted. V.R.C.P. 12(b)(6).

So ordered.

Electronically signed on January 26, 2017 at 11:43 AM pursuant to V.R.E.F. 7(d).

Robert P. Gerety, Jr.
Superior Court Judge

Notifications:

Thomas W. Costello (ERN 3513), Attorney for Plaintiff Willis S. Sheldon
Thomas W. Costello (ERN 3513), Attorney for Plaintiff Willis S. Sheldon
William L. Gagnon (ERN 3421), Attorney for Defendant Adel V. Pastor
Robin O. Cooley (ERN 4769), Attorney for Defendant Ruth E. Clough
Sharon Gentry (ERN 5235), Attorney for party 1 Co-counsel
Sharon Gentry (ERN 5235), Attorney for party 2 Co-counsel