MARYLAND: IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

NADIA RAIKIN **As Personal Representative of the Estate of Ekaterina Ioffe** **LEONID IGUDESMAN** **Plaintiffs** **v.** **HEBREW HOME OF GREATER WASHINGTON, *ET AL.*** **Defendants**	)	**Law No. 475067-V** **Hon. Jeannie Eun-Kyung Cho** **Next Event: Scheduling Hearing 2/7/2020 at 9:00 a.m.**

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This is a medical malpractice case arising out of two intertwined acts of negligence. The gravamen of Plaintiffs' Complaint is that:

(i) Defendant Hebrew Home of Greater Washington (the "Facility") negligently allowed Ms. Ioffe ("Decedent" or "Ms. Ioffe") to fall from her bed while being cleaned, causing her to hit her head on the cement floor, proximately resulting in her death within minutes;[1] and

(ii) Soon after Ms. Ioffe died, the Facility conspired with Dr. Fazli (a medical doctor on the team of physicians who cared for patients at the Facility) to conceal the true cause of Ms. Ioffe's death was the Facility's tortious conduct; by agreeing that Dr. Fazli would intentionally falsify Decedent's Death Certificate in an effort to protect the Facility from liability; .

[1]Excerpts from the Complaint are attached as **Appendix A** for convenience.

Plaintiffs do not contend that Dr. Fazli caused Plaintiffs' fatal injury, but as will be shown, that is irrelevant to the separate and subsequent wrongful conduct in fabricating the cause of death on the Death Certificate.

Plaintiffs filed a five-count Complaint against Defendants.[2] Count III (Negligence), Count IV (Negligent Misrepresentation), and Count V (Civil Conspiracy), each state well-recognized causes of action against Defendants for their willful falsification of Decedent's Death Certificate. Nevertheless, Defendants filed a Motion to Dismiss these three counts, conflating the sufficiency of allegations in a pleading with the sufficiency of proof at trial, and denying as incredulous that Plaintiffs could suffer damages after the Facility fatally injured their mother and then conspired with her doctor to conceal the cause of her death from Plaintiffs to avoid liability. In other words, Defendants ask the Court to ignore allegations of intentionally falsifying Decedent's Death Certificate, a criminal offense, for purposes of metaphorically burying their attempted cover-up with Decedent.

Defendants assert the same flawed arguments when challenging each count, seemingly substituting repetition for legal authority. The gravamen of the Motion to Dismiss is:

1. Dr. Fazli (the misrepresenting physician) and her employer owed no duty to Plaintiffs to accurately describe the cause of their mother's death, because Plaintiffs are third parties and not her patient;

2. Even though the false information was intentionally recorded to hinder Plaintiffs' ability to hold Defendants accountable and to conceal what really happened;

3. The Complaint fails to allege sufficiently the cause and nature of Plaintiff's injuries and their claim for damages—

[2]Defendants do not include Count I (Survivorship) or Count II (Wrongful Death) in their Motion to Dismiss.

Because Defendants cannot understand how the Plaintiffs can suffer emotional distress after the Facility killing their mother and then lying about it was any of Plaintiffs' business;

4. Plaintiffs did not satisfy heightened pleading requirements for fraud—

   A fair point because Plaintiffs did not allege fraud in the first place; and

5. Defendants cannot be liable for civil conspiracy because Dr. Fazli's conduct in purposefully misrepresenting the cause of death was not tortious—

   But Defendants seemingly overlook that the illegal act which the civil conspiracy count is based on a violation of the statutory prohibition on falsifying a death certificate, a misdemeanor.

As will be shown, Defendants' arguments are untenable. Defendants Motion should be denied.

ARGUMENT

1. PLAINTIFF HAS ALLEGED SUFFICIENT FACTS IN COUNTS III AND IV TO STATE CAUSES OF ACTION FOR NEGLIGENCE/MALPRACTICE AND NEGLIGENT MISREPRESENTATION AGAINST DR. FAZLI AND CHARLES E. SMITH[3]

A. Dr. Fazli Was Engaged in the Practice of Medicine for Purposes of Liability Under Maryland's Medical Malpractice Act When Falsifying the Death Certificate

The initial step is to determine if Dr. Fazli is potentially liable under the medical malpractice statute. Plaintiffs' claim against Dr. Fazli is alleged to have occurred in the context of providing healthcare under Maryland's Health Care Act, even if Ms. Ioffe was deceased at the time. As *Davis v. Frostburg Facility Operations, LLC* explained:

> Determining whether a claim falls under the HCA depends on "the factual context in which the tort was allegedly committed."
>
> [For] the HCA to apply—the cause of an injury must have been "'a breach by the defendant in his, her or its professional capacity, of the

[3] Defendants assert that Charles E. Smith is not a legal entity. Plaintiffs will require discovery to delve into the relationship between the two.

> duty to exercise ... professional expertise or skill' in rendering or failing to render medical care."

457 Md. 275, 290-291, 177 A.3d 709, 718-719 (Md. App. 2018). While a cover-up involving an IT person who deleted emails may evade the HCA, Dr. Fazli was acting in the capacity of Decedent's treating physician. Compl. at ¶ 22. As a healthcare professional, Dr. Fazli was required to meet the standards of care and community regulations. Her breach of the standards of care exposes her to a negligence claim under Maryland's medical malpractice act and therefore Dr. Fazli was obligated to exercise professional expertise and skill when completing the death certificate occurred.

Dr. Fazli and Charles E. Smith owed Plaintiffs a duty of honesty and candor, as well as the duty to obey Maryland's statutes, rules, and regulations prohibiting the willful falsification of a death certificate. "In Maryland, statutes define the role that [attending physicians] perform in investigating deaths." *Wilson v. State*, 136 Md. App. 27, 764 A.2d 284 (Md. App. 2000). The statutory framework emphasizes that when a physician prepares a death certificate, s/he is engaged in the practice of medicine. Pertinent sections include:

> "A certificate of death regardless of age of decedent shall be filled out and signed by ... the physician who last attended the deceased" [if the medical examiner does not take charge of the body]." H.G. § 4-212(1)(b)(ii) of the Health-General Article ("H.G.");
>
> "Physician" means ***a person authorized or licensed to practice medicine*** ... pursuant to the laws of this State. H.G. § 4-201(r).
>
> The death certificate is required to set forth the ***cause of death.*** H.G. § 4-212(b)(2)(ii) (which only a medical doctor can conclude);
> "The person who is required to complete the record ***shall attest to its accuracy*** either by signature or by approved electronic process." Section 4-207(a)(2);
>
> "A person ***may not willfully provide false information for entry or willfully enter false information on a certificate*** of birth, death, or fetal death." H.G. § 4-226(b)(1);
>
> "A person who violates § 4-226 of this subtitle ***is guilty of a misdemeanor.***" H.G. § 4-227(b)(2);

The physician must notify the medical examiner if the physician considers "An accident. including ***a fall with a fracture or other injury***" ... "to be the cause of death or to have contributed to the death." H.G. § 4-212(c)(3)(i);

A death certificate is a "vital record" (H.G. Section § 4-201(n)) and the "original or a certified copy of the certificate is prima facie evidence of the facts stated in it." H.G. § 4-223(a); and

The Code recognizes the need "To protect the integrity of vital records" H.G. § 4-224.

Plaintiffs have alleged that Dr. Fazli's malfeasance was part of an unbroken continuum of tortious healthcare Defendants delivered, from the fatal injury to the immediate decision to engage in a cover-up. As the Nebraska Supreme Court correctly observed in *Muller v. Thaut*, 230 Neb. 244, 250-251, 430 N.W.2d 884, 290 (Neb. 1988), the cause of death is material information that must be accurately presented:

> On the issue of fraudulent concealment, "A physician is under a duty to disclose material information to his patient, and failure to do so results in fraudulent concealment." ... ***"Material information" includes the cause of death of a patient.***

(emphasis added).

B. Dr. Fazli Owed a Legal Duty to Plaintiffs When Preparing Their Mother's Death Certificate

There is ample authority holding that in addition to the legal duty owed by the physician to his patient, the physician also owes a duty to non-patient third parties who are proximately injured as the result of a negligent act of the physician to his patient. For example, in *Hume v. Bayer*, 178 N.J.Super. 310, 428 A.2d 966 (N.J. Super. 1981), the New Jersey Supreme Court recognized the physician's duty to a minor patient's parents when the physician knowingly and untruthfully told the parents that their son was suffering from cancer when he only had an infection. The court observed that "For present purposes it is significant that ***the intentional nature of the***

actor's conduct gives the injured party's claim an added element of reliability." 178 N.J.Super. at 319, 428 A.2d at 971.

In *North American Co. for Life and Health Ins. v. Berger* 648 F.2d 305, 306 (5th Cir. 1981), *reh. denied* 655 F.2d 235, *cert. denied*, 70 L. Ed. 2d 619, 102 S. Ct. 641, permitted an insurance company to recover benefits paid to claimants whom the physician fraudulently certified were totally disabled. The court specifically rejected the argument that "a doctor is not subject to malpractice liability unless the injured party is or was the doctor's patient" when holding that "[The physician] knew exactly who would rely on his certification and for what purpose. [He] was under a duty to exercise reasonable care in performing medical services, making diagnoses, and transmitting them to [the insurer]."

In *Hiser v. Randolph*, 126 Ariz. 608. 617 P2d 774 (Ariz. App. 1980) a physician conducted a pre-employment physical exam and certified that that a driver was qualified to drive a truck under certain regulations. Actually, the driver had a severe visual problem as well as other physical problems. As such, the plaintiff involved in a serious motor vehicle accident with the driver stated a cause of action against the physician.

In *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 635 N.E.2d 331, 343 (Ohio 1994), the court stated:

> In our judgment, Figgie's alteration of records was inextricably intertwined with the claims advanced by appellant for medical malpractice ....
>
> If the act of altering and destroying records to avoid liability is to be tolerated in our society, we can think of no better way to encourage it than to hold that punitive damages are not available in this case. We believe that such conduct is particularly deserving of punishment in the form of punitive damages and that a civilized society governed by rules of law can require no less. Figgie's conduct of altering records should not go unpunished. We should warn others to refrain from similar conduct and an award of punitive damages will do just that.

In *Scampone v. Grane Healthcare Co.*, 11 A.3d 967, 992 (Pa.Super. 2010) *appeal granted,* 15 A.3d 427 (2011), the court held that defendants who colluded to alter patient records acted with a reckless disregard to the rights of others and created an unreasonable risk of physical harm to the residents of the nursing home when falsifying and altering medical records; such conduct "is outrageous and warrants submission of the question of punitive damages to the jury."

In *Re: Suspension or Revocation of the License of Mario E. Jascalevich, M.D.*, 442 A.2d 635, 645 (N.J. Super. Ct. App. 1982), the court reasoned that:

> ***The knowing entry of a false entry in a patient's record and the purposes of self-protection also in the Board's opinion demonstrates a patent lack of good moral character*** required by N.J.S.A. 45:9-6.
>
> ***We are persuaded that a physician's duty to a patient cannot but encompass his affirmative obligation to maintain the integrity, accuracy, truth and reliability of the patient's medical record.*** His obligation in this regard is no less compelling than his duties respecting diagnosis and treatment of the patient since the medical community must, of necessity, be able to rely on those records in the continuing and future care of that patient. Obviously, the rendering of that care is prejudiced by anything in those records which is false, misleading or inaccurate.

(emphasis added).

In *Healy v. West Virginia Bd. of Medicine*, 506 S.E.2d 89, 92 the court affirmed "in all respects" the suspension of physician's license because the doctor "falsified the patient medical records and made a deceptive, untruthful and fraudulent misrepresentation in the practice of medicine."

As these representative cases demonstrate, a third-party non-patient can state a cause of action against a physician who intentionally conceals material medical information, or who alters or destroys medical evidence. It is the willful and purposeful conduct that exposes the physician to liability. *See, e.g., Hume v. Bayer,* 178 N.J.Super. at 319, 428 A.2d at 971. When the willful and purposeful conduct in fabricating a death certificate or other medical records is coupled with

a selfish motive to protect the tortfeasor, at the expense of the truth, public policy objectives provide additional justification to hold the physician liable. *See, e.g., Re: Suspension or Revocation of the License of Mario E. Jascalevich, M.D.*, 442 A.2d 635, 645 (N.J. Super. Ct. App. 1982).

The Complaint alleges that Defendants intentionally falsified the Death Certificate for their own protection from liability[4] *E.g.*, Compl. at ¶¶ 26, 36-37. The court in *Muller v. Thaut* condemned this mockery of rewarding the dishonest physician and Facility:

> By misrepresenting or concealing facts, a physician, or any other person, may appreciate a twofold benefit. He may avoid having his skill and judgment questioned, and he may escape liability for the negligent harm he has caused. ***It is not the policy of the law to encourage such conduct.***

230 Neb. at 258, 430 N.W.2d at 893 (emphasis added).

Plaintiff Raikin has an additional relationship with Defendants that impose a duty on Defendants to provide truthful and complete medical records to her. As her mother's responsible party for healthcare decision-making before her death, and as her personal representative for litigation purposes, she meets the definition of a "Person in Interest" under the medical records

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[4]Although discussed in a different context, the Fourth Circuit Court of Appeals emphasizes that the viability of our legal system depends upon the judiciary's vigilant condemnation of concealment, alteration, or intentionally falsifying records to protect wrongdoers from being held accountable, which warning applies equally in this case, given a death certificate's use as evidence in a variety of contexts:

> The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth. ... The courts must protect the integrity of the judicial process because, "[a]s soon as the process falters ... the people are then justified in abandoning support for the system."

Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001).

privacy statute. As a person in interest, she has the right to receive accurate medical information from her mother's medical professional on matters relating to her care and cause of death.[5] Also, as biological relatives, knowing if a cause of death is hereditary is material information that Decedent's children are entitled to know. Furthermore, Defendants had a duty to the public generally to provide accurate information contributing to the health data of affected populations. *See, e.g.* H.G. §§ 4-219 and 4-220.

C. Plaintiffs Have Pled Damages and Causation Sufficiently

As a preliminary matter, Defendants overlook that Maryland recognizes liberal pleading requirements as reflected in Rule 2-303(b), which states:

> Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading are required. A pleading shall only contain such statement of fact as is necessary to show the pleader's entitlement to relief. It shall not include argument, unnecessary recitals of law, evidence or any immaterial, impertinent or scandalous matter.

A plaintiff "need only state such facts in his or her complaint as are necessary to show an entitlement to relief." *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 698 (1997). A litigant is not required to "state minutely all the circumstances which may conduce to prove the general charge." *Smith v. Shiebeck*, 180 Md. 412, 420 (1942). Defendants are confusing the sufficiency of a pleading with the sufficiency of proof at trial. As Rule 2-303(b) makes plain, however, a

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[5] The Code mandates that "[A] health care provider shall comply within a reasonable time after a ***person in interest*** requests in writing: (i) to receive a copy of a medical record. H.G. § 4-304. The statute defines a "Person in interest" as:

> (2) A person authorized to consent to health care for an adult consistent with the authority granted;
>
> (3) A duly appointed personal representative of a deceased person.

H.G. § 4-301(m). A person in interest is not always the patient, which expands the class of individuals who are foreseeable recipients of a falsified death certificate.

complaint "shall not include ... unnecessary recitals of ... evidence." Defendants' Motion to Dismiss is premised on a supposed failure to allege minutia, which fails as a matter of law.

Second, Plaintiffs have pled causation and the nature of their injuries and damages in sufficient detail to put Defendants on notice of the bases for their claims. While Defendants bemoan the sufficiency of the factual allegations, it is apparent that they know precisely why Plaintiffs are aggrieved. This reality is why Defendants labor mightily to avoid these allegations in an evidentiary vacuum and without citing supporting legal authority. But the sufficiency of facts alleged in a pleading, and the sufficiency of the evidence at trial, are two very different issues. Defendants may be unhappy with the facts alleged, but there is little question that Defendants understand the nature of Plaintiffs' claims. This is all that the rules require at the pleading stage.

The fact that Defendants' attempted cover-up did not cause Ms. Ioffe's death is irrelevant to the issues presented. Plaintiff has adequately pleaded damages proximately flowing from this breach, including mental anguish, distress, inconvenience and a corresponding violation of Ms. Ioffe's rights. Compl. at ¶ 27. The Estate and statutory beneficiaries were also injured "to the extent that proving the actual cause of death became more complicated and expensive." *Id.*

Third, Defendants profess disbelief that Plaintiffs suffered emotional trauma despite allegations that the Facility's negligence caused their mother's wrongful death and that the Facility, and her own physician orchestrated an illegal cover-up by falsifying the death certificate. In *Hume v. Bayer,* the court succinctly stated the harm expected from this intentionally shocking conduct, explaining that:

> ***Extreme and outrageous conduct by its nature produces distress in "normally constituted" persons against whom it is directed.***

178 N.J.Super. at 319, 428 A.2d at 971 (emphasis added). Indeed, contrary to Defendants' interpretation, misrepresentation damages may include emotional and psychological distress.

Vance v. Vance, 286 Md. 490, 498-501, 408 A.2d 728 (1979) (holding that spontaneous crying, difficulty sleeping, socializing and depression constituted proper elements of damages for misrepresentation). Furthermore, even if Plaintiffs had not specifically pled emotional distress and mental anguish, a general damages allegation would have been sufficient under these circumstances. Damages which necessarily result from the wrong complained of may also be shown through a general allegation and only special damages need to be pled with more particularity. *Id, citing Rein v. Koons Ford Inc.*, 318 Md. 130, 141, 567 A.2d 101 (1989).[6]

Fourth, Defendants also assert that "it is unknown how Plaintiffs could have suffered mental anguish and/or distress and what exactly it was concerning the alleged breach . . . that sparked the asserted mental anguish and/or distress and what treatment either received for these alleged conditions" (Def's memorandum at p. 8, internal quotations omitted). As their argument establishes, Defendants are aware that Plaintiffs claimed mental anguish and/or distress as a result of the falsification of the death certificate. In addition, Plaintiffs specifically alleged that this subterfuge threw them off the proverbial scent and thereby irreparably spoliated evidence that Plaintiffs jadedly suspect will be necessary to refute Defendants' trial story. Compl. at ¶¶ 27, 33, 38. While criticizing Plaintiffs for vague and conclusory pleading, Defendants ironically assert no more than conclusory objections why the facts alleged are insufficient. It seems apparent that Defendants are in actuality seeking additional details concerning the mental anguish, distress, and claim prejudice after evidence has been spoliated, which are the proper subjects of discovery and not a challenge to the pleading. Whether Plaintiffs are ultimately able to prove their allegations is

[6]Special damages in Maryland refer to pecuniary losses. *Wineholt v. Westinghouse Elec. Corp.*, 476 A.2d 214, 59 Md. App. 443 (Md. App. 1983) (explaining that the allegation that Plaintiff sustained extreme mental and emotional anguish which prevented her from engaging in her normal vocation was a sufficient allegation of damages in a defamation case, as Defendants were on notice of the nature of the loss).

a matter for another day. Under all these circumstances, the cause and extent of Plaintiffs' claimed injuries are matters of proof for the jury, not matters of pleading.

D. Plaintiffs Are Not Alleging a Claim for Fraud and Defendants' Discussion of an Inapplicable Higher Pleading Requirement is at Most an Irrelevant Distraction

Defendants try to hi-jack Plaintiffs' pleading by grafting a fraud claim onto the allegations to trigger an otherwise inapplicable heightened pleading requirement. While Plaintiff is amenable to adding a fraud count, Count III is premised on negligence/malpractice of Dr. Fazli breached the standard of care by negligently, intentionally and tortiously falsifying Ms. Ioffe's Death Certificate in an effort to cover up the true cause of her death. While some of Dr. Fazli's actions may constitute fraudulent conduct, Plaintiffs cannot be held the higher pleading standard simply because the word fraud is used, when the underlying action is not one for fraud (even if, as a practical matter, Plaintiffs' allegations are sufficient to make out a fraud claim).[7]

2. PLAINTIFFS HAVE ALLEGED SUFFICIENT FACTS IN COUNT V TO STATE A CAUSE OF ACTION FOR CIVIL CONSPIRACY

Under Maryland law, it is settled that a

> Civil conspiracy requires proof of three elements: "1) A confederation of two or more persons by agreement or understanding; 2) [S]ome unlawful or tortious act done in furtherance of the conspiracy or use of unlawful or tortious means to accomplish an act not in itself illegal; and 3) Actual legal damage resulting to the plaintiff."

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[7]In support of their fraud argument Defendants argue that there is no allegation that there "was a knowing false representation" made with "intent to deceive." The Complaint, however, alleges that "Dr. Fazli concealed that Ms. Ioffe died from a fall," knowing "that she died within minutes of sustaining a traumatic fall in which she suffered a head injury with significant bleeding from her nose." Complaint, ¶¶ 25 & 26. The Complaint further alleges that Dr. Fazli "intentionally . . . mispresented that Ms. Ioffe died from natural causes, specifically dementia." At the time, Dr. Fazli "either knew or should have known that Ms. Ioffe had suffered a recent head injury, which lead to her death minutes later." *Id.* ¶ 29. These allegations would be sufficient to make out a fraud count, but Plaintiff has chosen the easier route of proving a malpractice and negligent misrepresentation case.

Windesheim v. Larocca, 116 A.3d 954, 975, 443 Md. 312, 347-348 (Md. App. 2015); *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*, 596 A.2d 687, 88 Md.App. 672 (Md. App. 1990) (describing a civil conspiracy as a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the plaintiff."). Plaintiffs have alleged the requisite facts to state a cause of action against Defendants for civil conspiracy[8] and Defendants cannot seriously dispute that Plaintiffs have pled the essential elements of a civil conspiracy.

Instead, Defendants repeat their flawed argument that Dr. Fazli owed no duty to Plaintiffs and therefore cannot be held liable in negligence and therefore the conspiracy claim must also fail without an underlying tort or wrongful act to attach to the conspiracy claim. But Defendants overlook that falsifying a death certificate is a criminal offense. A civil conspiracy

Defendants seek dismissal of Count V on the grounds that (i) "no such tort exists as a separate action"; and (ii) Plaintiffs have not sufficiently alleged damages. Def's Motion, p. 14. First, Defendants either misunderstand or misstate the Court's pronouncements that a civil conspiracy is not a stand-alone tort. The legal principle, however, is not as Defendants suggest. As clarified in *Bachrach v. United Cooperative,* 181 Md. 315, 324-325, 29 A.2d 822, 827 (1943), "The act done must be one which if done by one alone would be unlawful; the fact of conspiracy

[8]Plaintiffs are aware of the "intracorporate conspiracy doctrine," which holds that acts of corporate agents are attributed to the corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy. In essence, this means that a corporation cannot conspire with its employees, and its employees, when acting in the scope of their employment, cannot conspire among themselves. *See, e.g., Marmott v. Maryland Lumber Company*, 807 F.2d 1180, 1184 (4th Cir.1986). But Plaintiffs alleged that the Facility and Dr. Fazli are separate from each other (Compl. at ¶¶ 3, 22) and therefore the doctrine does not apply to defeat Plaintiffs' civil conspiracy count.

is a matter of aggravation." Plaintiffs do not dispute that without a separate viable tort or violation of law, a civil conspiracy against Dr. Fazli is not actionable. However, Plaintiffs have alleged not only separate torts (*i.e.*, negligence, malpractice and negligent misrepresentation), but also a violation of law: "Dr. Fazli breached community and regulatory standards by failing to include the fall as an immediate and/or contributing cause of death for Ms. Ioffe." Compl. at ¶ 26. Furthermore, Plaintiffs have pled more than tortious conduct; Dr. Fazli's conduct was a criminal offense under Maryland law when submitting false information on a death certificate. H.G. § 4-226(b)(1) (2015). As such, even if a tort had not been properly alleged, Dr. Fazli is still liable for her violations of Maryland law under a conspiracy theory.

Second, although Defendants complain of the sufficiency of the civil conspiracy allegations as well, Defendants gloss over that by their very nature facts relating to a secretive conspiracy defy pleading with much specificity. The Court described the fact-intensive nature of proving a conspiracy in *Windesheim v. Larocca,* explaining that those who participate in concerted conduct are reluctant to incriminate themselves:

> Civil conspiracy may be proved by circumstantial evidence because "in most cases it would be practically impossible to prove a conspiracy by means of direct evidence alone." *Hoffman v. Stamper*, 385 Md. 1, 25, 867 A.2d 276, 291 (2005) (citation and internal quotation marks omitted). More specifically, a civil conspiracy may be established by inference from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation and relation of the parties at the time of the commission of the acts, the motives which produced them, ***and all the surrounding circumstances preceding and attending the culmination of the common design.*** *Id.* at 25–26, 867 A.2d at 291 (citation and internal quotation marks omitted).

116 A.3d 954, 975, 443 Md. 312, 347-348 (Md. App. 2015) (emphasis added). Stated differently, heightened pleading requirements are both impractical and inapplicable when alleging the details

comprising the conduct of a civil conspiracy. *Id.* Plaintiffs have more than sufficiently met their preliminary burden at the pleading stage to state a cause of action against Defendants.[9]

Defendants also argue that Plaintiffs have not alleged sufficient specifics about the agreement to protect the Facility with a sham Death Certificate. However, a litigant is not required to set forth the place, date of summary of the actual conversations when pleading conspiracy. As alleged, the conspiracy occurred on the day of Ms. Ioffe's death, because that is when she fell, and death certificate was completed. Plaintiff further alleges that the Director of Nursing and Dr. Fazli agreed to complete the death certificate (Compl. at ¶ 36), but Plaintiff was not privy to the specifics of that conversation.[10] Under Maryland's liberal pleading requirements, these allegations are more than sufficient to support a conspiracy claim.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court DENY Defendants' Motion to Dismiss Counts III, IV, and V in the Complaint, or alternatively, if the Motion to Dismiss is granted in whole or in part, Plaintiffs respectfully request leave to file an amended complaint to cure any deficiencies.

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[9] In reversing a grant of summary judgment based on purported insufficient factual allegations of civil conspiracy, the Court stated in *Lloyd v. General Motors Corp.* that

> It is clear to this Court that the facts pled in the TAC were not vague assertions, but rather were pointed facts alleging specific acts of conspiracy on the part of the respondents. Therefore, the Court of Special Appeals' decision to affirm the Circuit Court's grant of summary judgment on this ground is reversed.

916 A.2d 257, 284-285, 397 Md. 108, (Md. App. 2007). Plaintiffs' Complaint likewise satisfies the pleading requirements for each challenged Count and the Motion to Dismiss should be denied.

[10] If this Court find that Plaintiffs have not pleaded sufficient specifics surrounding the conspiracy, then Plaintiff respectfully requests that Plaintiff be permitted to engage in discovery before being required to file an amended complaint.

MD Rule-1-313 Certification

Pursuant to Rule 1-313 of the Maryland Rules of Civil Procedure, the undersigned Plaintiffs' Counsel, Jeffrey J. Downey, hereby certifies that he is a currently a member of the Maryland Bar and in good standing.

January 10, 2020

Respectfully submitted,

NADIA RAIKIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EKATERINA IOFFE;

AND

LEONID IGUDESMAN

Jeffrey J. Downey
Client Protection Fund No. 0308110001
Law Office of Jeffrey J. Downey
8270 Greensboro Drive, Suite 810
McLean, VA 22102
P: 703-564-7318
F: 703-883-0108
Email: jdowney@jeffdowney.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby affirm that on this 10th day of January 2020, I served a true and accurate copy of Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss via electronic mail and by regular mail postage prepaid, to counsel of record identified below:

Jodi V. Terranova, Counsel
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
1500 K St, N.W. Suite 330
Washington, D.C. 20005
Counsel for Defendants

Jeffrey J. Downey