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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.

FAIRVIEW RESPONDENTS' BRIEF AND APPENDIX

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Statement of Issues

1. Whether the district court correctly granted summary judgment dismissing Appellant's invasion of privacy claim for publication of private facts where there was no publication of the private facts to a large group.

Apposite authorities:

Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550 (Minn. 2003)
Restatement (Second) of Torts, § 625D

2. Whether the district court correctly dismissed Appellant's claims against Fairview for the unauthorized acts of its former employees when Appellant did not assert a respondeat superior claim, Fairview did not know of the employee's misconduct, and the misconduct did not further Fairview's business interest.

Apposite authorities:

P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996)
Snilsberg v. Lake Washington Club, 614 N.W.2d 738 (Minn. Ct. App. 2000)
Jones v. Baisch, 40 F.3d 252 (8th Cir. 1994)
Bagent v. Blessing Care Corp., 862 N.E.2d 985 (Ill. 2007)

3. Whether the district court properly granted summary judgment to Fairview dismissing Appellant's claim of breach of a confidential relationship because Minnesota does not recognize such a claim.

Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976)
Stubbs v. North Memorial Med. Ctr., 448 N.W.2d 78 (Minn. Ct. App. 1989)
D.A.B. v. Brown, 570 N.W.2d 168 (Minn. Ct. App. 1997)

4. Whether the district court correctly dismissed Appellant's claim under Minn. Stat. § 144.335 because HIPPA preempts contrary state law and because Fairview did not disclose a health record and is not subject to liability under Minn. Stat. § 144.335.

Apposite authorities:

Minn. Stat. § 144.335
42 U.S.C. § 1320d-7(a)(1)
Fisher v. Yale University, 2006 WL 1075035 (Conn. Apr. 3, 2006)

Statement of the Case

This appeal concerns claims arising out of the unauthorized disclosure of confidential medical information by one former Fairview employee, Navy Mao Tek, to another former employee, Net Phat, who in turn disclosed the information to the Appellant's estranged husband. Fairview did not know about or authorize the disclosure. Fairview discharged both employees upon learning of their involvement in the unauthorized disclosure of the information.

Appellant sued Fairview and Net Phat and raised various claims. R.A.1. Appellant did not allege defamation, sue for breach of contract, or assert a respondeat superior claim against Fairview. Instead, Appellant asserted direct claims against Fairview for negligence, invasion of privacy, breach of confidential relationship, negligent infliction of emotional distress, and violation of Minn. Stat. § 144.335.

The district court judge granted Fairview's motion for summary judgment. The district court also granted summary judgment dismissing most, but not all, of the claims against Net Phat. To obtain a final judgment and pursue this appeal, Appellant voluntarily dismissed her remaining intentional infliction of emotional distress claim against Net Phat.[1] Appellant appealed but has not challenged the district court's denial of Appellant's motion to amend the complaint to add a claim for punitive damages.

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[1] Appellant initially appealed in January, 2008 (A08-88), but that appeal was dismissed without prejudice because it was not from a final judgment in that certain claims against the individual defendants remained at that time.

Statement of Facts

Navy Mao Tek and Net Phat are former Fairview employees. Appellant claims that Navy Mao Tek and Net Phat, along with Molyka Mao, disclosed confidential medical information that Navy Mao Tek obtained when she improperly looked at Appellant's medical records. The confidential information Navy Mao Tek allegedly obtained and disclosed was that Appellant had herpes simplex virus type 2 and was involved with a new sexual partner. Amended Complaint, ¶¶ 18, 20.

Background on Fairview's Efforts to Protect Patient Privacy

Fairview Health Services has approximately 19,000 employees across 115 entities. (Ex. 27, L. Dahl dep. p. 21; Ex. 28, P. Franssen dep. p. 5. attached to the Affidavit of Paul C. Peterson ("Aff. Peterson")). Fairview has devoted extensive time and resources in developing and implementing policies and procedures designed to protect patient privacy. Affidavit of Lois Dahl ("Aff. Dahl"). It also spends significant time to ensure its 19,000 employees understand HIPAA and patient privacy and can implement the rules in their particular jobs. *Id.* HIPPA and patient privacy is discussed often at Fairview, including during training sessions, at monthly staff meetings, and by email. (Aff. Peterson, Ex. 27, M. St. Sauver dep. pp. 28, 206).

In April 2003, national standards for protecting the privacy of health information, commonly referred to as the Health Insurance Portability and Accountability Act ("HIPAA"), were scheduled to take effect. (Aff. Peterson, Ex. 27, L. Dahl dep. p. 30). Thus, in 2002 and 2003, Fairview brought together representatives from each of its care systems to develop and revise its privacy policies in light of the enactment of HIPAA.

(Ex. 1, Aff. Dahl). As a result, new policies were developed and existing policies were revised. *Id.*

In 2003, Fairview's privacy officials visited hospitals and clinics throughout the Fairview system to train management on HIPAA regulations and expectations for protecting patient confidentiality. (Ex. 1, Aff. Dahl). Every Fairview employee was expected to have a basic understanding of HIPAA and how to apply privacy regulations and policies. (Aff. Peterson, Ex. 27, L. Dahl dep. p. 66). Beginning in 2003, each employee began to receive overview training about HIPAA, which was later made part of the employee self-learning packet. (Ex. 1, Aff. Dahl). Each employee is required to review the HIPAA overview training and sign an acknowledgement of completion. *Id.* Ex. 32, HIPAA Privacy Overview training. This overview training became part of the New Employee Orientation in 2005 and continues to be updated annually and is part of new employee orientation training today. *Id.*

Fairview trained its employees on HIPAA security in 2004. (Ex. 1, Aff. Dahl). Fairview continues to update its materials on HIPAA security every year and has mandatory review training. *Id.* In 2005, Fairview's privacy director again visited the entities in the Fairview system to train management and deliver expectations of its employees regarding HIPAA and protecting confidential patient information. *Id.* In 2004 and 2005, Fairview dedicated approximately 19,000 hours of staff time to ensuring compliance with all HIPAA security regulations. *Id.*

Fairview also has mandatory reporting requirements. Fairview's systems administrators are required to notify the privacy official of any concerns about the

privacy or security of patients' health information. (Ex. 1, Aff. Dahl). Employees also are required to promptly report all known or suspected privacy violations. (Ex. 2, Fairview Reporting, Investigating, and Mitigating Compliance Programs Violations Policy). All reported issues or concerns are investigated. (Ex. 1, Aff. Dahl). After the investigation is completed, education and/or corrective action are taken when necessary. *Id.* Fairview has spent hundreds of thousands of dollars in privacy training, maintaining its privacy programs, and in responding to privacy concerns. (Aff. Peterson, Ex. 27, L. Dahl dep. pp. 139-40).

Fairview takes seriously patient privacy and promptly investigates all reported privacy questions or concerns. (Ex. 1, Aff. Dahl). Following an investigation, Fairview makes a decision about whether a privacy breach occurred, typically notifies the patient of the results of the investigation, and determines what corrective measures are warranted. (Ex. 1, Aff. Dahl; Aff. Peterson, Ex. 27, L. Dahl dep. p. 53). Employee violations are addressed through a variety of corrective actions, ranging from verbal advisement to written warning, and up to and including termination. (Ex. 1, Aff. Dahl; Aff. Peterson, Ex. 3, Fairview's Compliance Program Discipline Policy).

Since April of 2003 when HIPAA was implemented through December of 2006, Fairview has had approximately 15.2 million patient encounters with its approximately 19,000 employees throughout its 115 sites. (Ex. 1, Aff. Dahl ¶ 8). Of the patient privacy complaints that were documented during this time, a total of ten violations, including this one, were considered "serious" violations. (Id. at pp. 164-65; Ex. 1, Aff. Dahl ¶ 8). Serious violations are those involving intentional or repeated conduct involving

circumstances where there was clearly no legitimate business purpose for access or disclosure. (Id. at p. 164; Ex. 1, Aff. Dahl ¶ 8). Before this case, Fairview had documented only five or six serious violations since HIPAA was implemented. Id. at p. 170. With one exception, each employee that committed a "serious" violation was terminated. (Exh,.1, Aff. Dahl ¶ 9).

Net Phat's Employment with Fairview

Net Phat worked in the medical records department at Fairview Ridges Hospital as a medical records technician, which involved analyzing and coding medical procedures and diagnoses for payment processing. Her educational background includes a college degree in Health Information Technology.

She was employed from October, 1999 until mid-June, 2006, when she voluntarily resigned to help her husband with his business and to consider a move to California. (Aff. Peterson, Ex. 5, September 22, 1999, job confirmation letter; Ex. 6, Employee Resignation/Termination Form; Ex. 15, N. Phat dep. pp. 208-09). During the time of these events, Net Phat decided to resign and she officially informed Fairview of this decision in mid-May of 2006.

Net Phat later reapplied and was rehired in August, 2006 as a "casual" employee. (Aff. Peterson, Ex. 28, P. Franssen dep. p. 36). Her employment was intended to be short-term. It was. During discovery in this case, Fairview learned that she had lied about her involvement in the incident with Navy. Net was terminated on March 7, 2007 for violating HIPAA and obstructing Fairview's investigation regarding the disclosure of Plaintiff's medical information. (Aff. Peterson, Ex. 7, Notice of Discharge).

When Net Phat joined Fairview in 1999, she received training about the confidentiality of medical records. (Aff. Peterson, Ex. 15, N. Phat dep. p. 235; Ex. 8, N. Phat training history). This training included both a classroom component as well as printed materials. (Aff. Peterson, Ex. 15, N. Phat dep. p. 235). She attended the New Employee Orientation, which would have included confidentiality training. (Aff. Peterson, Ex. 27, L. Dahl dep. p. 97). She also attended various other classes encompassing privacy. *Id.*

Beginning in 2003, Net Phat, like all other employees, was required to attend HIPAA training. *Id.* at p. 97; Ex. 15, N. Phat dep. p. 236. This training included lectures, review of written materials, and the completion of the "Required Learning Packet." (*Id.*; Aff. Peterson, Ex. 26, Required Learning Packet). This packet contained information about patient confidentiality, including a section specifically devoted to the privacy of protected health information. (Aff. Peterson, Ex. 15, N. Phat dep. p. 238). Net Phat was required to, and did, review the Required Learning Packet each year she was employed at Fairview. (*Id.* at pp. 237-38; Aff. Peterson, Ex. 8, N. Phat training history).

Beginning in April 2004 and annually thereafter, Net Phat signed an agreement that she would not divulge or disclose confidential information acquired in the course of her employment with Fairview to anyone other than individuals authorized by Fairview. (Aff. Peterson, Ex. 15, N. Phat dep. pp. 239-40; Ex. 9, non-disclosure agreement with Fairview; Ex. 34, Acknowledgement to obey Principles of Conduct; Ex. 35, Principles of Conduct brochure). She knew from the training she received in college to become a registered health information technician, her employment elsewhere, and her training at

Fairview that information on patient medical records was considered confidential. *Id.* at pp. 240-42. Before this case, Net Phat had never been accused of a privacy violation. *Id.* at p. 233. Before this case, Net was regarded as an "asset" to the company, consistently demonstrated competency in her job, and was regarded as a good employee. (*Id.* at p. 234; Aff. Peterson, Ex. 10, N. Phat's performance reviews).

Navy Mao Tek's Employment with Fairview

In August 2004, Navy Mao Tek began her employment with Fairview in the flexible workforce as a medical assistant. (Aff. Peterson, Ex. 11, welcome letter to N. Tek). Navy Mao Tek had a medical assistant certificate, and had previously worked in a clinic setting as a medical assistant. (Aff. Peterson, Ex. 23, N. Tek's job application). She had previously worked in a clinic setting at the Quello Clinic.

Based on her previous work experience and her representations to Fairview, Fairview believed Navy Mao Tek would be a good employee. Navy Mao Tek explicitly acknowledged that she could keep medical information confidential. After being offered a job, one of the conditions of her employment was attending New Employee Orientation, which she did. (Aff. Peterson, Ex. 12. This orientation included confidentiality and privacy training. (Aff. Peterson, Ex. 27, L. Dahl dep. p. 103).

Throughout her employment with Fairview, Navy Mao Tek demonstrated competency with regard to her nursing skills and her customer relations responsibilities. (Aff. Peterson, Ex. 14). She was thought of as a very hard worker who displayed care and compassion to her patients. *Id.*

Before this case, Navy Mao Tek was never accused of violating patient privacy. (Ex. 1, Aff. Dahl ¶ 10; Ex. 28, P. Franssen dep. p. 21; Ex. 29, M. St. Sauver dep. pp. 32, 46-48, 125, 145). Before this case, Fairview had no reason to believe that Navy Mao Tek would access any patient's medical file without a legitimate business purpose, and had no reason to suspect that she would disclose confidential information from a patient's records. *Id.*

Circumstances of Alleged Privacy Breach

In March, 2006, Appellant went to her doctor at Fairview Cedar Ridge Clinic to be tested for sexually transmitted diseases. (Aff. Peterson, Ex. 16, C. Yath dep. p. 86). She told her doctor that she had a new sexual partner. *Id.* The purpose of the test was to find out if her new partner, Izzy, had given her a sexually transmitted disease. *Id.* Appellant was still married to Paul Yath, but was separated. *Id.* at 87. Izzy was one of her husband's closest friends. (Aff. Peterson, Ex. 18, P. Yath dep. p. 30).

Appellant's grandmother, Doris Perrault, accompanied her to the appointment. (Aff. Peterson, Ex. 17, Perrault dep. p. 26). Perrault had her own appointment that day. *Id.* Navy Mao Tek worked for Perrault's doctor. (Aff. Peterson, Ex. 17, Perrault dep. p. 26). Appellant and Navy Mao Tek knew of each other and waved as Appellant went into the exam room. (Aff. Peterson, Ex. 16, C. Yath dep. p. 88). Navy Mao Tek is Paul Yath's cousin so the two would see each other at family gatherings. *Id.* at. p. 88; Aff. Peterson, Ex. 15, N. Phat dep. p. 20.

Navy Mao Tek (Paul's cousin) and Net Phat (Paul's sister) were "good" friends. (Aff. Peterson, Ex. 15, N. Phat dep. p. 189). After looking at Appellant's medical records

and learning that Appellant had a new sexual partner, Navy Mao Tek decided to call Net Phat, *id.* at p. 102, and called Net Phat's personal cell phone while Net Phat was on break at work. *Id.* She told Net Phat about Appellant's new sexual partner. *Id.* at pp. 66, 102-04, 243.

Although Net Phat did not want to believe her sister-in-law was having an affair, *id.* at pp. 66, 102-04, she never looked at Appellant's medical record to confirm what Navy Mao Tek related. *Id.* at p. 243. As a Fairview hospital employee, Net Phat had no ability to access Appellant's medical records at the Cedar Ridge Clinic.

In April 2006, Net Phat invited her brother Paul for dinner. (Aff. Peterson, Ex. 15, N. Phat dep. pp. 113-14). Paul and Appellant were still separated because, according to Paul, he suspected Appellant was having an affair. (Aff. Peterson, Ex. 18, P. Yath dep. pp. 34-35). After Paul mentioned to Net Phat his concern about Appellant and Izzy, Net Phat told him about what Navy Mao Tek had disclosed to her, and confirmed what Paul had suspected. (Aff. Peterson, Ex. 15, N. Phat dep. pp. 113-14, 252-53). Net Phat told Paul about the affair because she "couldn't deal with herself" if she did not tell her brother what she knew, and she was concerned about her younger brother and wanted to protect him. *Id.* at pp. 178-79, 181-82. She felt it was her moral duty to tell Paul. *Id.* at p. 183.

Net Phat knew she was breaching patient confidentiality in disclosing what Navy Mao Tek had told her. *Id.* at 190-91. She knew it was not part of her job with Fairview to pass on information about Appellant's affair, and knew that she had no legitimate business reason to pass along the information. *Id.* at pp. 251-52. Her disclosure of

Appellant's information occurred after work hours and in her home, and was admittedly not to benefit Fairview, but instead was her effort to try to "protect" her brother and to fulfill her moral obligation to tell him. *Id.* at pp. 252-53.

Appellant's grandmother learned about the disclosure of Appellant's information and Perrault notified her doctor about it. (Aff. Peterson, Ex. 17, Perrault dep. pp. 63-64). During the appointment she told her doctor that she believed Navy Mao Tek looked at Appellant's and told Net Phat about Appellant's new sexual partner. *Id.* Perrault's doctor put Perrault in touch with Michelle St. Sauver, the clinic's manager. *Id.* at pp. 66-70; Ex. 29, M. St. Sauver dep. p. 12, 46, 54-55.

Fairview's Investigation

St. Sauver contacted Lois Dahl, Fairview's information privacy and security director, and reported the incident. (Aff. Peterson, Ex. 27, L. Dahl dep. pp. 197-98; Ex. 29, M. St. Sauver dep. p. 60). Perrault's report of a suspected privacy violation was promptly investigated. (Aff. Peterson, Ex. 27, L. Dahl dep. p. 199). Dahl immediately contacted the security administrator and obtained an audit report on those who accessed Appellant's medical information. *Id.* The audit report confirmed Navy Mao Tek's access of the records and the investigation did not reveal a business purpose for the access. (Aff. Peterson, Ex. 29, M. St. Sauver dep. pp. 63-65, 71, 110-111; Ex. 20 (St. Sauver's notes of incident)).

Fairview met with and interviewed Navy Mao Tek. *Id.* at p. 113. After initially denying that she accessed the records, she admitted doing so. *Id.* at pp. 113-14. She

stated she looked at the file because she was "curious" about why Appellant was at the clinic. *Id.* at 114. She offered no other explanation. Id. at p. 120.

Navy Mao Tek acknowledged that she knew she was not supposed to look at a patient's chart without a business purpose. *Id.* at pp. 115, 120. She claimed she did not tell anyone what she saw. *Id.* at pp. 115, 124-25. Although this was Navy Mao Tek's first offense, Fairview terminated her because she had repeatedly accessed Appellant's medical record and was not forthcoming about her access until she was confronted with the audit report that confirmed her access. (Ex. 28, P. Franssen dep. pp. 20-23; Ex. 29, M. St. Sauver dep. pp. 32, 46-48, 125, 145). She was terminated for violating HIPAA. *Id.* at p. 18; *Id.* at pp. 146-47, 154; Ex. 30, Notice of Discharge: Ex. 31, Employee Resignation/Termination Form.[2]

Fairview also interviewed Net Phat about the reported privacy violation. (Aff. Peterson, Ex. 29, M. St. Sauver dep. pp. 126, 136, 143, 145). Net Phat denied receiving any information from Navy Mao Tek. (Aff. Peterson, Ex. 28, P. Franssen dep. p. 32; Ex. 29, M. St. Sauver dep. pp. 143-45, 155). She confirmed that she was aware of HIPAA rules regarding patient privacy and knew that she had a duty to maintain patient confidentiality. *Id.* At this time, Net Phat had already made it known that she was resigning and was planning to move to California. (Aff. Peterson, Ex. 28, P. Franssen

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[2] Navy Mao Tek's last day of work at Fairview was May 4, 2006. She was sent home that day until Fairview could complete its investigation. (Aff. Peterson, Ex.. 28, P. Franssen dep. p. 28; Ex.. 29, M. St. Sauver dep. p. 115). Fairview decided to terminate Navy Mao Tek on May 9, 2006. (Aff. Peterson, Ex.. 28, P. Franssen dep. p. 28). She was fired on May 10, 2006, as soon as she came in for her shift. *Id.* (Ex.. 29. M. St. Sauver dep. p. 154).

dep. p. 33). Fairview verified that Net Phat had not personally been able to access Appellant's records at the Cedar Ridge Clinic and took no further action at this point because Net Phat was leaving Fairview anyway. *Id.*

After Navy Mao Tek was terminated, someone sent an e-mail about Appellant's herpes on May 10, 2006 to Appellant from an address of truth_hurtsdotcom@yahoo.com. (Aff. Peterson, Ex. 21, May 10, 2006 email). Net Phat denied any knowledge of anyone using this e-mail address. Although Appellant speculates that Navy Mao Tek or Molyka Mao may have sent the message, no one knows who sent it.

On May 11, 2006, a MySpace webpage was created with the name "Rotten Candy." (Aff. Peterson, Ex. 22, MySpace webpage). Navy Mao Tek was terminated before the MySpace webpage was created. (Aff. Peterson, Ex. 28, P. Franssen dep. p. 20; Ex. 29, Ex. 29, M. St. Sauver dep. pp. 148, 179). This webpage could not have been created at Fairview because MySpace is a blocked site on the Fairview computer systems. (Aff. Peterson, Ex. 27, L. Dahl dep. pp. 211-12; Ex. 29, M. St. Sauver dep. pp. 179-80). This webpage was only up for a day or two before it was taken down. (Aff. Peterson, Ex. 16, C. Yath dep. pp. 119-20). Someone posted on "Rotten Candy's MySpace blurbs "that she has "h.e.r.p.e.s.", had recently cheated on her husband, and had an addiction to plastic surgery. (Aff. Peterson, Ex. 22, MySpace webpage). Net Phat denied having anything to do with the MySpace webpage and does not know who has an e-mail address of Rotten Candy. (Aff. Peterson, Ex. 15, N. Phat dep. pp. 211-12).

When Fairview found out about the MySpace posting, Fairview's privacy director took immediate steps to assist in having it removed. (Aff. Peterson, Ex. 27, L. Dahl dep.

p. 226). Fairview contacted MySpace for their assistance in helping identify the source of the posting. *Id.* The webpage was taken down within two days of its creation. (Aff. Peterson, Ex. 16, C. Yath dep. pp. 119-20).

Until this lawsuit was started, Fairview had no information to suspect that anyone other than Navy Mao Tek was involved in accessing or disclosing Appellant's medical information. Navy Mao Tek told Fairview she did not tell anyone else about Appellant's medical information. (Aff. Peterson, Ex. 29, M. St. Sauver dep. pp. 145, 155 Ex. 20, Michelle's notes of incident). Net Phat, as a hospital employee and not a clinic employee, did not have access to Appellant's medical records. (Aff. Peterson, Ex. 27, L. Dahl dep. p. 192). After the lawsuit was commenced and Appellant named Net Phat as a defendant, Fairview discussed the allegations with Net Phat again. She told Fairview that she knew nothing about the allegations and that Navy Mao Tek had not told her anything. (Aff. Peterson, Ex. 15, N. Phat dep. pp. 216-17, 249). A lawyer Net Phat consulted also conveyed to Fairview on her behalf that she knew nothing about the allegations. *Id.* at 249-50.

In response to discovery requests, Fairview was able to recover archived emails from Net Phat's Fairview e-mail account. (Aff. Peterson, Ex. 28, P. Franssen dep. p. 37). It was at this time that Fairview learned for the first time that Net Phat had lied about her knowledge and involvement in the dissemination of Appellant's medical information. Fairview confronted her with the e-mails and fired her immediately for violating HIPPA and for obstructing Fairview's investigation. (Aff. Peterson, Ex. 15, N. Phat dep. pp. 213-17; Ex. 28, P. Franssen dep. p. 38; Ex. 7, Notice of Discharge). Because she was trying

to protect Navy Mao Tek, Net Phat denied that Navy Mao Tek had told her about Appellant's medical information. (Aff. Peterson, Ex. 15, N. Phat dep. pp. 94-98, 180-81). Net Phat's disclosure of Appellant's medical information was a single incident. In the seven or so years she worked for Fairview, there was never another occasion that she violated patient confidentiality. (Aff. Peterson, Ex. 15, N. Phat dep. p. 247). She was never disciplined at Fairview before this incident for any misconduct of any kind. *Id.* at p. 233. She completed the required training and had always received positive reviews and demonstrated competence regarding her job performance. *Id.* at pp. 233-34.

Likewise, in the years Navy Mao Tek worked for Fairview, Fairview was not aware of any other occasion that she violated patient confidentiality. (Aff. Peterson, Ex. 28, P. Franssen dep. p. 21; Ex. 29, M. St. Sauver dep. pp. 32, 46-48, 125, 145). She consistently received positive performance reviews and was well liked at Fairview. (Aff. Peterson, Ex. 14, N. Tek's performance review). Before this incident, Fairview had no information to suspect that she would violate a patient's privacy. (Aff. Peterson, Ex. 27, L. Dahl dep. p. 204; Ex. 29, M. St. Sauver dep. pp. 32, 46-48, 125, 145).

I. Introduction and Standard of Review

On appeal from a summary judgment, an appellate court reviews the record to determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *Offerdahl v. Univ. of Minn. Hosps. & Clinic*, 426 N.W.2d 425, 427 (Minn. 1988). A party opposing summary judgment must do more than create a metaphysical doubt as to a factual issue and may not rest on mere averments. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Instead, an opposing party must establish

a genuine issue for trial by substantial evidence. *Id.* at 69-70; *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn. 1995).

The district court did not err. This Court should affirm because there are no disputed issues of material fact and the district court properly cited to and applied the correct Minnesota law. Appellant's dissatisfaction with the application of the law to the undisputed facts does not warrant reversal.

Appellant raises multiple issues regarding Fairview and her claims arising out of the unauthorized disclosure of confidential information. Appellant has not shown that the district court erred in granting summary judgment to Fairview. The alleged factual disputes Appellant asserts are either unsupported or not material. This Court should reject Appellant's attempt to contradict her sworn deposition testimony with a self-serving affidavit containing speculative assertions. The district court carefully and appropriately applied the law in evaluating and ultimately rejecting Appellant's numerous claims against Fairview.

II. The district court correctly dismissed Appellant's invasion of privacy claim for publication of private facts because the limited disclosure that took place was insufficient to meet the "publication" element of such a claim.

The district court properly dismissed Appellant's invasion of privacy claim because it correctly concluded that Appellant did not establish the necessary "publication" element of the claim. The undisputed evidence is that there was a limited disclosure of information, which does not support an invasion of privacy claim.

Here, the alleged publicity was from Navy Mao Tek to Net Phat, a communication to just one person that is not an invasion of the right of privacy as a matter of law. Net

Phat in turn communicated the information to her brother, Appellant's then-husband, and perhaps two of her sisters and a friend. This communication also is insufficient publicity to support an invasion of privacy claim in Minnesota. As a matter of law, disclosure to a single person or to a small group of persons does not constitute publicity and does not support a claim for invasion of privacy. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 557 (Minn. 2003). In *Bodah*, the Court extensively reviewed an invasion of privacy claim concerning the defendant's disclosure of the names and social security numbers of 204 employees to 16 managers of trucking terminals in six states. *Id.* at 552.

The *Bodah* Court made clear that Minnesota follows the approach of the Restatement, which requires publicity to more than just a single person or even a small group of persons. *Id.* at 553-557 (citing Restatement (Second) of Torts, § 625D). Comment a. to § 625D makes clear that "'publicity' . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." The comment also continues that "it is not an invasion of the right of privacy . . . to communicate a [private fact] to a single person or even to a small group of persons."

Importantly, *Bodah* "considered whether there are legitimate or compelling reasons of public policy that justify imposing liability for egregious but limited disclosures of private information" but rejected creating just such an exception. *Id.* at 557. *Bodah* specifically rejected the theory of a "special relationship" or "particular public" test that other jurisdictions recognized, choosing instead to adopt the Restatement (Second) standard for invasion of privacy claims. *Id.* at 556-57. One of the cases *Bodah*

examined, and rejected, was an Illinois decision that found sufficient publicity for disclosing a plaintiff's medical information to fellow employees. *Id.* (citing *Miller v. Motorola*, 560 N.E.2d 900, 903 (Ill. 1990)).

Minnesota courts have consistently rejected invasion of privacy claims that failed to establish the element of publicity. *See, e.g., Robbinsdale Clinic, P.A. v. Pro-Life Action Ministries*, 515 N.W.2d 88, 92 (Minn. Ct. App. 1994) (invasion of privacy claim "generally not allowed where private facts are only communicated to a single person or a small group of people"); *Tibbetts v. Crossroads, Inc.*, 411 N.W.2d 535, 537-38 (Minn. Ct. App. 1987) (widespread publicity required to support an invasion of privacy claim; police officer's report to adoption agency of prior criminal sexual conduct charges insufficient to support a privacy claim).[3] The district court did not err in rejecting Appellant's invasion of privacy claim because of the limited disclosure that occurred.

On appeal, Appellant relies upon two foreign cases cited in *Bodah*. Neither affects the district court's correct application of Minnesota law. Appellant cites *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927). It provides no help to Appellant and does not alter the clear standard in Minnesota. *Brents* concluded that a large posting in a storefront window of a customer's overdue account constitutes "publicity." Its facts fit

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[3] *See also Robins v. Conseco Finance Loan Co.*, 656 N.W.2d 241, 244-45 (Minn. Ct. App. 2003) (lender's disclosure of plaintiff's poor credit history to co-employee, who disclosed information to others, does not constitute publicity; summary judgment dismissal of invasion of privacy claim affirmed); *Johnson v. Mithun*, 401 F.Supp.2d 964, 973 (D. Minn. 2005) (dismissing as a matter of law a privacy claim for disclosing employee's multiple sclerosis condition to a number of plaintiff's colleagues and client contacts); *C.L.D. v. Wal-Mart Stores, Inc.*, 79 F.Supp.2d 1080, 1082 (D. Minn. 1999) (manager sharing information with three other employees about plaintiff-employee's plan to obtain an abortion was not sufficient publicity to support invasion of privacy claim).

exactly within an illustration of the Restatement (and likely may have been the source of the illustration). Appellant also cites *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892, 893 (Mo. 1959), which dealt with a loud declaration of indebtedness in a public restaurant. *Biederman's* also is not controlling on this Court, but it is interestingly similar in its facts to a Minnesota case that rejected a claim of invasion of privacy. *See Hendry v. Conner*, 303 Minn. 317, 226 N.W.2d 921, 922-23 (1975) (hospital credit department employee's loud statement in waiting room did not constitute "publicity"). Appellant's reliance on the Missouri decision in *Biederman's* also ignores a more apt decision from a Missouri federal district court that granted summary judgment to a doctor for disclosing medical information regarding a patient to the patient's wife. *See Mikel v. Abrams,* 541 F.Supp. 591, 597 (W.D. Mo. 1982) ("singular disclosure is insufficient as a matter of Missouri law to satisfy the publicity requirement of an invasion of privacy case involving alleged public disclosure of private facts").

Appellant also argues that Fairview is liable for invasion of privacy because of an alleged posting of the information on a phony MySpace page that existed for perhaps two days. The district court correctly noted that there is no evidence establishing who created the short-lived MySpace page. A.12. Appellant claims on appeal that Navy Mao Tek and Net Phat "posted the information on a website, or caused it to be posed [sic], for the entire computer literate world to see (theoretically hundreds of millions of people)," Appellant's Brief at 23. Appellant, however, offered no admissible evidence as to who created or posted the phony MySpace page. She also offered no admissible evidence as

to how many individuals viewed the page. Appellant's unsupported assertion that over a hundred people received or viewed the information should be rejected.

Significantly, Appellant presented no admissible evidence that Fairview created or was even aware of this MySpace page. Appellant testified she did not know who created or posted the page. A.191 (Yath depo. p. 35; "[w]hoever had put the page up ..."). On appeal, she now asserts – without any supporting citation – that Molyka Mao, Navy Mao Tek's sister, created the phony page. Appellant's Brief at 2. Appellant also speculates that Navy Mao Tek and Net Phat "most likely" were involved in creating the phony page. *Id.* Fairview is not responsible for Molyka Mao's alleged actions because it never employed her and she was never its agent. *Urban v. American Legion Post 184*, 695 N.W.2d 153, 160 (Minn. Ct. App. 2005) (liability cannot exist unless there is a master-servant or principal-agency relationship between the tortfeasor and the third-party). As noted below, Fairview also is not responsible for Navy Mao Tek or Net Phat's alleged involvement in creating the MySpace page.

Even if this Court credits Appellant's bare speculation that Navy Mao Tek or Net Phat was involved in creating the MySpace page, Appellant has failed to establish that the information was actually communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. Appellant conceded she had no idea how many people actually looked at this web page. A.212 (Yath depo. p. 120). According to Appellant, in order to see the webpage, you had to be requested as a "friend." A.193 (Yath dep. pp. 42-43). There were only 6 "friends" listed on the webpage. (Aff. Peterson, Ex. 22, MySpace posting);

A.213 (Yath dep. p. 122). The creator of the page supposedly sent it out to people that Appellant had listed on her webpage as friends. A.191 (Yath depo. p. 35). Thus, besides the six "friends" that the page was sent to, the other people that could have seen the webpage would have been those looking over the shoulder of a friend listed on the page. A.193 (Yath depo. pp. 42-43). Appellant testified that she does not know of "too many people" that saw the webpage while overlooking one of her "friend's" shoulders. *Id.*

Importantly, Appellant did not check with MySpace to find out how many hits occurred on the page for the day or two it was up. A.212 (Yath depo. p. 120). Appellant did send messages to people alerting them to the MySpace page and asking them whether they had seen it. A.192 (Yath depo. p. 38). She was only able to identify 10 people that she claims saw it. A.194 (Yath depo. pp. 46-48). While Appellant speculates that many people must have heard about the information from others sharing the information, the Court in *Bodah* specifically considered and rejected just such an argument that information being shared is sufficient to meet the required publicity element for an invasion of privacy claim. *Bodah*, 663 N.W.2d at 558. Because Appellant failed to meet her burden to demonstrate that the information was actually communicated to the public at large, or was substantially certain to become public knowledge when it was posted for perhaps two days on MySpace, the district court properly dismissed her invasion of privacy claim. *See id.* at 552.

Appellant relies upon a later affidavit she submitted that suggests it was possible some eighty to a hundred people viewed the page. A review of the affidavit shows it to be an improper attempt to create a fact issue by contradicting Appellant's earlier

testimony. Moreover, the "sham" affidavit contains only conclusory and speculative assertions and hearsay. The sham affidavit Appellant submitted should be rejected. It is not sufficient to create a genuine issue of material fact. *See Augustine v. Arizant Inc.*, 751 N.W.2d 95, 101 (Minn. 2008); *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 541 n. 4 (Minn. 2001). As this Court has noted, a "self-serving affidavit that contradicts earlier damaging testimony is not sufficient to create a genuine issue of material fact." *Banbury v. Omnitrition Intern., Inc.*, 533 N.W.2d 876, 881 (Minn. Ct. App. 1995).

The district court recognized and applied the appropriate standard in resolving the summary judgment motion, and correctly concluded that "sufficient facts have not been presented to determine who created and published the MySpace page." A.18 (Order at 16, n.3). Because a party may not create a genuine issue of material fact through the submission of inconsistent evidence, the district court did not err in granting summary judgment to Fairview. *See Dakota County v. BWBR Architects, Inc.*, 645 N.W.2d 487, 491-92 (Minn. Ct. App. 2002). Accordingly, this Court should affirm the dismissal of Appellant's invasion of privacy claim against Fairview.

III. The district court properly dismissed Appellant's negligent infliction of emotional distress claim against Fairview.

A plaintiff may recover for negligent infliction of emotional distress when she is within the zone of danger of physical impact, reasonably fears for her safety, and consequently suffers severe emotional distress with resultant physical injury. *Bohdan v. Alltool Mfg. Co.*, 411 N.W.2d 902, 907 (Minn. Ct. App. 1987). An exception to the

"zone of danger" rule is that a plaintiff may recover damages for mental anguish or suffering for a direct invasion of her rights, such as defamation, malicious prosecution, or other willful, wanton or malicious conduct. *Id.*; *State Farm Mut. Automobile Ins. Co. v. Village of Isle*, 265 Minn. 360, 367-68 (1963).

The district court did not err in dismissing Appellant's negligent infliction of emotional distress claim because she was never in a "zone of danger," a point Appellant appears to concede on appeal. Instead, Appellant only contends that there was a direct invasion of her rights and bases that on the alleged invasion of privacy. Because the district court properly rejected the invasion of privacy claim, this Court should similarly affirm the dismissal of the negligent infliction of emotional distress claim.

Even assuming Appellant has a viable invasion of privacy claim, the negligent infliction of emotional distress claim still fails on the alternative ground that there is a lack of evidence of severe emotional distress. An essential element of a claim for negligent infliction of emotional distress is that the defendant's conduct caused severe emotional distress. *Engler v. Illinois Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005). The plaintiff has the burden of proof on this point, and expert medical testimony is required to establish causation when the question involves medical factors beyond the knowledge of the average layperson. *Patterson v. WU Family Corp.*, 594 N.W.2d 540, 550 (Minn. Ct. App. 1999), *rev'd on other grounds*, 608 N.W.2d 868 (Minn. 1999). In *Patterson*, the plaintiff claimed that he suffered from high blood pressure, dizziness, sweating, and headaches following an incident where a bouncer assaulted him. This Court concluded that establishing a causal connection between the defendant bouncer's

conduct and the plaintiff's symptoms required an understanding of medical factors beyond that of the average layperson. *Id.* at 550.

Here, Appellant alleged that she suffered from depression, anxiety, nausea, inability to eat, inability to sleep, nightmares, and suicidal thoughts. Appellant did not timely come forward with medical expert testimony linking any of these symptoms to the alleged breach of confidentiality. Because of the lack of objective evidence to establish that the breach of confidentiality caused Appellant's alleged psychological harm, this Court can alternatively affirm the dismissal of the negligent infliction of emotional distress claim. *See Patterson*, 594 N.W.2d at 550; *Northway v. Whiting*, 436 N.W.2d 796, 798 (Minn. Ct. App. 1989) ("we may affirm a summary judgment if there are no genuine issues of material fact and if the decision is correct on other grounds").

IV. Appellant did not assert a claim of respondeat superior against Fairview and may not recover against it for the unauthorized acts of its former employees.

The district court correctly concluded that Fairview was not responsible for the unauthorized acts of two of its employees. This Court should affirm because Appellant did not assert a claim of respondeat superior against Fairview and because it is not liable for the unauthorized acts of its former employees.

A. Appellant did not assert a respondeat superior claim against Fairview.

Appellant failed to assert a respondeat superior claim against Fairview, and cannot on appeal rely upon claims that were not pled. Instead, Appellant is bound by the pleadings and the claims she asserted, rather than claims and arguments that were not raised below and that are asserted on appeal for the first time.

In reviewing matters, an appellate court is limited to the claims an appellant pled and argued to the district court. *See Noske v. Friedberg*, 713 N.W.2d 866, 876 (Minn. Ct. App. 2006) ("[b]ecause appellant did not brief or argue separate theories of intentional fraud and misrepresentation, breach of contract, or breach of fiduciary duty, we do not decide whether appellant could survive summary judgment on any of those claims"). The district court certainly cannot be faulted for dismissing Appellant's claims against Fairview based upon theories that were either not pled or argued. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (reviewing court must generally consider only issues that were presented to and considered by the district court in deciding the matter before it); *see also Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 909 (Minn. 1999) (refusing to consider appellant/plaintiff's strict liability argument because it had not been pled).

B. The district court did not err in concluding that Appellant did not establish that Navy Mao Tek and Net Phat acted within the scope of their employment.

Even assuming that Appellant pled that Fairview is vicariously liable for the alleged tortious conduct of its former employees, the district court correctly dismissed the claims against Fairview because the conduct of the former employees was not within the scope of their employment.

It is well-settled that an employer is subject to vicarious liability only for the tortious conduct of an employee *occurring within the course and scope of employment. Ismil v. L.H. Sowles Co.*, 295 Minn. 120, 123, 203 N.W.2d 354, 357 (Minn. 1972).

The "test" in Minnesota for determining whether an employee's conduct is within the 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. *See Snilsberg v. Lake Washington Club*, 614 N.W.2d 738, 745 (Minn. Ct. App. 2000). The first three factors were adopted from the Second Restatement of Agency. Restatement (Second) of Agency §228 (1958). The last factor was explained in *P.L. v. Aubert*, 545 N.W.2d 666, 668 (Minn. 1996).

Appellant never explicitly alleged that Navy Mao Tek or Net Phat acted in the scope of their employment. This alone is sufficient to affirm the dismissal of the claims against Fairview. Regardless, Fairview was properly dismissed because the undisputed evidence is that Navy Mao Tek and Net Phat were not acting within the scope of their employment when they disclosed Appellant's medical information.

1. <u>The conduct of Navy Mao Tek and Net Phat was not in furtherance of Fairview's interests.</u>

The Illinois Supreme Court recently addressed a claim for breach of privacy in a similar context. *See Bagent v. Blessing Care Corp.*, 862 N.E.2d 985 (Ill. 2007). In Bagent, a patient filed suit against a hospital and its employee who revealed the patient's pregnancy test results to the patient's sister at a public tavern. *Id.* The patient alleged breach of patient confidentiality, invasion of privacy, and negligent infliction of emotional distress against the hospital and specifically asserted a theory of vicarious liability. *Id.* at 989. The hospital admitted its employee disclosed confidential medical

information but denied it was liable because the employee was acting outside the scope of her employment with the hospital.

The Illinois Supreme Court, in addressing whether the disclosure was to further the hospital's interests, focused on the state of mind of the employee. *Id.* at 995. The employee admitted that the reason she disclosed the plaintiff's pregnancy result to her friend was because the employee was friends with the plaintiff's sister and assumed that plaintiff had already told her sister. *Id.* The Court concluded that the employee's conduct was clearly not aimed at benefiting the hospital. *Id.* Accordingly, the hospital could not be vicariously liable for the plaintiff's breach of medical privacy. *Id.*

a. Navy Mao Tek's disclosure to Net Phat did not benefit Fairview

Here, Navy Mao Tek admitted that she accessed Appellant's medical information because she was "curious." (Aff. Peterson, Ex. 20, Michelle's notes of incident). This curiosity did not benefit Fairview. Moreover, Navy Mao Tek lied to Fairview about disclosing Appellant's medical information. Navy Mao Tek had been extensively trained and knew she could be fired for improperly accessing a patient's medical information and for disclosing medical information without authorization. Her disclosure to Net Phat regarding Appellant's extramarital affair was not aimed at benefiting Fairview. Consequently, Navy Mao Tek was acting outside the scope of employment when she accessed and disclosed Appellant's confidential information. *See Snilsberg*, 614 N.W.2d at 745; *Bagent*, 862 N.E.2d at 989.

b. Net Phat's disclosure to her brother did not benefit Fairview

Net Phat testified that she disclosed information about Appellant's new sexual partner out of a moral obligation and to "protect" her brother. (Aff. Peterson, Ex. 15, N. Phat dep. pp. 251-53). Net further admitted that she knew she was not benefiting Fairview when she told her brother about Appellant's affair. *Id.* Net Phat did not further Fairview's interests when she told anyone about Appellant's medical information. Significantly, she knew she would be violating patient privacy rules and policies if she disclosed Appellant's information. *Id.* at pp. 240-42. Thus, the district court did not err in concluding that Net Phat was acting outside the scope of her employment with Fairview when she disclosed the information to her brother or others. *See Snilsberg*, 614 N.W.2d at 745; *Bagent*, 862 N.E.2d at 989.

c. The MySpace posting did not benefit Fairview

There is no evidence that the MySpace webpage was created to serve Fairview's interests. Such a notion is absurd. The webpage may have been intended as revenge for Navy Mao's termination, but it did not benefit Fairview in any respect. Once Fairview found out about the page, it immediately tried to get it taken down. (Aff. Peterson, Ex. 27, L. Dahl dep. p. 226). Moreover, there is no evidence establishing who created the webpage. The evidence is undisputed that it was not done at Fairview because the MySpace website cannot even be accessed by Fairview's computers. The individual(s) responsible for creating the page were not furthering Fairview's interests and the conduct was clearly outside the scope of employment with Fairview, if Fairview's former employees were even involved in its creation.

Each time Appellant's medical information was disclosed, the disclosure did not serve or benefit Fairview. Because no reasonable person could conclude from the evidence that Navy Mao Tek or Net Phat acted in furtherance of Fairview's interests when they disclosed Appellant's information, Appellant failed to meet the first factor for establishing vicarious liability. Thus, the district court properly granted summary judgment to Fairview. *See Snilsberg*, 614 N.W.2d at 745 (issue of vicarious liability can be determined as a matter of law when no credible evidence that wrongful conduct occurred within the course and scope of employment); *Bagent*, 862 N.E.2d at 992; *Beyers v. Knox Community Hospital*, 2001 WL 1136055, 19 Fed.Appx. 348 (6th Cir. Sept. 19, 2001) (summarily affirming of invasion of privacy claim against hospital for alleged disclosure of confidential medical information because hospital is not vicariously liable for self-serving acts by its employees that in no way facilitate or promote the hospital's business).

2. Navy Mao Tek and Net Phat were not authorized to do what they did.

Any potential vicarious liability claim also fails because Navy Mao Tek and Net Phat were not authorized to access Appellant's medical information without a legitimate business purpose.

In *Bagent*, the Illinois Supreme Court analyzed this factor in the context of a breach of medical confidentiality. Several factors were listed by the court in determining whether the complained-of act of the employee was within the scope of employment: whether the act was commonly done by the employee; the time, place, and purpose of the act; the previous relations between the employer and the employee; the similarity in

quality of the act done to the act authorized; and the extent of the departure from the normal method of accomplishing an authorized result. 862 N.E.2d at 992 (citing the Restatement (Second) of Agency § 229(2) (1958)).

The disclosure of plaintiff's pregnancy test in *Bagent* was found to be not the kind of conduct the employee was hired to perform. *Id.* at 993. The employee was trained and hired to draw blood and keep records. *Id.* She was not hired to talk about patient medical information without authorization. The same analysis applies in this case.

a. Navy Mao Tek's duties did not include unauthorized access

Navy Mao Tek was trained and hired as a medical assistant. Her job duties included such tasks as rooming patients, taking vitals, recording vitals, and keeping records. She was not authorized to access medical records for which she had no business purpose. She was also not authorized to divulge confidential medical information at any time unless done in compliance with Fairview's policies and procedures. Moreover, Navy Mao Tek was certainly not authorized to post a patient's medical information on a webpage, as she has been alleged to have done in this case.

Navy Mao Tek was clearly acting outside her scope of employment when she accessed Appellant's record without a business purpose. She also acted outside her scope of employment when she told Net Phat that she learned Appellant had a new sexual partner. In short, Navy Mao Tek was not authorized to access or disclose Appellant's medical information, whether verbally or in writing. No reasonable person could decide otherwise.

b. Net Phat's job responsibilities did not include unauthorized access

Net Phat was hired to code medical procedures and diagnoses for billing purposes. She was not authorized to divulge Appellant's medical information at any time, let alone at a private dinner party at her house to her family. No reasonable person could decide otherwise.

Further, an employer's prohibition to act in a certain manner accentuates the limits of the employee's permissible action and, hence, supports a finding that the prohibited act is entirely beyond the scope of employment. *Bagent*, 862 N.E.2d at 994 (citing the Restatement (Second) of Agency § 230, Comment c (1958)).

In *Bagent*, the hospital required its employees to attend a training session on HIPAA and its privacy provisions. *Id.* at 988. The employee in that case attended the training and signed the hospital's confidentiality policy and code of conduct. *Id.* Because the hospital plainly forbade its employee from revealing confidential patient information and the employee knew so, the court in *Bagent* concluded that the employee was acting outside the scope of her employment when she disclosed the plaintiff's pregnancy result to her friend. *Id.* at 994.

In this case, as in *Bagent*, both Navy Mao Tek and Net Phat attended training on HIPAA privacy and Fairview's privacy and security policies. The fact that Fairview expressly forbade employees from revealing confidential medical information bolsters the conclusion that the disclosure of Appellant's medical information was not the kind of conduct these employees were employed to perform. Each act by Fairview's former employees was in direct violation of Fairview's policies and HIPAA. Both Navy Mao

Tek and Net Phat were aware that their conduct violated numerous privacy policies. No reasonable person could find otherwise. As such, the district court properly granted summary judgment to Fairview on Appellant's various claims. *See Snilsberg*, 614 N.W.2d at 745.

3. Time and Space Restrictions

a. Navy Mao Tek's disclosure to Net Phat occurred outside time and space restrictions

Navy Mao Tek called Net Phat's cell phone while Net Phat was on break at work, which is when the information about Appellant was disclosed. Because Navy Mao Tek has never been served or located, there is no evidence as to where she was or what she was doing at the time of the disclosure. It is clear that Net Phat was not within authorized work parameters at the time of the disclosure because she was on a personal break. This call wasn't "just business;" it represented a personal mission by Navy Mao Tek and Net Phat that was outside both their work duties and work related limits of time.

b. Net Phat's disclosure to her brother occurred outside time and space restrictions

Net Phat was at home having dinner when she told her brother about Appellant's new sexual partner. (Aff. Peterson, Ex. 15, N. Phat dep. pp. 252-53). She was clearly not within work related limits of time or space when she made this disclosure. No credible argument can be made to the contrary. Thus, this disclosure cannot not give rise to vicarious liability.

c. The MySpace posting occurred outside time and space restrictions

The alleged posting on MySpace did not occur within time or space constraints at Fairview. Appellant traced the internet provider (IP) address for the webpage's creation to a computer at Help-U-Sell in Eagan. No further information or evidence about the page's creator has been uncovered. It is clear, however, that the offending webpage could not have been created on a Fairview computer because the undisputed evidence is that Fairview blocks all access to the MySpace site.

It is also important that the webpage was created *after* Navy Mao Tek was fired. (Aff. Peterson, Ex. 28, P. Franssen p. 20). Assuming Navy Mao Tek had any involvement in the MySpace posting, Fairview has no vicarious liability because there was no existing employer/employee relationship at the time of the alleged wrongful conduct. *See Urban*, 695 N.W.2d at 160.[4]

In summary, there is no evidence to allow a reasonable person to conclude that the MySpace posting occurred within time and space restraints at Fairview. As such, Appellant cannot meet the third factor for establishing vicarious liability against Fairview for the MySpace posting. Accordingly, this Court should affirm the summary judgment granted to Fairview as to Appellant's claims. *See Snilsberg*, 614 N.W.2d at 745.

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[4] *See also Ventura v. The Cincinnati Enquirer*, 396 F.3d 784, 789 (6th Cir. 2005) (employer not vicariously responsible for the wrongful acts of former employee committed months after he was fired); *Schlesinger v. Pitney Bowes, Inc.*, 722 N.Y.2d 343, 345 (N.Y.App. Div. 2001) (no vicarious liability where former employee had already been fired when he left an allegedly threatening voice-mail message); *Loucks v. Community Home Care Servs.*, 618 N.Y.2d 826, 827 (N.Y. App. Div. 1994) (employer not vicariously liable for alleged assault of patient committed after employee was fired).

4. Reasonable Foreseeability

Minnesota's courts consider foreseeability when analyzing whether an employer is vicariously liable for its employee's wrongful conduct. The focus is on the particular context in which the wrongful conduct occurred. *P.L. v. Aubert*, 545 N.W.2d 666, 668 (Minn. 1996).

In *Aubert*, a teacher engaged in sexual contact with her student. The student sued the teacher and the school district. The trial court granted summary judgment to the district. After this Court reinstated some of the claims against the district, the Minnesota Supreme Court affirmed the trial court's decision. The Supreme Court concluded that because the acts by *this* teacher were not foreseeable the school district could not be held liable in *this* instance. *Id.* It noted that before the teacher was hired, a standard background check was completed and she was found to have good academic credentials and exceptional personal references. *Id.* at 667. The district also performed standard teacher evaluations and made several unannounced visits to the classroom. *Id.* Closer vigilance would not have uncovered the relationship because both participants worked hard to conceal it. *Id.* at 668. The Court explained that a school district should not be held liable for actions that are not foreseeable when it has employed reasonable measures of supervision to ensure the teacher is performing her duties and there is adequate consideration for the safety and welfare of the students. *Id.*

Like the school district in *Aubert*, Fairview reviewed Navy Mao Tek and Net Phat's credentials before hiring them. Both employees had good credentials and experience. During their employment and supervision at Fairview, both were assets to

the company. While both had received training on patient privacy during their schooling and previous work experience, Fairview also provided extensive additional training. Navy Mao Tek and Net Phat were trained on protecting patient privacy at their orientation and regularly throughout the year. Fairview has numerous training measures in place to educate its employees on patient privacy, including formal lectures, awareness articles, self-studies, contests with question and answer scenarios, electronic resources, and printed reference materials. Net Phat estimated that she spent 16 to 24 hours a year reviewing HIPAA and patient privacy regulations. (Aff. Peterson, Ex. 15, N. Phat dep. p. 265). Fairview has spent hundreds of thousands of dollars and thousands of hours of staff time on training its employees to protect patient confidentiality. (Ex. 1, Aff. Dahl).

Before this incident, Net Phat's supervisors gave her commendable performance reviews. (Aff. Peterson, Ex. 10, Net's performance reviews). She was considered an asset to the company. *Id.* Navy Mao Tek also received positive performance reviews. (Aff. Peterson, Ex. 14, Navy's performance reviews). She was considered compassionate and hard-working. Both Navy Mao Tek and Net Phat demonstrated competency in their job skills and knowledge of privacy regulations. There was no indication that either would knowingly breach privacy rules and regulations.

This case is not a situation in which the employees were inadequately trained or supervised. It was the first offense for both employees.

Given all of this training and supervision, Fairview never anticipated Navy Mao Tek or Net Phat would breach patient privacy. After the violation, both employees tried

to conceal their wrongful conduct and provided false information during Fairview's investigation.

Fairview enacted and implemented policies and rules that met or exceeded the standard of care expected in the medical industry. (Ex. 1, Aff. Dahl ¶ 11). There is nothing more that Fairview believes it could have done to prevent the privacy breach alleged in this case. (Aff. Peterson, Ex. 27, L. Dahl dep. p. 204). Neither Navy Mao Tek nor Net Phat's actions in violating Appellant's privacy were foreseeable. (Ex. 1, Aff. Dahl ¶ 12). Because the employees' conduct in this case was not foreseeable and reasonable training and supervision was provided, the district court did not err in finding that Fairview is not liable. *See Aubert*, 545 N.W.2d at 668.

A decision from the Eighth Circuit Court of appeals is instructive. In *Jones v. Baisch*, 40 F.3d 252 (8th Cir. 1994), the Eighth Circuit affirmed the dismissal of a lawsuit that is remarkably similar to the present case. *Jones* involved a patient brought an action against his physician and his corporation arising out of a disclosure by the physician's nurse and nurse's assistant. The plaintiff had genital herpes. *Id.* at 253. The nurse learned of the diagnosis from another employee. *Id.* Thereafter, during a family discussion the nurse warned her daughter, who was the nurse's assistant, that plaintiff had herpes. *Id.* The assistant then confirmed this by looking at the plaintiff's records. *Id.* She then informed her friends and some of the plaintiff's friends. *Id.*

When the assistant continued to inform her friends about plaintiff's condition, he filed suit against the physician and his corporation, alleging invasion of privacy and intentional infliction of emotional distress. *Id.* at 254. The trial court granted summary

judgment to the physician and his corporation. The Eighth Circuit affirmed the trial court, concluding that the physician and his corporation were not liable because the nurse and her assistant were not acting within the scope of their employment after they admitted during their deposition that they were not authorized to reveal the plaintiff's condition and the disclosure did not occur substantially within authorized work limits. *Id.* The Eighth Circuit also noted that the employee handbook specifically forbade disclosures of patient information and the physician promptly reprimanded the nurse and her assistant and warned them against further disclosures. *Id.* Based on these facts, the Eighth Circuit rejected the claim against the physician or his business for invasion of privacy.

The Eighth Circuit's analysis in *Jones* is applicable in this case. As in *Jones*, this case involved one employee, Navy Mao Tek, telling another employee, Net Phat, confidential medical information. The receiver of the information, Net Phat, then disclosed that information to individuals outside the organization, despite explicit policies prohibiting this type of conduct. The disclosure occurred after hours and at a place other than the employer's business. Based on these facts, and under the reasoning in *Jones*, this Court should affirm the district court's decision that Fairview cannot be held liable for the wrongful conduct of Navy Mao Tek and Net Phat.

Even if this Court were to consider whether disclosure of confidential medical information by employees in general was a "well-known hazard" at the Cedar Ridge Clinic, Appellant has failed to present any evidence to support such an argument. This Court should not imply foreseeability. *Aubert*, 545 N.W.2d at 668. In order to survive summary judgment, a plaintiff must present expert testimony in order to create a fact

question on the issue of whether the employee's wrongful conduct is a well-known hazard and thus foreseeable. *Id.* (summary judgment proper for employer when no expert testimony or evidence that sexual relationships between teacher and student are a well-known hazard).

Appellant presented no expert disclosure or other evidence to create a fact issue with regard to whether Fairview's employees' conduct was a well-known hazard in the medical profession at the time. When there is no evidence of a well-known employment hazard, a plaintiff's vicarious liability claim fails as a matter of law. *See Hagen v. Burnmeister & Assocs.*, 633 N.W.2d 497, 505 (Minn. 2001) (lack of evidence showing the risk of employees misappropriating trade secrets is a well-known hazard in the insurance industry was fatal to plaintiff's vicarious liability claim); *Wilson v. Stock Lumber, Inc.*, 2001 WL 1182796 (Minn. Ct. App. Oct. 8, 2001) (finding as a matter of law employee's conduct was not foreseeable when there is no evidence indicating employee could be expected to engage in assaultive conduct or that road rage is a well-known hazard in the delivery business).

In contrast to Appellant's lack of expert testimony to support her claim, Fairview's privacy and security director opined that the policies Fairview implemented to protect patient confidentiality are consistent with or exceed HIPAA privacy regulations as well as the standard of care in the medical community. (Ex. 1, Aff. Dahl, ¶ 11). Lois Dahl testified that the conduct of Navy Mao Tek and Net Phat was not foreseeable, in part because privacy violations like this one are so rare at Fairview. *Id.* Fairview consists of 115 different clinics and hospitals and related entities, it has 19,000 employees, and it has

provided medical care in over 15,000,000 million patient encounters from 2003 to the present. *Id.* Nonetheless, only ten patient complaints similar to this one have been substantiated, and some of these occurred after the incident involving Appellant in May of 2006. *Id.* None of these violations involved Navy Mao Tek, Net Phat, or Fairview's Cedar Ridge Clinic. These ten violations represent a frequency of only six ten thousandths of one percent (.00006%) of Fairview's total patient encounters since 2003. *Id.* There was no reason for anyone at Fairview to suspect that Navy or Net would violate patient privacy. *Id.* at ¶ 10. Nor is there anything that Fairview reasonably could have done to prevent the disclosures of Plaintiff's medical information in this case. (Aff. Peterson, Ex. 27, L. Dahl dep. p. 204). When Fairview became aware of Navy Mao Tek's violation, she was terminated. The same was true for Net Phat.

V. The district court did not err in rejecting Appellant's claim against Fairview for an alleged "breach of confidential relationship" because Minnesota does not recognize such a fiduciary relationship in the medical context.

Appellant claims she is entitled to damages from Fairview because it allegedly breached a required confidentiality and fiduciary duty by disseminating, allowing the dissemination of, or negligently safeguarding her medical information. The undisputed facts are that Fairview did not disseminate Appellant's information – its former employees did so acting outside their employment. As noted, Fairview is not liable for the unauthorized acts of Navy Mao Tek and Net Phat.

The district court did not err in rejecting Appellant's confidential relationship and fiduciary duty claim because Minnesota does not recognize such a claim. Appellant has pointed to no Minnesota cases recognizing a common-law claim for a breach of a

confidential medical relationship. On appeal, Appellant relies upon *In re D.M.C.*, 331 N.W.2d 236 (Minn. 1983). But that case simply noted that an evidentiary privilege exists because of the physician-patient relationship. *Id.* at 238. *D.M.C.* neither recognized nor created a cause of action. Likewise, the other cases Appellant cites simply discuss the privilege generally, but do not create a cause of action for breach of a confidential relationship or of the privilege.

Notably, in examining the scope of the medical privilege, the Minnesota Supreme Court in *Wenninger v. Muesing*, 307 Minn. 405, 240 N.W.2d 333 (1976), did not recognize a claim for disclosing confidential medical information, stating:

> We note without deciding that a physician who discloses confidential information about his patient ***may*** be subject to tort liability for breach of his patient's right to privacy or to professional discipline for unprofessional conduct.

Id., 240 N.W.2d at 337 (emphasis added) (creating, in a medical malpractice action, an informal conference procedure for defense counsel and non-party treating physicians and noting presence of patient's attorney will help protect against unwitting or improper disclosure of medical information). Significantly, *Wenninger* did not create such a cause of action, and "no Minnesota case has gone beyond this mere recognition of the issue." *Stubbs v. North Memorial Med. Ctr.*, 448 N.W.2d 78, 83 (Minn. Ct. App. 1989).

Stubbs dealt with an alleged unauthorized disclosure of a cosmetic surgery patient's "before" and "after" photos and specifically rejected a purported claim for a tortious breach of the physician/client relationship, noting that such a "cause of action has

not previously been recognized in Minnesota." *Id.* at 83.[5] Based on this authority, the district court here did not err in rejecting Appellant's attempted confidential relationship claim. As primarily an error-correcting court, this Court should not recognize such a new cause of action. *See id.*; *see also Engler v. Wehmas*, 633 N.W.2d 868, 873 (Minn. Ct. App. 2001).

The district court's dismissal of Appellant's confidential relationship claim is also consistent with this Court's repeated recognition that a hospital and its staff do not owe a fiduciary relationship to patients of the type Appellant seeks to create *See Hemmerlin-Stewart v. Allina Hosps. & Clinic*, 2005 WL 214369 (Minn. Ct. App. Sep. 6, 2005) ("no Minnesota case law holding that physicians or hospital staff members have a fiduciary duty toward their patients"); *McDeid v. O'Keefe*, 2003 WL 21525128 (Minn. Ct. App. July 8, 2003) (same). Even in the context of medical malpractice claims, Minnesota courts have declined to reframe the claims in terms of a breach of fiduciary duty. *D.A.B. v. Brown*, 570 N.W.2d 168, 171-72 (Minn. Ct. App. 1997) (statute precluding physicians from accepting compensation for referral of patients does not provide private remedy, even if physician could be subject to discipline or criminal sanctions); *see also Anderson v. Mayo Clinic*, 2008 WL 3836744 (Minn. Ct. App. Aug. 19, 2008) ("we find no authority to support imposing a fiduciary relationship on physicians, particularly with respect to matters outside the context of diagnosis and treatment;" rejecting plaintiff's

[5] *Stubbs* also rejected an invasion of privacy claim because Minnesota did not then recognize such a claim. *Id.* at 81. While Minnesota now recognizes such a cause of action, *Bodah* and other cases make clear that an invasion of privacy claim requires sufficient publication of private information, which did not occur here.

argument that an alleged fiduciary relationship with the doctor supported invasion of privacy claim). Accordingly, this Court should affirm the dismissal of Appellant's "confidential relationship" theory against Fairview because this common-law theory has not been recognized and the district court did not err in rejecting it.

VI. Fairview is not liable to Appellant under Minn. Stat. §144.335.

Appellant asserted a claim against Fairview contending it is liable under Minn. Stat. § 144.335 for releasing Appellant's health records. The district court correctly dismissed Appellant's claim because federal law preempts such a cause of action as a "contrary" state law. Alternatively, this Court should affirm the dismissal of this because Fairview did not release health records regarding Appellant, and the plain language of the statute does not provide for liability against medical providers.

A. The district court correctly found that HIPAA preempts Appellant's contrary statutory claim.

Appellant's statutory claim against Fairview was properly dismissed because HIPAA preempts such a claim. Congress enacted HIPAA in 1996 entrusting the Secretary of the Department of Health and Human Services with the task of creating national standards to ensure the integrity and confidentiality of individually identifiable health information. *Maier v. Green*, 485 F.Supp.2d 711, 721 n.3 (W.D. La. 2007); *Holmes v. Nightingale*, 158 P.2d 1039, 1043 (Okla. 2007). The goal was to establish uniform privacy regulations with regard to confidential medical information. *See* 45 C.F.R. part 164.

HIPAA contains a specific preemption provision. The "general rule" is as follows:

> Except as provided in paragraph (2), a provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall supersede any contrary provisions of State law, including a provision of State law that requires medical or health plan records (including billing information) to be maintained or transmitted in written rather than electronic form.

42 U.S.C. § 1320d-7(a)(1). Section 1320d-7 provides two "exceptions" to the general preemption rule:

> A provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall not supersede a contrary provision of State law, if the provision of State law—
>
> **(A)** is a provision the Secretary determines--
> **(i)** is necessary--
> **(I)** to prevent fraud and abuse;
> **(II)** to ensure appropriate State regulation of insurance and health plans;
> **(III)** for State reporting on health care delivery or costs; or
> **(IV)** for other purposes; or
> **(ii)** addresses controlled substances; or
>
> **(B)** subject to section 264(c)(2) of the Health Insurance Portability and Accountability Act of 1996, relates to the privacy of individually identifiable health information.

42 U.S.C. § 1320d-7(a)(1). Neither of these exceptions is present here.

Minnesota's Health Records Act, Minn. Stat. § 144.335 subd. 3a, provides:

> [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.

It provides for a cause of action for the unauthorized release of medical records. *Id.* There is, however, nothing to suggest that Minn. Stat. § 144.335 was enacted to prevent "fraud or abuse," to regulate insurance or health plans, or for reporting on health care delivery costs, as announced in the first exception to the general preemption rule. Thus, HIPAA's first exception does not apply.

The second exception is embodied at 42 C.F.R. § 160.203(b). The regulation contemplated preempting state law relating specifically to the privacy of individually identifiable health information unless the state law is more stringent than the federal standard. *Fisher v. Yale University*, 2006 WL 1075035 (Conn. Apr. 3, 2006). Here, Minn. Stat. § 144.335 is not more stringent than the federal standard. It mirrors HIPAA's requirement that a patient authorize the release of confidential information. 42 U.S.C. § 1320d. Therefore, exception two is inapplicable.

Because Minn. Stat. § 144.335 is a contrary provision of state law and the exceptions do not apply, it is preempted because it provides for a private cause of action where HIPPA does not. The court reached a similar conclusion in *Fisher*. Fisher complained that a hospital failed to safeguard her personal identifying medical information in a database. As a result, an employee was able to access the information and intimidate, threaten, and harass the plaintiff and her family. *Id.* The plaintiff brought a claim under the state's unfair trade practices act based on the hospital's failure to comply with HIPAA. Id.

Fisher faced the following narrow question of first impression: "To what extent, if any, has HIPAA preempted the right of a private individual to bring a [state unfair deceptive practices act claim] . . . (or an action under an analogous statute in another jurisdiction) for a violation of the provisions of HIPAA." The court determined plaintiff's claim was preempted because nothing in HIPAA or the promulgated regulations authorized a private cause of action. *Id.* Therefore, to the extent a state law provided for a private cause of action for a HIPAA violation, such a statute constituted a "contrary" provision of state law and fell within the ambit of HIPAA preemption. *Id.*

Appellant does not dispute that HIPPA does not provide for a private cause of action. *See University of Colorado Hosp. Auth. v. Denver Publ'g Co.*, 340 F.Supp.3d 1142, 1144 (D. Colo. 2004); *Munoz v. Island Fin. Corp.*, 364 F.Supp.2d 131, 136 (D.P.R. 2005) (citations omitted); *Ass'n of Am. Physicians & Surgeons, Inc. v. United States Dep't of Health & Human Servs.*, 224 F.Supp.2d 1115, 1129 (S.D. Tex. 2002); *Johnson v. Parker Hughes Clinics*, No. Civ. 04-4130 PAM/RLE, 2005 WL 102968 (D. Minn. Jan. 13, 2005) (parties conceded HIPAA does not provide for a private cause of action). Appellant does not dispute that HIPAA does not provide for a private cause of action.

The district court did not err in concluding that HIPPA preempts the private cause of action created in Minn. Stat. § 144.335 as a "contrary" state law. HIPAA supersedes any contrary state law. Minn. Stat. § 144.335 is a "contrary" state law because it provides for a private cause of action whereas HIPAA does not provide for a private cause of action.

B. Fairview is not a "person" and there was no "release of patient health records."

Even assuming HIPPA does not preempt Appellant's statutory claim under Minn. Stat. § 144.335, this Court should still affirm the dismissal of the claim. First, the statute only provides for a cause of action against a "person" who releases health records, and Fairview is not a person subject to the statute. Second, there was no "release of health records" under the statute, and thus no statutory cause of action exists.

The statute provides for a private cause of action against a "person" who intentionally or negligently releases health records. Minn. Stat. § 144.335 subd. 3a, provides: "[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." A provider is defined as any person who furnishes health care services, a licensed home care provider, a licensed health care facility, a registered physician assistant, and an unlicensed mental health practitioner. Minn. Stat. § 144.335, subd. 1(b). The statute separately provides that "**a person**" who releases a health record in violation of the statute is liable to the patient for compensatory damages caused by an unauthorized release, plus costs and reasonable attorney's fees. Minn. Stat. § 144.335, subd. 3a(e) (emphasis added). A straightforward review of the statute demonstrates that Appellant has no statutory claim against Fairview because it is not "a person" subject to the statutorily-created cause of action, an action created in derogation of the common-law.

A court is to presume the legislature's choice of words indicates its intent. *See Northern States Power Co. v. Comm'r of Revenue*, 571 N.W.2d 573, 575 (Minn. 1997) (holding that in construing the meaning and scope of a statute, the words of the statute govern and are to be given their common and approved usage). The plain language of the statute indicates the "person" who releases a health record is liable to the patient. But Fairview is not a person. Instead, it is a provider. While subdivision 3a(a) of § 144.355 prohibits "a provider" and "a person" from releasing patient records without patient consent, only "a person" who releases a health record is liable to the patient for compensatory damages. Giving the terms of subdivision 3a(e) their plain and ordinary meaning, the legislature intended only to hold the person who wrongfully releases patient information liable. If it intended to hold a medical provider liable as well, it could have done so, but it did not. Because the legislature did not create a statutory claim against a provider, Appellant's statutory claim against Fairview was properly dismissed and this Court should affirm on this alternative ground.

Additionally, Minn. Stat. § 144.335 creates liability only if a "health record" is disclosed improperly. Neither Navy Mao Tek nor Net Phat disclosed a "health record" because the information disclosed was not a "health record." The information disclosed – that Appellant had slept with her husband's best friend – was not a "laboratory report[], X-ray[], prescription[], [or] other technical information used in assessing [Appellant]'s health condition." Minn. Stat. § 144.335, subd. 2(b).[6] *Compare Koudsi v. Hennepin*

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[6] In 2007 the Legislature included a definition of "health record." "Health record" is now defined as "any information, whether oral or recorded in any form or medium, that relates

County Med. Ctr., 317 N.W.2d 705, 707 (Minn. 1982) (holding oral disclosure of information concerning a patient's discharge and the fact that she had given birth did not involve "medical records" within the meaning of the Patients' Bill of Rights; hospital not liable for alleged violation of mother's statutory right to privacy). Because the statute is in derogation of common-law, it must be narrowly construed. The statute did not provide for a private cause of action if oral information about a health record was disclosed. It only provided a cause of action for disclosing an actual health record. Because no health record was actually disclosed, this Court should alternatively affirm the dismissal of Appellant's statutory claim against Fairview.

Conclusion

For all the foregoing reasons, this Court should affirm the district court's grant of summary judgment to Fairview.

Dated: December 3, 2008

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to the past, present, or future physical or mental health condition of a patient; the provision of health care to a patient; or the past, present, or future payment for the provision of health care to a patient." Minn. Stat. § 144.291, subd. 2(c).

CERTIFICATE OF BRIEF LENGTH

I, William L. Davidson, hereby certify that this brief complies with the typeface requirements set forth in Minn. R. App. P. 132.01, subd. 1, as the brief is printed in a proportional font in at least 13-point size. I also hereby certify that this brief complies with the length limit set forth in Minn. R. App. P. 132.01, subd. 3(a), in that it contains 13,367 words, exclusive of pages containing the table of contents, tables of citation, any addenda or appendices. This number was calculated with the word count function of Microsoft Word 2003.

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