COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT DEPARTMENT

DARLENE SMITH as the PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA BIRCHMORE,
Plaintiff
v.

MATTHEW FARWELL, WILLIAM FARWELL, ROBERT DEVINE, And JOSHUA HEAL Individually, THE TOWN OF STOUGHTON, and THE STOUGHTON POLICE DEPARTMENT,
Defendants

Docket No.: 2282CV1197

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PLAINTIFF'S OPPOSITION TO DEFENDANT ROBERT DEVINE'S MOTION TO DISMISS UNDER RULE 12(b)(6)

Now comes the Plaintiff, Darlene Smith ("Plaintiff" or "Ms. Smith"), as the Personal Representative of the Estate of Sandra Birchmore, and hereby opposes Defendant Robert Devine's ("Defendant" or "Devine") Motion to Dismiss. In support thereof, the Plaintiff states the following:

INTRODUCTION

Darlene Smith, as the Personal Representative of the Estate of Sandra Birchmore brings this action against Defendant Robert Devine, and Defendants Matthew and William Farwell, Joshua Heal, the Town of Stoughton, and the Stoughton Police Department based on their collective actions in the sexual grooming and causal connection to the eventual death of Sandra Birchmore (hereinafter the "Decedent" or "Ms. Birchmore"). The Plaintiff seeks to recover for the losses suffered as a result of the Defendants' actions.

FACTS

In December of 2022, the Plaintiff, as Personal Representative of the Estate of Sandra Birchmore, commenced a civil action against Defendant Robert Devine and his co-defendants in Norfolk Superior Court. On January 6, 2023, the Plaintiff filed an Amended Complaint. On January 23, 2023, Ms. Smith filed a Motion to file a Second Amended Complaint, which was allowed by the Honorable Judge Joseph Leighton. On February 2, 2023, Ms. Smith filed a Second Amended Complaint. This Complaint references the Internal Investigation Report prepared by the Stoughton Police Department on August 29, 2022. The report outlines Defendant Devine and other Defendants' misconduct and sexual interactions with Sandra Birchmore both while she was a minor and thereafter. The report also states that Devine was a supervisor of the Stoughton Police Department Explorer Program (hereinafter "the Program"), and that Defendants M. Farwell and W. Farwell were his subordinates. Between the age of 13 and 18, Ms. Birchmore was an active participant in the Program.

Following Ms. Birchmore's death, the PD launched an internal investigation. During this investigation, video surveillance was uncovered showing M. Farwell leaving the decendent's apartment four days prior to the discovery of her body. The same internal investigation also determined that M. Farwell was the last to see Ms. Birchmore alive. In addition, during the investigation, it was discovered that M. Farwell had engaged in a continuous sexual relationship with Ms. Birchmore that began while she was still a minor. It was further revealed that Defendant Devine and Defendant W. Farwell were engaged in similar sexual relationships with Ms. Birchmore.

At all relevant times, Devine was the head of the Program, and Defendants M. Farwell and W. Farwell worked within the Program as officers and educators. These three Defendants

used their positions of power and respect as police officers and educators in the Program to take advantage of Ms. Birchmore. The long-term abuse and grooming[1] Ms. Birchmore suffered as a minor at the hands of Defendants Devine, M. Farwell, and W. Farwell exacerbated her underlying mental health issues and ultimately led to her untimely death.

STANDARD OF REVIEW

In Massachusetts, the legal standard of review for a motion to dismiss for failure to state a claim is set forth in Mass. R. Civ. P. 12(b)(6). The standard of review for such a motion is whether the plaintiff's complaint, taken as true, alleges sufficient facts to state a claim upon which relief can be granted. In *Iannocchino v. Ford Motor Co.*, the Massachusetts Supreme Judicial Court (hereinafter "SJC") explained, "[a] court considering a motion to dismiss [for failure to state a claim] must accept as true the factual allegations in the plaintiff's complaint and draw all reasonable inferences in the plaintiff's favor." 451 Mass. 623, 636 (2008).

The court will then determine whether the facts alleged, together with all reasonable inferences, make out a claim that is legally sufficient. As the SJC further explained in *Iannocchino*, "a complaint must do more than allege the bare elements of the cause of action; the factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Id.* at 636-37. When deciding on a 12(b)(6) motion, the court will draw every reasonable inference in favor of the plaintiff.

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[1] "Grooming is a method used by offenders that involves building trust with a child and the adults around a child in an effort to gain access to and time alone with her/him. In extreme cases, offenders may use threats and physical force to sexually assault or abuse a child. More common, though, are subtle approaches designed to build relationships with families. The offender may assume a caring role, befriend the child or even exploit their position of trust and authority to groom the child and/or the child's family. These individuals intentionally build relationships with the adults around a child or seek out a child who is less supervised by adults in her/his life. This increases the likelihood that the offender's time with the child is welcomed and encouraged."
Understanding Sexual Grooming in Child Abuse Cases (americanbar.org)

Galiastro v. Mortg. Elec. Registration Sys., Inc., 467 Mass. 160, 164 (2014) (citing *Lopez v. Commonwealth*, 463 Mass. 696, 700 (2012).

ARGUMENT

In his Motion to Dismiss all claims against him, Defendant Devine argues that pursuant to Mass. R. Civ. P. 12(b)(6), the Plaintiff has failed to properly state claims against him. Specifically, Devine argues that the Second Amended Complaint is "devoid of any specific facts drawing [him] into the labels and conclusions raised by the Plaintiff." The majority of Devine's Motion revolves around the Complaint's lack of concrete dates on which specific conduct occurred, and the lack of specificity of Ms. Birchmore's age at the time of said conduct. It is clear that the Defendant Devine does not realize the irony of his stated position. Of the two people who would have dates and details, one, Ms. Birchmore, is deceased, and the other, Devine, is the one complaining.

The Plaintiff need not cite specific dates or ages to the acts in her Complaint – all the Plaintiff must do is allege sufficient facts to state a claim upon which relief can be granted. The Complaint references that the abusive behavior occurred not with a single localized instance but over a long period of time, both while Ms. Birchmore was a minor and thereafter, thus illustrating that the actions described are taken cumulatively. The Defendant also argues that the Plaintiff did not disclose any witnesses in the Complaint – also a matter for discovery at a later stage.

Defendant Devine does not specifically address any of the claims against him in his Motion or argue why there are not sufficient facts to state such claims. Instead, he argues that the Complaint "tries to pull on the heart strings of its reader by inferring the outrageous allegation that Sandra Birchmore was some sort of underaged sex toy passed around between police

officers." As referenced above, the SJC's standard of review for a 12(b)(6) motion is "whether the plaintiff's complaint, taken as true, alleges sufficient facts to state a claim upon which relief can be granted." The Plaintiff's Second Amended Complaint alleges sufficient facts that, taken as true, state a claim upon which relief can be granted.

I. Wrongful Death

To establish a wrongful death claim, the Plaintiff must prove the following: (1) the defendant owed a duty of care to the deceased person (*Bartlett v. Gray*, 170 F. Supp. 3d 53, 57 (D. Mass. 2016)); (2) the defendant's acts or omissions fell short of what a reasonable person would have done under similar circumstances (*Estate of Berthiaume v. Pratt*, 448 Mass. 20, 25 (2006)); (3) the defendant's breach of duty was the cause of the deceased person's death (*Buckley v. Park Ward Motors, Inc.*, 20 Mass. App. Ct. 268, 272 (1985)); and (4) the death of the deceased person resulted in damages.

Here, the Second Amended Complaint states that Devine, M. Farwell, and W. Farwell's years-long pattern of grooming and abuse, beginning when Ms. Birchmore was a minor, over the duration of the Program and beyond, further exacerbated Ms. Birchmore's underlying mental health issues and difficult home life and ultimately overcame her will to live. The Complaint references the PD Internal Investigative Report, which determined that Defendant Devine (as well as the other Defendants) met Ms. Birchmore when she was 13 years old and a member of the Program and engaged in sexual relations with her while she was still a minor and thereafter. The Report also determined that Defendant Devine effectively established the Farwells as his understudies in using their position and influence to engage in inappropriate behaviors with Ms. Birchmore and other minors during the Program.

Defendant Devine owed a duty to Ms. Birchmore as the head of the Program to not use his position of authority to act inappropriately toward her, and there is also an additional expectation as an adult to not engage in sexual relationships with minors. Devine breached that duty when he used his power as a police officer and educator in the Program to engage in a years-long sexual relationship with Ms. Birchmore, both as a minor and thereafter. This is not how a reasonable person in his position would act under the circumstances. It was this breach of duty that created and exacerbated the underlying trauma, mental, and emotional distress suffered by Ms. Birchmore that ultimately overwhelmed her will to live and, in turn, caused her death. These allegations, taken as true, state sufficient facts on which relief can be granted and therefore should survive a 12(b)(6) motion.

II. Negligence

The elements for negligence are the similar to those of wrongful death: (1) the defendant had a legal duty to exercise reasonable care; (2) defendant breached that duty by failing to act as a reasonable person would under the circumstances; (3) the defendant's breach caused harm to the person owed the duty; and (4) that person suffered damages. *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928).

As stated above and in the Second Amended Complaint, Devine had a duty to protect the vulnerable class of minors in the Program from abusive and grooming behavior. Due to his position in the Program, he had a special relationship with Ms. Birchmore which created an elevated duty to protect her and the other children in the Program. He breached that duty when he engaged in said abusive and grooming behavior toward Ms. Birchmore over the course of several years. It was this breach of duty by Devine and the other Defendants that ultimately led

to the death of Ms. Birchmore. These facts, taken as true, are sufficient to state a claim and survive Defendant Devine's motion to dismiss.

III. Assault and Battery

Battery is the intentional causation of harmful or offensive contact, and assault is the intentional causation of apprehension of harmful or offensive contact. Mass. Gen. Laws ch. 265, § 13A. As alleged in the Complaint and *infra*, Defendant Devine intentionally caused harmful and offensive contacts with Ms. Birchmore, a minor at the time, and that continued contact directly resulted in her death. Devine knew that Ms. Birchmore was a minor, and therefore knew of the offensive nature of his sexual involvement with her. He acted willfully and wantonly with the intent to engage in such sexual contact. It was this abuse and grooming that caused Ms. Birchmore severe mental trauma and ultimately led to her alleged suicide. Therefore, the Complaint alleges sufficient facts which, taken as true, state a claim on which relief can be granted and should survive Defendant Devine's motion to dismiss.

IV. Negligent Infliction of Emotional Distress

To state a claim for negligent infliction of emotional distress, it must be shown that: (1) the defendant owed a duty of care; (2) the defendant breached that duty; (3) the person owed the duty suffered emotional distress as a result of the breach; and (4) the emotional distress was severe and could be anticipated by a reasonable person. *Payton v. Abbott Labs*, 383 Mass. 540, 438 N.E.2d 383 (1982).

As established above, Defendant Devine owed a duty to Ms. Birchmore, and he breached that duty by engaging in abusive and grooming behaviors while she was a minor. The Complaint outlines that Ms. Birchmore suffered significant emotional distress caused by the negligence of the Defendants. A minor suffering severe emotional distress as a result of a long period of sexual

abuse at the hands of her authority figures could certainly be anticipated by a reasonable person. Therefore, the Complaint alleges sufficient facts to survive Defendant Devine's motion to dismiss for failure to state a claim.

V. 42 USC § 1983 Violation

To state a claim under Section 1983 of the Civil Rights Act of 1871, the Plaintiff must show: (1) the defendant was acting under the color of law; (2) the defendant's actions deprived the plaintiff [or the person the plaintiff is acting on behalf of] of a right, privilege, or immunity secured by the laws of the United States; and (3) the defendant's action caused damages. *Monroe v. Pape*, 365 U.S. 167 (1961). As stated in the Complaint, at all relevant times, Defendant Devine was a police officer employed by the Town of Stoughton and was acting under the color of law. The Complaint further states that the abuse, grooming, and sexual assault all took place and was facilitated by the Officers' position as police officers and educators within the Program. Additionally, the Complaint points to *Almand v. Dekalb County* (citing *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989)) where the court held that rape and sexual assault by state actors and officials can violate the Constitution and serve as the basis for a § 1983 claim. Therefore, the Plaintiff has alleged sufficient facts which, taken as true, state a claim on which relief could be granted.

VI. Civil Conspiracy

Civil conspiracy is a combination of two or more persons to accomplish an unlawful purpose and involves (1) an agreement between two or more persons; (2) the specific intent to accomplish an unlawful purpose; (3) an overt act in furtherance of the conspiracy; and (3) damages suffered as a result. *Korff v. The Greater Lowell Mental Health Association, Inc.*, 54 Mass. App. Ct. 1001, 1003 (2002). As stated in the Complaint, during their employment by the

Town of Stoughton, Defendants Devine, M. Farwell, W. Farwell, and Heal worked in concert with each other to coerce and manipulate Ms. Birchmore into engaging in illicit sexual activities. Their actions were particularly coercive due to their position as officers, and their knowledge of Ms. Birchmore's adoration for police officers. The Complaint alleges that the Defendants not only knew of the unlawful conduct occurring but worked together to treat Ms. Birchmore as simply a sexual object. Taken as true, these allegations are sufficient to state a claim on which relief could be granted and should survive Defendant Devine's motion to dismiss.

CONCLUSION

For the foregoing reasons, the Plaintiff, Darlene Smith, as Personal Representative of the Estate of Sandra Birchmore, respectfully requests that this Court DENY Defendant Robert Devine's Motion to Dismiss.

Date: March 10, 2023

Respectfully Submitted,

DARLENE SMITH, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA BIRCHMORE,

By her Counsel,

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