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DATE: April 24, 2012

FILE: Outrageous Conduct

RE: Green Memo

**QUESTION PRESENTED**

Does Jennifer W. Green have a claim that sufficiently alleges extreme and outrageous conduct that will survive a Colo. R. Civ. P. 12(b)(5) (2003) motion to dismiss? The complaint alleges she received a faxed invoice containing sensitive and private medical information, which her employer and coworkers saw; therefore, causing her to suffer from emotional distress.

**BRIEF ANSWER**

Green’s complaint will survive a Colo. R. Civ. P. 12(b)(5) (2003) motion to dismiss. The complaint sufficiently alleges outrageous conduct for two of the three factors establishing a valid claim: (1) whether the defendant had knowledge of the plaintiff’s susceptibility to emotions distress, (2) whether a defendant in a position of authority abused that authority, and (3) whether the conduct shows a pattern of abuse. Boulder Reproductive Clinic (BRC) had previous knowledge of Green’s emotional susceptibility in relation to her receiving treatment. Also, BRC had access to Green’s sensitive medical information, and, when BRC faxed an invoice to Green’s place of employment with a clear and explicit subject line stating, “RE: TREATMENT FOR INFERTILITY/SYPHILIS,” BRC abused its authority by disclosing private health information that forfeited any privilege they had. The first two factors will outweigh the fact that the complaint does not show a pattern of abuse.

**LIST OF FACTS**

 Our client, Boulder Reproductive Clinic (BRC), requested our assistance with a complaint that one of their patients served on them. The complaint alleges the following facts.

In February 2008, Jennifer Green and her husband sought assistance from BRC while attempting to conceive a baby. (Compl. ¶ 7.) During this treatment, BRC had some concerns regarding Green’s clinical depression due to her emotional vulnerability and problems dealing with adversity. (*Id*. ¶ 9.) Green and the BRC discussed Green’s emotional vulnerability at length and in detail since it might have had an effect on Green’s ability to receive treatment. (*Id*. ¶ 9.)

Green is currently finishing up her third year at the University of Colorado Law School and has been working as a law clerk at Holmes & Howard; furthermore, there is some indication in the complaint that Green may be in line to receive a permanent offer of employment. (*Id*. ¶¶ 1-2.)

During Green’s treatment at BRC, she accrued an outstanding bill of just over twenty thousand dollars. (*Id.* ¶ 10.) In trying to recover on this debt, BRC handled it internally and did not utilize an external debt collection agency. (*Id.* ¶ 10.) Green subsequently notified BRC that she would not be able to pay her bill. (*Id.* ¶ 10.)

The complaint alleges that BRC obtained Green’s employment information from plaintiff’s confidential medical records. (*Id*. ¶¶ 13-15.) Furthermore, BRC created a faxed invoice, which was addressed care of John Johnson, Green’s supervisor at Holmes and Howard. (*Id*. ¶ 13.) Finally, in bold font and clear view, the subject line of the fax read, “RE: TREATMENT FOR INFERTILITY/SYPHILIS.” (*Id*. ¶ 11; Ex. A.)

Green alleges that the sensitive nature of this fax and the possibility that her supervisor and coworkers saw it has caused her to suffer severe emotional distress. (*Id*. ¶ 18.) She has been seeing a psychiatrist regarding severe sleeplessness, loss of appetite, and nightmares due to the alleged emotional distress caused by the contents of the faxed invoice. (*Id*. ¶ 19.)

**INTRODUCTION**

Green’s complaint will probably survive a Colo. R. Civ. P. 12(b)(5) (2003) motion to dismiss. In outrageous conduct cases, Colorado courts consider (1) whether the defendant had knowledge of the plaintiff’s peculiar susceptibility to emotional distress, (2) whether a defendant in a position of authority, abused that authority, and (3) whether the conduct shows a pattern of abuse. *See* *Zalnis v. Thoroughbred Datsun Car Co.*, 645 P.2d 292, 294 (Colo.App. 1982). In deciding a Rule 12 motion concerning outrageous conduct, courts seem to weigh the totality of factors, and, while the courts weigh all three factors, they will likely allow a claim when only one or more of the factors are met.

 Colorado courts sometimes consider the claim of outrageous conduct as the same claim as intentional infliction of emotional distress (“IIED”). However, this memo only examines the element of “outrageous conduct” and not the elements of “intent” or “severity of emotional distress”.

**KNOWLEDGE OF PECULIAR SUSCEPTIBILITY**

The complaint adequately alleges the defendant had knowledge of the plaintiff’s susceptibility to emotional distress and that the plaintiff had a peculiar mental condition.

The outrageous character of conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity. *Zalnis v. Thoroughbred Datsun Car Co.*, 645 P.2d 292 (Colo.App. 1982) (citing Restatement (Second) of Torts § 46 cmt. f).

In *Zalnis*, the Colorado Court of Appeals allowed a claim for outrageous conduct because the defendant used knowledge of a plaintiff’s emotional vulnerability for intimidation. *See* *Id*. One of the defendants was the president of an automobile sales agency, and, after realizing that he had sold a car to the plaintiff at a loss, requested that the plaintiff return the car. *Id.* at 293. The plaintiff refused, defendants commandeered the car. Defendants held the vehicle while making intimidating threats and hurling insults at the plaintiff. *Id.* at 293. “The defendants argue that their actions were no more than mere insults, indignities, threats, annoyances, petty oppressions, and other trivialities.” *Id.* at 293. However, one of the defendants had known the plaintiff for many years, and had known of her emotional susceptibility stemming from her watching her husband kill himself. *Id.* at 294. From these facts, a reasonable jury could find outrageous conduct because the defendants knew the plaintiff was peculiarly susceptible to emotional distress, and, knowing this, intimidated the plaintiff into leaving her car.  *Id.* at 294.

In *Culpepper v. Pearl Street Bldg*, the Supreme Court of Colorado dismissed a claim for outrageous conduct because the plaintiff was not peculiarly susceptible to emotional distress. 877 P.2d 877 (Colo. 1994). The defendant operated a crematorium and had mistakenly cremated the corpse of the plaintiffs’ son. *Id.* at 877-80. After noticing the mistake, an employee of the defendant shut down the cremation process and began salvaging the remains. *Id.* at 884. Plaintiffs brought suit against the crematorium for outrageous conduct due to the emotional distress caused by not being able to preserve their deceased son’s body. *Id.* at 880. While the court recognized the level of emotional distress a parent might have in this situation, the court found that the plaintiffs were not peculiarly susceptible to emotional distress since parents, in general, would have been affected by this action. The court allowed a motion to dismiss because the plaintiffs lacked a “peculiar” susceptibility to emotional distress. *See Id*.

As in *Zalnis,* if Boulder Reproduction Clinic (BRC) might have used the knowledge of the plaintiff’s susceptibility to emotional distress to intimidate her. *See* 645 P.2d 292, 294. The Plaintiff claims that the defendant sent a fax with sensitive medical information in it in order to “intimidate and embarrass [plaintiff] into paying the debt.” (Compl*.* ¶ 14.) Also, the complaint sufficiently states that our client had prior knowledge of the plaintiff’s emotional vulnerability. (*Id*. ¶ 9.) Moreover, BRC had access to the client’s medical information. In spite of these facts, BRC faxed an invoice with a subject line, in large and bold letters, stating, “RE: TREATMENT FOR INFERTILITY/SYPHILIS.” (*Id*. ¶ 11; Ex. A.) Like *Zalnis*, A reasonable jury could determine that BRC faxed this invoice in order to intimidate her by exploiting Green’s emotional susceptibility. 645 P.2d 292.

Furthermore, BRC’s actions are consistent with knowingly harming the plaintiff, since Green had a “peculiar” susceptibility to emotional distress. Unlike the parents in *Culpepper*, who didn’t have a peculiar susceptibility because all parents would react as they did, Green was peculiarly susceptible and had received prior professional help dealing with depression. 877 P.2d 877. While faxing private information to an average person may cause anger and angst, Green has a thin skull due to her known clinical depression and problems dealing with adversity, and BRC knew of the susceptibility. (Compl. ¶ 9.) A reasonable person could determine that BRC’s actions in the face of Green’s particular susceptibility allow BRC’s actions to rise to the level of outrageous conduct.

On the other hand, a note should be made about the parents in *Culpepper* not being peculiarly susceptible since their emotional susceptibility belongs to the class of parents. *See* 877 P.2d 877. Green belonged to a class of people called 3rd year law students. It is common knowledge that the rigors of law school place students in very “adverse” situations, since the field of law operates within an “adversarial” system. The court will strongly consider this fact in support of a motion to dismiss.

The complaint adequately alleges the defendant had knowledge of the plaintiff’s susceptibility to emotional distress and the plaintiff had a peculiar mental condition.

**PRIVILEGE DEFENSE**

The complaint adequately alleges the defendant’s conduct is an abuse by an actor in a position of power and the defendant cannot claim privilege.

”Conduct, otherwise permissible, may become extreme and outrageous if it is an abuse by the actor of a position in which he has actual or apparent authority over the other, or the power to affect the other's interests.” *Zalnis v. Thoroughbred Datsun Car Co.*, 645 P.2d 292 (Colo.App. 1982) (citing Restatement (Second) of Torts § 46 cmt. e). Furthermore, “conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.” *Therrien v. United Air Lines, Inc.*, 670 F.Supp. 1517, 1525 (D.Colo. 1987) (citing Restatement (Second) of Torts § 46 cmt. g).

In *Pearson v. Kancilia*, the Colorado Court of Appeals allowed a claim for outrageous conduct, because the defendant’s acted in an “atrocious and utterly intolerable” manner as an actor in a position of actual authority. 70 P.3d 594, 597 (Colo.App. 2003). The defendant, a chiropractor, carried out sexual relations with his employee, Michele R. Pearson, and one of his clients, Denise L. Fahy. *Id.* at 594-595. Both, the employee and client brought suit for outrageous conduct against the defendant. *Id.* at 594. The court found the defendant’s acts may, under normal contexts, be considered repugnant; however, the defendant’s abuse of power as an employer and healthcare provider brought the acts up to a level of outrageous conduct. *Id.* at 594.

In *Montoya v. Cherry Creek Dodge, Inc.*, the Colorado Court of Appeals rejected the defendant’s allegations the lower court erred in finding outrageous conduct based on the defendant’s arguments that they were within their legal rights and privileged. 708 P.2d 491 (Colo.App. 1985). Plaintiff purchased a car from defendant while using her current car as a trade in. *Id.* at 492. Plaintiff was unable to obtain financing due to the vehicle being overpriced. *Id.* at 492. When the plaintiff returned the recently purchased car and requested her old car back, the defendant took possession of the car and refused to return her old car unless she paid extra money. *Id.* at 492. The defendant claims privilege because the plaintiff owed them money under a contract for the purchase of the car. *Id.* at 492. The court found that the defendant lost its legal privilege because it had abused its position of power and acted in bad faith when the defendant bullied the plaintiff into paying for the vehicle.  *Id.* at 493.

Green, like the plaintiffs in *Pearson*, put her faith and trust in a health care provider; in spite of this, BRC abused its position of power, giving adequate justification for a claim of outrageous conduct. 70 P.3d 594. The holding of private medical information has a large potential for abuse and the court will hold health care providers to a higher standard to protect the covenant of doctor patient privilege and prevent this type of abuse. Green gave BRC information about her susceptible emotional condition and her sensitive medical information; despite this, BRC faxed an invoice to Green’s place of employment, with the front page of the fax reading, in large bold letters, “RE: TREATMENT FOR INFERTILITY/SYPHILIS.” See (*Id.* ¶ 13.); (Ex. A. to *Id.* ¶ 11.)

However, BRC can try to claim privilege, as the defendants did in *Montoya*, since BRC is also trying to recover debt obligations. The example from the restatement illustrates, “A and her children are destitute, ill, and unable to pay their rent. B, their landlord, calls on A and threatens to evict her if the rent is not paid. Although B's conduct is heartless, he has done no more than the law permits him to do, and he is not liable to A for her emotional distress.” Restatement (Second) of Torts § 46 cmt. g, illus. 14 (1982) (illustration of privilege).

However, privilege does not give license for abusive or illegal acts, and BRC’s action of putting Green’s health information on a fax and sending it to her place of employment may be in violation of the HIPAA Act. Under federal law, “[a] person who knowingly . . . discloses individually identifiable health information to another person” is subject to monetary penalties and imprisonment. Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d 6(a)(3) (2000). Even if BRC can claim that it intended for the fax to be sent to Green and not “another person,” the fax, by its nature, will disclose its information to unintended people. A fax, unlike a letter, which is cased in an envelope, can be read by anyone that comes in contact with it. Furthermore, BRC put on the front page of the fax both the private health information and delivery instructions care of Green’s supervisor. Under these circumstances, the court will determine that BRC abused its position of power and cannot claim privilege.

The complaint adequately alleges the defendant’s conduct is an abuse by an actor in a position of power and the defendant cannot claim privilege.

**PATTERN OF ABUSE**

The court will look to factors beyond the pattern of abuse because the sending of the fax was a single incident.

While the courts are more likely to find outrageous conduct in a series of incidents or a ‘course of conduct’ than in a single incident, it is the totality of conduct that must be evaluated to determine whether outrageous conduct has occurred. *Zalnis v. Thoroughbred Datsun Car Co.*, 645 P.2d 292 (Colo.App. 1982).

The complaint only alleges one incident, being the fax sent to Green’s office of employment. (*Id*. ¶ 13.) No other acts by BRC are alleged.

The court will look to factors beyond the pattern of abuse because the sending of the fax was a single incident.

**TOTALITY OF CIRCUMSTANCE/CONCULUSION**

Greens outrageous conduct claim (1) weakly alleges whether the defendant had knowledge of the plaintiff’s peculiar susceptibility to emotional distress, (2) strongly alleges whether a defendant in a position of authority, abused that authority, and (3) does not adequately allege whether the conduct shows a pattern of abuse. *See* *Zalnis v. Thoroughbred Datsun Car Co.*, 645 P.2d 292, 294 (Colo.App. 1982). In deciding a Rule 12 motion, dismissing outrageous conduct, courts will weigh the totality of factors. BRC had knowledge of defendant’s peculiar susceptibility to emotional distress and might have abused that knowledge. BRC abused their authority by relaying private medical information to a third party; moreover, BRC will not able to claim privilege due to their violation of HIPAA. Finally, Jennifer Green’s claim does not sufficiently show a pattern of abuse; nevertheless, the first two factors will sufficiently allow Green’s complaint to survive a Colo. R. Civ. P. 12(b)(5) (2003) motion to dismiss.