2013 WL 9759978 (Mass.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Massachusetts.
Worcester County

Lester MIETKIEWICZ, as Executor of the Estate of Sophie DiPillo, Plaintiff,
v.
James M. GALLIHER, Edwin H. Howard, Brian F. Donovan,
and Bonville & Howard, Attorneys at Law, Defendants.

No. WOCV201100616.
November 26, 2013.

Memorandum of Law in Support of Motion of Defendants, James M. Galliher, Edwin H. Howard, and Bonville & Howard, for Partial Summary Judgment

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Pursuant to Mass. R. Civ. P. 56, the defendants, James M. Galliher, Edwin H. Howard, and Bonville & Howard (the "defendants"), respectfully submit this Memorandum of Law in support of their Motion for Partial Summary Judgment as to the claim for wrongful death asserted against them by the plaintiff, Lester Mietkiewicz, as Executor of the Estate of Sophie DiPillo (the "plaintiff')-Specifically, the defendants request judgment on Count II (Wrongful Death), Count III (Wrongful Death - Punitive Damages), and, to the extent they allege wrongful death damages, the balance of the Amended Complaint, including Count I (Negligence).

INTRODUCTION

This is an action for, *inter alia*, negligence and wrongful death, arising out of the representation of the decedent, Sophie DiPillo ("DiPillo"), by James M. Galliher ("Attorney Galliher"), Edwin H. Howard ("Attorney Howard"), Brian F. Donovan ("Attorney Donovan"), all members of the law office of Bonville& Howard ("B&H"). [1] In or around April 2008, Attorney Galliher drafted three legal documents after meeting with DiPillo (then age 87) and her grand-nephew, Yared Weaver ("Weaver"): a Will, a Power of Attorney, and a Health Care Proxy. The plaintiff (Lester Mietkiewicz, DiPillo's nephew) alleges that at the time these instruments were executed, the defendants knew or should have known that DiPillo was suffering from dementia, and could not understand the contents or the ramifications of the documents. See *Ex. A*, Amended Complaint, ¶¶ 14-18. As a result of the defendants' alleged negligence, the plaintiff claims that DiPillo was forced by Weaver (the holder of the health care proxy) to undergo elective surgery, from which she never recovered, suffered great pain of body and mind, and eventually died. *See id.* at ¶ 19. The plaintiff subsequently initiated this legal malpractice suit on behalf of DiPillo, as executor of her estate.

At the outset of this litigation, the defendants filed a Rule 12(b)(6) motion to dismiss all claims, which was denied. See *Ex. E*. 11/22/11 Order. Relative to the plaintiff's wrongful death claim, the Court (Wilkins, J.) stated as follows:

The question of wrongful death damages is a matter of first impression but the complaint plausibly suggests entitlement to such relief if plaintiff shows that consent to the operation would not have been given if the defendants had not been negligent and

that therefore the death from the operation without lawful consent was a foreseeable consequence of the alleged negligence. At a minimum, the issue should be decided on a more complete record and not on the pleadings.

See id. Through the present Motion for Partial Summary Judgment, the defendants address the plaintiff's claim for wrongful death damages only—specifically, Count II (Wrongful Death), Count III (Wrongful Death - Punitive Damages), and, to the extent they allege wrongful death damages, the balance of the Amended Complaint, including Count I (Negligence). As set forth more fully below, the plaintiff's wrongful death claim fails as a matter of law. First, DiPillo's death was not a foreseeable consequence of their allegedly negligent conduct. Second, the summary judgment record conclusively demonstrates that the defendants' alleged negligence did not proximately cause DiPillo's death. On the contrary, the evidence demonstrates that the surgery recommended and performed by Dr. Frederik Pennings was in DiPillo's best interests. Accordingly, this Court should allow the defendants* Motion for Partial Summary Judgment.

BACKGROUND [2]

Given the plaintiff's contention that DiPillo died as a result of her back surgery on April 17, 2008, the events leading up to that surgery are material to this matter. On March 5, 2008, DiPillo and her grand-nephew, Weaver, met with Dr. Frederik Pennings at UMass Memorial Medical Center to discuss treatment for DiPillo's ongoing back pain. *See Ex. F*, 3/5/08 Letter from Dr. Pennings to Dr. Tracey. On March 23, 2008, Dr. Pennings held a follow-up meeting with DiPillo and Weaver, where he recommended and planned DiPillo's back surgery. *See Ex. G*, 3/23/08 Letter from Dr. Pennings to Dr. Tracey.

On March 28, 2008, Sophie DiPillo and Weaver met with Attorney Brian Donovan at the B&H office, for purposes of discussing the preparation of a revised will, power of attorney, and health care proxy. *See Ex. L*, Depo. of Donovan, at 21. To evaluate DiPillo's competency, B&H sought and obtained medical records related to DiPillo's health, including her history of dementia. On April 4, 2008, DiPillo and Weaver met with Attorney James Galliher at B&H, who drafted three legal documents for DiPillo: a will, power of attorney, and health care proxy, all of which were executed that same day. *See Ex. A*, Amended Complaint, ¶¶ 8, 11-13. *See also Ex. B.* 4/4/08 Will; *Ex. C.* 4/4/08 Power of Attorney; *Ex. D*, 4/4/08 Health Care Proxy. Weaver was named as the holder of the Power of Attorney and Health Care Proxy, and was the primary beneficiary in the Will. See *Exs. B to D.* The plaintiff alleges that at the time the defendants executed these legal documents on April 4, 2008, they knew or should have known that DiPillo had dementia, and thus lacked the capacity to sign them. *See Ex. A*, Amended Complaint, ¶¶ 14-18. Relevant to this issue, there is an audio recording of DiPillo from the XX/XX/2008 meeting, in which DiPillo is unable to state her birth date, address, or age, and could not identify her relationship with Weaver. See id. at ¶¶ 9-10.

On April 17, 2008, DiPillo's surgery occurred at UMass Memorial Medical Center. *See Ex. J*, Report of Operation. The surgery occurred without complication. See id. Following the surgery, an **elder abuse** action was initiated in Massachusetts Probate Court, which resulted in the legal documents executed on April 4, 2008 being vacated. Shortly after the surgery, Dr. Mietkiewicz moved DiPillo, a Massachusetts resident, to Maine, where she would be under the care of Dr. Mietkiewicz's sister. *See Ex. L* Depo. of Mietkiewicz, at 93:12-19. On November 29, 2008, DiPillo passed away at Westgate Manor, a nursing home in Maine. *See Ex. K*, "Record of Death." The "Record of Death" for DiPillo states that her cause of death was "multisystem failure." See id.

This civil action was initiated by Dr. Mietkiewicz, as executor of DiPillo's estate. The Amended Complaint asserts the following claims against the defendants: Negligence (Count I); Wrongful Death (Count II); Wrongful Death - Punitive Damages (Count III); and Violations of G.L. Chapter 93A (Count IV). *See Ex. A*, Amended Complaint. According to the plaintiff, DiPillo was forced by Weaver (as the holder of DiPillo's health care proxy) to undergo surgery, from which she never recovered, suffered great pain of body and mind, and eventually died. The plaintiff claims *inter alia* that the defendants are responsible for DiPillo's death, as well as for with attorneys' fees incurred in a subsequent Probate Court action to vacate the power of attorney and health care proxy. This Motion for Partial Summary Judgment is filed for the purpose of addressing the plaintiff's wrongful death claim only. [3]

SUMMARY JUDGMENT STANDARD

A summary judgment motion must be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Community National Bank v. Dawes*, 369 Mass. 550, 553 (1976) (citing Mass. R. Civ. P. 56(c)). A moving party who does not bear the burden of proof at trial may demonstrate the absence of a genuine dispute of material fact for trial either by submitting affirmative evidence negating an essential element of the non-moving party's case, or by showing that the non-moving party has no reasonable expectation of proving an essential element of his case at trial. See *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991).

Although under this standard some facts may remain disputed which will not defeat an otherwise properly supported motion for summary judgment, "the summary judgment standard requires that there be no *genuine* issue of material fact." *Cheswell. Inc. v. Premier Homes and Land Corp.*, 319 F. Supp. 2d 144, 148 (D. Mass. 2004). The materiality of the factual disputes will be judged in relation to the legal elements of the substantive claims at issue. See *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing [substantive] law will properly preclude entry of summary judgment." Id. If the non-moving party does not respond in the manner accorded by the rules, "summary "judgment, if appropriate, shall be entered against him," *Madsen v. Erwin*, 395 Mass. 715, 719 (1985).

ARGUMENT

I. THE PLAINTIFF HAS NO EXPECTATION OF PREVAILING ON HIS CLAIM FOR WRONGFUL DEATH: DIPILLO'S DEATH WAS NOT A FORESEEABLE CONSEQUENCE OF THE DEFENDANTS' PREPARATION OF LEGAL DOCUMENTS, AND THE PLAINTIFF HAS NO EVIDENCE THAT THE DEFENDANTS' ALLEGED NEGLIGENCE ACTUALLY CAUSED DIPILLO'S DEATH.

The plaintiff's claim for wrongful death damages depends upon his claim that the defendants were negligent. To prevail on a claim of negligence, a plaintiff must prove that the defendants: (1) owed a duty of care, (2) breached that duty, and (3) that the plaintiff's injuries were proximately caused by the breach. *Coughlin v. Titus & Bean Graphics, Inc.*, 54 Mass. App. Ct. 633, 638 (2002). Significantly, the law does not impose liability for all harm factually caused by tortious conduct. *Leavitt v. Brockton Hosp., Inc.*, 454 Mass. 37, 45 (2009) (citations omitted). Liability for negligent conduct attaches only where the resulting injury is within the scope of the foreseeable risk, and where the conduct is a cause-in-fact of the injury. *Stamas v. Fanning*, 345 Mass. 73, 76 (19621: *see also Kent v. Commonwealth*, 437 Mass. 312, 320 (2002) (plaintiff must show cause-in-fact and that injury was "foreseeable result" of conduct).

In the present case, the plaintiff fails on both fronts: the complained-of injury—DiPillo's death—was not within the scope of foreseeable risk, and the allegedly negligent conduct was not the cause-in-fact of DiPillo's death. Accordingly, the defendants are entitled to judgment as a matter of law on the plaintiff's wrongful death claim.

A. DiPiUo's Death Was Not a Reasonably Foreseeable Consequence of Any Alleged Negligence by the Defendants.

As a general rule, "in the absence of either a statute creating such a duty or a special relationship recognized by the common law, no person owes to another a duty to prevent the harmful consequences of a condition or situation he or she did not create." *Cremins v. Clancy*, 415 Mass. 289, 296 (1993). Causation is not established where "harm which occurred was not within the scope of foreseeable risk to the victim." *Foley v. Boston Hous. Auth.*, 407 Mass. 640, 646 (1990). Foreseeability defines the outer boundary of liability. "Foreseeability does play a large part in limiting the extent of liability.... Notions about what should be foreseen, in other words, are very much interwoven with our feelings about fair and just limits to legal responsibility." *Whittaker v. Saraceno*. 418 Mass. 196, 198 (1994) (quoting 4 F. Harper, F. James, Jr., & 0. Gray, Torts § 20.5, at 136-137 (2d

ed. 1986)). Where the issue is "reasonable foreseeability, the distinction between duty and proximate causation is not critical" and the two issues can be treated together. *Hebert v. Enos*, 60 Mass. App. Ct. 817, 821 n. 5 (2004) (citation omitted); see also *Coombes v. Florio*, 450 Mass. 182, 188 (2007) (the existence of a duty is an appropriate question of law for resolution by summary judgment). Thus, "[o]ne is bound to anticipate and provide against what usually happens and what is likely to happen, but is not bound in like manner to guard against what is ... only remotely and slightly probable." *See Hebert*. 60 Mass. App. Ct. at 821 (citations omitted). "There are situations where it can be said, as matter of law, that a cause is remote rather than proximate." *Stamas*, 345 Mass. at 76.

The plaintiff contends the defendants are liable for DiPillo's death solely based on their drafting of DiPillo'.s will, power of attorney, and health care proxy on April 4, 2008. The plaintiff alleges it was foreseeable that Weaver would not act in DiPillo's best interest, and would subject her to medical procedures which she would not have otherwise been subject to. *See Ex. A.* Amended Complaint at ¶ 20. In support thereof, the plaintiff cites to Weaver's "financial history," as well as DiPillo's "age, mental and physical condition," and the contents of the April 4, 2008 legal documents. See id.

These allegations are insufficient to support a claim for wrongful death. Contrary to the plaintiff's contentions, when the defendants prepared DiPillo's will, power of attorney, and health care proxy, DiPillo's death was outside the scope of reasonable foreseeability. While there is a dearth of case law addressing allegations that estate planning activities resulted in the death of a client, other cases discussing the foreseeability of alleged harm are instructive.

In *Leavitt v. Brockton Hosp., Inc.*, 454 Mass. 37 (2009), a patient was struck by a vehicle while walking home from Brockton Hospital, following a procedure in which the patient had been administered narcotics. *Id.* at 38-39. A police officer responding to the resulting emergency call was injured in a separate traffic accident, and brought a negligence action against the hospital for allowing the patient to exit the hospital unsupervised. *Id.* The hospital's motion to dismiss was allowed, and affirmed by the SJC. *Id.* The court concluded that the harm that befell Leavitt—an injury from a collision not involving the patient—arose not from the "same general type of danger" that the hospital allegedly should have taken reasonable steps to avoid (i.e., harm to the patient or to those injured by the patient as a result of being released while medicated), but from "some other danger" (i.e., the collision between the police cruiser and another vehicle unrelated to the patient). *Id.* at 46-47. According to the court, a police officer injured in an accident in which the patient was not involved was outside the scope of foreseeable risk caused by the hospital's alleged negligence. *Id.*

In *Girardi v. Gabriel*, Mass. App. Ct. 553 (1995), the defendant attorneys concededly failed to ensure that their client's will was properly witnessed upon execution; upon the client's death, his estate passed directly to his wife and children, rather than to a trust as intended. See *Id.* at 553-554. The real estate that made up the bulk of the estate was subsequently lost due to several factors, including the wife's second husband's misdealings. *Id.* at 553-558. In the malpractice suit brought by the wife as administratrix, it was alleged that this result would not have occurred but for the mishandling of the will execution. *Id.* The Appeals Court held that there was a lack of causal connection between the attorneys' conduct and subsequent loss of the estate, because the claim assumed that whoever managed the trust would have been able to preserve the property, and there was no basis for attributing the second husband's misdealings to the attorneys' negligence. *Id.* at 559-560. The court noted that "[t]he mere possibility that the defendants' negligence caused the harm is not sufficient to take the issue to the jury." Id at 560 (quoting *Marcus v. Griggs, Inc.*, 334 Mass. 139,143 (1956)).

Here, as in *Girardi*. the mere possibility that the defendants' alleged negligence contributed to DiPillo's death is not sufficient to take the issue to the jury. Simply put, DiPillo's death was not within the scope of the defendants' duty to her when they agreed to prepare the legal documents. "An attorney owes to a client, or a potential client, for whom the drafting of a will is contemplated, a duty to be reasonably alert to indications that the client is incompetent or is subject to undue influence and, where indicated, to make reasonable inquiry and a reasonable determination in that regard." *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 456, 462 (1997) (quoting *Logotheti v. Gordon*, 414 Mass. 308, 311 (1993)). The plaintiff's claim would have the court expand the scope of this duty far beyond what is reasonable. As the plaintiff has stated, his wrongful death theory assumes that the defendants knew or should have known that Weaver, once named as health care proxy, would act against the best interests of

DiPillo and take actions that would lead to her death. *See Ex. A,* Amended Complaint at *Id.* 20. However, the possibility that Weaver would act against the best interests of DiPillo and force her to undergo a surgery is not the "general type of danger" that the defendants "should have taken reasonable steps to avoid." See *Leavitt* 454 Mass. at 46-47. Pursuant to statute, the holder of a health care proxy must act in the principal's best interests. See G.L. c. 201D, § 5. The drafter of a health care proxy has no duty to guarantee that the person designated as health care proxy carries out his or her legal responsibilities. To hold otherwise would be to require attorneys to act as insurers for their clients' conduct, and insurers for contracts and agreements they draft. This certainly is not the law. It is not reasonable to conclude that the mere preparation and execution of DiPillo's will, power of attorney, and health care proxy would lead to her death. "To find in favor of [the] plaintiff would be to substantially extend the scope of reasonable foreseeability as set forth in Massachusetts case law and stretch the concept beyond reason." *Staelens v. Dobert*, 318F.3d77, 79(lstCir.2003).

In the same vein, the defendants cannot be held responsible for the surgeon's recommendation that DiPillo undergo back surgery, and subsequent decision to perform the surgery. To the extent the surgery contributed to DiPillo's death—as alleged by the plaintiff— the defendants certainly have no duty to insure a surgeon's actions and recommendations. To hold the defendants liable for the surgeon's conduct, the court would have to presume that the defendants had knowledge that the back surgery recommended by the surgeon was against the best interests of DiPillo—and that the surgeon would proceed with the surgery regardless. [4] The series of inferences necessary to impose liability for DiPillo's death here makes clear that the plaintiffs claim must be dismissed. See *Griffiths v. Campbell*, 425 Mass. 31, 35 (1997) (Massachusetts law will not permit "inference upon inference to impose liability").

As the SJC has observed, "[t]here must be limits to the scope or definition of reasonable foreseeability based on considerations of policy and pragmatic judgment." *Id.* at 35-36 (quoting *Poskus v. Lombardo's of Randolph, Inc.*, 423 Mass. 637, 640 (1996)). Such considerations of policy and pragmatic judgment are certainly present and determinative here. As noted above, the mere possibility of an act does not constitute legal foreseeability. *See e.g. Whittaker*, 418 Mass. at 200 (stating that "[t]he possibility of criminal conduct occurring is present in almost every aspect of daily life" and further stating that "[i]n that sense the possibility of [crime] is always able to be foreseen," but holding that the mere possibility of a criminal act does not constitute legal foreseeability). If the plaintiff's allegations are taken as true, after the defendants drafted DiPillo's health care proxy, both Weaver—as DiPillo's health care proxy—and DiPillo's doctors failed to act in DiPillo's best interests. The defendants cannot be "bound to anticipate and provide against what is unusual and not likely to happen, or what, as is sometimes said, is only remotely and slightly probable." *Kralik v. LeClair*, 315 Mass. 323, 328 (1943). Since DiPillo's death was not a reasonably foreseeable consequence of the defendants' drafting of DiPillo's legal documents, the plaintiff cannot establish a viable breach of duty that would enable him to recover wrongful death damages. The plaintiff's claim for wrongful death must be dismissed.

B. *The Defendants' Alleged Negligence Was Not the Proximate Cause of DiPillo's Death.*

Even assuming, *arguendo*, that the defendants were negligent in drafting DiPillo's will, power of attorney, and health care proxy, the plaintiffs wrongful death claim still fails as a matter of law, because the plaintiff cannot demonstrate a causal connection between the defendants' negligence and DiPillo's death.

The Wrongful Death Statute imposes liability on anyone who "by his negligence causes the death of a person." G.L. c, 229, § 2. In an action for wrongful death, it is essential to the recovery of damages that the plaintiff establish that the wrongful conduct of the defendant was the proximate cause of the death. See O'Connor *v. Ravmark Industries, Inc.*, 401 Mass. 586, 591-592 (1988); *see also* 1 Massachusetts Proof of Cases Civil § 34:12 (3d ed.). While the issue of proximate cause is generally one of fact for the jury, the issue may be resolved as matter of law at the summary judgment stage. *Girardi*, 38 Mass. App. Ct. 558-559 (citing *Leavitt v. Mizner*, 404 Mass. 81, 88-92 (1989)). "The principles and proof of causation in a legal malpractice action do not differ from those governing an ordinary negligence case." *Girardi v. Gabriel*, 38 Mass. App. Ct. 553, 557 (1995) (quoting Mallen & Smith, Legal Malpractice § 8.3, at 411 (3d ed. 1989).

In the instant case, the plaintiff cannot demonstrate that the defendants' alleged negligence was the proximate cause of Di[illo's death. Indeed, the record establishes that surgery would have occurred with or without the defendants' involvement. A brief overview of the relevant timeline is instructive. On March 5, 2008, Dr. Frederik Pennings met with DiPillo and Weaver to discuss treatment for her back pain. *See Ex. F*, 3/5/08 Letter from Dr. Pennings to Dr. Tracey. On March 23, 2008, Dr. Pennings held a follow-up meeting with DiPillo and Weaver, where he recommended and planned DiPillo's back surgery. *See Ex. G*, 3/23/08 Letter from Dr. Pennings to Dr. Tracey. On March 28, 2008, DiPillo and Weaver met with Attorney Donovan at B&H to discuss the preparation of a will, power of attorney, and health care proxy. *See Ex. L*. Depo. of Donovan, at 21. On April 4, 2008, DiPillo and Weaver met with Attorney Galliher at B&H, who prepared a new will, power of attorney, and health care proxy. See Ex. A, Amended Complaint, ¶¶ 8, 11-13. The documents were executed on the same day. *See Exs. B* to D. On April 17, 2008, DiPillo's surgery occurred at UMass Memorial Medical Center. *See Ex. J*. Report of Operation, As this sequence of events demonstrates, DiPillo's surgery was planned *more than two weeks prior* to the execution of her will, power of attorney, and health care proxy through the defendants on April 4, 2008. The defendants' drafting of legal documents was a formality that did not impact the surgery decision in any way.

There is also no genuine issue of material fact regarding the actual decision to proceed with surgery. Dr. Pennings memorialized his meeting with DiPillo and Weaver—and their joint decision to proceed with surgery—in a March 23, 2008 letter from Dr. Pennings to Dr. Audrey Tracey (DiPillo's primary care physician):

... reviewing her complaints, I think that she will not benefit from further conservative treatment. ... Although she is 87 and has mild dementia, I think that surgery is an option. This has a higher complication rate, but right now, the patient is housebound and basically has such a poor quality of life that continuation like this is not an option either. I, therefore, propose to do a L4 laminectomy with foraminotomies to decompress the L4 and L5 vertebral body height. With this treatment there is an 80% chance of significant pain reduction; however, due to the fact that she has osteoporosis, there is the chance that the laminectomy will result instability [sic]. ***After discussing this with her grandson [sic] and the patient, we all think that we have to take this moderate risk because, again, the condition where the patient is now is not tolerable anymore***. I am going to schedule her for surgery as soon as possible. ...

See Ex. G, 3/23/08 Letter from Dr. Pennings to Dr. Tracey (emphasis added).

Dr. Pennings' letter demonstrates quite clearly that the defendants had no influence on the decision to proceed with DiPillo's back surgery. As the Court noted in its order denying the defendants' Rule 12(b)(6) Motion to Dismiss, the plaintiff's claim for wrongful death depends on whether he can show "that consent to the operation would not have been given if the defendants had not been negligent and that, therefore, the death from the operation without lawful consent was a foreseeable consequence of the alleged negligence." See *Ex. E*, 11/22/11 Order. Based on Dr. Pennings' March 23, 2008 letter, the plaintiff has no likelihood of proving that DiPillo's "consent to the operation would not have been given if the defendants had not been negligent"— because the decision to proceed with surgery had already been made. [5]

The plaintiff contends that if he had been the health care proxy, he would not have consented to the surgery. However, if Dr. Mietkiewicz had actually been DiPillo's health care proxy (i.e., her agent), he would have been statutorily obligated to consider the wishes of DiPillo (i.e., the principal). To this end, G.L. c. 201D, § 5 (attached hereto as *Ex. M*) sets forth the duties of the holder of a health care proxy, including the following:

After consultation with health care providers, and after full consideration of acceptable medical alternatives regarding diagnosis, prognosis, treatments and their side effects, the agent shall make health care decisions: (i) ***in accordance with the agent's assessment of the principal's wishes***, including the principal's religious and moral beliefs, or (ii) if the principal's wishes are unknown, in accordance with the agent's assessment of the principal's best interests.

See G.L. c. 201D, § 5 (emphasis added). With respect to DiPillo's wishes, based on Dr. Pennings' testimony there is no genuine issue of fact that she expressed a clear desire to proceed with the operation. Dr. Pennings testified that DiPillo was capable of independently conveying the severe pain she was in, which the operation was intended to relieve:

So then I am thinking by myself can I do something with a relatively minor surgery because there is no instrumentation, no fusion involved, can I do something to help her walking again because that is independent of her dementia.

People with dementia have pain and they can tell you that they have pain, so I thought in that time that I was able to help her with the pain that was my goal.

See Ex. N, Depo. of Dr. Pennings, at 28:6-15. According to Dr. Pennings, DiPillo had the capacity to make surgery decisions on her own insofar as they related to mitigating her pain:

Q. When you operated on Sophie DiPillo, did you think that she lacked the capacity to make decisions on her own with respect to the operation?

A. No, not with respect to pain. She was in a lot of pain so she was able to make that decision as far as I am concerned because I explain it to her, what I was going to do and people who are demented, they do understand what you're telling them, as far as I am concerned.

...

Q. And did it appear to you that Sophie DiPillo understood what you were telling her?

A. Yes because she says please help me. She says I want to get rid of my pain.

Id. at 77:6-78:1. Based on Dr. Pennings' testimony, there is no genuine issue of material fact that DiPillo was in significant ongoing pain in April 2008 and wanted to proceed with surgery in an attempt to decrease that pain. If Dr. Mietkiewicz had been DiPillo's health care proxy in April 2008, he would have been legally obligated to take DiPillo's wishes into account; to disregard them and refuse to consider the surgery would have been in direct contravention of G.L.C.201D, § 5.

The plaintiff may argue in response that DiPillo's “wishes” are not ascertainable due to her dementia. Significantly, the fact that DiPillo had dementia did not enter into Dr. Pennings' analysis of whether to operate, because “her mental capacity had nothing to do with “the indication for surgery”—which was “pain[,] demented or not demented....” *Id.* at 60:13-17. According to Dr. Pennings, he “spoke to the patient and she was obviously in pain and that's enough she can verbalize that.” Id. at 34:5-7. Dr. Pennings obtained Weaver's consent because the 4/4/08 health care proxy was on file with the hospital, see id. at 78:2-14, but the evidence demonstrates that Dr. Pennings believed DiPillo was capable of expressing her wish to undergo surgery on her own, especially given that “pain has nothing to do with dementia.” *See id* at 30:14-15.

In addition to requiring the holder of a health care proxy to act in accordance with the principal's wishes, G.L. c. 201D, § 5 also requires the holder to consult with the principal's health care providers before making health care decisions. Thus, if Dr. Mietkiewicz had been the health care proxy in April 2008, he would have been obligated to consult with DiPillo's physicians, and take into account their recommendations as to what was in her best interests. Here, there is no ambiguity in Dr. Pennings' recommendation to proceed with the operation. There is no evidence that he was forced by Weaver to perform the surgery, or even that he had to be persuaded to perform the surgery. On the contrary, Dr. Pennings' letter and deposition testimony make clear that as of March 23, 2008, he had come to the independent and firm conclusion that the operation was in DiPillo's best interests. *See Ex. N*, Depo. of Dr. Pennings, at 27:17-28:15. Dr. Pennings' recommendation was reasonable and entirely independent—not only from Weaver, but also from the defendants, who had not yet been consulted. If, as he claims, Dr. Mietkewicz would not have consented to the operation if he had been health care proxy, the Court must presume that Dr.

Mietkiewicz would reject both the wishes of DiPillo and the recommendation of Dr. Pennings, arguably in violation of G.L. c. 201D, § 5. For these reasons, the plaintiff has no likelihood of establishing that consent to the surgery was contingent on the defendants' conduct and Weaver being named as health care proxy. [6]

Further establishing that DiPillo's surgery would have occurred with or without the defendants' involvement, the evidence indicates that DiPillo had already designated Weaver as her health care proxy on August 7, 2007—over six months before the defendants were ever asked to draft the health care proxy at issue in this case. To this end, Keystone Nursing Home— where DiPillo resided in 2007—maintained a health care proxy form, dated August 7, 2007, which named Weaver as the agent for DiPillo. *See Ex. H*. 8/7/07 Health Care Proxy. Thus, Weaver had legal authority to consent to the operation on behalf of DiPillo long before the defendants' involvement began. Since consent to the operation would have been given even if the defendants had not been involved, the defendants are entitled to judgment as a matter of law on the wrongful death claim.

Finally, the plaintiff has not presented any credible evidence that DiPillo's back surgery on April 17, 2008 actually caused or contributed to her death on November 29, 2008. DiPillo's "Record of Death" merely states that the cause of death was a "multisystem failure." *See Ex. K*, "Record of Death." Certainly, DiPillo had a well-documented history of dementia, *see e.g. Ex. G*, 3/23/08 Letter from Dr. Pennings to Dr. Tracey, which could have been a significant factor in her death. It is anticipated that the plaintiff will claim that DiPillo's surgery accelerated her dementia, leading to her death; however, the plaintiff has not offered any evidence other than speculation to support this contention. Moreover, even if DiPillo's dementia worsened in the days leading up to her death in November 2008, the plaintiff has no evidence that the surgery was the cause-in-fact of this decline. There are numerous other factors that could have contributed to such a decline, including the fact that the plaintiff sent DiPillo to new nursing home in a new state (Maine) shortly after her April 2008 surgery. Indeed, the plaintiff—an internist with a board certification in geriatrics—admits that sending DiPillo to an abnormal setting such as Maine could have caused a cognitive decline. *See Ex. L* Depo. of Mietkiewicz, at 91:1-14 ("... I knew my aunt would not do as well outside of her home. So I'm faced with this ... do I take my aunt from the situation that she's in where she's doing well as a patient ... or send my aunt to my sister [in Maine] and have her care for her up there, at which point she would definitely be worse. She would cognitively decline outside of her normal setting."). Despite these concerns, shortly after DiPillo got out of the hospital following surgery, the plaintiff sent her to Maine, where his sister could take care of her. [7] See id. at 124-125. In any event, it is possible and even likely that DiPillo's progressive dementia would have worsened over time, regardless of whether she underwent surgery. The bottom line is that the plaintiff has not presented any evidence that the surgery, and not some other factor, was the prevailing factor in DiPillo's death. Instead, the plaintiff relies upon speculation and conjecture, which does not support a viable claim. See *Enrich v. Windmere*, 416 Mass. 83, 87 (1993) (citing *Stewart v. Worcester Gas Light Co.*, 341 Mass. 425, 435 (1960)). Since the plaintiff has no reasonable expectation of demonstrating that DiPillo died as a result of the surgery, the Court must enter judgment for the defendants.

CONCLUSION

WHEREFORE, the defendants, James M. Galliher, Edwin H. Howard, and Bonville & Howard, respectfully request that this Honorable Court grant their Motion for Partial Summary Judgment and enter judgment in their favor on the plaintiff's claim for wrongful death. Specifically, the defendants request dismissal of Count II (Wrongful Death), Count III (Wrongful Death - Punitive Damages), and, to the extent they allege wrongful death damages, the balance of the Amended Complaint, including Count I (Negligence).

Respectfully submitted,

Defendants,

JAMES M. GALLIHER, EDWIN H. HOWARD, AND BONVILLE & HOWARD,

By their attorneys,

<<signature>>

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Footnotes

1 Attorney Donovan was dismissed from this action as a result of his successful Rule 12(b)(6) motion to dismiss.

2 This abbreviated summary of the facts is provided for the Court's convenience. A full recitation of material and undisputed facts is provided in the accompanying Statement of Facts submitted herewith.

3 As noted above, in addition to the wrongful death claim, the plaintiff seeks damages in the form of legal fees incurred to vacate the 4/4/08 power of attorney and health care proxy in Probate Court. For purposes of this motion, the defendants do not address this claim, which is not material to whether the defendants are liable for wrongful death. As noted throughout this Memorandum of Law, even assuming, *arguendo*, that the defendants were negligent in preparing DiPillo's legal documents, and that such negligence necessitated the Probate Court action, the plaintiffs wrongful death claim fails as a matter of law, and must be dismissed.

4 While the plaintiff has taken pains to avoid couching this case in medical malpractice terms, it is inconsistent to claim that Yared Weaver's endorsement of DiPillo's surgery was against her best interests, while simultaneously maintaining that her surgeon's recommendation of the same surgery was appropriate (as he has). *See e.g. Ex. I*. Depo. of Mietkiewicz, p. 120 (“The surgeon himself I think acted in very good form....”).

5 Alternatively, the court could elect to view Weaver's conduct, and the doctors' conduct, as intervening or superseding causes that break the chain of causation between the defendants' alleged negligence and the ultimate harm. “If a series of events occur between the negligent conduct and the ultimate harm, the court must determine whether those intervening events have broken the chain of factual causation or, if not, have otherwise extinguished the element of proximate cause and become a superseding cause of the harm.” *Kelly v. O E Plus. Ltd.*, 69 Mass. App. Ct. 1105, *3 (2007) (citing Kent. 437 Mass. at 321). “A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.” Kelly. 69 Mass. App. Ct. 1105 at *3 (citing *Jones v. Cincinnati, Inc.*, 32 Mass. App. Ct. 365, 366 n. 1 (1992)). “An intervening cause ... comes into active operation *after* the negligence of the defendant.” *Christopher v. Father's Huddle Cafe. Inc.*, 57 Mass. App. Ct. 217, 230-31 (2003) (emphasis in original) (citing Prosser & Keeton, Torts § 44, at 301 & n.2 (5th ed. 1984)). Viewing the actions taken by Weaver, and then DiPillo's doctors, as intervening causes underlines the defendants' position that their preparation of estate planning documents did not proximately cause DiPillo's death.

6 Moreover, even though the plaintiff knew, prior to the surgery, that DiPillo was suffering from back pain, and that back surgery was being considered (*see Ex. I*, Depo. of Mietkiewicz, at 121), he did not take any measures to make sure he was involved in the decision.

For example, he never attempted to contact Dr. Tracey (DiPillo's PCP) to discuss DiPillo's back pain or a potential surgery, and never instructed Dr. Tracey to contact him when there were significant medical events. *See id* at 108:23-109:21. While the plaintiff has stated that he did not know of the scheduled surgery until after it happened, the record suggests that was because he was not involved in DiPillo's medical care even when he believed he was the health care proxy.

7 According to Dr. Mietkiewicz, the basis for sending DiPillo to Maine was that his nephew, Weaver, "was becoming ... untenable." *See Ex. I*. Depo. of Mietkiewicz, at 92:7-8. Dr. Mietkiewicz further stated, "I could have left her in a nursing home in October of 2007. In hindsight, I should have just left her there, that would have been the end of it. She would have gone broke, she would have had issues, she would have died a ward of the state and that would have been the end of it." *Id.* at 92:18-24.

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