

NO. A08-1556

State of Minnesota  
 In Court of Appeals

Candace Yath, an individual,

*Appellant,*

vs.

Fairview Clinics, N.P. d/b/a Fairview,  
 Cedar Ridge Clinic, a Minnesota Non-Profit Corporation,  
 Fairview Health Services, N.P. d/b/a Fairview Ridges Hospital,  
 a Minnesota Non-Profit Corporation, and  
 Net Phat, an individual,

*Respondents.*


---

**RESPONDENT NET PHAT'S BRIEF**

---

DANIELS & WYMORE, PLLC  
 Christopher M. Daniels (#271809)  
 David J. Wymore (#0322623)  
 3165 Fernbrook Lane North  
 Plymouth, MN 55447  
 Tel: (763) 201-1209  
 Fax: (763) 201-1216

*Attorneys for Appellant Candace Yath*

BRENDEL AND ZINN, LTD.  
 Sylvia Ivey Zinn (#164379)  
 Julia A. Lines (#386918)  
 8519 Eagle Point Boulevard, Suite 110  
 Lake Elmo, MN 55042  
 Tel: (651) 224-4959  
 Fax: (651) 224-4547

*Attorneys for Respondent Net Phat*

LIND, JENSEN, SULLIVAN &  
 PETERSON, P.A.  
 Paul C. Peterson (#0151543)  
 150 South Fifth Street, Suite 1700  
 Minneapolis, MN 55402-4217  
 Tel: (612) 333-3637  
 Fax: (612) 333-1030

*Attorney for Respondents**Fairview Clinics, N.P., Cedar Ridge Clinic,  
 and Fairview Health Services, N.P.*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....iii

STATEMENT OF LEGAL ISSUES .....1

STATEMENT OF THE CASE .....3

STATEMENT OF THE FACTS.....3

STANDARD OF REVIEW.....11

ARGUMENT..... 12

    I.    APPELLANT HAS NOT PRESENTED ADEQUATE  
          EVIDENCE TO PROVE BREACH OF THE TORT OF  
          INVASION OF PRIVACY.....12

    II.   APPELLANT HAS NOT PRESENTED ADEQUATE  
          EVIDENCE TO INDICATE THAT RESPONDENT PHAT  
          WAS ACTING WITHIN THE SCOPE OF HER EMPLOYMENT  
          WHEN SHE DISCUSSED APPELLANT’S MEDICAL  
          INFORMATION.....14

    III.  MINNESOTA LAW DOES NOT RECOGNIZE A CAUSE  
          OF ACTION FOR BREACH OF CONFIDENTIAL  
          RELATIONSHIP.....16

    IV.  APPELLANT HAS NOT PRESENTED ADEQUATE EVIDENCE  
          TO PROVE NEGLIGENT INFLECTION OF EMOTIONAL  
          DISTRESS.....18

    V.   MINNESOTA STATUTE SECTION 144.335 IS PREEMPTED  
          BY HIPAA.....20

    VI.  APPELLANT HAS NOT PRESENTED ADEQUATE  
          EVIDENCE TO PROVE SPOILIATION OF EVIDENCE  
          AGAINST RESPONDENT NET PHAT.....23

CONCLUSION.....25

RESPONDENT’S CERTIFICATE OF COMPLIANCE.....27

## TABLE OF AUTHORITIES

### Cases

<u>Lake v. Wal-Mart Stores, Inc.</u> 582 N.W.2d 231 (Minn. 1998).....	1, 12
<u>Bodah v. Lakeville Motor Express, Inc.</u> 663 N.W.2d 550 (Minn. 2003).....	1, 11, 12, 13
<u>Ismil v. L.H. Sowles Co.</u> 295 Minn. 120, 123, 203 N.W.2d 354, 357 (Minn. 1972).....	1
<u>Snilsberg v. Lake Washington Club</u> 614 N.W.2d 738, 745 (Minn. Ct. App. 2000).....	1, 14, 15
<u>Jones v. Baisch,</u> 40 F.3d 252 (8 <sup>th</sup> Cir. 1994).....	1
<u>Stubbs v. North Memorial Medical Center</u> 448 N.W.2d 78, 83 (Minn. Ct. App. 1989).....	1, 16, 17
<u>Bohdan v. Alltool Mfg. Co.</u> 411 N.W.2d 902, 907 (Minn. Ct. App. 1987).....	1, 19
<u>Fisher v. Yale University</u> 2006 WL 1075035 (Conn. Apr. 3, 2006).....	2
<u>University of Colorado Hosp. Auth v. Denver Publ'g Co.</u> 340 F. Supp 2d 1142, 144 (D. Colo. 2004).....	2, 21
<u>Munoz v. Island Fin. Corp.</u> 364 F. Supp 2d 131, 136 (D.P.R. 2005).....	2, 21
<u>Johnson v. Parker Hughes Clinics</u> 2005 WL 102968 (D. Minn. Jan. 13, 2005).....	2

<u>State by Cooper v. French</u> 460 N.W.2d 2, 4 (Minn. 1990).....	11
<u>Antone v. Mirviss</u> 694 N.W.2d 564 (Minn. App. 2005). ....	11
<u>Schneider v. Buckman</u> 433 N.W.2d 98, 101 (Minn. 1988).....	14
<u>Wenninger v. Muesing</u> 307 Minn. 405, 240 N.W.2d 333 (Minn. 1976).....	16
<u>D.M.C., R.L.R., Jr.</u> 331 N.W.2d 236, 238-239 (Minn. 1983).....	17
<u>State v. Staat</u> 192 N.W.2d 192 (Minn. 1971) .....	17
<u>Marfia v. Great Northern Ry. Co.</u> 145 N.W.2d 385 (Minn. 1914).....	17, 18
<u>Wall v. Fairview Hosp. and Healthcare Services</u> , 584 N.W.2d 395 (Minn. 1998).....	19
<u>Engler v. Illinois Farmers Ins. Co.</u> 706 N.W.2d 764 (Minn. 2005).....	19
<u>Koudsi v. Hennepin County Medical Center</u> 317 N.W.2d 705, 707 (Minn. 1982) .....	23
<u>Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.</u> 456 N.W.2d 434, 436 (Minn. 1990).....	24
<u>Patton v. Newmar Corp.</u> 538 N.W.2d 116, 119 (Minn. 1995).....	25

**Statutes and Regulations**

Minnesota Statute § 144.335 (2002).....2, 20, 21, 22, 23

Minnesota Statute Section 592.02 Id. at 195-196.....17

42 U.S.C.A. § 1320d-7(a)(2).....2, 21

**Minnesota Rules of Civil Procedure**

Minn. R. Civ. Pro 37.03.....2

Minn. R. Civ. Pro. 12.02(e).....12

**Secondary Authorities**

Samuel D. Warren and Louis D. Brandeis, The Right to Privacy,  
4 Harvard L. Rev. 193 (1890).....12

Restatement (Second) of Torts § 652D.....13

## STATEMENT OF LEGAL ISSUES

1. **Did Appellant present adequate evidence to establish facts requisite to prove breach of the tort of invasion of privacy?**  
(Trial Court held in the negative)

Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550 (Minn. 2003).

2. **Did Appellant present adequate evidence to prove that Respondent Net Phat was acting within the scope of her employment when she discussed Appellant's medical information?**  
(Trial Court held in the negative)

Ismil v. L.H. Sowles Co., 295 Minn. 120, 123, 203 N.W.2d 354, 357 (Minn. 1972); Snilsberg v. Lake Washington Club, 614 N.W.2d 738, 745 (Minn. Ct. App. 2000); Jones v. Baisch, 40 F.3d 252 (8<sup>th</sup> Cir. 1994).

3. **Does Minnesota law recognize a cause of action for breach of confidential relationship?**  
(Trial Court held in the negative)

Stubbs v. North Memorial Medical Center, 448 N.W.2d 78, 83 (Minn. Ct. App. 1989).

4. **Did Appellant present adequate evidence to establish facts requisite to prove Negligent Infliction of Emotional Distress?**  
(Trial Court held in the negative)

Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902, 907 (Minn. Ct. App. 1987).

5. **Is Minnesota Statute Section 144.335 preempted by HIPAA?**  
(Trial Court held in the positive)

42 U.S.C.A. § 1320d-7(a)(2); Minnesota Statute § 144.335 (2002); Fisher v. Yale University, 2006 WL 1075035 (Conn. Apr. 3, 2006); University of Colorado Hosp. Auth v. Denver Publ'g Co., 340 F. Supp 2d 1142, 144 (D. Colo. 2004); Munoz v. Island Fin. Corp., 364 F. Supp 2d 131, 136 (D.P.R. 2005); Johnson v. Parker Hughes Clinics, 2005 WL 102968 (D. Minn. Jan. 13, 2005).

6. **Did Appellant present adequate evidence to establish facts requisite to prove spoliation of evidence against Respondent Net Phat?**  
(Trial Court held in the negative)

Minn. R. Civ. P. 37.03.

## **STATEMENT OF THE CASE**

This appeal originates from the Order of the Honorable William Howard, dated November 13, 2007 in the District Court of Hennepin County. The Order granted summary judgment to Respondent Fairview in its entirety and to Respondent Net Phat in part. The trial Court did not dismiss the claim against Phat for intentional infliction of emotional distress, determining that Appellant pled sufficient facts to bring a claim for intentional infliction of emotional distress. After issuance of Judge Howard's Order, Appellant and Respondent Phat executed and filed a Stipulation and Order to Dismiss with Prejudice the intentional infliction of emotional distress claim against Respondent Phat.

## **STATEMENT OF THE FACTS**

This lawsuit arises out of Navy Tek's admitted viewing of Appellant's medical records and sharing the information with Respondent Phat who then shared the information with her brother, who is Appellant's estranged husband. (AA-44, AA-322). The District Court found no evidence to establish an invasion of privacy claim on the part of Appellant and summary judgment was granted for Respondents, this appeal followed.

Respondent Net Phat (“Phat”) was employed in the medical records department at Fairview Ridges Hospital as a medical records technician from 2001 through June 16, 2006, when she voluntarily resigned. (AA-40). Phat’s job description involved coding medical procedures for payment processing. Previous to her employment with Fairview, Phat obtained a degree in Health Information Technology; she also performed 146 hours of internship training in medical records. (AA-32, 39). Phat returned to her position with Fairview on August 22, 2006, she was re-hired on a “casual basis,” meaning she would not be scheduled for work, but would be asked to come in on an as-needed basis. (AA-319).

Part of Phat’s training for her employment with Fairview involved extensive training about the confidentiality of medical records. (AA-87). Beginning in 2003 Phat was also specifically required to attend HIPAA training sessions which included lectures and completion of a “Required Learning Packet.” (AA-122). Finally, beginning in April of 2004 and annually thereafter, Phat signed an agreement encompassing her vow not to disclose confidential information acquired in the course of her employment with Fairview. (AA-88).

Prior to this case, Phat had never been accused of a privacy violation, and was regarded as an “asset” to Fairview. (AA-86, 89).

On March 21, 2006, Appellant visited her doctor at Fairview Cedar Ridge Clinic. (AA-204). During her visit Appellant informed her doctor that she had

acquired a new sexual partner and was concerned about the possibility of sexually transmitted diseases. (Id.). At the time of her visit Appellant was married to Respondent's brother Paul Yath ("Paul"), and her newly acquired sexual partner was her husband's close friend. (AA-190).

Appellant was accompanied by her grandmother, Doris Perrault, to the clinic at the same time for an appointment of her own. (AA-333). On the date of Ms. Perrault's visit, Respondent Navy Tek ("Tek") was employed as a medical assistant for Ms. Perrault's doctor. (Id.). Tek is a cousin to Phat and Paul, and thus acquainted with Appellant. She acknowledged Ms. Perrault's presence at the clinic with a friendly wave. (AA-204).

Tek and Phat were friends and communicated with one another frequently. (AA-75). On or about March 23, 2006, Tek phoned Phat and reported that she had learned about Appellant's acquisition of a new sexual partner after her visit to Fairview Cedar Ridge Clinic. (AA-44, 53, 89). Phat was unsure whether to believe Tek. Phat did not look to Appellant's medical records for confirmation. As a hospital employee, Phat had no ability to access the Appellant's medical records at the Cedar Ridge Clinic. (AA-89).

In April of 2006, Paul indicated to his sister Phat that he had suspicions about his wife having an extramarital affair. (AA-56). Phat then confirmed his suspicions, by reporting what Tek had told her about Appellant's confessions

regarding a new sexual partner. (AA-56, 91). Phat was aware that she had no particular business reason for passing along this information, rather she felt it was her moral duty to tell her brother what she had learned. (AA-74, 91).

Even though Phat asked her brother not to share the information with anyone, Paul told Heidi Leonard, a friend of Appellant's grandmother, Doris Perrault. (AA-190). Heidi then told Ms. Perrault about her conversation with Paul, and specifically how Paul had come by the information. (AA-342, 3434). Ms. Perrault reported the disclosure to personnel at Fairview Cedar Ridge Clinic. (Id.). Fairview conducted a thorough investigation and ultimately terminated Tek's employment for violating HIPAA. (AA-318, 319).

Appellant asserts that Respondent Phat personally viewed Appellant's personal health information via Fairview's electronic record system; however, Appellant has cited nothing to support this contention. There is no proof that Respondent Phat personally accessed Yath's medical information via the Fairview system. To the contrary, Phat testified that she did not have access to records at Fairview Clinics. While she worked as a coder for Fairview Hospital, Phat could not have accessed Yath's records even if she had wanted to. (AA-42). She did imply that she had accessed the records in an email, but when asked about the email, Phat replied,

A: "That is not true,"

Q: "And why did you write that?"

A: "Like I said, I was trying to protect Navy..."

(AA-73).

Next Appellant asserts that Phat acted "intentionally and with malice when she told her brother" about what Net told her about what Appellant's medical records revealed, citing to AA-310 which is the cover page to the deposition transcript of Patty Franssen. Ms. Franssen, the director of human resources for the Minnesota Valley within the Fairview system, testified that Phat told her she disclosed some information because it involved her brother. (AA-320). Phat herself testified that she told her brother because she knew what was going on with Appellant and she could not live with herself if she did not tell him, she then begged him not to tell anyone else. (AA-72). There is nothing about Phat's testimony or her explanation to Fairview staff concerning her actions to indicate that she disseminated Appellant's personal health information maliciously.

Appellant alleges that 12 separate HIPAA "document" violations occurred, citing to no provisions that confirm these allegations of "document" violations are actually violations. Since Phat never accessed Appellant's record and provided the documentation to others without Appellant's permission, she certainly did not

commit a HIPAA “document” violation, notwithstanding the fact that there is no private cause of action for HIPAA violations.

Appellant further asserts that Mao and Phat “most likely” created the MySpace page concerning Appellant, again there are no facts in the voluminous record to support this conclusory allegation. When asked about creating the MySpace page Phat replied:

Q: “And as you sit here today, you – your testimony is you have absolutely nothing to do with this Web site?”

A: “Yes.”

Q: “And you have absolutely no idea who did have anything to do with this web site; is that correct?”

A: “That is correct.”

(AA-80, AA-81). Appellant makes a blanket statement that Phat admitted involvement in the information leak, creating the MySpace web page, and sending emails from truth\_hurtsdotcom, citing to A61-62, a portion of Phat’s deposition transcript that reads in pertinent part,

Q: “Did you have any face-to-face conversations with Doris Perrault or Candace Yath?”

A: “Yes.”

Q: “When – when and where were those conversations?”

A: “They came into my work”

Q: “Okay. And tell me what happened.”

A: “They start raising their voice, and I told them to go to the hallway to talk about this, and I – and they told me about the e-mail and the web site or something like that, and I was shocked. I didn’t know what they were talking about.”

(AA-61). Once again Appellant cites to “supporting” documentation which only proves the opposite of her assertion. The record indicates that Phat **did not** access Yath’s personal medical information, **did not** create a MySpace web site or send emails from truth\_hurtsdotcom, and she certainly never admitted her involvement in such activities despite what Appellant alleges without any supporting evidence. Appellant has further alleged that hundreds if not thousands of people could have viewed this web site; again this is an unfounded statement. Yath herself admits that she can only identify five people who actually saw the MySpace Rotten Candy web page. (AA-193).

Finally, Appellant asserts that the dissemination of information concerning her sexual history among other personal health information has caused her physical and mental injuries requiring psychotherapy. (AA-602). Yath herself testified that for the year prior to the subject incident she and her husband had

been having marital troubles, and that he was not there for her emotionally. (AA-197). She was also stressed out and concerned about her Grandmother's illness and a friend "dumping" her. (Id.). Some of the information contained in the MySpace web page refers to Yath's prior plastic surgery and an STD she acquired in high school, Yath herself admits that she contracted the herpes virus at age seventeen; she also had liposuction and a breast augmentation, around the age of seventeen or eighteen. (AA-202). This was information that was known to others long before the dissemination of medical information which is the subject of this lawsuit. Prior to this incident, before March of 2006, Yath was seen by three separate therapists for mental health treatment, specifically depression. (AA-203). Likewise, Paul Yath had suspected his wife was not being faithful to him before learning from his sister the information regarding his wife's new sexual partner. Paul Yath also confronted Appellant with an email between Yath and her sexual partner (Paul's best friend) that he had found. (AA-205). Not only are there numerous inferences in the record that confirm Appellant's previous mental health problems, Appellant has presented no proof to substantiate her claim of physical injury.

Finally, Appellant alleges spoliation of evidence on the part of Respondent Phat with regard to computer files. On July 3, 2007 at 4:51 p.m. Appellant served by facsimile a Notice of Deposition Duces Tecum on Phat's former attorney,

Laura Myslis. The notice requested all files contained on any computer owned by Phat or her husband Sophon Phat. (A-515). Due to the July 4<sup>th</sup> holiday, the notice was not served on Phat personally until July 5, 2007. Appellant hired an expert to examine the computer and alleges that there were no temporary internet files or browser cache as of July 3, 2007, at 8:05 p.m.. (AA-531). Appellant asserts that it is “too convenient” that her expert found files were removed a few hours after the notice was faxed to Respondent Phat’s previous counsel. Phat’s previous counsel, Laura Myslis testified that she did not receive the notice until July 5<sup>th</sup> and served it on her client on the same date. (AA-594).

### **STANDARD OF REVIEW**

In an appeal from summary judgment, the appellate court determines whether there is a genuine issue of material fact for trial and whether the district court erred in its interpretation or application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990), Antone v. Mirviss, 694 N.W.2d 564 (Minn. App. 2005).

In reviewing cases involving dismissal for failure to state a claim upon which relief can be granted, the question before the appellate court is whether the complaint sets forth a legally sufficient claim for relief; the standard of review is therefore de novo. Bodah v. Lakeville motor Express, Inc., 663 N.W.2d 550,

(Minn. 2003) citing Minn. Rule of Civ. Pro. 12.02(e). In the present case Appellant failed to present any issues of material fact and failed to prove that the District Court misapplied and/or misinterpreted statutory construction. Therefore, the District Court's granting of Respondents summary judgment motions must be upheld.

## ARGUMENT

### **I. APPELLANT HAS NOT PRESENTED ADEQUATE EVIDENCE TO PROVE BREACH OF THE TORT OF INVASION OF PRIVACY.**

The tort of invasion of privacy stems from a common law right to privacy. Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998), citing, Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 Harvard L. Rev. 193 (1890). The Minnesota Supreme Court in Lake adopted a cause of action for invasion of privacy consisting of three separate causes of action: intrusion of seclusion, appropriation of a name or likeness of another, and publication of private facts. 582 N.W.2d 231, 236 (Minn. 1998). Appellant's claim concerns the publication of private facts. To maintain a claim for invasion of privacy, Appellant must establish: (1) "publicity"; (2) disclosure of a private matter that would be highly offensive to a reasonable person; and (3) disclosure of a private matter that is not of legitimate concern to the public. Bodah v. Lakeville Motors Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003).

The Bodah Court adopted the Restatement (Second) of Torts definition of publicity for purposes of invasion of privacy, “publicity” differs from “publication,” publicity is, “a communication that reaches, or is sure to reach, the public.” 603 N.W.2d 550, 554 citing Restatement (Second) of Torts § 652D.

Appellant bases her claim for invasion of privacy on the allegation that the MySpace “Rotten Candy” web page that revealed her private health information was considered “publicity” for purposes of establishing invasion of privacy. Phat has never admitted being involved in creating this web page so the invasion of privacy claim against her was properly dismissed. (AA-61). Regardless, the District Court was correct in considering the web page insufficient to prove publicity; Yath herself admits that she does not know of any more than five people who viewed the page. (AA-193). As was the case in Bodah, the District Court was better suited to determine whether publicity occurred, and it correctly determined that Appellant failed to establish publicity, stating that, “No one has been able to establish who created the MySpace posting. Even if the Court or the parties knew who had posted the MySpace page, sufficient evidence has not been submitted to indicate that MySpace page was communicated to the public at large.” (AA-12). Appellant’s invasion of privacy fails; not only does she rest her case on the *assumption* that Phat assisted in the creation of the MySpace page, of which there is no evidence, she also failed to prove the requisite requirement of publicity.

**II. APPELLANT HAS NOT PRESENTED ADEQUATE EVIDENCE TO INDICATE THAT RESPONDENT PHAT WAS ACTING WITHIN THE SCOPE OF HER EMPLOYMENT WHEN SHE DISCUSSED APPELLANT'S MEDICAL INFORMATION.**

It is well established that under the principle of respondeat superior an employer is vicariously liable for the torts of employees committed while in the course and scope of employment. Schneider v. Buckman, 433 N.W.2d 98, 101 (Minn. 1988). The test for determining whether an employee's conduct is within the course and scope of employment is whether: (1) the conduct was to some degree in furtherance of the employer's interests; (2) the employee was authorized to perform the type of conduct; (3) the conduct occurred substantially within authorized time and space restrictions; and (4) the employer should reasonably have foreseen the conduct. Snilsberg v. Lake Washington Club, 614 N.W.2d 738, 745 (Minn. Ct. App. 2000).

Here, the analysis concerning Phat does not extend past the first Snilsberg criteria. Phat learned about Yath's personal health information from Tek, nothing about this exchange was in furtherance of any interest of Fairview.

The District Court determined that, "Plaintiff has provided no evidence that either [Tek] or [Phat's] disclosure of Plaintiff's private medical information were in furtherance of any interests of Fairview. In fact, common sense leads the Court

in the other direction.” (AA-11). Appellant has not pointed out any additional evidence that would indicate that the District Court was incorrect in this determination. Phat received the information from Tek, who accessed it because she was “curious”. (Id.). After hearing the information from Tek, Respondent Phat told her brother out of concern for him and moral obligation – certainly not in furtherance of any interest of Fairview. (AA-72, 320).

The second Snilsberg requirement is also not met as it concerns Phat. Phat could not access the record herself. Her computer did not allow her to access the information even if she had wanted to access it herself. (AA-42, 73, 89).

Finally, Appellant has presented no evidence to indicate that the District Court was incorrect in its determination that, “Both [Tek] and [Phat] had proper schooling, training and relevant experience prior to being hired by Fairview. Both [Tek] and [Phat] received positive performance reviews prior to this incident. No evidence has been presented to show Fairview should have foreseen [Tek] or [Phat] would knowingly breach privacy rules or regulations.” (AA-14). Thus, the final Snilsberg element is not met, as Fairview could not reasonably have foreseen that Tek would view Yath’s medical information and share her findings with Phat outside of work.

For all of the above-stated reasons, the District Court was correct in dismissing Appellant’s invasion of privacy claim against Respondent Phat.

### **III. MINNESOTA LAW DOES NOT RECOGNIZE A CAUSE OF ACTION FOR BREACH OF CONFIDENTIAL RELATIONSHIP**

Apparently disregarding the established case law and its interpretation by the District Court, Appellant continues to maintain that she has a legitimate cause of action for “breach of confidential relationship”. First, it is undisputed that no physician-patient relationship existed between Phat and Plaintiff, as Phat was employed as a medical coder who had no contact with patients whatsoever. Second, even if Phat had provided patient care to Plaintiff, Minnesota courts have specifically denied that a cause of action for breach of confidential relationship exists. While the issue has been recognized, and the confidentiality between patients and physicians determined to be of utmost importance, Minnesota does not recognize a cause of action for breach of confidential relationship. Stubbs v. North Memorial Medical Center, 448 N.W.2d 78, 83 (Minn. Ct. App. 1989) *review denied* Jan. 1990, citing Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (Minn. 1976). It should be noted that Stubbs involved publicity of a photo of a patient without permission, the photo was provided by the physician himself, and the Court still declined to consider breach of confidential relationship.

Appellant cites several cases for her proposition that Minnesota does recognize a cause of action for breach of confidential relationship, each one

emphasizes that privilege and confidentiality between patient and physician is necessary for proper diagnosis and medical treatment, Appellant cites In re D.M.C., R.L.R., Jr., 331 N.W.2d 236 (Minn. 1983) in support of this proposition. In D.M.C., R.L.R., Jr., the Supreme Court determined that policy reasons support the legislature's determination to waive the medical privilege of proposed patients, and that records of a proposed patient shall be made available to the pre-hearing examiner in a commitment proceeding. 331 N.W.2d 236, 238-239 (Minn. 1983). It is unclear how D.M.C., R.L.R., Jr. applies to the present case and certainly not to the issue of breach of confidential relationship.

Next Appellant looks to State v. Staat, to support her claim. 192 N.W.2d 192 (Minn. 1971). State v. Staat involves the interpretation of Minnesota Statute Section 592.02, concerning what witnesses may testify to at trial, including what information medical professionals may disclose at trial. Id. at 195-196. Again, it is not clear how this case in any way relates to the present matter. As acknowledged by the District Court, some of the cases cited by Appellant and the Supreme Court in Stubbs, physician/client relationships should be confidential, however, it is not the duty of the courts to create new laws authorizing causes of action, such as the one claimed here by Appellant.

Finally, Appellant cites Marfia v. Great Northern Ry. Co., in her attempt to circumvent the unambiguous decision in Stubbs clarifying that Minnesota does not

recognize a cause of action for breach of confidential relationship. In Marfia, Wisconsin law is applied, and again the Court is considering what information physicians may testify to at trial. 145 N.W.2d 385 (Minn. 1914). Appellant has cited no credible authority for her proposition that she has a claim for breach of confidential relationship. Therefore, the District Court was correct in dismissing this pretended cause of action.

**IV. APPELLANT HAS NOT PRESENTED ADEQUATE EVIDENCE TO PROVE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.**

The only claim that was not disposed of against Phat in the Summary Judgment action was Yath's claim for intentional infliction of emotional distress. Appellant's counsel later agreed to dismiss the claim with prejudice. Appellant does not address this claim in her brief, thus it appears she is only appealing the negligent infliction of emotional distress claim which was brought against Fairview. (AA-15, 15). However, Appellant's brief refers to her negligent infliction of emotional distress claim against Respondents, therefore, argument as it relates to Respondent Phat is outlined below.

An Appellant presents a valid claim for negligent infliction of emotional distress when she experiences a reasonable anxiety, with physical symptoms, from being in a situation where it was abundantly clear that the claimant was in grave

personal peril for some specifically defined period of time, even though the feared calamity did not occur. Wall v. Fairview Hosp. and Healthcare Services, 584 N.W.2d 395 (Minn. 1998). In addition to proving the elements of a negligence claim, an Appellant claiming negligent infliction of emotional distress must prove that she: (1) was within the zone of danger of physical impact created by the defendant's negligence; (2) reasonably feared for her own safety; and (3) consequently suffered severe emotional distress with attendant physical manifestations. Engler v. Illinois Farmers Ins. Co., 706 N.W.2d 764 (Minn. 2005).

An exception to the "zone of danger" requirement is that a plaintiff may recover damages for mental suffering resulting from a direct invasion of her rights, such as defamation, malicious prosecution, or other willful, wanton or malicious misconduct. Bodhan v. Alltool Mfg. Co., 411 N.W.2d 902, 907 (Minn. Ct. App. 1987). Because Appellant has not proven any of the above required elements as she was not in the zone of danger in a situation where she reasonably feared for her own safety, her only hope is to prove that her claim falls into the noted exception. Under the exception to the zone of danger requirement, a plaintiff can only assert a negligent infliction of emotional distress claim if her claim for invasion of privacy succeeds. Id. at 907. As discussed above, Appellant's claim for invasion of privacy against Respondent Phat fails.

Appellant further alleges in her brief that not only does she have an independent basis for bringing her claim of negligent infliction of emotional distress based on the invasion of privacy claim, but she also “has evidence of a causal link between Respondents’ conduct and her severe emotional distress.” (App. reply brief p. 35). It is unclear what Appellant could possibly be referring to. Since her claim for invasion of privacy fails she must prove all of the elements necessary to prove negligent infliction of emotional distress. Appellant has never claimed that she was in the zone of danger of *physical impact*, and she has presented no evidence that she reasonably feared for her own safety. Further, the voluminous record confirms the fact that Appellant has a history of long-standing pre-existing psychological problems for which she has treated with mental health professionals. Therefore, the District Court was correct in dismissing Appellant’s claim for negligent infliction of emotional distress. Similarly, Appellant appropriately voluntarily dismissed with prejudice her claim for intentional infliction of emotional distress. That issue cannot now be considered on appeal.

V. **MINNESOTA STATUTE SECTION 144.335 IS PREEMPTED BY HIPAA.**

Appellant contends that Phat negligently or intentionally released Appellant’s health records even though it is undisputed that Phat did not actually access or release any of Appellant’s medical records. Respondent Phat made an

oral disclosure of the fact that Appellant had a new sexual partner, something that was suspected by Appellant's husband and others prior to the date of the disclosure by Phat.

The general rule on HIPAA preemption is that HIPAA supersedes any contrary law. 42 U.S.C.A. § 1320d-7(a)(2). Appellant argues that Minn. Stat. § 144.335 is not a contrary law and that HIPAA's exceptions apply. The District Court correctly concluded that Minn. Stat. § 144.335 is preempted by HIPAA, and dismissed Appellant's claims on the basis that there is no private cause of action under HIPAA, a federal statute. Minn. Stat. § 144.335 provides for a private cause of action while HIPAA does not. See University of Colorado Hosp. Auth. V. Denver, Publ'g Co., 340 F. Supp 2d 1142, 144 (D. Colo. 2004); Munoz v. island Fin. Corp., 364 F. Supp 2d 131, 136 (D.P.R. 2005). HIPAA does not provide for a private cause of action unlike Minn. Stat. § 144.335. The Minnesota statute is contrary to HIPAA and thus preempted pursuant to 42 U.S.C.A. § 1320d-7.

Assuming for argument sake that the Appellant is correct and that HIPAA does not preempt Minn. Stat. § 144.335, Appellant's claims still must fail as they pertain to Respondent Phat as Appellant has failed to meet the statutory requirements addressed below:

Minn. Stat. § 144.335, subd. 3(a), known as the Health Records Statute reads in pertinent part:

(a) A provider, or a person who receives health *records* from a provider, may not release a patient's health *records* to a person without a signed and dated consent from the patient or the patient's legally authorized representative authorizing the release, unless the release is specifically authorized by law.

*(emphasis added)*

Minn. Stat. § 144.335, subd. 3(a)(e) provides:

A person who negligently or intentionally releases a health *record* in violation of this subdivision or who forges a signature on a consent form, or who obtains under false pretenses the consent form or health records of another person, or who, without the person's consent, alters a consent form, is liability to the patient for compensatory damages caused by an unauthorized release, plus costs and reasonable attorney's fees.

*(emphasis added)*

Although the above statute section does not define health record, section 144.335, subdivision 2, which governs a patient's right to access his or her own health records, states that health records include "laboratory reports, x-rays, prescriptions, and other technical information used in assessing the patient's health condition." Minn. Stat. § 144.335, subd. 2(b) (2002). Thus, there is no liability under this statute unless a person actually releases a patient's medical records, i.e. documentation, to another person. This statute does not address any mention of oral dissemination of a patient's medical information as opposed to actual release of medical records.

Both the Minnesota Supreme Court and Minnesota Court of Appeals have ruled that oral disclosure of information concerning a patient does not violate

Minn. Stat. § 144.651, otherwise known as the Patient’s Bill of Rights, since oral disclosure does not involve “medical records” within the meaning of that statute. Koudsi v. Hennepin County Medical Center, 317 N.W.2d 705, 707 (Minn. 1982). Koudsi involved announcement by telephone of a patient’s having given birth against her wishes. The court concluded that the information communicated over the phone did not constitute a violation of the confidentiality of the patient’s medical records. Id.

As in Koudsi, Phat disclosed information regarding Appellant orally to a member of her family. Minn. Stat. § 144.335, subd. 3(a)(e), like the Patient Bill of Rights, is not triggered unless a medical or health *record* is actually released. Therefore, even if Minn. Stat. § 144.335 is not preempted by HIPAA as the District Court correctly concluded, Appellant’s claim still fails as the statute applies to Respondent Phat.

**VI. APPELLANT HAS NOT PRESENTED ADEQUATE EVIDENCE TO PROVE SPOILIATION OF EVIDENCE AGAINST RESPONDENT NET PHAT.**

Appellant alleged spoliation in her argument at Summary Judgment and raises it again on appeal. She bases this argument on an allegation that the former attorney for Respondent Phat tipped off her client after the notice of deposition duces tecum was served via facsimile on July 3, 2007 at 4:51 p.m.. Appellant

argued that it was too convenient that her hired expert found that Phat “wiped” her computer clean at 8:05 p.m. on July 3, 2007, only a few hours after the notice of deposition duces tecum was sent via facsimile. At the summary judgment hearing, Ms. Myslis, the former attorney for Respondent Phat stated that she did not receive the notice of deposition until July 5, 2007 due to the 4<sup>th</sup> of July holiday, and she was offended by the allegation that she would suggest to her client that she should spoliage the requested evidence. (AA-594-595). Ms. Myslis testified to receiving the Appellant’s notice on July 5, 2007, and then serving it on her client on the same date. There are no facts that would indicate that Ms. Myslis’ testimony is untrue. (AA-594). Likewise, the District Court concluded that “Plaintiff has failed to prove Defendant Phat or her counsel had any actual knowledge of the subpoena duces tecum prior to July 5, 2007... Furthermore, Plaintiff has failed to show any deletion of browser history, temporary internet files, internet or browser cache was intended to hide evidence relevant to litigation.” (AA-21). The District Court did not place merit in the Appellant’s expert findings regarding when and what information was allegedly removed from Respondent Phat’s computer. Appellant’s spoliation claim is unfounded and unsubstantiated and was thus properly dismissed by the District Court.

Spoliation is the destruction of evidence. Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 436 (Minn. 1990). The

District Court has broad authority in determining what (if any) sanction is to be imposed for spoliation of evidence. Patton v. Newmar Corp., 538 N.W.2d 116, 119 (Minn. 1995). Disposal of evidence is spoliation if a party knew or should have known that the evidence should be preserved for pending or future litigation. Id. at 119. A party challenging the district court's choice of sanction, or choice not to impose a sanction, must meet the difficult burden of convincing an appellate court that the district court abused its discretion; the burden is met only upon a showing that "no reasonable person would agree with the trial court's assessment of what sanctions are appropriate." Id.

Here, the District Court found *no* credible evidence to back up Appellant's reckless assertion that Respondent Phat's attorney suggested that she destroy evidence in anticipation of litigation. There is no evidence to indicate that Respondent Phat "scrubbed" her computer of its memory at all, much less doing so in an attempt to destroy evidence. Certainly no reasonable person would disagree with the Trial Court's decision in this instance.

### CONCLUSION

Appellant's misstatements of the facts and unfounded conclusory allegations do not support her contention that the District Court erred in dismissing the claims against Respondent Phat. For all of the foregoing reasons, the Trial Court's dismissal of Respondent Phat was proper and should be affirmed.

**BRENDEL AND ZINN, LTD.**

Date: Dec. 2, 2008

By: Sylvia Ivey Zinn

Sylvia Ivey Zinn, #164379

Julia A. Lines, #386918

8519 Eagle Point Blvd, Suite 110

Lake Elmo, MN 55042

Telephone: (651) 224-4959

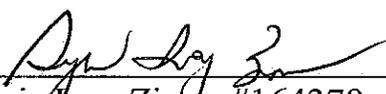
*Attorneys for Respondent Phat*

## CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minn. R. Civ. App. P.132.01, subd.3(a). This brief was prepared using Microsoft Word 6.0, which reports that the brief contains 445 lines/5,433 words.

Date: December 1, 2008

BRENDEL AND ZINN, LTD.

By   
Sylvia Avey Zinn - #164379  
Julia A. Lines - #386918  
8519 Eagle Point Boulevard  
Suite 110  
Lake Elmo, MN 55042  
Telephone: (651) 224-4959  
*Attorneys for Respondent*