

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

KAYSE EICHELBERGER, et al.,)
)
 Plaintiffs)
)
 v.)
)
 NORTHERN OUTDOORS, INC., et al.,)
)
 Defendants)

Docket No. 07-82-P-S

**MEMORANDUM DECISION ON MOTION FOR LEAVE TO AMEND AND
RECOMMENDED DECISION ON MOTION TO DISMISS**

Defendant Northern Outdoors, Inc. (“Northern”) moves to dismiss Counts II, III, V and VII of the first Amended Complaint and portions of Count I. The plaintiffs move for leave to amend their complaint again. In their motion for leave to amend, the plaintiffs include a request to dismiss the claims for loss of consortium asserted by Cynthia Eichelberger and David Eichelberger against both defendants¹ that are included in Counts V, VI, VII and VIII. Motion for Leave to Amend Complaint (“Motion to Amend”) (Docket No. 23) at 1. Defendant Northern Outdoors, Inc. had sought dismissal of these claims in its own motion. Defendant Northern Outdoors, Inc.’s Motion to Dismiss Plaintiffs’ Amended Complaint (“Motion to Dismiss”) (Docket No. 12) at 6-7. I grant the plaintiffs’ request to dismiss the claims for loss of consortium asserted in Counts V-VIII of the amended complaint.

¹ The other defendant is Michael Harding.

I. Motion to Dismiss²

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6). Motion to Dismiss at 1. As the Supreme Court recently has clarified:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted).³

“In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs.”

Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001).

Ordinarily, in weighing a Rule 12(b)(6) motion, “a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment.” *Id.* “There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint.” *Id.* (citation and internal quotation marks omitted).

² The plaintiffs have requested oral argument on this motion. Motion to Present Oral Argument, etc. (Docket No. 22). Because the parties' papers provide a sufficient basis on which to decide the motion, the request is denied.

³ In so explaining, the Court explicitly backed away from the Rule 12(b)(6) standard articulated in *Conley v. Gibson*, 355 U.S. 41 (1957), that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Twombly*, 127 S. Ct. at 1968 (quoting *Conley*, 355 U.S. at 45-46). The Court observed: “[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.* at 1969. Both the plaintiffs and the moving defendant cite the *Conley* standard, Motion to Dismiss at 2-3, Memorandum of Law in Support of the Plaintiffs' Opposition, etc. (“Dismissal Opposition”) (Docket No. 21) at 2, despite the fact that both were filed after the Supreme Court's decision in *Twombly*.

A. Count II

Count II alleges that Northern acted as a common carrier when it took plaintiff Kayse Eichelberger (“Kayse”), a minor, on an overnight rafting and camping trip, and owed her a duty of care which it breached when she was assaulted by defendant Harding, its employee. Amended Complaint (Docket No. 10) ¶¶ 17-21. Northern contends that it was not a common carrier. Motion to Dismiss at 3-5. Under Maine law, a common carrier owes a heightened duty to its passengers. *Emery v. Wildwood Mgt., Inc.*, 230 F.Supp.2d 116, 120-21 (D. Me. 2002). Whether Northern is a common carrier is a question of law. *Id.* at 121.

Apparently, neither the Maine Legislature nor the Maine courts has yet specifically included whitewater rafting companies within the definition of a common carrier. Northern cites a number of cases from other jurisdictions where such companies have been held not to be common carriers. Motion to Dismiss at 4. The amended complaint alleges that Northern “acted as a common carrier” when it transported Kayse on an overnight rafting and camping trip in August 2005. Amended Complaint ¶¶ 14, 19. There are no allegations in the amended complaint about the nature of Northern’s business beyond offering summer rafting and camping trips in Maine. *Id.* ¶¶ 9-13, 18-19. Northern asserts, without citation to authority, that it “offered the same type of whitewater rafting services that have consistently been found in other jurisdictions not to be those of a common carrier.” Motion to Dismiss at 4.

The plaintiffs respond that Northern’s motion relies on a two-page document entitled “A User Participation Agreement” which is not attached to or incorporated into the amended complaint and therefore may not be considered for purposes of this motion. Dismissal Opposition at 3. Northern asserts in reply that the plaintiffs cannot seriously dispute the authenticity of the document, a copy of which was submitted with its motion, and that the document “is central to Plaintiffs’

assertion of common carrier liability,” citing *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). Defendant Northern Outdoors, Inc.’s Response to Plaintiff’s [sic] Opposition to Motion to Dismiss, etc. (Docket No. 27) at 1. Those are two exceptions recognized by the First Circuit Court of Appeals to the rule that a court may not consider documents outside of the complaint in ruling on a motion to dismiss unless it converts the motion into one for summary judgment. *Id.* However, in this case, the document submitted with the motion to dismiss may not accurately be characterized as “central to the plaintiffs’ claim,” to use the language of *Alternative Energy*, as Count II is asserted in the amended complaint. Further, the plaintiffs have been very careful in their opposition neither to admit nor to dispute the authenticity of the document. While it appears likely that the document is authentic, that is a conclusion that the court cannot draw at this point in the proceedings. In the absence of this document, nothing in the record indicates that Northern is a white water rafting company.

I hasten to point out that the plaintiffs’ contention that this court may not rely on the persuasive decisions of courts in other jurisdictions in order to predict whether the Maine Law Court would hold that whitewater rafting companies are common carriers, Dismissal Opposition at 4-5, is simply wrong. If the facts and underlying legal definitions are sufficiently similar, this court may do just that, and often has. It cannot do so at this time in this case, however, because the necessary evidence is not properly before it in connection with the pending motion to dismiss.

B. Count III

Northern asserts that Count III of the amended complaint alleges a claim of negligent supervision against it, Motion to Dismiss at 5, and the plaintiffs apparently agree, Dismissal Opposition at 5-8. Northern argues that Maine law does not recognize the tort of negligent supervision, except where the facts alleged by a plaintiff establish a “special relationship” between

the plaintiff and the defendant in accordance with section 315(b) of the Restatement (Second) of Torts, a factual situation not implicated in this case. Motion to Dismiss at 5-6. The plaintiffs respond that there was a special relationship between the defendant and Kayse, similar to that between a priest and a young altar boy at his church, *see Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57 ¶ 3, 871 A.2d 1208, 1212, because at the time of the incident Kayse was under the age of 18 and a student, taken by the defendant to an area without police or parental protection. Dismissal Opposition at 5-6, 8.

In *Fortin*, the Law Court noted that “we have made it clear that we have not yet adopted or rejected a cause of action for negligent supervision by an employer.” 871 A.2d at 1215-16. The Court adopted the following test for a claim of negligent supervision that is subject to a motion to dismiss: whether the complaint, viewed in a light most favorable to the plaintiff, asserts facts constituting a special relationship with sufficient particularity to enable the court to determine whether, if true, such facts could give rise to a fiduciary relationship. *Id.* at 1219. These facts must describe aspects of the plaintiff’s relationship with the defendant that were “distinct from those of its relationships with any other members [of the group of which the plaintiff was a part], adult or child.” *Id.* at 1220. A one-time rafting and camping trip does not constitute “[a]n established and close connection,” *id.* at 1222, between a minor and the company offering that trip. As the *Fortin* court made clear, the duty to protect a child did not exist “simply because of [the plaintiff’s] status as a student and an altar [sic] boy, but because of the added assertion that the Diocese knew or should have known of the risk of harm posed by the priest who abused” the plaintiff. *Id.* at 1222. The plaintiffs contend that their allegations that Northern “failed to [fully] investigate Michael Harding’s background, failed to properly train Michael Harding, and failed to exercise due care by retaining Michael Harding in its employ,” Amended Complaint ¶ 26, meet the *Fortin* requirement, Opposition

at 6-7. They do not.⁴ Nothing in the recommended decision of Magistrate Judge Kravchuk of this court in *Bloomquist v. Town of Bridgton*, 2003 U.S. Dist. LEXIS 8976 (D. Me. May 29, 2003), cited by the plaintiffs, Dismissal Opposition at 10, is inconsistent with my conclusion in this case.

Finally, the plaintiffs contend that the facts as alleged in the amended complaint might support other as yet unasserted causes of action, such as vicarious liability. Dismissal Opposition at 8-10. A plaintiff is not entitled to maintain a particular alleged cause of action because the underlying facts alleged might also support a separate, unalleged cause of action. Negligent supervision and vicarious liability are separate causes of action. *See Fortin*, 871 A.2d at 1215.

Northern is entitled to dismissal of Count III of the amended complaint.⁵

II. Motion for Leave to Amend

The plaintiffs seek leave to amend the amended complaint to add counts alleging negligent infliction of emotional distress against Northern and counts of negligent and intentional infliction of emotional distress against Harding, all on behalf of Cynthia and David Eichelberger. Motion to Amend at 1. Harding and Northern have filed a joint opposition to the motion. Defendants Northern Outdoors, Inc.'s and Michael Harding's Joint Opposition to Plaintiffs' Motion to Amend Complaint ("Amendment Opposition") (Docket No. 28). They argue that the proposed amendments would be futile. *Id.* at 1.

Fed. R. Civ. P. 15(a) provides that leave to amend a pleading "shall be freely given when justice so requires." Nevertheless, where a complaint as amended could not survive a motion to

⁴ The plaintiffs argue that this view of *Fortin* "eliminate[s] the discovery process inherent in all litigation." Dismissal Opposition at 7. To the contrary, facts which could not reasonably have been discovered by a plaintiff before bringing suit may under appropriate circumstances lead to the amending of a complaint when they come to light during discovery. *Fortin* dealt with a motion to dismiss. 871 A.2d at 1212. If its requirements could be avoided by a plaintiff who merely asserted that he or she would undertake discovery to see whether some facts could be unearthed to support a claim of negligent supervision already asserted, *Fortin*'s holding would be hollow indeed.

⁵ Northern also seeks dismissal of "those portions of Counts I [and] II . . . that assert or attempt to assert claims for (continued on next page)

dismiss, the motion to amend is to be denied as futile. *Aroostook Band of Micmacs v. Ryan*, 403 F.Supp.2d 114, 131 n.22 (D. Me. 2005).

A. Negligent Infliction of Emotional Distress — Northern

Under Maine law,

proof of negligent infliction of emotional distress requires plaintiffs to show that (1) defendant [was] negligent; (2) plaintiffs suffered emotional distress that was a reasonably foreseeable result of defendant[’s] negligent conduct; (3) and plaintiffs suffered severe emotional distress as a result of defendant[’s] negligence.

Veilleux v. NBC, 206 F.3d 92, 129 (1st Cir. 2000). The duty to act reasonably to avoid emotional harm to others arises under “very limited circumstances: first, in claims commonly referred to as bystander liability actions; and second, in circumstances in which a special relationship exists between the actor and the person emotionally harmed.” *Curtis v. Porter*, 2001 ME 158, ¶19, 784 A.2d 18, 25. Northern contends that neither Cynthia nor David witnessed the alleged acts of Northern and thus cannot establish bystander liability. Amendment Opposition at 3-4. The plaintiffs do not respond to this argument and I accordingly conclude that they do not base their proposed claims against Northern on the concept of bystander liability.

Northern next argues that no special relationship between Northern and Cynthia and David is alleged in the proposed amended complaint, so any claim asserted on the alternate basis would also be futile. *Id.* at 4. The plaintiffs’ memorandum of law in support of their motion reiterates the arguments made in connection with Count III of the existing amended complaint — that they may assert a claim for negligent supervision in this case. Memorandum in Support of Motion for Leave to Amend Complaint (“Amendment Memo”) (Docket No. 24) at 3-4. The plaintiffs repeat this

‘negligent supervision’” against it. Motion to Dismiss at 1. I do not read Count II to assert any such claim. To the extent that one or more paragraphs of Count I might be so construed, my recommendation applies to Count I as well.

argument in their reply memorandum. Response to Defendants’ Joint Opposition to Plaintiffs’ Motion to Amend Complaint (“Reply”) (Docket No. 30) at 2-6. That is not the issue here. The question is whether David and Cynthia have alleged the kind of special relationship between each of them and Northern that would allow them to proceed on a claim of negligent infliction of emotional distress.

In their reply memorandum the plaintiffs contend that they have alleged a special relationship between David and Cynthia and Northern “because the defendants had voluntarily taken custody of their minor daughter . . . such as to deprive her of her normal opportunities for protection” and because they had “entrusted their daughter” to Northern. *Id.* at 2, 4. I have reviewed the paragraphs making up Count V of the proposed second amended complaint (Docket No. 25).⁶ The former reason is not alleged therein and the latter at best fleetingly, in paragraphs 34 and 42. Assuming *arguendo*, as the plaintiffs contend, Reply at 3, that these reasons may reasonably be inferred from the language of the proposed amended complaint, I do not agree that the necessary special relationship is alleged thereby. The plaintiffs cite no authority in support of their position. I doubt that the Maine Law Court would find either situation to constitute the necessary special relationship. If it were to do so, every injury to a child that occurred while the child was in school, for example, would expose the operator of the school to liability for a parent’s claim of negligent infliction of emotional distress, because the parent “entrusted” the child to the school. Should the child be injured on a field trip to a remote area, the school could be said to have “deprived” the child of “her normal opportunities for protection.” That is simply too wide an interpretation of the “very limited” special relationship exception recognized by the Law Court.

⁶ The proposed second amended complaint was mistakenly filed directly on the docket by the plaintiffs at the same time they filed their motion for leave so to amend it. It has been stricken from the docket. Docket No. 26. It nonetheless remains available to the court, which must review it in order to be able to rule on the motion for leave to amend, as it (*continued on next page*)

The parents also contend that a special relationship should be found to exist in this case because it involves “contractual services that carry with them deeply emotional responses in the event of breach.” Reply at 4. The Maine courts have not adopted such a theory, even in the case cited by the plaintiffs. See *Angelica v. Drummond, Woodsum & MacMahon, P.A.*, 2003 WL 22250354 (Me. Super. Sept. 9, 2003), at *9 (finding attorney-client relationship to be special relationship for purposes of claim of negligent infliction of emotional distress). Even if this were a recognized “special relationship” for purposes of a claim of negligent infliction of emotional distress based on Maine law, the contractual service at issue here can only have been “an overnight, multi-day rafting and camping expedition to be conducted in Maine,” which was to be “safe and guided by experienced, reliable and trusted individuals,” Amended Complaint ¶¶ 12-13; Proposed Second Amended Complaint ¶¶ 12-13, the breach of which would not carry “deeply emotional responses” in most instances. The existence of the necessary special relationship cannot be established through hindsight; it must exist before the alleged injury occurs.

Finally, the plaintiffs assert, Reply at 4-5, that they have alleged a claim against Northern for other torts, Harding’s assault on Kayse and Northern’s negligence in allowing the assault to occur, allowing them to assert a claim for negligent infliction of emotional distress under the *Curtis* court’s observation that “[w]e have also held that a claim for negligent infliction of emotional distress may lie when the wrong doer has committed another tort[.]” 784 A.2d at 26. The Law Court went on to say:

However, as we have recently held, when the separate tort at issue allows a plaintiff to recover for emotional suffering, the claim for negligent infliction of emotional distress is usually subsumed in any award entered on the separate tort. We have long allowed recovery for mental anguish and loss of enjoyment of life in most tort actions. Although the words may be

would have been available if it had been submitted properly, as an attachment to the motion.

different, the recovery is for the same harm — the harm to the emotional health of the plaintiff. On the other hand, when there can be no recovery for emotional harm cause by the separate tort, as is the case in a few limited instances, such as negligent misrepresentation claims, a plaintiff may not circumvent that restriction by alleging negligent infliction in addition to the separate tort.

Id. (citations and internal punctuation omitted). But here the parental plaintiffs have not alleged that Northern committed any other tort against them. The claims based on the alleged assault and the alleged negligence in allowing the assault to occur are all brought only by Kayse. Amended Complaint Counts I-IV; Proposed Amended Complaint Counts I-IV. The underlying tort which allows a separate claim for negligent infliction of emotional distress to be brought within the meaning of the Law Court’s observation in *Curtis* can only be a tort committed by the same defendant against the same plaintiff. To interpret the remark otherwise would expand the parameters of a negligent infliction claim by a degree of magnitude well beyond the Law Court’s contemplation of “limited circumstances.”

The motion of David and Cynthia Eichelberger for leave to amend the amended complaint to assert claims of negligent infliction of emotional distress against Northern, as set forth in Counts V and VII of the proposed second amended complaint, is denied.

B. Infliction of Emotional Distress – Harding

The plaintiffs also seek leave to add claims of negligent and intentional infliction of emotional distress by Harding on David and Cynthia. Proposed Second Amended Complaint, Counts VI and VIII-X. With respect to the claims for negligent infliction of emotional distress, the defendants make the same arguments that they pressed with respect to the claims against Northern. Amendment Opposition at 2-4. Because the plaintiffs offer no further argument in support of their negligent infliction claims against Harding, the same result obtains. Harding would be entitled to

dismissal of Counts VI and VIII of the proposed second amended complaint and therefore the motion for leave to amend the amended complaint to add these claims is denied.

With respect to the proposed claims for intentional infliction of emotional distress (Counts IX and X of the proposed second amended complaint), Harding argues that the proposed second amended complaint includes no allegations that he directed his alleged conduct at Cynthia or David, and accordingly cannot succeed. *Id.* at 4-5. Under Maine law, the elements of a claim of intentional infliction of emotional distress are:

- (1) the defendant engaged in intentional or reckless conduct that inflicted serious emotional distress or would be substantially certain to result in serious emotional distress;
- (2) the defendant's conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable; and
- (3) the plaintiff suffered serious emotional distress as a result of the defendant's conduct.

Botka v. S.C. Noyes & Co., 2003 ME 128, ¶17, 834 A.2d 947, 952. “Serious emotional distress” means “emotional distress, created by the circumstances of the event, that is so severe that no reasonable person could be expected to endure it.” *Id.*⁷ The problem for Cynthia and David, here, as the defendants point out, is that the proposed second amended complaint does not allege either that Harding intended his alleged assault on Kayse to inflict serious emotional distress on them, that he recklessly ignored the likelihood that it would do so or that it would be substantially certain to do so. They say in their reply memorandum that Harding “at the very least should have known that his acts would cause an unreasonable risk of harm to Kayse Eichelberger’s close family members,”

⁷ The plaintiffs’ contention that the determination whether a defendant’s conduct may reasonably be regarded as so extreme and outrageous as to permit recovery — the plaintiffs erroneously phrase this as “to permit discovery” — “is inherently factual and would be premature before any discovery has occurred,” Reply at 7, is directly contrary to Maine law. *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶16, 711 A.2d 842, 847 (“In the context of an IIED claim . . . the court must first determine whether, as a matter of law, the facts alleged are sufficient to satisfy the elements.”). An allegation of rape easily meets this standard.

Reply at 8, but that assertion is not alleged in the proposed second amended complaint and it is not a reasonable inference to be drawn from anything that is alleged.

III. Conclusion

For the foregoing reasons, the plaintiffs' motion for leave to amend the amended complaint is **GRANTED** insofar as it seeks to withdraw claims of loss of consortium and otherwise **DENIED**. In addition, I recommend that the defendants' motion to dismiss be **GRANTED** as to Count III and that portion of Count I that may reasonably be construed to allege a claim for negligent supervision and otherwise **DENIED**. If this recommended decision is adopted by Judge Singal, the plaintiffs shall file an amended complaint consistent with Judge Singal's action within 5 business days thereof.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 4th day of October, 2007.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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