COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

ESSEX, ss.

SUPERIOR COURT
DEPARTMENT
CIVIL ACTION
No. 1677CV01590

PEGGIE AND THOMAS RITZER[1] & others[2]

vs.

DINISCO DESIGN PARTNERSHIP

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT DINISCO DESIGN INC.'S MOTION FOR SUMMARY JUDGMENT (PAPER NO. 41)

INTRODUCTION

This case arises out of the murder of Colleen Ritzer ("Ms. Ritzer"), a high school teacher employed by the Town of Danvers (the "Town"), on October 22, 2013, by one of her students, Philip

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[1] Individually and as Personal Representatives of the Estate of Colleen Ritzer

[2] Daniel Ritzer and Laura Ritzer

Chism ("Chism"), on the grounds of the Danvers High School (the "School"). On October 18, 2016, her parents and siblings, Peggie and Thomas Ritzer, individually and as personal representatives of the Estate of Colleen Ritzer, and Danial Ritzer and Laura Ritzer (the "Ritzer Plaintiffs"), filed the Complaint with Jury Demand (the "Complaint") (Paper No. 1), asserting a claim against the defendant, DeNisco Design Partnership, correctly named DiNisco Design, Inc. ("DiNisco"), for wrongful death (Count I).[3] After a hearing on June 10, 2022, DiNisco's Motion for Summary Judgment (Paper No. 41) will be **DENIED**.

The court finds that the question of whether or not DeNisco breached its duty of care by failing to clearly notify the town that the technology as configured would never function correctly is a jury question, not to be decided by a judge on this pretrial motion. Denial of this motion is required.

[3] The Ritzer Plaintiffs also asserted a claim against DiNisco for negligent infliction of emotional distress (Count II). Following hearing on DiNisco's Motion to Dismiss the Plaintiffs' Complaint (Paper No. 13), the court (Karp, J.) dismissed this claim. As a result, the claim for wrongful death is the only claim that remains against DiNisco.

BACKGROUND

The court omits certain unnecessary detail, mostly of a technical nature, and refers to some technical information with intentional imprecision, to allow for the posting on the public docket of this opinion without providing information helpful to a shooter. The court does not describe in detail the plaintiffs' theory of why DiNisco's alleged mistakes in relation to the technology might have mattered because of this security-related concern. The court finds, suffice it to say, that the plaintiffs' theories on why technology shortcomings mattered warrant presentation to a jury.

In 2009, the Town entered into a contract with DiNisco concerning renovations to be performed at the School. As part of this contract, DiNisco was required to provide technology (the "System") to be used at the School, to help ensure the safety of students, teachers, and other personnel. There is record evidence that, as designed, the System was to allow multiple viewers to view a live video feed at the same time from various

locations. There is also record evidence that, as designed, when motion triggered the cameras placed around the School, the System was to automatically send triggers/alerts to designated users, to allow these users to investigate any unusual activity at the School.

There is record evidence that, both before and after October 2013, there were numerous problems with the System. DiNisco was told early on, by at least two subcontractors—American Service Company and Wayne Griffin Electric—that the System's software would not work properly with the School's existing hardware. There is, however, no record evidence that DiNisco ever provided this information along to the Town. And, problems with the System persisted; there is record evidence that, between November 2012 and November 2013, Assistant Superintendent Keith Taverna ("Taverna") contacted DiNisco numerous times to report various problems with the System. The parties dispute whether the system was functioning properly on October 22, 2013, when Ms. Ritzer was killed.

DISCUSSION

The Ritzer Plaintiffs assert a claim against DiNisco under the wrongful death statute, G. L. c. 229. This provision provides, in pertinent part, that a "person who (1) by his negligence causes the death of a person . . . under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, . . . shall be liable in damages." G. L. c. 229, § 2. Thus, the viability of this claim is examined in connection with the standards that apply to a claim for negligence. See Correa v. Schoeck, 479 Mass. 686, 693 (2018) ("[t]o prevail in her wrongful death suit, [the plaintiff] must prove that the defendants were negligent"), citing Afarian v. Massachusetts Elec. Co., 449 Mass. 257, 261 (2007). To prevail on a negligence claim, a plaintiff must prove four elements: "(1) duty; (2) breach of duty; (3) a causal connection between the breach of duty and damages; and (4) damages." Adams v. Cong. Auto Ins. Agency, Inc., 90 Mass. App. Ct. 761, 765 (2016). Here, DiNisco argues it is entitled to summary judgment because the

Ritzer Plaintiffs cannot present facts sufficient to prove elements one through three.[4] As discussed below, the court disagrees.

I. Standard of Review

Summary judgment will be granted only where, "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established, and the moving party is entitled to judgment as a matter of law." Cabot Corp. v. AXV Corp., 448 Mass. 629, 636-637 (2007). When the moving party does not bear the burden of proof at trial, as is the case here, it is entitled to summary judgment only if it either submits affirmative evidence that negates an essential element of the opposing party's case, or if it demonstrates that the opposing party has no reasonable expectation of proving an essential element of its case. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). If the moving party meets this burden, the nonmoving

[4] DiNisco does not challenge the Ritzer Plaintiffs' ability to demonstrate damages; thus, the court need not address this element.

party must provide specific facts to show that there is a genuine issue for trial. Id.

The court may consider pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, when deciding motions for summary judgment. Polaroid Corp. v. Rollins Envt'l Servs., 416 Mass. 684, 696 (1993), citing Conley v. Massachusetts Bay Transp. Auth., 405 Mass. 168, 173 (1989). In doing so, the court views the evidence in the light most favorable to the nonmoving party; however, it does not weigh the evidence, determine witness credibility, or make its own findings of fact. Attorney Gen. v. Bailey, 386 Mass. 367, 370-371 (1982). Lastly, for purposes of this case, the court notes that summary judgment is disfavored in negligence cases because of the inherently factual nature of the dispositive issues, which are ordinarily best left to the determination of the trier-of-fact. See Manning v. Nobile, 411 Mass. 382, 388 (1991).

II. Analysis

A. Duty

The existence of a duty of care is generally a question of law for the court to decide. See Jupin v. Kask, 447 Mass. 141, 146 (2006). "The concept of 'duty' is not sacrosanct in itself, but is only an expression of the sum total of considerations of policy which lead the law to say that the plaintiff is entitled to protection. No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." Id. (internal punctuation and citation omitted).

In this case, there is record evidence that DiNisco contracted with the Town to perform renovation work at the School, and that, pursuant to this contract, DiNisco was required to provide the System, to help ensure the safety of students, teachers, and other personnel. Given these facts, it is reasonable to conclude that DiNisco owed Ms. Ritzer, a teacher at the School, a duty of care. See LeBlanc v. Logan Hilton Joint Venture, 463 Mass. 316, 327-328 (2012) ("[i]t is settled that a claim in tort may arise

from a contractual relationship, . . . and may be available to persons who are not parties to the contract . . . . [A] defendant under a contractual obligation 'is liable to third persons not parties to the contract who are foreseeably exposed to danger and injured as a result of its negligent failure to carry out that obligation'"), quoting Parent v. Stone & Webster Eng'g Corp., 408 Mass, 113-114 (1990).

B. Breach

In the negligence context, breach "'is a want of diligence commensurate with the requirement of the duty . . . imposed by the law.'" Nelson v. Massachusetts Port Auth., 55 Mass. App. Ct. 433, 435 (2002), quoting Altman v. Aronson, 231 Mass. 588, 591 (1919). In this case, the question is whether DiNisco negligently performed its contractual obligations. See LeBlanc, 463 Mass. at 328 ("[w]here a contractual relationship creates a duty of care to third parties . . . a breach is committed . . . by the negligent performance of that duty"), citing Anderson v. Fox Hill Village Homeowners Corp., 424 Mass. 365, 368 (1997). This is a

question of fact for the jury and not a determination made on this motion for summary judgment. See Jupin,. 447 Mass. at 146 (noting that, generally, breach falls within "the special province of the jury").

Here, it is for the jury to determine whether DiNisco breached the duty of care it owed to Ms. Ritzer. There is record evidence indicating that, despite its contractual obligations, the System had continuous problems; that the System did not function as designed; and that the System was not functioning properly on the day Ms. Ritzer was killed. More concerning, there is record evidence indicating that DiNisco, the entity the Town hired to design the System, knew that the System was not compatible with, and could never function properly with, the School's existing technology, and that it never clearly notified the Town about this incompatibility. This is the key reason why this motion must be denied.

C. Causation

"'Causation is an essential element of [the burden of] proof' for a negligence claim." Aulson v. Stone, 97 Mass. App. Ct. 702, 712 (2020), quoting Glidden v Maglio, 430 Mass. 694, 696 (2000). Generally, it is "'one of fact for the jury. A plaintiff need only show that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause.'" Lieberman v. Powers, 70 Mass. App. Ct. 238, 244 (2007), quoting Mullins v. Pine Manor Coll., 389 Mass. 47, 58 (1983). The necessary causal connection may be found "[if] the injury to the plaintiff was a foreseeable result of the defendant's negligent conduct." Kent v. Commonwealth, 437 Mass. 312, 320 (2002). And, "'[a]n expert's opinion based on facts in evidence is sufficient proof of causation.'" Aulson, 70 Mass. App. Ct. at 244, quoting Mullins, 389 Mass. at 58.

In this case, the Ritzer Plaintiffs have presented Howard Levinson ("Levinson") as an expert witness.[5] In his affidavit, he opines that DiNisco breached its obligation to ensure that the System performed according to its design specifications, because the System's multi-viewer live feed and trigger/alert functions never worked properly. Further, he opines that DiNisco was negligent because it never advised the Town to use different software that would be compatible with the School's existing hardware. Levinson also opines that the System was not functioning properly when Ms. Ritzer was killed on October 22, 2013. Given Levinson's opinion, the record evidence that forms

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[5] The court is not entirely convinced that, in the circumstances of this case, the Ritzer Plaintiffs were required to present expert testimony. "Expert testimony is necessary where proof . . . lies outside the ken of lay jurors." Pitts v. Wingate At Brighton, Inc., 82 Mass. App. Ct. at 289 (2012), citing Held v. Bail, 28 Mass. App. Ct. 919, 921 (1989). "However, where a determination of causation lies within 'general human knowledge and experience,' expert testimony is not required." Id. at 290, quoting Bailey v. Cataldo Ambulance Serv., Inc., 64 Mass. App. Ct. 228, 236 n.6 (2005). In this case, there is record evidence indicating that DiNisco, the entity the Town hired to design the System, negligently performed its contractual obligations, and that it failed to inform the Town that the System was never going to function properly with the School's existing technology. At their most basic, these allegations appear to fall within the knowledge and understanding of a lay juror. Even without an expert, the plaintiffs might be allowed to argue to the jury that DiNisco, as the consultant on the project, was required to unambiguously notify the town that the technology was never going to work.

the basis of that opinion, and the requirement that the court view the evidence in the light most favorable to the Plaintiffs, the issue of causation is a jury question.[6]

CONCLUSION AND ORDER

For the reasons explained above, DiNisco's Motion for Summary Judgment (Paper No. 41) is **DENIED**.

/s/ John T. Lu
John T. Lu
Justice of the Superior Court

DATED: June 24, 2022

[6] Lastly, to the extent that DiNisco argues that it cannot be the cause of Ms. Ritzer's injuries because Chism was the actual perpetrator of the crimes against her, the argument fails. "Where [an] intervening occurrence was foreseeable by a defendant, the causal chain of events remains intact and the original negligence remains a proximate cause [of the plaintiff's injury]." Zinck v. Gateway Country Store, Inc., 72 Mass. App. Ct. 571, 578 (2008). The Town contracted with DiNisco to design the System to help ensure the safety of students, teachers, and other personnel. It is foreseeable that DiNisco's failure to meet its contractual obligations to design the System according to required specifications would lead to a student or teacher being injured, as was the case here. From the plaintiffs' point of view, in various communications with DiNisco, Taverna even presciently complained that the System's continuous failures were presenting safety concerns for the School.